



# Which Punishment Fits Which Crime?: Supreme Court to Consider Whether Portion of Supervised Release Statute is Unconstitutional

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*UPDATE: On June 26, 2019, the Supreme Court issued its [decision](#) in United States v. Haymond, with five Justices agreeing that applying 18 U.S.C. § 3583(k) with respect to the defendant's conduct was unconstitutional. Justice Gorsuch, writing for a plurality of four Justices, observed that Section 3583(k) permitted the judge in the defendant's case, rather than the jury, to find facts that resulted in the defendant "fac[ing] a minimum of five years in prison instead of as little as none." For the plurality, this judicial fact-finding "increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." The plurality limited its opinion to Section 3583(k)'s "unusual" mandatory-minimum sentencing provision for certain violations of supervised release conditions as it applied in the case before the Court, opting not to pass judgment on ordinary supervised release revocation proceedings that typically involve judicial discretion and lack a mandatory-minimum sentencing requirement.*

*In a separate opinion, Justice Breyer, writing only for himself, agreed that Section 3583(k) was unconstitutional but underscored that he did not see a problem with the ordinary supervised-release regime and would not apply the Court's Sixth Amendment jurisprudence to that regime more broadly. In Justice Breyer's view, "three aspects" of Section 3583(k) specifically, "considered in combination," rendered it distinct from "ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach": (1) that it applies only when a defendant commits one of a "discrete set of federal criminal offenses specified in the statute"; (2) that it removes the judge's discretion with*

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respect to imprisonment and term length; and (3) that it imposes a mandatory-minimum term of imprisonment upon a finding that commission of a listed criminal offense occurred.

Having concluded that Section 3583(k)'s mandatory-minimum provision violated the defendant's right to a jury trial, the plurality and Justice Breyer agreed that the court of appeals should be given the opportunity, in the first instance, to address the government's argument that the proper remedy would not be to strike down the relevant portion of Section 3583(k), but rather would be to empanel a jury to decide whether the defendant violated the underlying provision. The Court thus vacated the court of appeals' judgment and remanded the case for further proceedings.

Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Kavanaugh, dissented, arguing that under the original meaning of the Sixth Amendment, there was no constitutional basis for the Court's decision and that the plurality opinion suggested "that the entire system of supervised release . . . is fundamentally flawed in ways that cannot be fixed." In the dissent's view, there was "no good reason to depart" from the settled understanding that supervised release, like parole previously, is not a part of a criminal prosecution and thus does not implicate the Sixth Amendment jury-trial right.

The original post from November 27, 2018, follows below.

On October 26, 2018, the Supreme Court [granted certiorari](#) in *United States v. Haymond*—a case that could change how sex offenders who commit certain additional crimes after their release from prison are resentenced and invalidate a portion of the applicable federal statute in the process.

At issue is [18 U.S.C. § 3583](#), which establishes the requirements for imposing a term of "supervised release" following a federal criminal defendant's imprisonment. The Supreme Court has referred to [supervised release](#) as "a form of postconfinement monitoring" that the sentencing court oversees. Section 3583 [authorizes](#) courts to include a term of supervised release as a part of a defendant's sentence and establishes the permissible lengths of supervised release terms based on the severity of the offense of conviction. The statute also [requires](#) the court to order that the defendant "abide by certain conditions" during the supervised release term, [one](#) of which is that the defendant "not commit another Federal, State, or local crime during the term of supervision." For violation of this or other conditions imposed by the court, Section 3583 permits the court to revoke supervised release and reimprison the offender upon a finding by a preponderance of the evidence—i.e., that it is more likely than not—that a violation has occurred.

With respect to most violations of supervised release conditions, [Section 3583](#) (1) gives the court discretion to revoke supervised release and impose a term of reimprisonment within one of several specified ranges, and (2) defines those ranges by reference to the severity of *the original criminal conviction* (as opposed to the nature of the violation). However, for certain defendants—those required to register as sex offenders under federal law—who violate the terms of their supervised release by committing additional specified sex offenses, Section 3583(k) requires the court to revoke supervised release and reimprison the defendant for between five years and life. As a result, Section 3583(k) differs from the ordinary approach under Section 3583 by (1) eliminating the court's discretion with respect to revocation and the minimum reimprisonment term, and (2) tying that reimprisonment term to subsequent criminal conduct in violation of the conditions of supervised release (as opposed to the original crime of conviction).

In a 2017 [decision](#), the United States Court of Appeals for the Tenth Circuit in *United States v. Haymond* concluded that these aspects of Section 3583(k) rendered the provision [unconstitutional](#). Specifically, the appellate court held that Section 3583(k) "strips the sentencing judge of discretion to impose punishment" within the statutory range of punishment that would otherwise apply to the original crime of conviction and "imposes heightened punishment on sex offenders" based on "new conduct for which they have not been convicted by a jury beyond a reasonable doubt." The Supreme Court has now [agreed](#) to review the

Tenth Circuit's holding in order to determine whether it, and the attendant invalidation of the relevant portions of Section 3583(k), were in error.

The dispute at issue in *Haymond* arose after a jury convicted Andre Haymond of a child pornography offense carrying a statutory sentencing range of between 0 and 10 years' imprisonment. In turn, a federal district court sentenced the defendant to a term of incarceration followed by a supervised release term. Haymond completed his prison term, but during the term of his supervised release, probation officers discovered thumbnail images in his phone's gallery cache that were identified as child pornography. Based on this discovery, the court that originally sentenced Haymond found by a preponderance of the evidence that he had possessed child pornography in violation of the supervised release condition that he not commit another federal, state, or local crime. Because possession of child pornography is one of the enumerated offenses in Section 3583(k) that triggers mandatory supervised release revocation and reimprisonment for a minimum of five additional years, the court sentenced Haymond to five years' reincarceration, to be followed by five more years of supervised release.

On appeal, the Tenth Circuit determined that the provision in Section 3583(k) under which Haymond was sentenced to reimprisonment violated the Fifth and Sixth Amendments to the U.S. Constitution. Among other guarantees, those amendments protect a criminal defendant's right (1) to have each element of the criminal offense with which he is charged be submitted to a jury and proved beyond a reasonable doubt, and (2) to be free from multiple prosecutions and duplicative punishment for the same conduct (commonly referred to as "double jeopardy").

The Tenth Circuit based its holding on two separate lines of Supreme Court precedents. First, in a series of cases reaching back to the late 1990s, the Supreme Court has clarified that, although judges (rather than juries) can ordinarily determine the sentences of those convicted of federal crimes and base certain sentencing decisions on facts they find by only a preponderance of the evidence, when a mandatory "increase in a defendant's authorized punishment [is made] contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." In other words, when the existence of a fact means that a defendant *must* be sentenced to a longer term in prison than would otherwise be required, that fact must be proven to a jury beyond a reasonable doubt in order to comport with the Constitution. In this vein, in the landmark 2005 ruling in *United States v. Booker*, the Court held that the United States Sentencing Guidelines—which at the time could subject criminal defendants to mandatory, heightened sentencing ranges based on facts found by a judge by a preponderance of the evidence—ran afoul of the Constitution.

Second, the Supreme Court has elucidated the nature and constitutional limitations of supervised release revocation decisions. On one hand, the Court has recognized that because the Sixth Amendment applies only to "criminal prosecutions," and revocation of supervised release "is not part of a criminal prosecution," a defendant accused of violating at least certain conditions of his supervised release has "no right to a jury determination of the facts constituting that violation." Many conditions of supervised release, the violation of which may subject a released offender to reimprisonment, are not even criminal in nature. (For example, a court may impose a condition that a defendant submit to a search of his person and property under certain circumstances). At the same time, however, the Court has suggested that "serious constitutional questions" might arise if revocation and reimprisonment are used to punish the violation of a condition of supervised release itself. Specifically, treating postrevocation penalties in this way would raise the specter that they (1) conflict with the Constitution's jury and reasonable doubt requirements by allowing violations to be found by a judge based on a lower standard of proof, and (2) run afoul of the Constitution's double jeopardy prohibition because the conduct triggering revocation can be separately prosecuted. According to the Supreme Court, "[t]reating postrevocation sanctions as part of the penalty for the initial offense . . . avoids these difficulties."

Applying the above precedents, the lower court in *Haymond* viewed Section 3583(k)'s mandate that a court impose a five-year minimum reimprisonment term upon the judge's finding that a particular crime

was committed during the supervised release term as [indistinguishable](#) from the sentencing range increases based on judge-found facts held impermissible in *Booker*. Although the Constitution’s jury and reasonable doubt requirements ordinarily do not apply to a finding that a defendant has violated a condition of supervised release, the *Haymond* court [saw](#) the five-year minimum term of imprisonment as retroactively imposing a higher mandatory sentencing floor than would have otherwise been available for the original crime of conviction, which carried no minimum imprisonment term. In the court’s [view](#), under *Booker*, the Fifth and Sixth Amendments prohibited the application of that five-year minimum based only on a judge’s finding by a preponderance of the evidence—rather than a jury’s finding beyond a reasonable doubt—that the subsequent criminal violation occurred. The difficulty in *Haymond* is that the judge-found fact at issue—commission of an additional crime in violation of *Haymond*’s terms of supervised release—occurred *subsequent* to the imposition of *Haymond*’s sentence for his original crime of conviction, rendering the supervised release finding and mandatory reimprisonment term distinct from the mandatory sentencing range increases that the Supreme Court viewed as problematic in *Booker*. The government [emphasized](#) this distinction in its petition for certiorari in *Haymond*.

The *Haymond* court also held that the five-year mandatory minimum provision of Section 3583(k) was unconstitutional for [another](#) reason: according to the Tenth Circuit, because the provision makes certain subsequent offenses that violate supervised release conditions—rather than the original offense of conviction—the trigger for a heightened term of reimprisonment, that portion of Section 3583(k) is at odds with the Supreme Court’s [admonition](#) that postrevocation sanctions should be treated “as part of the penalty for the initial offense” to avoid constitutional difficulty. More specifically, the court in *Haymond* [concluded](#) that tying an increased penalty to specific subsequent offenses in this way raises the same Fifth and Sixth Amendment problems identified in *Booker*—i.e., that commission of the subsequent offense is not found by a jury beyond a reasonable doubt—while also running afoul of the Fifth Amendment’s double jeopardy prohibition. In its petition for certiorari seeking review of this aspect of the Tenth Circuit’s ruling, however, the government [maintained](#) that considering the severity of a supervised-release condition violation in imposing reimprisonment is permissible and does not transform the reimprisonment into a new criminal prosecution.

The Supreme Court’s ultimate decision in *Haymond* could have significant implications going forward for the over [16,000](#) federal inmates currently incarcerated and the nearly [9,000](#) former federal inmates currently serving terms of supervised release for sex offenses, as well as for how Congress crafts laws concerning supervised release. If the Supreme Court agrees with the Tenth Circuit’s conclusions, and agrees with its remedy, revocation and terms of reimprisonment would be [limited](#) to the provisions of Section 3583(e), which [establish](#) a five-year ceiling for the most serious felonies. Nevertheless, [according](#) to *Haymond*, Congress could still set a higher discretionary term of reimprisonment based on the severity of particular crimes of *conviction* if it so chooses—i.e., Congress could say that conviction for possession of child pornography specifically may permit a court to reincarcerate a defendant for a lengthier term upon a finding that the defendant has violated a condition of supervised release. But imposing higher penalties based on a subsequent criminal condition violation itself, as Section 3583(k) currently does, would [not](#) be permissible without a jury finding. By contrast, should the Court reject the Tenth Circuit’s conclusions in *Haymond*, it would be an affirmation that Section 3583(k) and any future legislative provisions like it can limit judicial discretion regarding resentencing based on specific criminal violations of supervised release conditions without running afoul of the Fifth and Sixth Amendments. The Court has yet to schedule oral argument in *Haymond*, but the Court will likely set the argument for early 2019 with the potential for a decision several months thereafter.

