

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JARDIEL INFANTE CABALLERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

1. Whether imposing a supervised release term—which authorizes a court to send Petitioner to prison for an additional prison term beyond the custodial sentence authorized by his guilty plea—subjects Petitioner to an unconstitutional punishment scheme under 18 U.S.C. § 3583(e)(3) because it violates his right to a jury trial under the Fifth and Sixth Amendments?

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Petitioner, Jardiel Infante Caballero, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On January 7, 2020, the Ninth Circuit affirmed Petitioner's sentence, rejecting his constitutional claim and also finding that the district court did not procedurally err when imposing sentence. *See* App. A.

JURISDICTION

Petitioner was convicted of violating of 8 U.S.C. § 1326, in the United States District Court for the Southern District of California, for illegally reentering the

United States after being deported. The United States Court of Appeals for the Ninth Circuit reviewed his sentence under 28 U.S.C. § 1291, and affirmed on January 7, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

U.S. Const. amend. V

U.S. Const. amend. VI

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

- A. Petitioner was sentenced to a 30-month custodial sentence, and three years of supervised release to follow, which exposed him to an additional three years in prison if a judge found, by a preponderance of the evidence, that he violated his supervision terms.**

Immigration officials found Petitioner hiding in the bushes just north of the border between Mexico and the United States. He had been deported about eight years earlier, but wanted to reunite with his teenage sons in California and work in the United States, so he returned. He pleaded guilty to attempting to enter the United States without permission after previously being removed.

At sentencing, the district court imposed a 30-month custodial sentence.

Regarding supervised release, the court stated:

it does appear to the Court that a term of supervised release is warranted here. So following your release from custody, as recommended by the probation officer, you'll be on supervised release for a period of three years.

This term authorized the sentencing judge, under 18 U.S.C. § 3583(e)(3), to later impose up to three years of custodial time on Petitioner if the judge found, by a preponderance of the evidence, that Petitioner violated the terms of his supervision.

- B. Petitioner appealed, arguing that the three-year supervised release term exposed him to an unconstitutional punishment scheme, but the Ninth Circuit affirmed.**

On appeal, Petitioner argued that the supervision term would allow a judge, not a jury, to send him to prison for up to three years if it found by a preponderance—not beyond a reasonable doubt—that he had violated the terms of supervised release,

some of which did not even prohibit criminal conduct. This violated his constitutional rights to due process and a jury trial, which required a jury, not a judge, to authorize any additional punishment beyond what his guilty plea authorized.

The Ninth Circuit did not reach the merits of his claim. *See* App. A at 3. Instead, it dismissed the “constitutional challenge to his term of supervised release as unripe.” *Id.* It held that he lacked “standing to challenge hypothetically a revocation that may never occur,” and affirmed the sentence. *Id.* at 4.

REASONS FOR GRANTING THE PETITION

A. Exposing Petitioner to an additional three years in prison under the terms of 18 U.S.C. § 3583(e)(3), which does not require a jury to make the findings authorizing the additional punishment, conflicts with this Court’s caselaw and violates the Fifth and Sixth Amendments.

During Petitioner’s supervision term, he must comply with conditions like not leaving the judicial district, notifying the probation officer within 10 days if he moves, and not possessing any controlled substances. And if he doesn’t strictly comply with each of these conditions, he can have his supervision revoked and return to prison.

A court can revoke the supervision term—and send Petitioner back to prison for up to three years—if it “finds by a preponderance of the evidence that the defendant violated a condition of supervised release.” *See* 18 U.S.C. § 3583(e)(3). So although Petitioner’s guilty plea authorized a 30-month sentence, he could spend three more years in custody—more than the original 30-month sentence—if a judge finds, based on a preponderance of the evidence, that he violated his supervised release conditions.

He could spend three more years in prison if, for example, the judge finds it more likely than not that he didn't tell his probation officer that he moved until two weeks after he moved. And it could do so with only minimal procedural safeguards, *see* Fed. R. Crim. P. 32.1(b)(2), which do not include the normal protections of a criminal prosecution, like the right for a jury to render a unanimous verdict based on factual findings made beyond a reasonable doubt.

But punishing Petitioner, and others like him, for non-criminal conduct like not telling Probation about a move raises "serious constitutional questions." *Johnson v. United States*, 529 U.S. 694, 700 (2000). Not only is untimely notification about residence not criminal conduct, but also, a judge, rather than a jury, is permitted to find by only a preponderance of the evidence that it happened. And even sending Petitioner to prison for a supervision violation that does constitute criminal conduct, like possessing a controlled substance, raises "serious constitutional questions," *see id.*, because the drug possession "may be the basis for separate prosecution, which would raise an issue of double jeopardy." *See id.*

Moreover, allowing a judge to send Petitioner to prison based only on a preponderance finding violates his Fifth and Sixth Amendment rights, which guarantee that charges be proved beyond a reasonable doubt, as well as tried to a jury. *See* U.S. CONST. amend. V (right to due process of law), VI (right to jury trial). His original guilty plea authorized a sentence of 30 months, but he can go back to prison for another three years based on a judicial finding that he more than likely violated his supervised release. Yet under *Apprendi v. New Jersey*, 530 U.S. 466, 483

(2000), and *Alleyne v. United States*, 570 U.S. 99, 108 (2013), any fact that increases the range of punishment beyond what is authorized by a guilty plea must be found beyond a reasonable doubt by a jury—not a judge. Petitioner’s supervised release term therefore allows for a punishment scheme that violates this Court’s *Apprendi/Alleyne* rule because it subjects him to additional punishment beyond his original sentence without a jury’s beyond-a-reasonable-doubt finding or a guilty plea.

Importantly, this Court has been clear that a judge is the wrong factfinder for these types of factual findings that increase a defendant’s punishment. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (a judge may only sentence a defendant “on the basis of the facts reflected in the jury verdict or admitted by the defendant.”); *see also Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (“judges ... may not inflict punishment that the jury’s verdict alone does not allow.”) (quotation and alterations omitted). And the Court has also been clear that any findings authorizing increased punishment must be made beyond a reasonable doubt—not by the lower preponderance of the evidence standard that is applicable in civil proceedings with much lower stakes. *See Alleyne*, 570 U.S. at 108 (holding that facts subjecting a defendant to an increased mandatory sentencing range must be submitted to a jury and found beyond a reasonable doubt); *see also In re Winship*, 397 U.S. 358, 363 (1970) (“a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”) (alterations and quotation omitted).

The supervised release term imposed on Petitioner, then, conflicts with this Court’s caselaw requiring that any punishment beyond what is authorized by the additional guilty plea—here, the 30-month custodial term—must abide by constitutional standards.

B. 18 U.S.C. § 3583(e)(3) also conflicts with this Court’s decision in *Haymond*.

Last term, this Court addressed the supervised release scheme in *United States v. Haymond*, 139 S. Ct. 2369 (2019), which dealt with a different subsection of the supervised release statute than the one at issue in Petitioner’s case, but is still instructive here. In *Haymond*, the Court analyzed 18 U.S.C. § 3583(k), which addressed a supervised release revocation procedure for sex offenders that requires a judge to revoke supervised release and impose a mandatory minimum sentence if the judge finds a particular type of violation. The Court began its opinion by underscoring that “[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty.” *Haymond*, 139 S. Ct. at 2373. It emphasized the jury trial right as “one of the most vital protections against arbitrary government,” *id.*, and the “heart and lungs” of our liberties. *Id.* at 2375. The Court held unconstitutional the supervision provision that allowed a judge—“acting without a jury and based only on a preponderance of the evidence”—to find that Haymond violated his supervised release, and then required the judge to impose a sentence of at least five years. *Id.* at 2378.

The plurality limited its decision to § 3583(k), emphasizing that it required a mandatory minimum sentence if a judge revoked supervised release. *Id.* at 2383. Yet it also recognized that perhaps its decision could raise constitutional questions for § 3583(e), the supervised release provision at issue in Petitioner’s case, albeit only in a small number of cases. *Id.* at 2384.

While *Haymond* specifically dealt only with § 3583(k) and its mandatory imposition of prison time for violations, its broad principles nevertheless extend to Petitioner’s supervised release subsection, § 3583(e)(3). This subsection, which allows a judge to impose an additional custodial term for violations, without empaneling a jury to make beyond-a-reasonable-doubt findings, cannot be reconciled with *Haymond*’s clear statement that the Constitution requires that “any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.” *See* 139 S. Ct. at 2380.

The dissent in *Haymond* recognized as much. It noted that the plurality opinion in *Haymond* “suggest[s] that the entire system of supervised release ... is fundamentally flawed in ways that cannot be fixed.” *Id.* at 2387 (Alito, J., dissenting). It reasoned that “the thrust of the plurality’s statement is that any factual finding needed to [send someone to prison] must be made by a jury, not by a judge, as is currently done.” *Id.* This “strongly suggest[s] that the Sixth Amendment right to a jury trial applies to *any* supervised-release revocation proceeding,” since, in a § 3583(e) proceeding, a judge may send a defendant to prison based on a preponderance finding. *Id.*

C. All of the circuits to address this issue have refused to follow *Haymond's* broad principles about constitutional punishment.

Yet despite *Haymond's* broad principles, which indicate that § 3583(e)(3) is unconstitutional, the circuits that have addressed this issue after *Haymond* have refused to follow *Haymond's* reasoning for § 3583(e)(3) supervision terms, demonstrating that this is an important question that the Court should address by granting certiorari. For instance, the Second Circuit held that *Haymond* did not apply to § 3583(e)(3) because it does not eliminate a trial judge's discretion in revocation proceedings, and does not impose a mandatory minimum term of imprisonment for a supervised release violation. *See United States v. Doka*, 955 F.2d 290, 296-97 (2d Cir. 2020).

Similarly, the D.C. Circuit refused to apply *Haymond's* principles where the supervised release violations were not for criminal offenses and no mandatory minimums were involved. *See United States v. Casseday*, - - - F. App'x - - -, 2020 WL 1482174, *3 (D.C. Cir. 2020). *See also United States v. Johnson*, - - - F. App'x - - -, 2020 WL 2520644 (6th Cir. 2020) (refusing to apply *Haymond* to supervision violation that did not arise from § 3583(k)); *United States v. Horne*, 789 F. App'x 139, 142-43 (11th Cir. 2019) (refusing to apply *Haymond* to § 3583(e)(3)); *United States v. Aguirre*, 776 F. App'x 866, 867 (5th Cir. 2019) (same); *United States v. Mooney*, 776 F. App'x 171, 171 n.* (4th Cir. 2019) (holding that *Haymond* does not apply beyond § 3583(k)).

Given that the lower courts have refused to apply *Haymond's* broad principles beyond the § 3583(k) context, as well as that almost every convicted defendant is

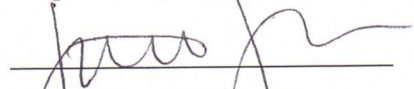
subject to a supervised release term, whether § 3583(e)(3) is constitutional is a question of substantial importance with broad impact. This Court should therefore grant the petition to address whether the principles underlying the narrow holding in *Haymond* apply in the greater supervised release context.

CONCLUSION

This Court should grant the writ to address this important question of constitutional law and ensure that defendants are not subject to unconstitutional punishment schemes.

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Respectfully submitted,



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