No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

DONTAYOUS TONARD CAMERON,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is 18 U.S.C. § 3583(e) unconstitutional as applied to Mr. Cameron because his combined initial and revocation sentences exceed the statutory maximum punishment for his original offense? And is subsection 3583(e)(3) unconstitutional as amended in 2003 because the addition of the words "on any such revocation" to the limitations on revocation sentences resulted in the elimination of any statutory cap on sequential revocation sentences and permit a life sentence on the installment plan for each and every federal offense?

This case presents an important question which the Courts of Appeals decline to address because of a continued failure to grapple with the fundamental difference between parole and supervised release.

TABLE OF CONTENTS

Question Presented for Review i

Table of Contents ii

Table of Citations iii

Petition for a Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of Facts 3

Reasons for Granting the Petition 4

I. The Supervised Release Sentencing Scheme Found at 18 U.S.C. 3583(e)(3) is Unconstitutional Because it Violates the Fifth and Sixth Amendment by Allowing an Extension of the Original Sentence Based on Judge Found Facts Rather Than Facts Found by a Jury, Beyond a Reasonable Doubt and Because it Provides No Cap on the Number and Aggregate Length of Revocation Sentences 6

Conclusion 20

ATTACHED APPENDIX

Opinion Below ..... Attachment A

TABLE OF CITATIONS

Supreme Court Opinions

Alleyne v. United States,
570 U.S. 99 (2013) 7, 9, 13

Apprendi v. New Jersey
530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington,
542 U.S. 296 (2004) 7

Johnson v. United States,
529 U.S. 694 (2002) 17

Morrissey v. Brewer,
408 U.S. 471 (1972) 6

Ring v. Arizona,
536 U.S. 584 (2002) 9

Southern Union Co. v. United States,
567 U.S. 343 (2012) 7

United States v. Booker,
543 U.S. 220 (2005) 7

United States v. Haymond,
139 S.Ct. 2369 (2019) ..... *passim*

U.S. Constitution

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. VI.....*passim*

Federal Court Opinions

United States v. Carlton,
442 F.3d 802 (2d Cir. 2006) 15

United States v. Caso,
723 F.3d 215 (C.A.D.C. 2013) 10

United States v. Cenna,
448 F.3d 1279 (11th Cir. 2006) 12

United States v. Coston,
964 F.3d 289 (4th Cir. 2020) 13

United States v. Cunningham,
607 F.3d 1264 (11th Cir. 2010) 11, 13

United States v. Doka,
955 F.3d 290 (2d Cir. 2020) 13

United States v. Eagle Chasing,
965 F.3d 647 (8th Cir. 2020) 13-14

United States v. Huerta-Pimental,
445 F.3d 1220 (9th Cir. 2006) 15

United States v. Jenkins,
42 F.3d 1370 (11th Cir. 1995) 12

United States v. Lamirand,
669 F.3d 1091 (10th Cir. 2012) 16

United States v. Williams,
425 F.3d 987 (11th Cir. 2005) 12

Federal Statutes and R

18 U.S.C. § 922 3

18 U.S.C. § 924 3

18 U.S.C. § 3553 ..... 2, 11, 19

18 U.S.C. § 3581 18

18 U.S.C. § 3583 ..... *passim*

28 U.S.C. § 1254 1

U.S.S.G. § 7A 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dontayous Tonard Cameron respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINION BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals was issued on June 2, 2020 and is attached as Appendix A.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on June 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of criminal and civil cases from the courts of appeals.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause states:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Sixth Amendment states that:

> [i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

U.S. const. Amend. VI.

> Section 3583(e) of the United States Code states in relevant part that:
>
> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> * * *
>
> **(3)** revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve **on any such revocation** more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

18 U.S.C. § 3583(e) (emphasis added).

STATEMENT OF FACTS

Mr. Cameron was originally charged in a criminal information with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The statutory maximum punishment for this offense is 10 years. 18 U.S.C. § 924(a)(2). Mr. Cameron was sentenced to serve 108 months in prison, to be followed by three years of supervised release.

Mr. Cameron was released from prison and began his supervised release on February 14, 2017. On July 31, 2019, an amended petition to revoke his supervised release was filed. The petition alleged three violations: (1) armed robbery of a drug dealer; (2) associating with known felons; and (3) possession of marijuana. *Id*.

Mr. Cameron admitted the second and third violations. The advisory Guideline range for revocation was 18 to 24 months, and the parties agreed to recommend to the court that Mr. Cameron be sentenced to 18 months. The district court revoked Mr. Cameron's supervised release and imposed a two year sentence of imprisonment and an additional year of supervised release.

Mr. Cameron objected to the sentence as procedurally and substantively unreasonable. He appealed his sentence, challenging the revocation sentence as a violation of his Fifth Amendment right to due process and Sixth Amendment right to a jury trial because his combined initial and revocation sentences exceeded the statutory maximum 10 year penalty for being a felon in possession of a firearm, and because 18 U.S.C. § 3583 imposes no cap on the cumulative length of revocation sentences, making it possible to serve a life sentence on the installment plan for any federal offense. The Eleventh Circuit affirmed Mr. Cameron's sentence.

REASONS FOR GRANTING THE PETITION

The Courts of Appeals continue to treat supervised release as if it is the same as parole. But supervised release is very different. Parole revocations could never exceed the initial sentence set by the district court. And they certainly could not exceed the statutory maximum for the offense of conviction. Supervised release revocations can and do both, because supervised release is an entirely separate structure that operates independently from the original prison sentence.

Because there is no limit to the number of times a court may revoke supervised release and re-impose supervision, it is possible for the district

court to exceed the statutory maximum sentence for the original offense of conviction. The district court did so in Mr. Cameron's case. A district court can also continue to find by a preponderance of the evidence that a person has violated their supervised release, revoke them, and re-impose supervised release *ad infinitum*. Here, the district court re-imposed supervised release on Mr. Cameron, exposing him to the potential for additional prison time. The court did so despite the fact that his aggregate sentences already exceed the statutory maximum for his offense of conviction. This lack of limits on the aggregate length of imprisonment and number of potential revocations violates the Fifth Amendment's due process guarantee and the Sixth Amendment's jury trial right.

A district court may not find facts and use those judge-found facts to increase a person's sentence above the authorized statutory maximum. A court definitely may not use facts found by a judge by a preponderance of the evidence to increase a sentence above the statutory maximum. Section 3583(e) is unconstitutional as applied to Mr. Cameron because his sentences exceed the statutory maximum for his offense. Section 3583(e)(3)

is also unconstitutional because it provides no limit on the number and aggregate length of revocation sentences for any federal offense.

I. The Supervised Release Sentencing Scheme Found at 18 U.S.C. 3583(e)(3) is Unconstitutional Because it Violates the Fifth and Sixth Amendment by Allowing an Extension of the Original Sentence Based on Judge Found Facts Rather Than Facts Found by a Jury, Beyond a Reasonable Doubt and Because it Provides No Cap on the Number and Aggregate Length of Revocation Sentences

The supervised release scheme was created in 1984 to replace federal parole.[1] However, the two systems operate very differently. "The essence of parole [was] release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). Supervised release is entirely separate from the original prison sentence imposed, and has a separate revocation process. 18 U.S.C. § 3583(e). Revocation is mandatory for some violations, including possession of a firearm or controlled substance and refusal to comply with drug testing or accruing three positive drug tests within one year. 18 U.S.C. § 3583(g).

[1] Pub. L. 98-473, Title II, § 212(a)(2), 98 Stat. 1999 (1984).

Parolees could never serve more than the original sentence imposed, and therefore could never serve more than the statutory maximum for their original offense. Individuals whose supervised release is revoked automatically serve more than the original sentence imposed, because the supervised release scheme is disconnected from the sentence of imprisonment. They may also receive, as Mr. Cameron did, a revocation sentence that pushes their aggregate sentence above the statutory maximum for the offense of conviction.

In *Apprendi v. New Jersey*, this Court held that "any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and proved beyond a reasonable doubt" or admitted by the defendant. 530 U.S. 466, 495 (2000). After *Apprendi*, the Court extended this principle to a number of different contexts. *Blakely v. Washington*, 542 U.S. 296 (2004) (mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines based on judicial fact finding). In *Alleyne v. United States*, 570 U.S. 99, 112 (2013), the Court extended the rationale of *Apprendi* to hold that

any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury for a finding beyond a reasonable doubt.

Then, in *United States v. Haymond*, this Court reaffirmed these holdings to find that the last two sentences of 18 U.S.C. § 3583(k) violate the Fifth and Sixth Amendments because they require a judge to impose a mandatory minimum sentence of five years if the judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses. 139 S.Ct. 2369, 2373 (2019). The defendant in *Haymond* had been convicted after a jury trial of possessing child pornography and was sentenced to 38 months imprisonment and ten years of supervised release. *Haymond*, 139 S.Ct. at 2373. After serving his prison term, *Haymond* violated the terms of his supervised release by again possessing child pornography. *Id.* at 2374. A judge, acting without a jury and based only on a preponderance of the evidence standard, found that Haymond knowingly possessed child pornography and sentenced him under § 3583(k) to a minimum mandatory sentence of five years imprisonment.

This Court invalidated Haymond's sentence. *Haymond,* 139 S.Ct. at 2384-85. Writing for a four-justice plurality, Justice Gorsuch stated that § 3583(k)'s minimum mandatory provision rendered it unconstitutional in light of *Alleyne*. As it had in previous cases, the Court rejected the government's attempt to dodge the demands of the Fifth and Sixth Amendments by relabeling a criminal prosecution as a "sentence enhancement" or, as in *Haymond*, what the government referred to as a "post-judgement sentence administration proceeding." *Id.* at 2379. In doing so, Judge Gorsuch noted that the Court had repeatedly explained that any increase in punishment contingent on a finding of fact requires a jury and proof beyond a reasonable doubt. *Id.* (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

At several points in the plurality opinion, Justice Gorsuch emphasized that the Court's decision was limited to § 3583(k). *Haymond*, 139 S.Ct. at 2379 n.4 ("Because we hold that this mandatory minimum sentence rendered Mr. Haymond's sentence unconstitutional in violation of *Alleyne v. United States,* we need not address the statute's effect on his maximum sentence under *Apprendi v. New Jersey*.")(internal cites omitted);

see also, *id.* at 2382 n.7. But, in doing so, Justice Gorsuch acknowledged that the plurality opinion could be read to cast doubt on the constitutionality of 18 U.S.C. § 3583(e).

> . . . even if our opinion could be read to cast doubts on § 3583(e) and its consistency with *Apprendi*, the practical consequences of a holding to that effect would not come close to fulfilling the dissent's apocalyptic prophecy. In most cases (including this one) combining a defendant's initial and post-revocation sentences under § 3583(e) will not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction. That's because "courts rarely sentence defendants to the statutory maxima." *United States v. Caso*, 723 F.3d 215, 224-225 (C.A.D.C. 2013)(citing Sentencing Commission data indicating that only about 1% of defendants receive the maximum), and revocation penalties under § 3583(e) are only a small fraction of those available under § 3583(k). So even if § 3583(e) turns out to raise Sixth Amendment issues in a small set of cases, it hardly follows that "as a practical matter supervised release revocation proceedings cannot be held" or that "the whole idea of supervised release must fall." *Post,* at 238. Indeed, the vast majority of supervised release revocation proceedings under subsection (e)(3) would likely be unaffected.

Haymond, 139 S.Ct. at 2384; *see also*, *id.* at 2384 n.9.

In sum, *Haymond* held that imposing a mandatory minimum sentence on a supervised release revocation, based on judge found facts and by a preponderance of the evidence, is unconstitutional because it

violates the Fifth Amendment right to due process and the Sixth Amendment right to proof beyond a reasonable doubt. 139 S.Ct. at 2373. Justice Gorsuch wrote, "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Id.* at 2373.

However, pursuant to 18 U.S.C. § 3553(e)(3) and (g), district courts adjudicate supervised release violations based on a preponderance of the evidence standard. *United States v. Cunningham*, 607 F.3d 1264, 1268 (11th Cir. 2010). Congress permits the district courts, via 18 U.S.C. § 3583(e)(3) and (g), to impose additional imprisonment beyond the original sentence by adding incarceration without any accounting for time on supervised release. 18 U.S.C. § 3583(e) states the district court may:

> [R]evoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release.

Thus, a violation of supervised release means that any time spent on supervised release is null if the district court so chooses. In addition to the

fact an individual can receive prison time without credit for the period on supervised release, the "courts can order supervised release in addition to the maximum term of imprisonment available by statute." *United States v. Cenna*, 448 F.3d 1279, 128 (11th Cir. 2006) (*citing United States v. Jenkins*, 42 F.3d 1370, 1371 (11th Cir. 1995)). The effect of supervised release is that a defendant faces more incarceration than the original sentence for a violation. Indeed, under the statute as written, the district court may extend incarceration beyond the initial penalty, even beyond the statutory maximum.

In 2003, Congress amended the statute, and worsened the constitutional infirmity, because the amendment permitted multiple revocations with no ceiling. In the 2003 amendments, Congress added the words "on any such revocation" to section 3583(e)(3) such that it reads, in relevant part, that "a defendant whose term is revoked under this paragraph may not be required to serve **on any such revocation** more than [5, 3, or 2 years depending on the class of felony]." 18 U.S.C. § 3583(e)(3) (emphasis added). *See also United States v. Williams*, 425 F.3d 987, 989 (11th Cir. 2005) (explaining effect of 2003 amendment).

Thus amended, the statute permits the court to revoke a portion of the supervised release term, re-impose supervision, and revoke again, *ad infinitum*, if other violations occur. Essentially, for any federal offense, no matter how minor, the district court has the power to impose a life sentence on the installment plan. This cannot and does not comport with the demands of the Due Process Clause and Sixth Amendment or *Apprendi and Alleyne*.

Before *Haymond*, the Eleventh Circuit and its sister circuits found that "18 U.S.C. § 3583(e)(3) does not violate the Fifth or Sixth Amendments because a violation of supervised release need only be proved by a preponderance of the evidence and there is no right to trial by jury in a supervised release revocation hearing." *Cunningham*, 607 F.3d at 1268. After *Haymond*, the Courts of Appeal have continued to ignore the constitutional problems with the supervised release scheme. *United States v. Doka*, 955 F.3d 290, 297 (2d Cir. 2020) (rejecting challenge to constitutionality of 3583(e) on grounds that system was no different than parole); *United States v. Coston*, 964 F.3d 289, 292 (4th Cir. 2020) (rejecting challenge to 3583(g) and showing multiple revocations are common); *United States v. Eagle Chasing*, 965 F.3d 647, 651 (8th Cir. 2020)

(acknowledging possibility of Sixth Amendment problem but rejecting challenge to 3583(e)).

If supervised release acted like parole, this would make sense under the Fifth Amendment due process clause and the Sixth Amendment right to jury trial. In a parole system, a defendant faces no more than the balance of the original term of incarceration in the case of a violation. That is because parole is early release from the remainder of an original sentence. In a traditional parole revocation, the defendant only may receive up to the balance of the original sentence upon revocation.

In contrast, the supervised release statute allows the district courts to impose supervised release to follow incarceration. 18 U.S.C. § 3583(a). Supervised release is not an early release from the prison sentence, but a separate and additional part of the final sentence. *Haymond*, 139 S.Ct. at 2379. "Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment by the court." U.S.S.G. § 7A(2)(b).

The distinction between parole and supervised release is significant because, upon a supervised release violation, the law allows a sentence of

incarceration in addition to the initial sentence and ignores the constitutional implications. Supervised release exposes individuals to the control of the district court despite the service of their original sentence of incarceration and any portion of the supervised release term prior to revocation. As discussed above, it can be a life sentence served in increments.

The circuit courts have continuously rejected due process and constitutional challenges to 18 U.S.C. § 3583(e). The circuit courts range in reasoning. The Second Circuit noted, "[b]ecause revocation proceedings generally have not been considered criminal prosecutions, they have not been subject to the procedural safeguards, including the rights to trial by jury and to accusations proved beyond a reasonable doubt," *United States v. Carlton*, 442 F.3d 802, 807 (2d Cir. 2006). The Ninth Circuit holds that the sentencing scheme in supervised release has always been advisory, therefore there is no Sixth Amendment violation. *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006). The Tenth Circuit reasons that the text of 18 U.S.C. § 3583 allows the imposition of imprisonment longer than the term of revoked supervised release, and therefore a sentence in

excess of the remaining term is legal. *United States v. Lamirand*, 669 F.3d 1091, 1095-96 (10th Cir. 2012).

The courts treat supervised release with less deference than parole, rationalizing a sentence of additional incarceration because the statute permits it. They fail to analyze fully whether the statutory construction that allows additional incarceration or punishment beyond the statutory maximum is in accord with the demands of the Fifth and Sixth Amendments. *Haymond*, 139 S.Ct at 2379.

Haymond has its roots in *Apprendi*. In *Apprendi*, the Supreme Court held that any fact that increases a penalty for a crime beyond the statutory maximum must be submitted to a jury. *Id*. at 2362-2363. A judge cannot find facts that allow an increase in punishment beyond the statutory maximum. However, that is precisely what 18 U.S.C. §3583(e)(3) permits. A judge can find facts that increase the penalty, as well as increase the penalty beyond the original sentence imposed, even if it was the statutory maximum. The judge can give a new and additional punishment without the benefit of proof beyond a reasonable doubt. *Haymond* indicates that such a scheme is unconstitutional.

Haymond calls into question the extension of additional punishment. "The Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a *new and additional punishment* is proven to the satisfaction of a jury beyond a reasonable doubt." *Haymond*, 123 S.Ct. at 2380 (emphasis added). That reasoning logically extends to imprisonment beyond the remaining term of supervised release. If the courts are to treat supervised release as a "part of the penalty for the initial offense," *Johnson v. United States*, 529 U.S. 694, 700, (2002), they must do so in a manner that complies with due process. As Justice Gorsuch states, "While the Sixth Amendment surely does not require a jury to find every fact that the government relies on to adjust the terms of a prisoner's confinement…that does not mean the government can send a free man back to prison for years based on judge found facts." *Haymond*, 123 S.Ct. at 2382. However, this is precisely what 18 U.S.C. § 3583(e)(3) permits, despite this Court's clear and repeated pronouncements of the sacred right to have a jury decide facts that will extend a sentence.

Indeed, when Justice Gorsuch, writing for the plurality in *Haymond*, discussed the statutory maximum, he referred not to the statutory

maximum revocation sentence provided in section 3583(e), but to the statutory maximum for the offense itself. *Haymond*, 139 S.Ct. at 2378. "By now, the lesson for our case is clear. Based on the facts reflected in the jury's verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years **under § 2252(b)(2)**." *Id*. (emphasis added).

The only difference between Mr. Haymond and Mr. Cameron is that the term of incarceration was mandatory for Mr. Haymond, but was discretionary for Mr. Cameron. Mr. Cameron did not initially receive a statutory maximum sentence, but he did receive a lengthy one, of 108 out of a possible 120 months. His revocation sentence was 24 months, for a total of 132 months imprisonment.

Section 3583(e) is clearly constitutionally suspect as to the "small set of cases" where an aggregate sentence above the statutory maximum has been imposed. And it has been imposed based on judge found facts, found by a preponderance of the evidence. It also violates the Fifth and Sixth Amendments because there is no limit in any case to the number of revocation sentences a court may impose. A defendant can do life on the installment plan for a class D felony that should have a maximum punishment of no more than six years. 18 U.S.C. § 3581.

Any new and additional punishment, beyond the original sentence of imprisonment, cannot be based on judge found facts. What makes 18 U.S.C. § 3583(e) unconstitutional is the same principle espoused in both *Haymond* and *Apprendi* -- that a judge can extend the sentence based on judge found facts. Thus, should this Court not declare 18 U.S.C. § 3553(e)(3) unconstitutional on its face but only as applied to those like Mr. Cameron, whose revocation sentences exceed the statutory maximum in the aggregate, he could only have been sentenced to 12 additional months, which reaches the 120 month statutory maximum, and his sentence should be vacated and remanded for imposition of a sentence of no more than 12 months.

CONCLUSION

Wherefore, Mr. Cameron respectfully requests that this Court grant the writ.

This 16th day of October, 2020.

Respectfully Submitted,

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