HAYMOND'S RIDDLES: SUPERVISED RELEASE, THE JURY TRIAL RIGHT, AND THE GOVERNMENT'S PATH FORWARD

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Abstract

In United States v. Haymond*, the Supreme Court found one piece of the federal supervised release system to be unconstitutional. This Article discusses three issues that are unresolved in* Haymond*'s wake. First, it examines whether applying the* Apprendi *line of cases to the main supervised release system would disrupt that system, concluding that it would not. Second, it considers what the proper remedy should be for the constitutional infirmity identified in* Haymond*, finding that the provision in question must be struck down due to a previously unexplored double jeopardy issue. Lastly, this Article argues that legislatures can largely achieve the same outcome as the provision at issue in* Haymond *by allowing defendants—in exchange for receiving shorter prison sentences—to prospectively waive their jury trial rights for supervised release revocations.*

Introduction

United States v. Haymond represents a divided Supreme Court's first foray into the interaction between the jury trial right and federal supervised release, but likely not its last.[1] The Court's narrow decision to hold a unique provision of the federal supervised release system unconstitutional leaves a number of questions unanswered. Some of these were acknowledged in the Court's opinion, while others were not. This Article seeks to provide answers to three of these remaining questions. The issues discussed range from immediate disputes posed in the *Haymond* case, to the overarching challenge of designing alternatives to incarceration that still comport with the Fifth and Sixth Amendments.

The provision at issue in *Haymond*, 18 U.S.C. § 3583(k), required a judge to revoke a defendant's supervised release for a term of five years to life if the judge found, by a preponderance of the evidence, that the defendant (a) was a member of a particular class of sex offenders and (b) committed a certain subset of crimes

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1. 139 S.Ct. 2369 (2019).

while on supervised release.[2] This is in contrast to the typical supervised release procedure, where the maximum prison time for revocation is determined solely by the defendant's underlying conviction, and the judge can refuse to revoke the supervised release altogether, even if the defendant has engaged in criminal behavior.[3]

In 2016, a judge in the Northern District of Oklahoma found by a preponderance of the evidence that Andre Ralph Haymond committed a crime on supervised release that triggered the special revocation procedure mandated by § 3583(k).[4] Accordingly, he was given a five-year prison term, even though the normal authorized period of revocation based on his underlying conviction was zero to two years.[5] Haymond argued that under Supreme Court precedent, increasing the mandatory minimum and maximum punishment he could receive based on facts found by a judge violated his right to a jury trial.[6]

In *Apprendi v. New Jersey*, the Supreme Court held that the Sixth Amendment requires facts that increase the maximum punishment for a criminal prosecution to be found by a jury beyond a reasonable doubt.[7] They cannot be found by the judge during a post-trial proceeding such as sentencing.[8] In *Alleyne v. United States*, the Supreme Court similarly held that imposing or increasing a mandatory minimum based on judicial fact-finding at sentencing also violates the Sixth Amendment because those facts had to be found by a jury.[9]

In *Haymond*, Justice Gorsuch, writing for a four-justice plurality, found § 3583(k) to be unconstitutional under a straightforward application of *Apprendi* and *Alleyne*.[10] Since § 3583(k) imposed a mandatory minimum of five years triggered by judicial fact-finding, the plurality concluded that it violated the jury trial right.[11] They reasoned that any fact found that results in an increase in the minimum punishment is an element of an offense, and all elements of an offense must be found by a jury.[12] For the plurality, it was of little consequence that the

2. 18 U.S.C. § 3583(k) (2018) ("If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.").

3. *See id.* § 3583(e).

4. United States v. Haymond, No. 08-201, 2016 U.S. Dist. LEXIS 100915, at *41 (N.D. Okla. Aug. 2, 2016).

5. *Haymond*, 139 S. Ct. at 2375.

6. *Id.*

7. 530 U.S. 466, 490 (2000). For the sake of brevity, I will refer to the defendant's right to have the elements of an offense found by a jury beyond a reasonable doubt as the "jury trial right."

8. *Id.* at 491–92.

9. 570 U.S. 99, 102 (2013).

10. *Haymond*, 139 S. Ct. at 2373–83 (plurality opinion).

11. *Id.* at 2378–79.

12. *Id.*

mandatory minimum term of incarceration was being imposed at a revocation instead of a traditional sentencing following a prosecution.[13]

In a brief concurrence, Justice Breyer expressed concern about the possible ramifications of applying *Apprendi* and *Alleyne* to the supervised release context.[14] But even so, he concluded that § 3583(k) too closely mimicked a traditional criminal statute and therefore violated the jury trial right.[15] Rather than determine the proper remedy, the Court remanded the case on that issue.[16] Four members of the Court, led by Justice Alito, dissented.[17]

This Article examines three unresolved issues raised by the *Haymond* decision. The first is about the practical consequences of applying the *Apprendi* decisions to § 3583(e), the supervised release system's default revocation provision.[18] Unlike § 3583(k), which is a limited, specialized provision, the vast majority of supervised release revocations are carried out under the more general terms of § 3583(e). All nine justices suggested that applying *Apprendi* to § 3583(e) could disrupt how that provision currently operates, though they disagreed on the magnitude.[19] Contrary to their view, this Article argues that § 3583(e) would not be functionally affected. That is because the fact-finding authorized under that section is so minimal that the provision as written is effectively indistinguishable from a system where the judge has total discretion to administer a sentence, cabined by a requirement to act "reasonably." The Supreme Court has already found that a similar system passes muster under the Sixth Amendment.[20]

The second question addresses the proper remedy for § 3583(k). Haymond asked the Supreme Court to strike down the revocation provision of § 3583(k) in its entirety and let the judge decide whether to revoke his supervised release under the default procedure.[21] The government preferred to send these revocations cases to a jury, which would decide whether the defendant engaged in any of the crimes enumerated in § 3583(k).[22] Presumably, this was important to the government because Haymond's maximum sentence under § 3583(k) is considerably harsher than the applicable maximum sentence would be if his criminal activity was prosecuted as a standalone crime.[23]

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13. *Id*. at 2379–80.

14. *See id*. at 2385 (Breyer, J., concurring).

15. *Id*. at 2386.

16. *Id*. at 2385 (plurality opinion); *id*. at 2386 (Breyer, J., concurring).

17. *Id*. at 2386–400 (Alito, J., dissenting).

18. 18 U.S.C. § 3583(e) (2018).

19. *Id*. at 2383–84 (plurality opinion); *id*. at 2385 (Breyer, J., concurring); *id*. at 2388 (Alito, J., dissenting).

20. *See* United States v. Booker, 543 U.S. 220, 245–71 (2005).

21. *See* Brief for Respondent at 30–32, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

22. *See* Reply Brief for the United States at 20–21, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

23. Section 3583(k) provides that Haymond could have received up to life in prison on revocation of supervised release. In contrast, under 18 U.S.C. § 2252(b)(2), which is part of the statute criminalizing possession of child pornography, as a repeat offender Haymond could only receive a maximum sentence of 20 years.

In fact, the courts will have no choice but to invalidate § 3583(k) in its entirety because of a double jeopardy issue that has been largely unexplored. Applying the jury trial right to revocation proceedings involves recognizing that the facts triggering the punishment are elements of an offense. That has consequences for double jeopardy protections as well. The Supreme Court has held that convicting a defendant of one crime and trying him for a second that includes all the elements of the first violates the Double Jeopardy Clause.[24] In most jury trial cases, double jeopardy issues usually do not bear on the remedy since there is only one prosecution. That is not the case for revocation proceedings. Sending § 3583(k) revocation cases to a jury would turn the defendant's original conviction into a lesser included offense and violate double jeopardy protections. The fact that recidivist statutes have been upheld by the Supreme Court cannot save § 3583(k) because unlike those statutes, § 3583(k) cannot be fairly characterized as being a punishment solely for the second offense.[25]

The third question examines policy responses to *Haymond*. Regardless of the remedy, lawmakers will have to decide how to craft supervised release and parole policies going forward. In an era when many across the political spectrum have become concerned that the United States overincarcerates, systems such as supervised release serve as a crucial alternative to incarceration.[26] Effectively restricting the terms on which a legislature can create alternatives to incarceration might lead them, on the margins, to prescribe prison where they may have otherwise chosen supervised release.

Lawmakers can constitutionally address these concerns by creating a policy that reaches a similar outcome to § 3583(k). They can make the term of supervised release a substitute to completing a longer prison term that the defendant can access only by partially waiving his or her jury trial right for the duration of the term of supervised release. The current supervised release system operates as a benefit to the defendant. If supervised release were no longer available for defendants, then Congress may have mandated a longer term of incarceration. While this tradeoff benefits defendants at a policy level, the current scheme suffers from the defect that the defendant has not consented to it. The solution is to offer each defendant this bargain at an individual level: serve out a longer prison term or take a term of supervised release with a diminished jury trial right. While such a scheme would burden the jury trial right, it would be constitutional because it would serve the important purpose of creating alternatives to incarceration. Allowing defendants to engage in such a bargain would make for more desirable policy because

24. *See* Brown v. Ohio, 432 U.S. 161, 161 (1977).

25. *See* Witte v. United States, 515 U.S. 389, 400 (1995).

26. *See* Michelle Mark, *Most Americans Approve of the Bipartisan, Trump-Backed Criminal-Justice Reforms that the Senate Just Passes*, BUS. INSIDER (Dec. 19, 2018), http://www.businessinsider.com/poll-first-step-act-criminal-justice-reforms-most-americans-approve-2018-12; Shaila Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This*, N.Y. TIMES (Nov. 14, 2018), http://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html.

legislatures will be more likely to reduce incarceration if they have flexibility in creating alternatives.

Part I will explain the current federal supervised release system, as well as its origins. Part II will address the first of the three questions above, specifically the interaction of the jury trial right with the main supervised release revocation provision, § 3583(e). Part III will address the second of the three questions and argue that the revocation provision of § 3583(k) must be struck down in its entirety. Part IV will address the last question and propose a policy solution that will allow lawmakers to achieve the same goals as § 3583(k) while still complying with the jury trial right.

I. THE SUPERVISED RELEASE SYSTEM

A. *The Background of Supervised Release*

Federal supervised release began in 1984 with the enactment of the Sentencing Reform Act (SRA).[27] Previously, the federal government used a typical parole system.[28] After a prisoner served a certain amount of time in prison, an executive agency, the United States Board of Parole, would allow the incarcerated to serve up to two-thirds of their sentence outside of prison on a discretionary basis.[29] Parolees were subject to numerous conditions and if they violated their parole, the Board had the authority to revoke it without credit for time served.[30] The statutory standards for granting and revoking parole were extremely vague, effectively placing great discretion in the hands of the Parole Board, which could find facts under a preponderance of the evidence standard.[31] Under the statute, those subject to revocation of parole had the right to a hearing before the Parole Board.[32] As time went on, the Parole Board increasingly delegated its powers to hearing examiners, and by the time federal parole was eliminated, these examiners were making the majority of parole decisions.[33]

In 1972, the Supreme Court in *Morrissey v. Brewer* weighed in on the minimum standards constitutionally required for revoking parole.[34] The Court held that parolees were entitled to preliminary and final hearings on the revocation.[35] Neither of these hearings had to be before a judge, but the parolee did have to receive written notice of the accused violations, disclosure of evidence against him, the ability to appear in person to present his own evidence, a non-absolute

27. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3583, 98 Stat. 1837 (1984).

28. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 984–90 (2013).

29. *Id.* at 984.

30. *Id.* at 985.

31. *Id.* at 985, 990 n.201.

32. *Id.* at 985.

33. *Id.* at 988.

34. 408 U.S. 471 (1972).

35. *Id.* at 485–87.

right to cross-examination, a neutral decision-maker, and a written explanation of the decision.[36]

Over time, the federal parole system inspired a bipartisan chorus of critics. Conservatives saw it as promoting excessive leniency, while liberals believed the discretion given to the Parole Board resulted in arbitrariness.[37] Congress therefore abolished federal parole in the 1984 Sentencing Reform Act.[38] The Senate Report singled out the effectively indeterminate sentences of the parole system as its principal flaw.[39] As a result, all federal prisoners going forward would have to serve virtually their entire terms.[40]

The SRA created supervised release as a supplement that judges could, at their discretion, add following a prison sentence.[41] Unlike parole, it could not serve as a substitute for prison and would be administered by the court, not an administrative agency. The Senate Report explained that supervised release's primary purpose was rehabilitative—meant "to ease the defendant's transition" back into society.[42] Accordingly, with only a few mandatory terms, the judge generally had wide discretion to set the conditions of the supervised release.[43] More importantly, Congress chose to make the punishment for violating supervised release not revocation, but criminal contempt, which meant defendants had access to the jury trial right and the case against them had to be proven beyond a reasonable doubt.[44]

Before the supervised release system went into effect, however, Congress had an apparent change of heart in 1987 and decided to change the principal enforcement mechanism back to revocation.[45] The Justice Department, Parole Commission, and other critics expressed concern that the conditions of supervised release would not be followed unless there was a revocation process and also noted that federal probation continued to have revocation.[46] Ultimately, the revival of revocation came in what Congress styled as "technical amendments" to the supervised release statute, raising the question of whether lawmakers seriously considered the policy implications of their decision.[47] Since 1987, there have been no structural changes to the general supervised release system.[48]

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36. *Id*. at 489.

37. Doherty, *supra* note 28, at 993–95.

38. *Id*. at 995–97.

39. S. REP. NO. 98-225, at 115 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3298.

40. Doherty, *supra* note 28, at 996. The only way that prisoners can now get their sentences reduced is a credit for good behavior that is capped at less than two months. *Id*.

41. *Id*. at 998. Later statutes would add mandatory minimum terms of supervised release following certain crimes. *See, e.g*., 21 U.S.C. § 841(b)(1)(A)(viii) (2018).

42. S. REP. NO. 98-225, at 124 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3307.

43. Doherty, *supra* note 28, at 999.

44. *Id*. at 1000.

45. *Compare* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207 (1986), *with* 18 U.S.C. § 3583 (2018).

46. Doherty, *supra* note 28, at 1001–02.

47. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207 (1986).

48. Doherty, *supra* note 28, at 1003–04.

Nonetheless, Congress did enact a series of laws in the 2000s that added unique, stricter supervised release requirements for those convicted of certain federal sex crimes.[49] These requirements are at the center of the *Haymond* case.

B. *The General Supervised Release System*

The principal supervised release statute is 18 U.S.C. § 3583. Subsection (a) establishes that when sentencing a defendant to prison, judges may choose to add on a term of supervised release unless a different statute makes supervised release mandatory, in which case the judge has no choice.[50] Under subsection (b), the maximum term of supervised release is determined entirely by the crime for which the defendant was convicted.[51] The sentences range from one year or less for those convicted of misdemeanors or Class E felonies to up to five years for those convicted of Class A or B felonies.[52]

The conditions of supervised release are governed by subsection (d). The statute provides some mandatory provisions such as that the "defendant not commit another Federal, State, or local crime" and that the defendant cooperate with certain DNA collection programs.[53] Some conditions are mandatory depending on the defendant's conviction. For example, for defendants required to register under the Sex Offender Registration and Notification Act, compliance with that act must be a condition of supervised release.[54] The judge can impose further conditions on supervised release provided they conform to three rules.

First, the conditions must be reasonably related to (1) purposes of recognizing the nature and circumstances of the offense, (2) the history and character of the defendant, (3) the need for deterrence of criminal conduct, (4) the protection of the public, and (5) the importance of providing the defendant with "correctional treatment."[55] Second, there must be "no greater deprivation of liberty than is reasonably necessary" to fulfill the purposes relevant for the first rule.[56] Third, the rule must be consistent with pertinent policy statements put out by the U.S. Sentencing Commission.[57]

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49. *See* PROTECT Act, Pub. L. No. 108-21, § 101, 117 Stat. 650 (2003); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e), 120 Stat. 587 (2006).

50. 18 U.S.C. § 3583(a) (2018). When deciding whether to include a term of supervised release, the judge must consider eight of the factors set forth in 18 U.S.C. § 3553, which governs the imposition of a sentence generally. *See id.* § 3583(c).

51. *Id.* § 3583(b).

52. *Id.* Federal felonies are grouped into one of five classes based on the maximum term of imprisonment authorized for each offense. *See* 18 U.S.C. § 3559(a) (2018).

53. 18 U.S.C. § 3583(d).

54. *Id.*

55. *Id.* § 3583(d)(1) (referencing 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) (2018)). In addition to recognizing the need for "correctional treatment" generally, § 3553(a)(2)(D) specifically mentions "educational or vocational training" and "medical care."

56. *Id.* § 3583(d)(2).

57. *Id.* § 3583(d)(3). The constitutionality of § 3583(d)(3) is not entirely clear in the aftermath of *Booker*. In the sentencing reduction context, district courts have been divided on whether Sentencing Commission

Subsection (e) deals with terminating, extending, or revoking supervised release.[58] The judge can terminate supervised release after one year if "such action is warranted by the conduct of the defendant released" and termination serves "the interest of justice."[59] The judge has largely unfettered discretion to extend a term of supervised release and add or subtract discretionary conditions.[60] However, in extending a term of supervised release, the judge may not exceed the limits set forth in subsection (b), and any alteration of the conditions must still conform to subsection (d).[61]

For revocation, the judge *may* revoke a term of supervised release if she finds by a preponderance of the evidence that the defendant violated a condition of supervised release.[62] The judge can require the defendant to serve the entire term of supervised release in prison without credit for time served on release, but the period of reincarceration must not exceed limits set out in subsection (e) that are based on the defendants underlying conviction.[63] Subsection (h) allows the judge to add a term of supervised release after a defendant completes a term of incarceration caused by a revocation.[64] But this addition of supervised release cannot exceed the general limits set forth in subsection (b) minus the amount of time served in prison for the revocation.[65]

The typical revocation of supervised release functions similarly to the previous parole system. For example, consider a defendant who committed a Class A felony and is given a five-year term of supervised release. If in year two he violates his supervised release, the judge can sentence him to five years in prison. However, after he serves that sentence, he cannot receive an additional term of supervised release. This is because subsection (b) caps supervised release for those who committed Class A felonies at five years, and subsection (h) requires the time he spent in prison for the revocation to be applied to that cap.[66]

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statements can have binding force. *Compare* United States v. Cruz, 560 F. Supp. 2d 198, 202 (E.D.N.Y. 2008) (holding that *Booker* did not affect Sentencing Commission policy statements), *with* United States v. Ragland, 568 F. Supp. 2d 19, 23–24 (D.D.C. 2008) (concluding that *Booker* made the policy statements advisory). The issue appears not to have come up in the supervised release context. That may be for two reasons. First, the policy statements seem likely to function only to constrain the conditions that can be imposed, so defendants have no interest in challenging them. Second, many of the policy statements may not involve any fact-finding and therefore do not implicate the jury trial right.

58. 18 U.S.C. § 3583(e). The judge must also consider the same eight factors from § 3553 when exercising his or her discretion under this section.

59. *Id.* § 3583(e)(1).

60. *Id.* § 3583(e)(2).

61. *Id.*

62. *Id.* § 3583(e)(3). The impact of the *Apprendi* line of cases on this provision is discussed below. *See infra* Part II.C.

63. 18 U.S.C. § 3583(e)(3). These limits are different than the ones in subsection (b). For example, for a Class C felony, the default limit on supervised release under subsection (b) is three years. However, subsection (e) limits the amount of time for which a Class C felon can be reincarcerated to two years.

64. *Id.* § 3583(h).

65. *Id.*

66. *Id.* §§ 3583(b), (h).

C. *Section 3583(k)—Special Provisions for Sex Offenders*

Section 3583(k) has two parts. The first, which was added in 2003, requires various sex offenders to be sentenced to a term of supervised release ranging from five years to life as part of their original sentence.[67] Since it is a mandatory minimum triggered solely by the jury's verdict, and not judicial fact-finding, it was not challenged in the *Haymond* case. The second, which was the provision challenged in *Haymond*, provides that if a defendant who is required to register in the federal sex offender registry commits one of a number of enumerated federal sex crimes while on supervised release, the judge must revoke supervised release and impose a term of imprisonment of at least five years.[68] The normal caps on incarceration to revocation of supervised release do not apply.[69]

II. THE JURY TRIAL RIGHT AND SUPERVISED RELEASE

A. Apprendi, Booker, *and* Alleyne

Starting with *Apprendi v. New Jersey*, the Sixth Amendment jury trial right experienced a revival.[70] In that case, Apprendi pled guilty to three crimes that carried, per his plea agreement, a possible maximum cumulative sentence of twenty years (two counts carried a maximum penalty of ten years, and the plea agreement specified that the sentence for the third count had to be served concurrently).[71] After accepting his plea, however, the trial court judge convened a special evidentiary hearing to determine whether Apprendi acted with racial bias in committing one of the counts to which he had pled guilty.[72] Apprendi maintained that he was not so motivated, but the judge found otherwise by a preponderance of the evidence.[73] This finding triggered a "sentencing enhancement" on one of the counts, authorizing a maximum twenty-year sentence, as opposed to just ten, meaning that Apprendi could now be subject to a cumulative sentence of thirty years.[74] Ultimately, the judge sentenced Apprendi to twelve years on the "enhanced" count and shorter, concurrent sentences on the other counts.[75]

The Supreme Court ruled that the post-plea evidentiary hearing violated the Sixth Amendment by depriving Apprendi of a jury trial.[76] It had long been established that all elements of a crime must be found by a jury, beyond a reasonable

67. *Id.* § 3583(k).
68. *Id.*
69. *Id.*
70. 530 U.S. 466 (2000).
71. *Id.* at 469–70.
72. *Id.* at 470–71.
73. *Id.* at 471.
74. *Id.* at 470.
75. *Id.* at 471.
76. *Id.* at 491–92.

doubt.[77] The question was whether acting with racial bias constituted an element of the offense.[78] The Court concluded that it was, rejecting New Jersey's argument that the racial bias issue was a mere "sentencing factor."[79] Examining the relevant precedent and history on the jury's traditional role in the criminal process, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[80] That the finding of racial bias changed the statutory maximum was key. The Court took care to note that judges could still, on their own accord, find facts to help them exercise their discretion when sentencing a defendant *within* the statutorily authorized range.[81] But as the finding of a racist motivation increased the potential statutory maximum to which Apprendi could have been sentenced, it was an element that should have been sent to a jury to be found beyond a reasonable doubt.[82]

In *United States v. Booker*, the Supreme Court applied *Apprendi* to the Federal Sentencing Guidelines.[83] The Guidelines are a set of regulations produced by an administrative agency that, at the time, constrained how judges were to exercise their discretion in sentencing defendants within the prescribed statutory range.[84] For example, Freddie Booker was convicted of possession with intent to distribute at least fifty grams of crack by a jury, which carried a sentence of ten years to life.[85] However, the Guidelines required the district court to sentence Booker to a baseline of 17.5 to 21.8 years unless the judge found additional facts.[86] In Booker's case, the judge did so, finding at sentencing by a preponderance of the evidence that Booker had actually possessed over 600 grams of crack and that he had obstructed justice.[87] Due to those findings, the authorized sentencing range was now between thirty years and life; Booker was sentenced to thirty years.[88] Under a straightforward application of *Apprendi*, the Court, in an opinion by Justice Stevens, found that the Guidelines scheme violated the Sixth Amendment by

77. *See* United States v. Gaudin, 515 U.S. 506, 510 (1995); *In re* Winship, 397 U.S. 358, 361–64 (1970).
78. *Apprendi*, 530 U.S. at 491–92.
79. *Id.* at 494–96.
80. *Id.* at 490.
81. *Id.* at 481. The Court stated:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.

Id.
82. *Id.* at 491–92.
83. 543 U.S. 220 (2005).
84. *Id.* at 241–43.
85. *Id.* at 227.
86. *Id.*
87. *Id.*
88. *Id.*

increasing what was effectively the statutorily authorized maximum sentence based on facts found by the judge.[89]

In a separate opinion, Justice Breyer, writing for a different majority, addressed the proper remedy. The Court recognized that there were essentially two remedial options. First, the jury trial requirement could be grafted onto the Guidelines.[90] Facts that determined sentencing under the Guidelines, such as whether Booker possessed additional crack, would be sent to the jury during trial.[91] The second option would invalidate and sever the provision, making the guidelines advisory.[92] Judges would then simply sentence defendants within the range originally authorized by the statute, for example, ten years to life in Booker's case.[93] Adhering to congressional intent, the Court chose the latter option.[94] While noting that extension is normally preferred to nullification, the Court explained that given numerous legal and policy concerns, it could not "assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible."[95]

First, the opinion noted that the statutory provision that made the Guidelines mandatory referred to "the court" as imposing the sentence, which it took to typically refer to the judge and not the judge and jury together.[96] This textual issue made the remedy of sending Guidelines-relevant factual issues to the jury tenuous.[97] Justice Breyer further expressed concerns that the jury option would defeat Congress's objective of promoting uniform sentences.[98] Judges would lack discretion to sentence for the underlying conduct and would instead be limited by whatever the prosecutors decide to charge.[99] And the fact that so much would now be riding on what prosecutors charged would put too much emphasis on plea bargaining.[100] Additionally, sending all these extra factual questions to juries would excessively increase complexity in the system, and the Court found that this was unlikely to accord with Congress's desires.[101] Making the Guidelines advisory raised the question of what standard to apply when an appellate court reviews the district court's sentence, since the standard stated in the statute essentially required the court to examine how well the mandatory guidelines were followed.[102] Justice

89. *Id*. at 232–33.
90. *Id*. at 246.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*. at 248–49.
95. *Id*. at 247–48.
96. *Id*. at 249–50.
97. *Id*. at 250.
98. *Id*. at 250–53.
99. *Id*.
100. *Id*. at 256.
101. *Id*. at 254.
102. *Id*. at 260–61.

Breyer examined the statutory scheme and found that it implied a standard of review for "unreasonableness."[103]

Finally, in *Alleyne v. United States*, the Supreme Court extended the rule of *Apprendi* to facts that trigger a mandatory minimum in sentencing.[104] Previously, in *Harris v. United States*, the Supreme Court had, despite *Apprendi*, characterized facts that activated mandatory minimums as "sentencing factors" and allowed them to be found by the judge by a preponderance of the evidence.[105] But in *Alleyne*, the Court overruled *Harris*, finding that the older case could not be reconciled with the rationale in *Apprendi*.[106] If a fact is an element of the crime because it affects the authorized sentence range at the upper level, the Court explained, then facts that affect the authorized sentence range at the lower level must likewise be elements.[107] *Apprendi*'s fundamental teaching was that the sentencing range must be determined solely by the elements of the offense.[108] As mandatory minimums determined the sentencing range, the facts that trigger them must be elements of the offense.[109] From a functional perspective, the Court added, mandatory minimums "aggravate" the sentences that trial courts hand down.[110] In many cases, defendants will receive higher sentences than they would have absent the mandatory minimum, and *Apprendi* held that facts that increase the punishment must be found by a jury.

B. *The Haymond Case*

In 2010, Andre Ralph Haymond was convicted by a jury of one count of possession of child pornography.[111] He was sentenced to thirty-eight months in prison and, in accordance with the mandatory minimum in § 3583(k), a supervised release term of ten years.[112] Haymond was released from prison in 2013.[113] In 2015, probation officers searched his apartment, seized his smartphone, and subjected it to a forensic examination.[114] Based on the results of that search, the district court concluded by a preponderance of the evidence that Haymond knowingly possessed child pornography—but the question was a close one.[115]

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103. *Id.*

104. 570 U.S. 99, 107–08 (2013).

105. 536 U.S. 545, 549–50 (2002).

106. *Alleyne*, 570 U.S. at 103.

107. *Id.* at 112–13.

108. *Id.* at 106.

109. *Id.* at 112 ("It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.").

110. *Id.* at 113.

111. United States v. Haymond, 869 F.3d 1153, 1156 (10th Cir. 2017). Specifically, Haymond was convicted of violating 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1159–60. While it was undisputed that his smart phone contained child pornography, the evidence did not conclusively establish that he knew the images were there. *Id.*

The thirteen offending images were found in the cache of his phone.[116] The cache is a folder that contains images that were, at one point, in one of the phone's applications.[117] Typically, a user has to take an affirmative action to bring an image into one of the phone's applications, which suggests that Haymond had recently viewed child pornography.[118] However, Haymond contended, with the assistance of uncontroverted expert testimony, that one of the applications on his phone may have downloaded the images without Haymond's knowledge.[119] Furthermore, only thumbnail images appeared in the cache, which indicated that Haymond likely had not viewed a full-size version.[120] Ultimately, the district court found it more likely than not that the images came from a volitional act and that Haymond was therefore aware of their presence.[121] Because Haymond was required to be on the National Sex Offender Registry and knowing possession of child pornography is one of the crimes enumerated in § 3583(k), this triggered the mandatory minimum in that section.[122] Accordingly, the district court revoked his supervised release and imposed the mandatory minimum term of five years in prison as well as a term of five years of post-incarceration supervised release.[123] The judge did take care to note that the government had not proved its case beyond a reasonable doubt, and that "[i]f this were a criminal trial and the Court were the jury, the United States would have lost."[124] He further expressed concern that Haymond could be given such a harsh sentence without a jury trial and under a diminished standard of proof.[125]

Haymond appealed to the Tenth Circuit, contending both that the evidence was insufficient and also that § 3583(k) unconstitutionally deprived him of a jury trial and therefore had to be invalidated.[126] The court rejected the sufficiency challenge, concluding that while it was possible that the images had been automatically downloaded without Haymond's knowledge, it was still more likely than not that he knowingly downloaded them.[127] However, Haymond prevailed on his Sixth Amendment claim and the Tenth Circuit decided to strike down the revocation part of § 3583(k), remanding Haymond for resentencing under § 3583(e)(3).[128] The government subsequently petitioned for certiorari, which was granted.[129]

116. *Id.* at 1159.
117. *Id.* at 1158–60.
118. *Id.*
119. *Id.* at 1157.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. United States v. Haymond, No. 08-201, 2016 U.S. Dist. LEXIS 100915, at *40 (N.D. Okla. Aug. 2, 2016).
125. *Id.* at *19–20, *41.
126. United States v. Haymond, 869 F.3d 1153, 1156 (10th Cir. 2017).
127. *Id.* at 1159–60.
128. *Id.* at 1162, 1168.
129. United States v. Haymond, 139 S. Ct. 2369 (2018).

At the Supreme Court, a majority of justices found that § 3583(k) violated the jury trial right. The four-justice plurality saw this as a clear-cut case governed squarely by *Alleyne*. They noted that "just like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments."[130] After recounting the facts of the case, the historical role of the jury, and the *Apprendi* line of cases, the plurality devoted just one paragraph to applying those cases to § 3583(k).[131]

Most of the plurality opinion was actually devoted to rebutting arguments made by the government and the dissent. The first was that unlike in *Apprendi*, *Booker*, and *Alleyene*, a revocation of supervised release occurs after sentencing and therefore is not part of a "criminal prosecution" to which the Sixth Amendment applies.[132] The plurality responded by observing that "[o]ur precedents, *Apprendi* . . . and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement' [something other than a prosecution]."[133] The central insight of the plurality's view is if facts are being found at any point in the process that change the authorized sentencing range, they are elements of a crime and must be found by a jury.[134] In this sense, the post-trial fact-finding that occurred in *Apprendi*, *Alleyene*, and *Booker* were all "prosecutions." The problem was that they were being carried out in an unconstitutional manner. Just as previous schemes that were struck down attempted to hide what were in effect prosecutions in other parts of the criminal process, so too did § 3583(k).

Second, the government and dissent argued that the jury's verdict from Haymond's original conviction authorized the reincarceration for violating the conditions of supervised release under the mandatory minimum provision.[135] But the Court noted that "[i]n *Apprendi* and *Alleyne*, the jury's verdict triggered a statute that authorized a judge at sentencing to increase the defendant's term of imprisonment based on judge-found facts" and that even so, "[t]his Court had no difficulty rejecting that scheme as . . . impermissible[.]"[136]

Third, the government and dissent analogized revocation of supervised release under § 3583(k) to revocation of parole,[137] which previously passed muster under the Sixth Amendment in *Morrissey v. Brewer*.[138] The plurality distinguished

130. *Id*. at 2378 (quoting Alleyne v. United States, 570 U.S. 99, 115 (2013)). Because the plurality found that the mandatory minimum component of § 3583(k) was unconstitutional, they refrained from "address[ing] the constitutionality of the statute's effect on [Haymond's] maximum sentence under *Apprendi*[.]" *Id*. at 2379 n.4.

131. *See id*. at 2378–79.

132. *Id*. at 2379–80.

133. *Id*. at 2379.

134. *Id*. at 2379–80.

135. *Id*. at 2380–81.

136. *Id*. at 2381.

137. *Id*. at 2381–82; *id*. at 2394 (Alito, J., dissenting)

138. 408 U.S. 471 (1972).

parole, however, because time spent incarcerated on parole revocation can never exceed "the remaining prison term authorized by statute for [a defendant's] original crime of conviction."[139] In contrast, § 3583(k) "expose[s] a defendant to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict" based on judicial fact-finding.[140] In other words, unlike parole or regular supervised release revocation, § 3583(k) increases the floor of the statutorily authorized sentencing range.

Fourth, the dissent compared revocation of supervised release to prison disciplinary procedures.[141] The plurality found the "analogy" to be "a strained one" since reincarcerating a free man is materially different from adjusting his conditions of confinement.[142]

Finally, and perhaps most importantly, the plurality responded to the dissent's accusation that it was laying the groundwork to strike down the entire supervised release system.[143] The dissent noted that while § 3583(e)(3), the general supervised release revocation provision, lacks a mandatory minimum, it allows the effective punishment imposed on a defendant to be increased.[144] And if *Alleyne* applies to supervised release, then *Apprendi* must as well.[145] The dissent saw this as a disruptive outcome for the supervised release system, comparing it to a "40-ton truck speeding down a steep mountain road with no brakes."[146]

The plurality reiterated that its holding addresses only the mandatory minimum aspect of § 3583(k), which § 3583(e)(3) lacks.[147] It further noted that even if *Apprendi* was applied to § 3583(e)(3), "the practical consequences of a holding to

139. *Haymond*, 139 S. Ct. at 2382.

140. *Id*. Though not discussed by the plurality, this distinction is clearly supported by language in *Morrissey* and related cases. For example, the *Morrissey* court noted that, "[i]n practice, not every violation of parole conditions automatically leads to revocation." *Morrissey*, 408 U.S. at 479. It further stated that "[t]he broad discretion accorded the parole officer is also inherent in some of the quite vague conditions[.]" *Id*.; *see also* Gagnon v. Scarpelli, 411 U.S. 778, 782, 784 (1973) (extending *Morrissey* to probation and noting that "[b]ecause the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation"). Indeed, one of the reasons the *Morrissey* court concluded that some procedural protections were needed for parolees was to ensure that the parole authorities' largely unfettered discretion in making revocation decisions was exercised reasonably. *Morrissey*, 408 U.S. at 484 ("What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."); *see also Gagnon*, 411 U.S. at 785 ("Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.").

141. *Haymond*, 139 S. Ct. at 2396–98 (Alito, J., dissenting).

142. *Id*. at 2382 (plurality opinion).

143. *Id*. at 2383–84.

144. *Id*. at 2388–89 (Alito, J., dissenting).

145. *Id*.

146. *Id*. at 2391.

147. *Id*. at 2383–84 (plurality opinion).

that effect would not come close to fulfilling the dissent's apocalyptic prophecy."[148] It interpreted the maximum initial prison sentence for a given conviction as a cap on the total amount of time a defendant could serve in prison for both the initial sentence and revocation of supervised release.[149] The plurality described this as "the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction."[150] As this cap is unlikely to be met in most supervised release cases, the plurality viewed any estimated disruption to be minor.

Justice Breyer concurred in the judgment, expressing agreement with "much of the dissent" and stating that "in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context."[151] Despite his misgivings about Haymond's arguments, Justice Breyer still found that § 3583(k) violated the right to a jury trial because it "resemble[d] the punishment of new criminal offenses[.]"[152] Three factors in particular influenced his decision. First, the provision is triggered "only when a defendant commits a discrete set of federal criminal offenses[.]"[153] Second, under § 3583(k), the judge lacks discretion in deciding whether a violation "should result in imprisonment and for how long."[154] Third, the provision imposes a mandatory minimum.[155] Since Justice Breyer determined § 3583(k) to effectively be an ordinary criminal statute that had been shoved into the supervised release system, the regular protections of the criminal process, including the jury trial right, applied.

C. *Applying* Apprendi*,* Alleyne*, and* Booker *to Supervised Release Generally*

One of the principal disputes among the justices in *Haymond* concerned the magnitude of disturbance that would result if the jury trial right were applied to § 3583(e)(3). The dissent and Justice Breyer foresaw major damage to the supervised release system, while the plurality conceded some potential disruptions, but contended that most revocations would be unaffected. Contrary to both views, applying *Apprendi* to § 3583(e)(3) should have no effect.

In dicta, the plurality suggested that § 3583(e)(3) could be applied unconstitutionally in cases in which the length of incarceration for revocation, when combined with the original sentence, would exceed the maximum initial prison sentence authorized by the original conviction.[156] A revocation term in excess of that would require a jury to be convened.[157] For example, if a defendant was

148. *Id.* at 2384.
149. *Id.*
150. *Id.*
151. *Id.* at 2385 (Breyer, J., concurring).
152. *Id.* at 2386.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 2384 (plurality opinion).
157. *Id.*

convicted of an offense that carried a maximum prison sentence of ten years, but received only five years of prison in addition to a maximum term of ten years of supervised release, her supervised release could only be revoked for a total of five years. The plurality saw this view as grounded in the "maximum term of imprisonment the jury has authorized."[158]

However, it is not clear why the jury's verdict authorizes that result. After all, a jury's verdict authorizes whatever Congress wants it to, provided that punishment comports with the requirements of the Constitution. Recall that the statutory scheme allows for revocation of supervised release, even when a defendant was given the maximum initial prison sentence.[159] Congress accordingly seems to have intended the jury's verdict to authorize a period of incarceration in excess of that maximum initial sentence—the caveat being that after a certain number of years in prison, the defendant has to be given a chance on supervised release.[160]

Yet, one could still make out a case that § 3583(e)(3) appears to violate *Apprendi*. Regardless of what the initial prison sentence could have been, when a defendant is freed on supervised release, the government has no legal right to reincarcerate that person unless a judge finds that the defendant "violated a condition of supervised release."[161] Since the judge is finding facts that increase the authorized punishment by a preponderance of the evidence, it might seem that § 3583(e)(3) violates *Apprendi*, including in cases where the total amount of incarceration does not exceed the plurality's proposed limit.

Yet, even if the Supreme Court adopted the above view, it would not functionally alter how that section operates—a fact that demonstrates that the provision is constitutional. Suppose that the Court held that § 3583(e)(3)'s judicial "fact-finding" was unconstitutional. It would face the same remedial choice as in *Booker*. Either it could graft the jury trial onto § 3583(e)(3) revocations or it could strike the fact-finding requirement and allow the judge to operate with true discretion.[162] Practically, though, the Court might have no choice but to choose the latter option. First, § 3583(e)(3) has the same textual issue as the statute in *Booker*—it refers to the "court" finding facts and revoking supervised release.[163] More importantly, given the history of supervised release, probation, and parole, it seems unlikely that Congress would have preferred to send these general revocation cases to juries. These systems have traditionally been built around the discretion of the adjudicating authority so it seems most plausible that Congress would want to keep revocation decisions within the judicial sphere.[164]

158. *Id.*
159. *See* 18 U.S.C. § 3583(b) (2018).
160. *See Haymond*, 139 S. Ct. at 2390 (Alito, J., dissenting).
161. 18 U.S.C. § 3583(e)(3).
162. *See* United States v. Booker, 543 U.S. 220, 248–49 (2005).
163. *See id.* at 249–50.
164. *See supra* Part I.A.

If the Court thus followed the remedial path in *Booker*, it would likewise have to impose a legal standard of "reasonableness" for evaluating the adequacy of revocations. However, a standard of reasonableness would, as a practical matter, end up imposing the same fact-finding requirements that § 3583(e)(3) presently contains. Finding that the defendant violated his conditions of supervised release would have to be at least the bare minimum for reasonably revoking supervised release.[165] It would be presumably unreasonable, if not a violation of due process, to revoke supervised release on a basis for which the defendant had never been given prior notice. In this sense, § 3583(e)(3) as written effectively creates a system of judicial discretion, cabined by a reasonableness requirement. This is what *Booker* explicitly approved.[166]

Moreover, unlike § 3583(k), all the other limits on § 3583(e)(3) revocation derive solely from the jury's verdict. The amount of time for which the judge may incarcerate a defendant is determined by what "class" offense the defendant was convicted of.[167] And subsection (h) effectively creates a cap on the total period of reincarceration derived from the amount of supervised release the defendant's conviction initially authorized.[168] Applying *Apprendi* to § 3583(e)(3) should therefore not disrupt that provision.

III. DOUBLE JEOPARDY CONCERNS DETERMINE THE PROPER REMEDY: THE REVOCATION PART OF SECTION 3583(K) SHOULD BE INVALIDATED

In keeping with *Booker*'s overall approach, the briefing on the remedy issue largely focused on congressional intent. Haymond argued that the revocation part of § 3583 (k) should be invalidated.[169] He noted that Congress has always put supervised release decisions in the hands of the judge and contended that the policy concerns that guided the Court's decision in *Booker* were present in this case.[170] He also reprised the double jeopardy concern from an earlier case, *Johnson v. United States*—that the government would be forced to choose between pursuing a jury trial on § 3583(k) revocations and prosecuting the post-release conduct separately.[171] The government argued that sending these cases to a jury would best fulfill Congress's goal of incarcerating certain repeat sex offenders for longer periods of time.[172]

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165. *See* Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (noting that not every violation of parole actually provides "reasonable grounds for revoking parole").

166. *See Booker*, 543 U.S. at 260–63.

167. 18 U.S.C. § 3583(b) (2018).

168. *Id.* § 3583(h).

169. Brief for Respondent at 30–35, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

170. *Id.*

171. *Id.*; *see also* Johnson v. United States, 529 U.S. 694, 700 (2000). *Johnson* is discussed in more detail below.

172. Brief for Petitioner at 53–54, United States v. Haymond, 139 S. Ct. 2369 (2019) (No.17-1672). Another potential remedy, which would be to strike the fact-finding requirement from § 3583(k) but otherwise leave it in place, was not proposed by either party. Presumably, this is because that remedy would create a result which Congress could not have intended—that those on the Sex Offender Registry would face potentially significantly longer revocations than other defendants. The harsher revocations authorized by § 3583(k), under this remedy,

However, both parties ignored a crucial double jeopardy issue. The Fifth Amendment's Double Jeopardy Clause prohibits a person from being prosecuted twice for the same offense.[173] The Supreme Court, in *Blockburger v. United States*, explained that two crimes are punishment for the "same offense" if all of the elements of one crime are part of the other crime.[174] In other words, two crimes are not the same offense for double jeopardy purposes only if each crime contains at least one element that the other does not.[175] *Brown v. Ohio* illustrates how this principle works for successive prosecutions.[176] In that case, the defendant stole a car and was convicted of joyriding.[177] He was then prosecuted again for the same act and charged with auto theft, a crime whose elements consist of "joyriding with the intent permanently to deprive the owner of possession."[178] Since joyriding did not consist of any elements that were not part of auto theft, they were the same offense.[179] Accordingly, the defendant could not be prosecuted for auto theft when he had already been convicted of the "lesser included offense" of joyriding.[180]

The Double Jeopardy Clause should control the remedy in *Haymond*. That is because finding the current § 3583(k) revocation procedure to violate the Sixth Amendment requires the Court to recognize that the factual predicates for a § 3583(k) revocation are elements of a crime. Indeed, the determination of what is an element of a crime is really the central issue in *Apprendi* and its progeny.[181] No one in those cases disputed that a jury had to find all of the elements of a crime beyond a reasonable doubt. The question was whether the facts found in post-trial proceedings were in fact elements.[182] *Apprendi* provided a test to answer the question of whether the facts increase the statutorily authorized sentencing range for the crime.[183] Section 3583(k) is unconstitutional because its fact-finding requirements do just that and are therefore elements of a crime that must be found by a jury. And if they are elements of a crime for the jury trial right, they must likewise be elements of a crime for the Double Jeopardy Clause. It would be anomalous if a proceeding was a prosecution for purposes of the jury trial right but was not a

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could be imposed for many other kinds of supervised release violations. We know Congress did not intend this result because the current statutory scheme authorized just a 0–2 year revocation for the vast majority of potential supervised release violations, even for those required to be on the Sex Offender Registry.

173. U.S. CONST. amend. V.

174. 284 U.S. 299, 304 (1932).

175. *Id.*

176. 432 U.S. 161 (1977).

177. *Id.* at 162.

178. *Id.* at 167.

179. *Id.* at 168.

180. *Id.*

181. *See* Alleyne v. United States, 570 U.S. 99, 114 (2013) ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime.").

182. *Id.* at 114–15.

183. *See id.* at 111.

prosecution for purposes of double jeopardy, since both rights are defined in relation to the elements of a crime.[184]

This is an important point because it means that § 3583(k) essentially turns the defendant's original conviction into a lesser included offense. Revocation under § 3583(k) has three components. The defendant must (1) be on supervised release, (2) commit one of a list of enumerated federal crimes, and (3) be required to register on the National Sex Offender registry.[185] However, that last element serves no other purpose than to serve as short hand for a prior conviction—revocation under § 3583(k) has nothing do with enforcing registration requirements. Section 3583(k) makes the defendant's prior conviction—and by proxy the elements of that prior conviction—elements of the new revocation offense.[186] Since the prior conviction does not have an element which is not part of the § 3583(k) offense, it is the same offense for double jeopardy purposes, and prosecution based on § 3583(k) is prohibited.

One possible rebuttal is to draw an analogy between § 3583(k) and recidivist statutes, but this is not a viable argument. Recidivist statutes, such as three strikes laws, increase the authorized sentencing range for a defendant based on the fact of

184. *See id*. at 114; *Brown*, 432 U.S. at 166; Blockburger v. United States, 284 U.S. 299 (1932). There are admittedly some anomalies in how a prosecution is defined for different constitutional rights. For example, the Sixth Amendment gives a defendant the right to a jury trial and the right to counsel for "all criminal prosecutions." U.S. CONST. amend. VI. But whether a "prosecution" counts for purposes of the jury trial right depends on the statutorily maximum punishment, while the existence of a "prosecution" for purposes of the right to counsel hinges on whether the defendant is actually given a prison sentence. *See* Scott v. Illinois, 440 U.S. 367 (1979). However, a similar result is unlikely to occur with regard to the jury trial right and the protection against double jeopardy because the Supreme Court has already made clear that both of these rights are doctrinally rooted in the concept of a crime's elements.

185. *See* 18 U.S.C. § 3583(k) (2018).

186. While it is true that the fact of a prior conviction is exempt from *Apprendi*'s holding, that is not because the fact of a prior conviction is not an element. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[.]") (emphasis added). Rather it is because logistical and prudential concerns make it unnecessary to get a jury involved. The exception exists only because of a prior case, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which was largely reinterpreted by the *Apprendi* opinion. *Apprendi* stated in explaining the exception that "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant in *Almendarez-Torres*] did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Apprendi*, 530 U.S. at 488. And even so, the *Apprendi* court could not help but note that even that rationale seemed to be in conflict with its overall holding. *See id*. at 489–90 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it[.]").

Moreover, it is clear that a prior conviction is an element for double jeopardy purposes. Otherwise, it would be unnecessary to engage in the legal fiction, discussed below, that recidivist statutes only punish for the second crime even though they take prior criminal conduct into account. Yet, if the fact of a prior conviction was not an element, then the *Blockburger* test would be satisfied on its own terms, since the first and second offenses would contain *only* elements that the other does not. Furthermore, if the fact of a prior conviction was not an element, then the holding in *Brown v. Ohio* could be circumvented merely by recasting auto theft as the fact of a prior conviction for joyriding plus intent permanently to deprive the owner of possession.

a prior conviction, effectively making the prior conviction an element of the second prosecution.[187] As one judge once noted, recidivist statutes "might seem to violate" basic double jeopardy principles at first blush.[188] Given that a recidivist statute effectively just contains the earlier offense but adds new elements, it would violate a straightforward application of the *Blockburger* test. Yet, the Supreme Court has refrained from applying *Blockburger* to recidivist statutes.[189] Instead, the Court engages in an interpretative legal fiction, explaining that "the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'"[190]

This exception is not open to § 3583(k) because it cannot plausibly be "viewed" as only a "stiffened penalty for the latest crime."[191] A criminal prosecution based on revocation of supervised release by its very nature punishes the original offense that resulted in the supervised release. Unsurprisingly in *Johnson v. United States*, the Supreme Court held that in the supervised release context, courts should "[t]reat[] postrevocation sanctions as part of the penalty for the initial offense."[192] They cannot interpret revocation of supervised release as punishment for the later conduct at all.[193] Therefore, the Court cannot cure the double jeopardy problem by reinventing the revocation section of § 3583(k) as a recidivist statute. Doing so in a case such as Haymond's would be even more unreasonable when one considers that Congress has already created a recidivist statute to address the very conduct of which he is accused.[194]

Also of note, the twenty-year maximum penalty under that recidivist statute is less than the maximum penalty of life under § 3583(k).[195] Furthermore, even as the Supreme Court has explicated the recidivist statute exception to double jeopardy, it has taken care to note that the fact of a prior conviction is relevant only insofar as it relates to the "defendant's background more generally."[196] It does not extend to "conduct arising out of the same criminal transaction as the offense of which the defendant was convicted."[197] Yet, there can be little doubt that prosecution based on revocation of supervised release arises from the original criminal conviction.

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187. *See supra* note 186.

188. United States v. Kaluna, 152 F.3d 1069, 1072 (9th Cir. 1998).

189. *See, e.g.*, Witte v. United States, 515 U.S. 389 (1995).

190. *Id.* at 400 (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)).

191. *See id.*

192. Johnson v. United States, 529 U.S. 694, 700 (2000). For further discussion, see *supra* note 140.

193. *Id.*

194. *See* 18 U.S.C. § 2252(b)(2) (2018) (increasing the authorized sentence range for possession of child pornography from 0 to 10 years to 10 to 20 years, if the defendant has previously been convicted of a sex offense).

195. *See id.* § 2252(b)(2); 18 U.S.C. § 3583(k) (2018).

196. Witte v. United States, 515 U.S. 389, 400 (1995).

197. *Id.*

The government may also look to *Diaz v. United States* and *Garrett v. United States* to argue that the Double Jeopardy Clause does not bar a trial for revocation.[198] In *Diaz*, the Supreme Court held that a defendant previously convicted of assault may be subsequently tried for murder when the victim succumbs to his wounds after the initial assault conviction.[199] The Court noted that only after the victim's death "was it possible to put the accused in jeopardy for [murder]."[200] *Garrett* applied *Diaz* to the crime of engaging in a continuing criminal enterprise (CCE).[201] The government sought to use a low-level drug offense the defendant had previously been convicted of as a predicate for the CCE offense.[202] While the Court expressed skepticism as to whether a traditional double jeopardy analysis even applied to a compound crime like a CCE offense, it assumed for the purposes of the opinion that the low-level drug conviction was a lesser included offense under *Brown*.[203] Nevertheless, since "the continuing criminal enterprise charged by the Government had not been completed at the time" of the earlier conviction, *Diaz* allowed the subsequent prosecution.[204]

But to apply this exception to supervised release would strain credulity. It would require the courts to reimagine § 3583(k) revocations as a single, long term offense where the only instances of relevant conduct may take place decades apart. The *Haymond* plurality characterized revocation of supervised release as the court "adjusting the defendant's sentence for his original crime"[205] and specifically analogized § 3583(k) to a "sentencing enhancement" for the original offense.[206] And it would once again violate *Johnson*'s holding that, for other constitutional reasons, revocation of supervised release cannot be construed as "impos[ing] punishment for defendants' new offenses[.]"[207] Both the plurality *and* the dissent in *Haymond* agreed that *Johnson*'s understanding of supervised release was directly applicable to § 3583(k).[208] How could § 3583(k) be understood as punishing only for the original offense if it is actually punishing a continuing offense that is not completed until years after the original conviction?

Furthermore, as Justice O'Connor explained in her *Garrett* concurrence, the *Diaz-Garrett* rule, like other double jeopardy exceptions, is predicated on the need to accommodate "the compelling public interest in punishing crimes."[209] In

198. *See* Diaz v. United States, 223 U.S. 442 (1912); Garrett v. United States, 471 U.S. 773 (1985).
199. *Diaz*, 223 U.S. at 448–49.
200. *Id*. at 449.
201. *Garrett*, 471 U.S. at 775, 791–92.
202. *Id*. at 775.
203. *Id*. at 790.
204. *Id*. at 792.
205. United States v. Haymond, 139 S. Ct. 2369, 2400 n.5 (2019).
206. *Id*. at 2381.
207. Johnson v. United States, 529 U.S. 694, 700 (2000) (quotations omitted). For further discussion, see *supra* note 140.
208. *See Haymond*, 139 S. Ct. at 2381; *id*. at 2394 (Alito, J., dissenting).
209. Garrett v. United States, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring).

contrast to the CCE context, the government's interest is presumably insubstantial when it can prosecute the same conduct under a recidivist statute. With no applicable exception to double jeopardy, § 3583(k) must be struck down to avoid violating the defendant's Fifth Amendment rights.

IV. THE GOVERNMENT'S PATH FORWARD: USING A WAIVER PROCESS TO CRAFT FLEXIBLE ALTERNATIVES TO INCARCERATION

Striking down § 3583(k) will of course create difficulties for federal and state governments for a variety of reasons. For those legislative officials trying to reduce their prison populations, such a holding may pose obstacles to crafting politically viable alternatives to incarceration. Politicians from across the ideological spectrum who want to fight mass incarceration have typically acknowledged that promoting alternatives to incarceration is part of the solution.[210] Yet, the politics of criminal justice mean that alternatives to prison may need to treat those who violate conditions sufficiently harshly to get enacted.[211] Applying the jury trial right to alternatives like supervised release forces legislatures to make a choice: either keep longer sentences or have a supervised release system without harsher penalties like mandatory minimum revocations. Given this choice, legislatures may just choose incarceration. In this scenario, both the government and defendants arguably lose out. Declaring provisions like § 3583(k) to be unconstitutional can thus create an impediment to reducing mass incarceration, as legislatures attempt to reform their sentencing schemes going forward.

One way to conceptualize something like supervised release is as a bargain imposed on defendants. In exchange for reducing the prison sentence range, the legislature releases the defendant but constrains his liberty in various ways. Section 3583(k)'s problem is that, though it is an alternative to prison, it partially eviscerates the defendant's jury trial right as part of an arrangement to which the defendant has never consented.

This issue was alluded to but never fully drawn out at oral argument in *Haymond*. For example, at one point the government argued that "the jury's verdict authorizes reimprisonment under [§ 3583](k) just the same as the conceded authorization of reimprisonment under [§ 3583] (e)(3)."[212] Chief Justice Roberts then

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210. *See, e.g.*, Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 34, 34 (2018); Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, ATLANTIC (Apr. 28, 2016), https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/; Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018), https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform. *But see* Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 313 (2009) (contending that focusing on alternatives to incarceration is one of a number of "crucial distractions from the agenda of [reducing] mass incarceration").

211. *See, e.g.*, Rachel E. Barkow, *Panel Four: The Institutional Concerns Inherent in Sentencing Regimes: Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1279–81 (2005); Herman, *supra* note 210, at 36–37, 56–57; *see also* Clear & Austin, *supra* note 210, at 315.

212. Transcript of Oral Argument at 23, United States v. Haymond, 139 S. Ct. 2369 (2019) (No. 17-1672).

responded "that's kind of a, like, bitter with the sweet argument. You know, you're going to get supervised release, but if you do, you're going to have to buy into what might present constitutional problems."[213] At another point, the government's lawyer attempted to analogize the supervised release system to parole, but Justice Sotomayor commented that "[w]ell, in parole, the original sentence was already X number of years, and the state granted a benefit and said, instead of serving 10 years, we'll let you serve eight if you behave. If you don't, you've got to finish serving the two that we imposed originally."[214] What both Chief Justice Roberts and Justice Sotomayor were getting at is that the supervised release system and § 3583(k) do not properly or clearly make an exchange of the benefit of a shorter prison sentence for the "bitter" of a diminished jury trial right.

Legislatures could, however, constitutionally achieve a similar outcome to § 3583(k) by requiring defendants to prospectively waive their jury trial right in exchange for being granted supervised release and serving less time in prison. If a legislature would increase sentences because it cannot constitutionally enact provisions like § 3583(k), then it could instead offer the defendant a choice between more prison or supervised release with the § 3583(k)-type provision. The statute could be amended to require that the defendant be offered this bargain. It would effectively grant a statutory right to the defendant.[215] The waiver of the Sixth Amendment rights would not be absolute. Rather, it would last only for the period of supervised release and could extend only to revocation for committing crimes related to the original conviction. The procedural standards for the waiver could be based off of those for plea bargains, i.e., the waiver would have to be "voluntary and knowing."[216] The upshot is that the government and at least some defendants would be able to achieve an outcome that they both prefer.

For example, suppose that Congress was considering cutting the sentence for one of the crimes that requires registration in the National Sex Offender Registry but is now hesitant because § 3583(k) has been invalidated.[217] Perhaps Congress is troubled by dangerousness concerns about releasing offenders earlier if they cannot be more easily re-imprisoned for committing certain crimes. Further suppose that it was going to reduce the sentence for this crime by two years at both ends, from five to fifteen years to three to thirteen years. If Congress is now unwilling to cut the sentence, it has an alternative. Congress can instead provide that a defendant be released onto supervised release two years early, *if* they waive their rights and agree to accept potential reincarceration under a § 3583(k)-type provision

213. *Id.* at 24.

214. *Id.* at 4.

215. This system would admittedly bring supervised release closer to parole. But crucially, it still would avoid what Congress saw as parole's principal flaw, the potential for arbitrariness. *See supra* notes 37–40 and accompanying text. Under this system, all defendants with the same conviction would be treated the same. They would, in effect, all be offered the exact same deal.

216. Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 466 (1938)).

217. Admittedly, this is an oversimplified example, but it demonstrates the larger theoretical point.

during the term of supervised release.[218] If the defendant prefers to get out earlier in exchange for making the waiver, then he can take the deal. If not, the defendant can say no and will be no worse off.

Even though such a scheme still burdens the right to a jury trial, it should be constitutional. The case law on burdening constitutional rights in exchange for benefits is somewhat muddled.[219] In *United States v. Jackson*, the Supreme Court struck down a provision that allowed a jury to sentence a defendant to death, but insulated the defendant from any possible capital sentence if he either waived a jury trial or pled guilty.[220] By discouraging the defendant from pleading not guilty and seeking a jury trial, the statute "needlessly chill[ed] the exercise of basic constitutional rights."[221] The government argued that the provision served the purpose of "mitigat[ing] the severity of [capital] punishment"[222] by "limiting the death penalty to cases where the jury recommend[ed] its imposition."[223] The Court rejected this argument.[224] It noted that the government could instead limit the death penalty to cases in which a jury recommends death by having a jury decide the sentence in all cases, regardless of whether the defendant waived the jury trial or pleaded guilty.[225] As the burden on the jury trial right was "unnecessary and therefore excessive," the death penalty provision had to be struck down.[226]

Yet, soon after deciding *Jackson*, the Court appeared to change course. In a series of decisions, it upheld the constitutionality of plea bargains, even in situations in which it was clear that the defendant had taken the deal—and accordingly waived the jury trial right—only to receive a lower sentence.[227] In *Brady v. United States*, the Court upheld a guilty plea that was made under the very provision struck down in *Jackson*, based on the rationale that the plea was "voluntary" and "knowing."[228] Even if the unconstitutional death penalty provision was the "but for" cause of the defendant's guilty plea, the Court explained, that would not rise

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218. Alternatively, Congress could provide that the judge impose an automatic two-year sentence reduction from whatever they were going to sentence the defendant, if the defendant agrees to waive their Sixth Amendment rights and accept § 3583(k).

219. *See* Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001) (observing inconsistencies among cases and proposing potential paths of reconciliation); *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003) (arguing that Supreme Court's approach to burdens on constitutional rights is completely different in criminal procedure than it is in other areas).

220. 390 U.S. 570, 571–73 (1968).

221. *Id.* at 582.

222. *Id.*

223. *Id.* at 581.

224. *Id.* at 582.

225. *Id.* at 582–83.

226. *Id.*

227. *See* North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970). *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), extended this principle further. The Court upheld a defendant's conviction for an offense even though it was undisputed that the prosecutor had only charged the defendant with that offense because the defendant had refused to take a plea deal. *Id.* at 364–65.

228. *Brady*, 397 U.S. at 748.

to the level of coercion required to defeat the plea.[229] For the *Brady* court, many aspects of the criminal process encouraged guilty pleas and plea bargaining had tremendous advantages for both the defendant and state.[230]

The Court further departed from *Jackson* in *Corbitt v. New Jersey*.[231] That case concerned a statutory scheme that gave defendants a mandatory life sentence if they pleaded guilty but created the possibility of a significantly shorter sentence if the defendant pleaded *non vult* or *nolo contendere*.[232] Despite the obvious resemblance to *Jackson*, the *Corbitt* court distinguished that case on two grounds. First, *Corbitt* did not involve a death sentence, even though the Court explicitly declined to limit *Jackson*'s holding to capital cases.[233] Second, *Jackson* involved a case where the maximum possible sentence depended on the defendant seeking a jury trial, whereas in *Corbitt* the maximum possible sentence was the same for all defendants.[234] The *Corbitt* court then proceeded to apply the plea-bargaining precedents, finding that their reasoning dictated that the Court uphold the New Jersey statute.[235]

Overall, *Jackson*—and not the plea-bargaining cases or *Corbitt*—still seems to be the relevant case for evaluating the constitutionality of the above proposal. Similar to *Jackson*, it is not a plea bargain because it would be derived from statute and not from a deal made with a prosecutor.[236] The proposal is also different from *Corbitt* because it would involve altering the maximum punishment possible. Like *Corbitt*, though, revocation of supervised release cannot result in a capital sentence, but it was unclear how much that distinction factored into the result of that case.

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229. *Id.* at 750 ("That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.").

230. *See id.* at 752. The Court stated:

> [B]oth the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id.

231. 439 U.S. 212 (1978).

232. *Id.* at 215.

233. *Id.* at 217.

234. *Id.* This rationale echoes the distinction made in *Harris*, that was ultimately discarded in *Alleyne*.

235. *Id.* at 221 ("There is no difference of constitutional significance between *Bordenkircher* and this case.").

236. To the extent that there are constitutional problems with this statutory proposal, the government could achieve fairly similar results by having prosecutors include a Sixth Amendment waiver for supervised release revocations as part of the terms of the overall plea bargain. Based on the Supreme Court's treatment of plea bargains, such a practice would be certainly upheld. The downside is it would introduce more arbitrariness and disparate treatment for similarly situated defendants. Not every defendant would receive the same benefit in exchange for consenting to the waiver.

Regardless, allowing defendants to bargain away their Sixth Amendment right for supervised release revocations as a matter of statutory right would still pass *Jackson*'s more exacting constitutional scrutiny. The government has an important interest in creating alternatives to prison to reduce mass incarceration while also addressing concerns that those released early will re-offend. Only a system that *ensures* easier reincarceration fully responds to these concerns. The government could enact harsher recidivist statutes but that would only go principally to deterrence, and not to the issue of removing repeat offenders from the general population. Thus, unlike in *Jackson*, the exercise of the jury trial right is not "*needlessly* chill[ed]."[237]

There is no evidence to suggest that § 3583(k) was enacted for the specific purpose of punishing defendants by removing their Sixth Amendment rights, as opposed to an attempt by Congress to remedy legitimate policy concerns.[238] Of course, such a waiver policy would have to be at least somewhat tailored to the defendant's original conviction. For example, it would probably be unconstitutional for the waiver of a defendant convicted of a child pornography offense to include subsequent securities fraud offenses. The Supreme Court has observed that there is "conflicting evidence" on whether sex offenders reoffend at particularly high rates, but Congress must be entitled to weigh evidence and act accordingly.[239] Furthermore, it should not pose an obstacle that the waiver would cover constitutional rights related to future violations of the law. While that might seem problematic because the defendant cannot really predict the future consequences of his waiver, this is true for many waivers that are clearly valid. For example, a defendant who pleads guilty and waives the right of appeal might have been able to take advantage of a later Supreme Court ruling. Someone who takes a plea deal might have later benefitted from exculpatory evidence that did not immediately surface. And anyone who pleads guilty is subjecting themselves to higher penalties if there is an applicable recidivist statute and they reoffend. All these are arguably as consequential as a limited Sixth Amendment waiver for future violations.

CONCLUSION

On its face, *Haymond* appears to be concerned solely with the application of the jury trial right to an unusual supervised release provision. But it implicates substantially more than that. On the issue of applying *Apprendi* to supervised release generally, there would be no disruption of the current system. As to the remedy, courts have no choice but to invalidate § 3583(k)'s revocation procedure because sending those cases to a jury would violate the protection against double jeopardy. Finally, governments can achieve similar results to § 3583(k) by allowing defendants to partially waive their Sixth Amendment rights prospectively in exchange for receiving shorter sentences.

237. United States v. Jackson, 390 U.S. 570, 582 (1968) (emphasis added).
238. *See supra* Part I.C.
239. United States v. Kebodeaux, 570 U.S. 387, 396 (2013).