NO. _____

# In The
# Supreme Court of the United States

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## BRIAN DAVID HILL,

*Petitioner*,

**v.**

## UNITED STATES OF AMERICA,

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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***Dated: January 8, 2021***

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## QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred in failing to find that the district court erred in sentencing Petitioner by denying Petitioner his Sixth Amendment right to trial by jury and/or by finding Petitioner guilty by a preponderance of the evidence rather than beyond a reasonable doubt or, in the alternative, whether existing law should be extended and/or modified to find the above.

Whether the United States Court of Appeals for the Fourth Circuit erred in failing to find that the district court erred in finding that the evidence before it was sufficient to find that Petitioner violated his supervised release by violating Virginia Code § 18.2-387.

Whether the United States Court of Appeals for the Fourth Circuit erred in denying Petitioner's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

## STATEMENT OF RELATED CASES

- *United States v. Brian David Hill*, No. 19-4758, United States Court of Appeals for the Fourth Circuit. Judgment entered October 16, 2020; *Petition for Rehearing and Rehearing En Banc* denied on November 17, 2020.

- *United States v. Brian David Hill*, No. 1:13-cr-00435, United States District Court for the Middle District of North Carolina. Judgment entered October 7, 2019.

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## JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 16, 2020. A petition for rehearing and rehearing *en banc* was timely filed on October 27, 2020, which was denied by Order entered November 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; 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; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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.

3. 18 U.S.C. § 2252(a)(5)(B) provides as follows:

> (a) Any person who –
>
> ...
>
> Knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility or interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

4. 18 U.S.C. §§ 3583(e) & (k) provides as follows:

(e) Modification of conditions or revocation.--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)—

> (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
>
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

> (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; or
>
> (4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.
>
> . . .

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. 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.

5. Va. Code § 18.2-372 provides as follows:

> The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

6. Va. Code § 18.2-387 provides as follows:

> Every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor. No person shall be deemed to be in violation of this section for breastfeeding a child in any public place or any place where others are present.

## STATEMENT OF THE CASE

On or about June 10, 2014, Petitioner plead guilty to a one-count indictment before the Honorable William L. Osteen, Jr., United States Chief Judge for the Middle District of North Carolina for allegedly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). (JA 5, 24). On November 12, 2014, Petitioner was sentenced to time served plus ten (10) years of supervised release.

On or about November 13, 2018, approximately four years after sentencing, a petition for revocation of Petitioner's supervised release for allegedly committing a misdemeanor of indecent exposure. (JA 26-27). Petitioner was subsequently taken into federal custody from December 22, 2018, until May 14, 2019, when he was released on bond. (JA 17-18).

On September 12, 2019, the district court denied Petitioner's motion to continue the hearing until after his underlying criminal trial and the district court conducted a hearing, without a jury, in which the district court made findings of fact and adjudged Petitioner guilty of the misdemeanor charge by a preponderance of the evidence, not beyond a reasonable doubt, based on those findings of fact. (JA 35-36). In doing so, the district court heard evidence that Petitioner was naked in public and taking photographs of himself out of fear that another person would harm his family if he did not do so. (JA 42-43). The district court also heard that this nudity occurred in between midnight and 2:00 a.m., when few members of the public would be present. (JA 53). The district court did not hear, however, any evidence of Petitioner having his dominant theme, or purpose being an appeal to the prurient interest in sex. Nevertheless, the district court sentenced Petitioner to nine (9) months of incarceration, which was at the high end of the guideline range. (JA 100-01). The district court gave Petitioner credit for time served and ordered him to self-report on December 6, 2019. (JA 101-03). After self-reporting for incarceration, Petitioner was quickly released when it was determined that his time served satisfied his entire nine (9) month sentence.

A notice of appeal was filed on October 9, 2019 and, pursuant to the Petitioner's request, the undersigned was appointed as new counsel on October 31, 2019. (JA 136, 159).

On December 19, 2019, the Petitioner filed his brief. On January 7, 2020, the government, filed a responsive brief. The Petitioner filed a reply brief on January 17,

2020. On October 27, 2020, a panel of the United States Court of Appeals for the Fourth Circuit issued a brief order granting the government's motion to dismiss. App. 1a. On November 17, 2020. Petitioner filed a timely Petition for Rehearing and Rehearing *En Banc* which was subsequently denied by the United States Court of Appeals for the Fourth Circuit on July 16, 2019.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. THE COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT FAILED TO FIND THAT THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONDUCTING THE REVOCATION HEARING WITHOUT A JURY AND BY MAKING FINDINGS OF GUILT BY PREPONDERANCE OF THE EVIDENCE, RATHER THAN BEYOND A REASONABLE DOUBT, BASED UPON THOSE FINDINGS OF FACT. ALTERNATIVELY, EXISTING LAW, AS RECENTLY MODIFIED BY THIS COURT, SHOULD BE EXTENDED AND/OR MODIFIED TO FIND THE ABOVE.

The Fourth Circuit erred as a matter of law when it affirmed the district court conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt, based upon those findings of fact. Until recently, it was undisputedly considered constitutionally permissible to revoke supervised release in a bench hearing, without a jury, and to determine guilt by preponderance of the evidence, rather than beyond reasonable doubt, based upon findings of fact by the district court. *See*, *e.g.*, *Black v. Romano*, 471 U.S. 606, 610 (1985).

However, on June 26, 2019, approximately two and one-half (2 ½) months prior to Petitioner's revocation hearing, this Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019).

In *Haymond*, the defendant was initially convicted of possession of child pornography, which is the same initial offense as Petitioner. *Id.* at 2373. As in the instant case, Haymond was sentenced to a term of (10) years of supervised release. *Id.* at 2574; (JA 7). Haymond was later caught, while on supervised release, with additional child pornography and a revocation hearing was conducted before a district judge without a jury and under a preponderance of the evidence standard, not the beyond a reasonable doubt standard. *Id.* Similarly, in the instant case, Petitioner appeared before a district judge in a revocation hearing based upon his alleged indecent exposure, without a jury and under a preponderance of the evidence standard. (JA 26-27, 35-36, 120-21).

Both Haymond and Petitioner were sentenced to an additional term of incarceration based upon the findings of fact of a district judge, without a jury, by a preponderance of the evidence. *Id.*; (JA 120-21).

Although Haymond's violation invoked the mandatory minimum provision of 18 U.S.C. § 3583(k), whereas Petitioner's sentence for his alleged violation fell under 18 U.S.C. § 3583(e), Petitioner maintains that the expanded scope of trial by jury and the burden of proof being beyond a reasonable doubt also applies to Section 3583(e) violations, such as this case, either directly through *Haymond* or through an expansion and/or change in existing law.

"Together with the right to vote, those who wrote our Constitution considered the right to trial by jury the heart and lungs, the mainspring and the center wheel of our liberties, without which the body must die; the watch must run down; the

government must become arbitrary. Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375. (internal citations omitted)[1].

Many statements and passages in this Court's opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding. For example, the first sentence of the opinion reads: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373.

Unlike that previous statement of ages old law, in a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that takes a person's liberty, in the sense that the defendant is sent back to prison. This Court recognized that the Sixth Amendment applies to a "criminal prosecution," and then gave that term a broad definition that encompasses any supervised-release revocation proceeding.

This Court defined a "crime" as any "ac[t] to which the law affixes ... punishment," and says that a "prosecution" is "the process of exhibiting formal charges against an offender before a legal tribunal." *Haymond*, 139 S. Ct. at 2376. This Court, however, uses this definition for the purpose, of declaring that every supervised-release revocation proceeding is a criminal prosecution. See *Haymond*,

[1] For the sake of brevity, Petitioner will not reproduce this Court's eloquent remarks from *Haymond* on the historic and fundamental importance of both the right to trial by jury and that proof of criminal conduct must be beyond a reasonable doubt. Petitioner hereby incorporates by reference, as if fully set forth herein, pages 2376 through 2378 of the *Haymond* opinion.

139 S. Ct., at 2379 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.... [A]n accused's final sentence includes any supervised release sentence he may receive".)

Quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004), this Court states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Haymond*, 139 S. Ct. at 2370. Since a defendant sentenced to incarceration after being found to have violated supervised release is receiving a "punishment," then this Court's statement should mean that any factual finding upon which that judgment is based must be made by a jury, not by a judge.

While both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), apply only to a defendant's sentencing proceeding and not to a supervised-release revocation proceeding, which has been described at times as a "postjudgment sentence-administration proceedin[g]," this Court states that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d] by the simple expedient of relabeling a criminal prosecution a ... 'sentence modification' imposed at a 'postjudgment sentence administration proceeding." *Haymond*, 139 S. Ct. at 2379. The meaning of this Court's above statement is clear. A supervised-release revocation proceeding is a criminal prosecution and is therefore governed by both the Fifth and Sixth Amendments. See *Haymond*, 139 S. Ct. at 2390 ("any accusation triggering a new and additional punishment [must be] proven to the

satisfaction of a jury beyond a reasonable doubt"); *Id.* at 2380 ("a jury must find all of the facts necessary to authorize a judicial punishment").

This Court, in summary, posits that parole was constitutional, but supervised release is entirely different. *Haymond*, 139 S. Ct. at 2381-82. The implication in the above statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment. This Court hints at where it is heading when it writes: "[O]ur opinion, [does] not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*." *Haymond*, 139 S. Ct. at 2382-84, n.7. Section 3583(e), the section under which Petitioner was sentenced, sets out the procedure to be followed in all supervised-release revocation proceedings. Therefore, the Court left open the door that provision, the one through which Petitioner was sentenced, is not consistent with *Apprendi*, which means that Petitioner's proceeding required trial by jury.

There is no clear ground for limiting the *Haymond* opinion only to Section 3583(k). This Court simply let that issue sleep for another day. Today is that day. This Court should recognize the larger paradigm shift which has occurred in this Supreme Court's reasoning, which when applied, protects Petitioner from being sentenced to further incarceration without a jury and requires a beyond a reasonable doubt evidence standard.

## II. THE COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT ERRED IN FAILING TO FIND THAT THE DISTRICT COURT ERRED IN FINDING THAT THE EVIDENCE BEFORE IT WAS SUFFICIENT TO FIND THAT PETITIONER VIOLATED HIS SUPERVISED RELEASE BY VIOLATING VIRGINIA CODE § 18.2-387 BECAUSE THE EVIDENCE FAILS TO SHOW THAT PETITIONER ACTED INTENTIONALLY TO MAKE AN OBSCENE DISPLAY OR EXPOSURE OF HIS PERSON.

The district court erred in finding that the evidence before it was sufficient to find that Petitioner violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Petitioner acted intentionally to make an obscene display or exposure of his person. That statute provides, in relevant part, that "[e]very person who **intentionally** makes an **obscene** display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387 (emphases added).

"The 'obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005) (*en banc*); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex, *Hart*, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. *See Price v. Commonwealth*, 201 S.E.2d 798, 800 (Va. 1974) (finding that '[a] portrayal of

nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene')." *Romick v. Commonwealth*, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013) (unpublished) (internal citations reformatted).

While the evidence may show that Petitioner was naked in public, as stated above, nudity, without more, is not obscene under Virginia law. Rather, "[t]he word 'obscene' where it appears in this article shall mean that which, **considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex**, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value." Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

In summary, in order to show that Petitioner violated his supervised release by committing the offense of indecent exposure under Virginia law, the government was required to prove, among other things, that Petitioner had the intent to display or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification,

excuse, or other defense.[2] The government failed to do so. Rather, the government's evidence, presented through its own witnesses, showed Petitioner as someone who was running around naked between midnight and 2:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so. (JA 42-43, 53).

The district court did not hear, however, any evidence of Petitioner having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, there was no evidence of Petitioner making any sexual remarks, being aroused, masterbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Petitioner did not do that. Rather, he was running around between midnight and 2:00 a.m. and the witnesses to his nudity were few. Hence, the statements Petitioner made to police and his conduct both indicate that, in the light most favorable to the government, he was naked in public while having a psychiatric episode, but without the intent necessary to commit indecent exposure under Virginia law. Consequently, the district court erred, as a matter of law, when it found that Petitioner had violated his supervised release by committing the Virginia state law offense of indecent exposure as per Virginia Code § 18.2-387.

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[2] For the reasons stated above, the government's burden was to prove every element of the offense, including the *mens rea*, beyond a reasonable doubt. However, even if, *arguendo*, this Court were to find that the government's burden was only a preponderance of the evidence, the government has still failed to carry its burden.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, and reverse the decision of the Fourth Circuit.

## III. THIS COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT SHOULD HAVE EXTENDED AND/OR MODIFIED EXISTING LAW TO HOLD THAT THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED PETITIONER'S MOTION TO CONTINUE THE REVOCATION HEARING UNTIL AFTER THE UNDERLYING CRIMINAL APPEAL WAS COMPLETED.

This Court should find that the panel should have extended and/or modified existing law to hold that the district court abused its discretion when it denied Petitioner's motion to continue the revocation hearing until after the underlying criminal appeal, which was a trial *de novo*, was completed. As stated above, this Court should extend and/or modify existing law to find that Petitioner had a constitutional right to a trial by jury and for his guilt to be determined to the beyond a reasonable doubt standard.

An abuse of discretion occurs when the district court demonstrates "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

However, if the district court had not wanted to empanel a jury, it could have still protected Petitioner's constitutional rights by simply granting Petitioner's motion to continue the hearing in order to allow Petitioner's pending state court appeal, which was a trial *de novo*, to reach a final decision. (JA 30-36). Had the district court done so, it could have used the final conviction from the Virginia state court, if the retrial were unsuccessful, as a factual basis for a revocation because Petitioner would have, at that point, been determined to be guilty of said underlying

offense beyond a reasonable doubt by a jury of his peers and any further appeal at that point would have not been a complete retrial but appellate review on an old record. Conversely, if said appeal were successful, then the district court could have dismissed the revocation petition. Therefore, the district court demonstrated an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay by insisting that the hearing proceed that day.

As provided in 18 U.S.C. § 3583(e)(4), and discussed at the revocation hearing, the district court could have ordered Petitioner to remain at his place of residence during non-working hours and/or placed him on electronic monitoring. (JA 103-06). Such an order would have alleviated any public safety concern while Petitioner's appeal was ongoing in state court. Therefore, the district court abused its discretion when it denied Petitioner's motion to continue, as the district court could have alleviated the basis for this appeal by merely granting the continuance. Respectfully, the panel erred when it affirmed the district court.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Petitioner's motion to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

## CONCLUSION

Based on the foregoing reasons, arguments, and authorities, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

**BRAIN DAVID HILL**

**By Counsel**

**/s/ E. Ryan Kennedy**
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