No. _____

IN THE

Supreme Court of the United States

SHAUN J. SALAZAR AND JOSEPH M. UMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This joint petition asks this Court to resolve a question left open two years ago in *United States v. Haymond*, 139 S.Ct. 2369, 2384 (2019):

> Whether a district court may impose a revocation imprisonment term under 18 U.S.C. § 3583(e)(3) that, when combined with a defendant's initial term of imprisonment, exceeds the statutory maximum imprisonment term for the underlying offense.

RELATED PROCEEDINGS

United States v. Salazar, Case No. 2:08-cr-20084-CM-1 (D. Kan. Sept. 26, 2019)

United States v. Salazar, Case No. 19-3217 (10th Cir. Feb. 16, 2021)

United States v. Uman, No. 2:06-cr-20122-KHV-1 (D. Kan. Jan. 16, 2020)

United States v. Uman, No. 19-3128 (10th Cir. Apr. 28, 2021)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

JOINT PETITION FOR WRIT OF CERTIORARI

Shaun Salazar and Joseph Uman respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published decision in Mr. Salazar's appeal is available at 987 F.3d 1248, and is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc in Mr. Salazar's appeal is included as Appendix G. The district court's oral decision overruling Mr. Salazar's objection to a sentence above the underlying statutory maximum sentence is included as Appendix B. The judgments entered in Mr. Salazar's appeal are included as Appendix C.

The Tenth Circuit's unpublished order in Mr. Uman's appeal is not available on a commercial legal database but is included as Appendix D. The district court's oral decision overruling Mr. Uman's objection to a sentence above the underlying statutory maximum sentence is included as Appendix E. The judgments entered in Mr. Uman's appeal are included as Exhibit F.

JURISDICTION

The district courts had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed Mr. Salazar's sentence on February 16, 2021, and denied his petition for rehearing en banc on April 12, 2021. The Tenth Circuit affirmed Mr. Uman's sentence on April 28, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3583 (full text included as Appendix H)

18 U.S.C. § 924(a)(2) provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Sixth Amendment provides, in part:

> 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.

STATEMENT OF THE CASE

At the root, this petition asks a fundamental and extremely important question: how should a court determine the statutory maximum imprisonment term for a federal criminal offense? The answer should seem obvious: look to the statute of conviction. *See generally United States v. Evans*, 333 U.S. 483, 485-495 (1948). But that's not the answer in the Tenth Circuit. In the Tenth Circuit, the statutory maximum is not found within the statute of conviction, but is instead found by combining the statutory penalty provided within the statute of conviction with 18 U.S.C. § 3583's revocation imprisonment terms. *See* Pet. App. 24a. This means that, in the Tenth Circuit (as illustrated here), a defendant can be sentenced to an imprisonment term that exceeds the statutory maximum authorized by the underlying statute of conviction.

The Tenth Circuit's approach is not a plausible interpretation of the applicable statutes, and that is especially true under this Court's precedent interpreting those statutes. Nor is it consistent with the Sixth Amendment, as interpreted by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Tenth Circuit's approach also

makes it impossible for district courts to advise defendants on statutory maximum imprisonment terms. *See* Fed.R.Crim.P. 11(b)(1)(H) (requiring such advice at a plea colloquy). In the Tenth Circuit, the statutory maximum prison term is an unknowable number, contingent on uncertain future events. And that can't be right. *See generally Evans*, 333 U.S. at 485-495. This petition is an ideal vehicle to address this extremely important question. This Court should grant this petition.

A. Statutory Background

Federal district courts are tasked with imposing punishment on individuals convicted of federal crimes. *See generally* 18 U.S.C. § 3551. In general, punishment consists of probation or a term of imprisonment, and/or a fine. 18 U.S.C. § 3551(b). When a term of imprisonment is imposed, a term of supervised release, to be served after imprisonment, is also permissible (sometimes required). *See generally* 18 U.S.C. § 3583(a); 21 U.S.C. § 841(b). The authorized terms of supervised release are sometimes found in the statute of conviction. *See*, *e.g.*, 21 U.S.C. § 841(b). If not, § 3583(b) authorizes (but does not require) district courts to impose the following terms of supervised release: not more than five years for a class A or B felony; not more than three years for a class C or D felony; and not more than one year for a class E felony or misdemeanor. *See also* 18 U.S.C. § 3559(a) (listing classification of offenses).

Supervised release replaced parole for federal convictions. *Johnson v. United States*, 529 U.S. 694, 696-697, 709 (2000). Supervised release is similar to parole in that, under both regimes, a defendant is released to the supervision of an officer (parole or probation) after the completion of a prison term. *Id.* at 710-711. Like parole,

supervised release "is a form of postconfinement monitoring that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison." *Mont v. United States*, 139 S.Ct. 1826, 1833 (2019) (quotations omitted). Like a parolee, a defendant who violates his terms of supervised release may be reimprisoned. 18 U.S.C. § 3583(e)(3). And any penalties imposed for violations committed on parole or supervised release are treated "as part of the penalty for the initial offense." *Johnson*, 529 U.S. at 700; *see also Haymond*, 139 S.Ct. at 2381-2382 (noting that, under the federal parole system, "a judge generally could sentence the defendant to serve only the remaining prison term authorized by statute for his original crime of conviction").[1]

Congress switched from parole to supervised release in the Sentencing Reform Act of 1984 (which took effect in 1987). *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-401 (1991). The purpose of supervised release is rehabilitation, not punishment. *Pepper v. United States*, 562 U.S. 476, 502 n.15 (2011) (noting that supervised release serves an entirely different purpose than the original sentence, namely, "rehabilitative ends"). "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). As initially codified, Congress did not even provide penalties for violations of supervised release, but instead expected: (1) "repeated or serious" violations to be

[1] There are also differences between parole and supervised release. *See, e.g., United States v. Thompson*, 777 F.3d 368, 372 (7th Cir. 2015) ("Parole shortens prison time, substituting restrictions on the freed prisoner. Supervised release does not shorten prison time; instead it imposes restrictions on the prisoner to take effect upon his release from prison."). But any differences are immaterial with respect to the discrete legal issues raised here.

punished as contempt of court under 18 U.S.C. § 401; or (2) new crimes to be punished via new criminal prosecutions. Sentencing Reform Act, Pub. L. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 2397, 3308; Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 191 (2013); *Gozlon-Peretz*, 498 U.S. at 401.

But, as mentioned above, Congress now permits district courts to reimprison defendants for violations of supervised release. 18 U.S.C. § 3583(e)(3). Congress initially tied any revocation imprisonment term to the length of the term of supervised release imposed at the initial sentencing. 18 U.S.C. § 3583(e)(3) (1992) ("require the person to serve in prison all or part of the term of supervised release"). Thus, a defendant who received a two-year term of supervised release, for instance, could be reimprisoned upon revocation for up to two years.

In 1994, however, Congress amended § 3583(e)(3) to unlink the length of reimprisonment from the term of supervised release *imposed at sentencing* and instead to link the length of reimprisonment to "the term of supervised release *authorized by statute for the offense that resulted in the term of supervised release*." 18 U.S.C. § 3583(e)(3) (emphasis added); Violent Crime Control and Law Enforcement Act of 1994, Pub. Law 103-222, § 110505, 108 Stat. 1796, 2016-2017 (1994). This language naturally refers to any term of supervised release authorized in the underlying statute of conviction, *see*, *e.g.*, 21 U.S.C. § 841(b), or the supervised-release terms authorized in § 3583(b). But Congress also capped those reimprisonment terms within § 3583(e)(3) itself: no more than 5 years for a class A felony; no more than 3 years for a class B felony; no more than 2 years for a class C or D felony, and no more

than 1 year in any other case. *Id.* For class B, C, and D felonies, the statutory maximums in § 3583(e)(3) are lower than the "authorized terms" in § 3583(b) (but the same for class A and E felonies and misdemeanors). At present, then, a defendant might serve a longer revocation imprisonment term than the term of supervised release imposed at the initial sentencing. For instance, a defendant convicted of a Class A felony who receives a two-year term of supervised release can be reimprisoned upon revocation for up to three years. 18 U.S.C. § 3583(e)(3).

Section 3583(e)(3) is silent, however, about whether a revocation imprisonment term, when combined with the original prison term, can exceed the maximum imprisonment term authorized by the statute of conviction. Specifically, if a defendant has already served the statutory maximum imprisonment term for the underlying offense (or most of it), does § 3583(e)(3) permit a district court to reimprison the defendant beyond the underlying statutory maximum? Nothing within the applicable statutes expressly answers that question (which is the question presented by this petition).

B. Proceedings Below

1a. In 2010, Mr. Salazar pleaded guilty to a gun-possession offense under 18 U.S.C. § 922(g)(1). Pet. App. 2a. This offense carries a statutory maximum imprisonment term of 10 years. 18 U.S.C. § 924(a)(2). In 2011, the district court imposed a 115-month term of imprisonment and a three-year term of supervised release. Pet. App. 2a, 28a-33a. Mr. Salazar served just 5 months short of ten years in prison and was released to supervision in May 2019. Pet. App. 2a. Soon after, Mr. Salazar violated the conditions of his supervised release. Pet. App. 2a. At the

revocation hearing, Mr. Salazar argued that the district court could not impose more than a 5-month imprisonment term in light of the 10-year statutory maximum for his underlying offense. Pet. App. 3a. The district court rejected the argument and imposed a 10-month term of imprisonment, to be followed by a new one-year term of supervised release. Pet. App. 3a, 25a-27a, 34a-38a.

b. The Tenth Circuit affirmed. Pet. App. 24a. In a published opinion, a panel of the Tenth Circuit relied on stare decisis principles, holding that it was bound by a published decision from 1995: *United States v. Robinson*, 62 F.3d 1282 (10th Cir. 1995). Pet. App. 24a. The Tenth Circuit rejected Mr. Salazar's argument that *Robinson* was no longer good law in light of the 1994 amendments to § 3583(e)(3) and subsequent precedent from this Court. Pet. App. 10a-24a (discussing *Johnson*, 529 U.S. 694; *Apprendi*, 530 U.S. 466; and *Haymond*, 139 S.Ct. 2369). In a footnote, the panel noted that it would "not speculate as to whether, if we were free to reconsider *Robinson*, we would arrive at the same conclusion." Pet. App. 24 n.9.

In light of this latter reservation, Mr. Salazar petitioned for rehearing en banc, asking the full Tenth Circuit to overrule *Robinson*. But the Tenth Circuit denied the petition for rehearing en banc in a one-page unpublished order, noting that "no member of the panel and no judge in regular active service on the court requested that the court be polled." Pet. App. 54a.

2a. In 2006, Mr. Uman pleaded guilty to possession of a stolen firearm under 18 U.S.C. § 922(j). Pet. App. 43a. This offense also carries a statutory maximum 10-year imprisonment term. 18 U.S.C. § 924(a)(2). In 2009, the district court imposed the statutory maximum 10 years, to be followed by a 3-year term of supervised

release. R1.42. Mr. Uman was released to supervision in November 2018. R1.43a-48a. In 2019, Mr. Uman violated the conditions of his supervised release. Pet. App. 49a. Mr. Uman argued that the district court could not impose a term of imprisonment because he had already served the 10-year statutory maximum for his underlying offense. Pet. App. 41a-42a. The district court rejected the argument and imposed a 24-month term of imprisonment, to be followed by a 1-year term of supervised release. Pet. App. 49a-53a.

b. On appeal, because Mr. Uman sought to raise the identical issue raised in Mr. Salazar's appeal, Mr. Uman's appeal was held in abeyance pending the disposition in *Salazar*. After the Tenth Circuit affirmed in *Salazar*, the Tenth Circuit summarily affirmed in Mr. Uman's appeal. Pet. App. Pet. App. 39a-40a. The Tenth Circuit nonetheless noted that "Mr. Uman preserves the issue on appeal for review in the Supreme Court." Pet. App. 40a.

This timely joint petition follows.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decisions below conflict with several decisions from this Court, including *Johnson*, *Apprendi*, and *Haymond*. The decisions also conflict with bedrock principles established by this Court decades ago. As this Court has made clear, Congress must provide punishments for federal crimes "with precision." *Evans*, 333 U.S. at 641. When a court "can only guess with too large a degree of uncertainty" the applicable punishment for a crime, it is up to Congress "to revise the statute," rather than for the court to "make speculation law." *Id.* at 640-641. And here, the Tenth Circuit's decision creates speculative statutory punishments for every federal crime.

For those reasons alone, review is necessary. But the question presented is also exceptionally important. It essentially asks this Court to resolve how a federal court determines the statutory maximum imprisonment term for every crime enumerated in the United States Code. If that is not an issue of exceptional importance, it is difficult to imagine what is.

Finally, this petition is an excellent vehicle to resolve this critical question. Mr. Uman has been sentenced to serve a full two years in prison beyond the 10-year imprisonment term authorized by Congress for his offense of conviction. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("any amount of actual jail time is prejudicial"). Although mootness is often an issue in cases involving revocation imprisonment terms (because the sentences imposed are often short), in light of the lengthy imprisonment term imposed on Mr. Uman (to be followed by an additional year on supervised release), and the unique circumstances in Mr. Salazar's case (explained below), this petition could not possibly become moot. This petition gives this Court an ideal opportunity to resolve the critical question presented here. This Court should grant the petition.

I. The Tenth Circuit erred under this Court's precedent.

Review is necessary because the Tenth Circuit's decisions below are inconsistent with this Court's decisions in, *inter alia*, *Johnson*, *Apprendi*, and *Haymond*. The errors are statutory and constitutional. We start with the statutory error.

1a. As explained above, petitioners were convicted of gun offenses that carried 10-year statutory maximum imprisonment terms under 18 U.S.C. § 924(a)(2). That statute is explicit: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j),

or (o) of section 922 shall be fined as provided in this title, **imprisoned not more than 10 years**, or both." (emphasis added). There is nothing ambiguous about this language: "imprisoned not more than 10 years" means "imprisoned not more than 10 years." "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written . . . ." *Bostock v. Clayton Cty., Georgia*, 140 S.Ct. 1731, 1749 (2020). And the law as written tells the world, in plain terms, that anyone who violates the enumerated subsections shall be "imprisoned not more than 10 years."

Contrary to § 924(a)(2)'s plain terms, the petitioners have now been imprisoned for more than 10 years for violations of §§ 922(g) & (j). At the initial sentencing hearing in Mr. Salazar's case, the district court imposed a 115-month prison term and a 3-year term of supervised release. Pet. App. 2a. The district court thereafter reimprisoned Mr. Salazar for an additional 10 months following the revocation of his supervised release. Pet. App. 3a. In *Johnson*, this Court held that "postrevocation sanctions [are] part of the penalty for the initial offense." 529 U.S. at 700. This necessarily means that the district court imposed a 125-month term of imprisonment for Mr. Salazar's § 922(g)(1) conviction. Contrary to § 924(a)(2)'s plain text, Mr. Salazar has been imprisoned for more than ten years for a violation of § 922(g).

So too with Mr. Uman. Contrary to § 924(a)(2)'s plain terms, Mr. Uman has been imprisoned for more than 10 years for a violation of § 922(j). At the initial sentencing hearing, the district court imposed a 10-year prison term and a 3-year term of supervised release. R1.42. The district court thereafter reimprisoned Mr. Uman for an additional 2 years following the revocation of his supervised release. Pet. App. 37a-

41a. Because "postrevocation sanctions [are] part of the penalty for the initial offense," *Johnson*, 529 U.S. at 700, this necessarily means that the district court imposed a 12-year term of imprisonment for Mr. Uman's § 922(j) conviction. Contrary to § 924(a)(2)'s plain text, Mr. Uman has been imprisoned for more than ten years for a violation of § 922(j).[2]

b. The Tenth Circuit affirmed only by ignoring this Court's decision in *Johnson*. The Tenth Circuit found itself bound by its prior decision in *Robinson*, but *Robinson* was decided in 1995, five years before this Court decided *Johnson*. Pet. App. 2a. When *Robinson* was decided in 1995, this Court had not yet held that "postrevocation penalties relate to the original offense." *Johnson*, 529 U.S. at 701. That holding makes all the difference. If a postrevocation penalty is "part of the penalty for the initial offense," *id.* at 700, then it necessarily follows that a postrevocation penalty, when combined with the initial imprisonment term, cannot exceed the statutory maximum imprisonment term "for the initial offense." The Tenth Circuit was wrong below when it held that "nothing in *Johnson* states or even suggests that a term of imprisonment and a term of reimprisonment must be aggregated." Pet. App. 13a-14a. That is precisely what *Johnson* held, and it did so to avoid a Double Jeopardy violation. 529 U.S. at 700-701.

Again, *Johnson* recognized that a revocation sentence is "imposed for [the defendant's] initial offense." 529 U.S. at 708. "Nor would it be mere formalism to link

[2] Although federal inmates are eligible for good-time credits, 18 U.S.C. § 3624(b), the relevant records indicate that both Mr. Salazar and Mr. Uman have actually been imprisoned more than 10 years for their § 922 offenses.

the second prison sentence to the initial offense; the gravity of the initial offense determines the maximum term of reimprisonment." *Id.* at 708. Although *Johnson* cited § 3583(e)(3) in support of this latter proposition, *id.*, that citation made sense under the specific facts of that case. The defendant in *Johnson* originally received a 25-month term of imprisonment for violating 18 U.S.C. § 1029(b)(2). *Id.* at 697. That provision carried a 5-year statutory maximum term of imprisonment. *Id.* (labeling the conviction a class D felony); 18 U.S.C. § 1029(b)(2), (c)(1)(A)(i). Thus, under the statute of conviction, the district court could have imposed a 35-month term of reimprisonment without exceeding the statutory maximum. Yet, § 3583(e)(3) limited any revocation sentence to 2 years' imprisonment. In *Johnson*, § 3583(e)(3) in fact "determine[d] the maximum term of reimprisonment." 529 U.S. at 708.

Not so here. Here, both petitioners have served more than the 10-year statutory maximum sentence. Thus, under *Johnson*, the underlying statutory maximum must cabin the statutory maximum provided in § 3583(e)(3). *United States v. Henderson*, 998 F.3d 1071, 1084 (9th Cir. 2021) (Rakoff, J., dissenting) (under *Johnson*, "Henderson's fifteen-month revocation sentence must be 'treated as part of the penalty for' being a felon in possession of a firearm. The district court has thus imposed a total prison term of 132 months for that offense. Based upon Henderson's original conviction standing alone, the district court was not statutorily authorized to impose such a sentence.").

c. This Court's plurality opinion in *Haymond* is consistent with this reasoning. "As *Johnson* recognized, when a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's

sentence for his original crime." *Haymond*, 139 S.Ct at 2380 n.5. As such, the *Haymond* plurality called into question a post-revocation sentence (like the ones imposed here) that, when combined with the defendant's initial sentence, "yield[s] a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction." *Id.* at 2384; *see also id.* at 2381 (rooting the violation at issue in *Haymond* in, *inter alia*, *Johnson*'s holding).

Moreover, contrary to the Tenth Circuit's suggestion below, Pet. App. 20a, Justice Breyer's concurrence in *Haymond* did not part ways with the plurality on this point. Indeed, Justice Breyer acknowledged *Johnson*'s rule that "[r]evocation of supervised release is typically understood as 'part of the penalty for the initial offense.'" 139 S.Ct. at 2386 (Breyer, J., concurring). Justice Breyer further reiterated *Johnson*'s point that "the consequences for violations of the conditions of supervised release under § 3583(e), *which governs most revocations*, are limited by the severity of the original crime of conviction, not the conduct that results in revocation." *Id.* (emphasis added).

In *Haymond*, § 3583(k) applied rather than § 3583(e), and Justice Breyer agreed that § 3583(k)'s application was unlawful because it increased the statutory penalties beyond those provided by the underlying statute of conviction. *Id.* This logic is in line with the *Haymond* plurality, and our position here, that § 3583(e)'s application is unlawful when that statute's application increases the statutory penalties beyond those provided by the underlying statute of conviction (as it does here).

d. The Tenth Circuit's decades-old, pre-*Johnson*/*Haymond* reasoning in *Robinson* is otherwise unpersuasive. In *Robinson*, the Tenth Circuit acknowledged that the "maximum" term of imprisonment was "provided under the statute of conviction." 62

F.3d at 1286. But the Tenth Circuit further held that a defendant who "*violates the terms of [supervised] release* may be required to serve a total period of imprisonment greater than the maximum provided under the statute of conviction." *Id.* (emphasis added). *Robinson* cited a Ninth Circuit case, not a federal statute, for this proposition. *Id.*

Robinson appeared to derive its rule from two subsections within 18 U.S.C. § 3583 – subsections (a) and (e)(3). 62 F.3d at 1284 (referring to these subsections as the "key provisions"). Section 3583(a) generally provides that a district court, "in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." This provision has nothing to do with a defendant's term of imprisonment. By its plain terms, the provision only authorizes *a term of supervised release after imprisonment*." *Id.* (emphasis added). As Congress has made clear, a defendant cannot serve a term of supervised release in prison. 18 U.S.C. § 3624(e) ("The term of supervised release commences on the day the person is released from imprisonment."); *see also Pepper*, 562 U.S. at 502 n.15 ("Supervised release *follows a term of imprisonment* and serves an entirely different purpose than the sentence imposed under § 3553(a)."") (emphasis added). Thus, there is no basis whatsoever to interpret this provision as somehow trumping § 924(a)(2)'s 10-year statutory maximum term of imprisonment. *See Mont*, 139 S.Ct. at 1833 ("prison time is 'not interchangeable' with supervised release").

The second provision, § 3583(e)(3) (which we've already discussed in detail), authorizes a district court to "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." This language is silent, however, about whether a term of reimprisonment imposed under this section can exceed the maximum term of imprisonment provided for in the statute of conviction. *Robinson* drew meaning from this silence, "find[ing] no deference . . . to the statute of conviction by the supervised release statute in this connection." 62 F.3d at 1285. *Robinson* also looked to Congress's perceived "intent": "[t]he contrary interpretation suggested by defendant would impair the deterrent mechanism which we feel was obviously intended by Congress." *Id.* This was the extent of *Robinson*'s statutory analysis on this issue.

This reasoning is flawed. This Court has held that it is inappropriate to "draw[] meaning from silence . . . where 'Congress has shown that it knows how to direct sentencing practices in express terms.'" *Dean v. United States*, 137 S.Ct. 1170, 1177 (2017). Congress knows how to provide maximum terms of imprisonment different than the default terms that typically apply for criminal offenses. *See*, *e.g.*, 18 U.S.C. § 3559. Section 922, the statute of conviction here, is one such example. While § 924(a)(2) generally provides a 10-year statutory maximum term of imprisonment, that maximum term increases to life (with a minimum term of 15 years) if a defendant qualifies as an armed career criminal under 18 U.S.C. § 924(e). Section 3583(e)(3) contains no similar language indicating that its authorized reimprisonment terms trump the statutory maximum terms of imprisonment for the numerous underlying federal criminal offenses codified throughout the United States Code.

Robinson also erred in rejecting a plain-text interpretation of § 3583(e)(3) because of a belief that it "would impair the deterrent mechanism which [the Court felt] was obviously intended by Congress." 62 F.3d at 1285. This is so because "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1815 (2019). "[I]t is quite mistaken to assume . . . that 'whatever' might appear to 'further[] the statute's primary objective must be the law.'" *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017). And there is nothing anywhere that even hints that Congress had this particular dilemma (a revocation sentence that exceeds the underlying statutory maximum) in mind when it amended § 3583(e)(3) in 1994. *Id.* ("And while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced.").

More than seventy years ago, this Court made clear that courts cannot adopt an "implied extension of [a statute's] penalty provision." *Evans*, 333 U.S. at 489. "That is essentially the sort of judgment legislatures rather than courts should make." *Id.* at 490. "It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." *Id.* at 495. Tenth Circuit precedent (including the decisions below) violates this bedrock rule by holding that Congress implicitly increased the numerous statutory maximum terms of imprisonment throughout the United States Code when it enacted § 3583(e)(3).

In light of the importance of statutory maximum terms of imprisonment, this Court should "expect more than simple silence if, and when, Congress were to intend a major departure" from that definition. *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 984 (2017). But there is "nothing in the statute that evinces this intent." *Id.* If Congress really intended such a profound impact on the federal criminal code, it would have said so expressly. *See*, *e.g.*, *Sessions v. Dimaya*, 138 S.Ct. 1204, 1218 (2018) (rejecting the government's reading of a criminal sentencing provision and noting that, if Congress had wanted to adopt the government's reading, "it presumably would have said so").

The only plausible way in which *Robinson* makes sense is if postrevocation sanctions are tied to the underlying revocation of supervised release. If that's true, then the prison terms authorized in § 3583(e)(3) have nothing to do with the underlying offense, and, thus, nothing to do with the penalties for that underlying offense. But this Court held otherwise in *Johnson*. 529 U.S. at 700. Postrevocation penalties are attributed to the initial offense. *Id.*

There is good reason to think that the Tenth Circuit's 1995 decision in *Robinson* is based on this mistaken premise. As late as 2004, the Tenth Circuit had held that, when a district court revokes a term of supervised release, it "is merely altering the location of the defendant's supervised release from outside prison to inside prison." *United States v. Tsosie*, 376 F.3d 1210, 1216 (10th Cir. 2004). It was not until 2012 that the Tenth Circuit corrected this erroneous reading of § 3583(e)(3). *United States v. Mendiola*, 696 F.3d 1033, 1039 (10th Cir. 2012); *see also id.* at 1044 (Gorsuch, J., concurring) ("sending a defendant to prison after revocation has to be a 'term of

imprisonment' for any number of other sentencing administration statutes to make any sense at all"). The Tenth Circuit's later holding in *Mendiola* is consistent with this Court's decision in *Johnson*, which plainly attributes "postrevocation penalties to the original conviction." 529 U.S. at 700. *Johnson* and *Mendiola* make clear that *Robinson*'s holding is based on a mistaken premise.

There is no reason to think that the four Justices who dissented in *Haymond* would reject our reading of *Johnson* and § 3583(e)(3). The dissent did not take issue with the plurality's interpretation of *Johnson*. The dissent only cited *Johnson* for the proposition that "'[s]upervised release is 'a form of postconfinement monitoring' that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison.'" *Id.* at 2399. And as the dissent acknowledged, this specific issue was not presented under the facts in *Haymond*. 139 S.Ct. at 2390 (Alito, J., dissenting) ("None of this matters in respondent's case because the sum of his original sentence (38 months) and the additional time imposed for violating supervised release (60 months) is less than 120 months"). Rather, the dissent's real concern was not with the cases like this one, but with language in the plurality opinion that the dissent thought called into question "the whole system of supervised release." *Id.* at 2391.

To be clear, that concern is not present here. We do not argue that the whole system of supervised release is subject to attack. Our position is simply that, in light of this Court's decision in *Johnson*, a revocation sentence, when combined with the sentence imposed for the underlying offense, cannot exceed the statutory maximum for that underlying offense. That rule will not apply in most cases. *Haymond*, 139

S.Ct. at 2384. And the concerns expressed by the dissent, *see id.* at 2390-2391, can be accounted for when district courts impose sentences. For instance, if a district court wants the authority to impose a lengthy sentence upon revocation, then it knows not to impose a sentence at or near the statutory maximum at the initial sentencing. The district court could instead impose a shorter term of imprisonment and a longer term of supervised release. And regardless, if a defendant commits a new crime while on supervision, he can always be prosecuted, and punished, for that new crime. Other conduct may be prosecuted as contempt. 18 U.S.C. § 455(3).

In other words, this is not a doomsday scenario or one that even appreciatively alters supervised-release revocation proceedings. It is simply the process that courts should have adopted twenty years ago on the heels of this Court's decision in *Johnson*. *See*, *e.g.*, *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

e. There is one additional rule that severely undermines the Tenth Circuit's interpretation of § 3583(e)(3): Federal Rule of Criminal Procedure 11(b)(1)(H). That rule requires district courts at plea hearings to advise criminal defendants of "*any maximum possible penalty*, including imprisonment, fine, and term of supervised release." (emphasis added). In light of *Johnson*'s holding that postrevocation penalties are attributed to the underlying conviction, it is only possible to comply with Rule 11(b)(1)(H) if the maximum term of imprisonment upon revocation is capped at the statutory maximum for the underlying offense. Otherwise, the "maximum possible" term of imprisonment would be contingent on unknowable future events

(such as whether the defendant's supervised release will be revoked and, if so, how many times and for how long). "To interpret the statute broadly is to invite controversy on those and other matters; our narrower construction avoids it." *Lagos v. United States*, 138 S.Ct. 1684, 1689 (2018).

Importantly, below, the government never disputed that its definition of the statutory maximum for a federal offense would be unworkable (indeed, unknowable) for purposes of Rule 11. The government has never even attempted to explain how a federal district court can comply with Rule 11(b)(1)(H) under the interpretation of § 3583(e)(3) adopted by the Tenth Circuit below. Our interpretation of the statute not only "hews most closely to the text," as that text has been interpreted in *Johnson*, but it also "provides an administrable construction." *Life Techs. Corp. v. Promega Corp.*, 137 S.Ct. 734, 741 (2017). The Tenth Circuit's interpretation does not.

f. For all of these reasons, the Tenth Circuit's decisions below and in *Robinson* cannot be squared with this Court's precedent. There is no textual basis to conclude that § 3583(e)(3) authorizes a term of imprisonment above the statutory maximum term of imprisonment for the underlying offense. And certainly no basis to adopt such an interpretation of a federal criminal statute. If there is ambiguity within the relevant statutes, the rule of lenity resolves that ambiguity in the defendants' favor. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). When "[n]either the wording of the statute nor its legislative history points clearly to either meaning . . . the Court

applies a policy of lenity and adopts the less harsh meaning." *Id.* at 177.

This Court has applied lenity in the revocation context once before to reach a decision favorable to the defendant. *United States v. Granderson*, 511 U.S. 39, 42-43, 54 (1994). In *Granderson*, this Court interpreted the ambiguous phrase "original sentence" in the federal probation statue, 18 U.S.C. § 3565(a), as the highest end of the guidelines range applicable to the defendant, rather than the actual probationary sentence imposed, because such an interpretation was the more lenient one. *Id.* at 54. Although we think that our reading of the provisions in this case is unambiguously correct in light of *Johnson*, to the extent that there is ambiguity with respect to the applicable statutory maximum upon revocation, the rule of lenity would apply. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (The rule of lenity is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.").

2a. The Tenth Circuit's decision is also inconsistent with *Apprendi*. *Apprendi* holds 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." 530 U.S. at 490. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303-304 (2004). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 303-304. The Tenth Circuit's decisions below contradict this rule by permitting a district

court, based on judge-found facts, to impose a sentence beyond a prescribed statutory maximum term of imprisonment. *See Haymond*, 139 S.Ct. at 2384 (noting *Apprendi* concerns in this context, where a revocation sentence increases the defendant's combined sentence beyond the statutory maximum for the underlying offense); *Henderson*, 998 F.3d at 1078 (Rakoff, J., dissenting) ("the judge's constitutional authority to sentence a supervisee ultimately stems from the original jury conviction or informed guilty plea. Accordingly, upon finding a violation of supervised release the judge may not impose a prison term that, together with the original term, would exceed the statutory maximum for the underlying offense.").

b. *Haymond* supports the point. The *Haymond* plurality struck down a different revocation provision (§ 3583(k)) on *Apprendi*-related grounds. 139 S.Ct. at 2379-2381. Because § 3583(k)'s 5-year mandatory minimum sentence came "into play only as a result of additional judicial factual findings by a preponderance of the evidence," that provision could not stand. *Id.* at 2381 (citing *Alleyne v. United States*, 570 U.S. 99 (2013) (extending *Apprendi* to mandatory minimum sentences). The plurality signaled a similar belief that, in a case like this, a sentence imposed under § 3583(e)(3) that exceeds the underlying statutory maximum would also violate *Apprendi*. *Id.* at 2380, 2384.

Although Justice Breyer concurred only in the judgment, his concurrence necessarily agreed with the plurality that the *Apprendi* line of cases calls into question at least some revocation sentences that exceed the statutory penalties for the underlying offense. 139 S.Ct. at 2386. Like the plurality decision, Justice Breyer found that § 3583(k)'s features "more closely resemble the punishment of new

criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* at 2386. Justice Breyer agreed with the plurality that, even in the revocation context, "a jury must find facts that trigger a mandatory minimum prison term." *Id.* (citing *Alleyne v. United States*, 570 U.S. 99, 103 (2013)). Thus, five Justices in *Haymond* held that 18 U.S.C. § 3583(k) violated *Apprendi*'s basic rule prohibiting enhanced statutory penalties based on judge-found facts. *See id.* In doing so, five Justices applied *Apprendi* in the supervised-release revocation context. This Court should do so here as well.

The Tenth Circuit concluded otherwise below, holding that Justice Breyer "declined to expressly rely on *Alleyne*." Pet. App. 18a. This is apparently in reference to Justice Breyer's comment that he "would not transplant the *Apprendi* line of cases to the supervised-release context." 139 S.Ct. at 2385. But it is implausible to read this statement to mean that *Apprendi* never applies in the supervised-release context. Justice Breyer further stated:

> Taken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution. And in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term. ***Alleyne*, 570 U.S. at 103, 133 S.Ct. 2151.**

Id. at 2386 (emphasis added). Justice Breyer did not "refus[e] to join the plurality's reliance on *Alleyne*." Attach. 21 n.7. Justice Breyer *expressly relied* on *Alleyne*. 139 S.Ct. at 2386. The Tenth Circuit said exactly that on remand in *Haymond*. *United States v. Haymond*, 935 F.3d 1059, 1063 (10th Cir. 2019) (noting that Justice Breyer concluded that § 3583(k) was "unconstitutional under *Alleyne*"); *see also United States*

v. Ka, 982 F.3d 219, 225 (4th Cir. 2020) (Gregory, C.J., dissenting) ("while Justice Breyer disagreed with the plurality on the extent to which the Court's Fifth and Sixth Amendment jurisprudence should apply to supervised release revocations more broadly, he agreed that constitutional protections *can* attach").

The only plausible reading of Justice Breyer's concurrence is that he would not adopt *wholesale* the *Apprendi* line of cases in the supervised release context. And we do not disagree. Again, it is not our argument here that any judge-found fact at a revocation hearing increases the applicable penalty in violation of *Apprendi*. Only those facts that increase the applicable statutory penalties for the underlying offense trigger an *Apprendi* violation. Justice Breyer's concurrence is consistent with that position. 139 S.Ct. at 2386. The Tenth Circuit's position is not.

Indeed, Justice Breyer commented that "the role of the judge in a supervised-release proceeding is consistent with traditional parole." *Id.* at 1286. Statutory maximums still existed under a traditional parole system, and nobody has suggested that a court could reimprison a parolee beyond the statutory maximum for his underlying offense. *See id.* at 2390 (Alito, J., dissenting). So too with supervised release. Rather, under traditional parole revocation, "a judge generally could sentence the defendant to serve only the remaining prison term authorized by statute for his original crime of conviction." *Id.* at 2382 (plurality decision); *Henderson*, 998 F.3d at 1084 n.3 (Rakoff, J., dissenting) ("A violation of parole allows the sentencing judge to sentence the defendant to serve out the balance of his authorized sentence; it does not provide the possibility of a sentence exceeding the statutory maximum, which is the issue here."). For this reason as well, there is no reason to think that

Justice Breyer would interpret the applicable statutes to permit a defendant (like petitioners here) to serve more time in prison than the statute of conviction permits. *See also* 18 U.S.C. § 3624(e) (requiring any supervised release term to run concurrently with any parole term). That could not have happened to a parolee, and so there is no reason to think that Congress expected it to happen to a defendant on supervised release.

Of course, any discussion in *Haymond* about § 3583(e)(3) was dicta (the case had nothing to do with that provision). But in the end, five Justices in *Haymond* struck down a subsection in § 3583 because it offended *Apprendi*'s constitutional requirements. The same should happen here. Review is necessary.

3. At present, there is not an established Circuit conflict on this issue. But there is every reason to believe that there will be an established conflict soon. In a published opinion, the Eighth Circuit has indicated that, "in a future case," that Court may well "follow[] the [*Haymond*] plurality" and limit sentences "when the sum of a defendant's initial and revocation sentences is a total term of imprisonment exceeding the statutory maximum for the original crime of conviction." *United States v. Eagle Chasing*, 965 F.3d 647, 651 (8th Cir. 2020); *see also United States v. Wilson*, 939 F.3d 929, 933 (8th Cir. 2019) (noting that the defendant's aggregate 105-month sentence following revocation was "less than the statutory maximum 120 months authorized for" the defendant's underlying conviction).

Moreover, although the Ninth Circuit recently published a decision on this issue in accord with the Tenth Circuit's decision below, it did so in a two-Judge panel decision over a dissent. *United States v. Henderson*, 998 F.3d 1071 (9th Cir. 2021).

The dissent would have held that a sentence like the one imposed in the instant cases violates the Sixth Amendment under "*Apprendi* and its progeny." 998 F.3d at 1078 (Rakoff, J., dissenting). In doing so, the dissent noted that, like the Tenth Circuit below, the Ninth Circuit panel affirmed on stare decisis principles (and did not adopt the principles within the prior opinion as its own). *Id.* at 1078-1079. In any event, the Tenth Circuit's decisions conflict with decisions from this Court. Review is necessary.

II. The resolution of this issue is critically important to the federal criminal justice system.

Finally, the issue presented is exceptionally important to the federal criminal justice system. The Tenth Circuit has held that § 3583(e)(3) implicitly increases the statutory maximum terms of imprisonment for countless federal crimes. *Robinson*, 62 F.3d at 1284-1286. In the Tenth Circuit's view, statutory maximum terms of imprisonment are not found within statutes of conviction. For instance, when Congress limits a term of imprisonment to "not more than 10 years," 18 U.S.C. § 924(a)(2), it doesn't really mean what it says. A criminal defendant could serve more than 10 years' imprisonment (like the petitioners have done here), despite this plain, unambiguous language, depending on whether a term of supervised release is imposed, then revoked, and the length of sentence imposed upon revocation. That is a remarkable position that makes punishment speculative for essentially every federal criminal offense found within the United States Code. Nobody charged with a federal crime can ever know the possible maximum imprisonment term for the crime. It all depends on future, unknowable events (events triggered (or not) by discretionary decisions made by probation officers and federal district courts). If

review is not appropriate here, it is difficult to imagine when review would be appropriate.

Such a judicial increase in maximum terms of imprisonment is not something that this Court should brush aside. After all, "any amount of actual jail time" is significant. *Glover v. United States*, 531 U.S. 198, 203 (2001). And jail time also "'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration.'" *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018). The Tenth Circuit's precedent flouts these basic principles, instead adopting (by drawing meaning from silence and purported policy concerns) an interpretation of § 3583(e)(3) that doles out judicial punishment unauthorized by Congressionally-enacted statutes of conviction. The Tenth Circuit's precedent is a product of a bygone era, where perceived Congressional "intent" took precedence over statutory text. Subsequent precedent undermines every aspect of this precedent. This Court should grant this petition and overrule that incorrect precedent.

This issue is also extremely important because it affects many criminal defendants. Sentencing Commission data reflect that around 4 percent of criminal defendants receive sentences at or around the statutory maximum imprisonment term authorized by the statute of conviction. *Henderson*, 998 F.3d at 1086 (Rakoff, J., dissenting). And federal district courts hold an average of 21,600 revocation hearings per year. *Id.* Although we have found no statistics or statistical studies on how many of these revocation hearings involve defendants sentenced at or near the statutory maximum authorized by the statute of conviction, if we take just 2 percent of 21,600

(to account for life sentences and effective life sentences), we get 432 revocation hearings per year that we would expect to involve a criminal defendant sentenced at or near the statutory maximum term of imprisonment (that's around 4 such revocation hearings per year in each of the 94 federal judicial districts).

These numbers make clear that the question presented will be a recurring issue in the lower courts and in this Court until this Court resolves it. An issue that concerns hundreds of criminal defendants each year, and that asks whether Congress has authorized punishments beyond the statutory maximum terms of imprisonment for these hundreds of defendants, is one of exceptional importance. *See, e.g.*, *Mendiola*, 696 F.3d at 1045 (Gorsuch, J., concurring) ("Few things should give us more pause than the possibility of mistakenly sending to prison a man Congress has said should not be there."). Review is necessary.

Finally, the fractured decision in *Haymond* is also an important reason to grant review here. Below, the Tenth Circuit viewed Justice Breyer's sole concurrence as the controlling opinion in *Haymond*. Pet. App. 20a. According to the Tenth Circuit, one concurring opinion, that no other Justice joined, "represents the Court's holding" in *Haymond*. Pet. App. 20a. Others disagree. *Henderson*, 998 F.3d at 1083 (Rakoff, J., dissenting) (disagreeing that Justice Breyer's concurrence controls [b]ecause the plurality and Justice Breyer did not agree upon a single rationale, and because Justice Breyer's rationale is not a logical subset of the plurality's (or vice-versa)"). It is an interesting question whether Justice Breyer's concurrence in *Haymond* is the controlling opinion under *Marks v. United States*, 430 U.S. 188 (1977). By granting certiorari here, and answering the question presented, this Court could help resolve

that debate. By resolving the question presented "on the merits," this Court can make "unnecessary" "the proper application of *Marks*" to *Haymond*, and it can "give the necessary guidance to federal district courts and to the courts of appeals" with respect to statutory maximum terms of imprisonment under federal law. *Hughes v. United States*, 138 S.Ct. 1765, 1772 (2018). Unless and until this Court answers the question presented, the lower courts will lack guidance on the actual holding in *Haymond*.

For all of these reasons, this Court should grant this petition to resolve the exceptionally important question presented here.

III. This petition is an ideal vehicle to resolve the question presented.

For two reasons, this petition presents an ideal opportunity for this Court to answer the question presented.

1. The question arises on direct review from a lower federal court of appeals. Both petitioners properly preserved the question presented below, and the Tenth Circuit affirmed under de novo review. And although the Tenth Circuit panel relied on stare decisis principles in doing so, the Tenth Circuit denied Mr. Salazar's petition for rehearing en banc in an unpublished summary order (without any dissents). The unanimous, summary denial of en banc rehearing makes clear that the Tenth Circuit will not overrule its precedent on this point. Thus, there are no procedural hurdles to overcome for this Court to address the merits of this critically important question.

2. The average revocation sentence is 11 months' imprisonment. *Henderson*, 998 F.3d at 1086 (Rakoff, J., dissenting) (citing Sentencing Commission data). Because revocation sentences are generally less than one year, the question presented here will often become moot before this Court is able to address it. *See* Pet. App. 3a-4a. Not

so here. In January 2020, the district court imposed a 24-month term of imprisonment upon revocation in Mr. Uman's case, as well as a 1-year term of supervised release to follow that term of imprisonment. Pet. App. 50a-51a. That lengthy sentence gives this Court the opportunity to address this issue before it becomes moot.

And that is even more so for Mr. Salazar. Although Mr. Salazar has served his imprisonment term, he is currently in pretrial custody on different federal charges. Pet. App. 4a n.1. For that reason, he has not yet begun to serve his 12-month term of supervised release (and will not begin to do so anytime soon). Pet. App. 4a n.1 (explaining that a sentencing appeal is not moot until the defendant has served any term of supervised release). For that reason, there is no possibility that this petition would become moot if this Court were to grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAUN J. SALAZAR,

Defendant - Appellant.

No. 19-3217

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:08-CR-20084-CM-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, with him on the briefs), Kansas Federal Public Defender, Kansas City, Kansas, for Defendant-Appellant.

John M. Pellettieri, Attorney, Appellate Section, Criminal Division, Department of Justice, Washington, D.C. (Stephen R. McAllister, United States Attorney, James A. Brown, Assistant United States Attorney, Kansas City, Kansas; Brian A. Benczkowski, Assistant Attorney General, John P. Cronan, Deputy Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C., with him on the brief), for Plaintiff-Appellee.

Before **HOLMES**, **SEYMOUR**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Shaun Salazar appeals the district court's order revoking his term of supervised release and sentencing him to ten months' imprisonment. He argues that his ten-month prison sentence is illegal because—when combined with his prior 115-month prison term—it exceeds the 120-month statutory maximum for his crime of conviction. We previously rejected this argument in *United States v. Robinson*, where we held "that [18 U.S.C.] § 3583 authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his [or her] substantive offense, will exceed the maximum incarceration permissible under the substantive statute." 62 F.3d 1282, 1285 (10th Cir. 1995) (quoting *United States v. Purvis*, 940 F.2d 1276, 1279 (9th Cir. 1991)). Because we remain bound by *Robinson*, we affirm.

Background

In 2010, Salazar pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Section 922(g)(1), by way of 18 U.S.C. § 924(a)(2), carries a statutory maximum of 120 months in prison. In 2011, the district court sentenced Salazar to 115 months in prison and three years of supervised release. Salazar completed his prison term and began serving his term of supervised release in May 2019. Soon after, a probation officer filed a petition to revoke Salazar's supervised release, alleging that Salazar violated two conditions of his supervised release by committing battery against his brother and associating with a felon, his girlfriend.

At his revocation hearing, Salazar argued that any term of imprisonment resulting from the revocation of his supervised release could not exceed five months because anything greater would result in a total term of imprisonment that exceeded the 120-month statutory maximum prescribed by § 924(a)(2). The district court rejected this argument, revoked Salazar's supervised release, and imposed ten months' imprisonment followed by one year of supervised release.

Salazar appeals.

Analysis

I. Jurisdiction

Before addressing the merits of this appeal, we must be satisfied that we have jurisdiction. *See United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007). Article III of the Constitution limits federal jurisdiction to "[c]ases" or "[c]ontroversies." U.S. Const. art. III, § 2, cl. 1. In practice, this case-or-controversy requirement means that a party seeking relief must have an actual injury that is likely to be redressed by a favorable judicial decision. *Vera-Flores*, 496 F.3d at 1180. If a party no longer suffers from a redressable injury, the case becomes moot, and we no longer have jurisdiction. *Id.* Here, our review of publicly accessible Bureau of Prisons records suggested that Salazar was released from federal custody on or about November 22, 2019. We therefore ordered supplemental briefing from the parties asking whether this case—which challenges the length of Salazar's prison sentence—is moot.

In response, both Salazar and the government argue that even though Salazar has finished serving his ten-month prison sentence, his case is not moot because he has not yet served his one-year term of supervised release.[1] We agree. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself . . . of its own jurisdiction . . . ,' even though the parties are prepared to concede it." (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))).

The general rule in this circuit is that "a defendant's unexpired term of supervised release, which could be reduced by a favorable appellate decision, is sufficient to defeat a claim of mootness." *United States v. Castro-Rocha*, 323 F.3d 846, 847 n.1 (10th Cir. 2003). In *Castro-Rocha*, the defendant had completed his original 15-month prison sentence but continued to serve his three-year term of supervised release. *Id.* at 847 & n.1. Success on appeal would have decreased his sentencing range from 15–21 months to 8–14 months. *Id.* at 847 n.1. The court explained that because under this new sentencing range "the district court could choose to impose a term of imprisonment of less than one year, the district court could also choose to impose a lesser term of supervised release, or no term of

[1] Salazar explains that "[d]uring the pendency of this appeal, [he] has been in pretrial custody in [a] subsequent federal case." Aplt. Supp. Br. 2. Thus, he "has been in continuous custody since June 2019." *Id.* at 3. And "[b]ecause he has been in continuous custody, he has not yet begun to serve the 12-month term of supervised release imposed in this case." *Id.* The government agrees.

supervised release at all." *Id.* This possibility of a lesser term of supervised release was sufficient to save the case from mootness.

Notably, a reduced term of supervised release need not be a guaranteed result of success on appeal—the mere *possibility* of a reduced term of supervised release is enough to maintain a live controversy. In *Castro-Rocha*, for instance, if the defendant had been successful on appeal, the district court on remand could nevertheless have chosen the high end of the newly applicable sentencing range and imposed a 14-month prison sentence, which is more than one year (and, indeed, is only one month shorter than his original sentence). *See id.* In so doing, it could further have chosen to impose the same three-year term of supervised release. *See id.* Thus, Castro-Rocha's success on the merits of his appeal would not guarantee him a shorter term of supervised release; such relief was certainly possible, but it remained within the district court's discretion. *See id.* And that discretion was enough to maintain a live controversy. *See id.*; *see also United States v. Montgomery*, 550 F.3d 1229, 1231 n.1 (10th Cir. 2008) (concluding that "sentencing appeal [wa]s not moot because [defendant's] unexpired term of supervised release *potentially* could be reduced if we were to render a ruling favorable to him on his upward departure challenge" (emphasis added)); *United States v. Westover*, 435 F.3d 1273, 1277 (10th Cir. 2006) (finding it "sufficient to prevent this appeal from being moot" that district court on remand could "*potentially* shorten[] the term [of supervised release] or eliminat[e] it altogether" (emphasis added)); *cf. United States v. Fields*, 823 F. App'x 587, 590 (10th Cir. 2020) (unpublished) (finding sentencing appeal moot despite unexpired

supervised-release term because length of that term was mandated by statute and thus could not be shortened or eliminated on remand).

Here, although Salazar has served his prison sentence, he has not yet served his term of supervised release. And critically, a favorable appellate decision could potentially reduce his term of supervised release: If we were to grant Salazar the relief he seeks and remand for resentencing, the district court "could . . . choose to impose a lesser term of supervised release, or no term of supervised release at all." *Castro-Rocha*, 323 F.3d at 847 n.1; *see also* § 3583(h) (providing that "[w]hen a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court *may* include a requirement that the defendant be placed on a term of supervised release after imprisonment" (emphasis added)).

As the government suggests, neither *United States v. Meyers*, 200 F.3d 715 (10th Cir. 2000), nor *Rhodes v. Judiscak*, 676 F.3d 931 (10th Cir. 2012), require a different result. *Meyers* is not on point because it found moot an appeal by a defendant who was "out of prison, under no further terms of probation or supervised release." 200 F.3d at 718. Thus, the defendant there had no continuing injury for purposes of Article III. *See Vera-Flores*, 496 F.3d at 1180–81 (explaining that defendant on supervised release satisfies Article III "because the defendant's liberty is affected by ongoing obligations to comply with supervised release conditions and restrictions"; finding appeal moot despite unexpired term of supervised release because defendant had been deported and therefore was not subject to conditions of supervised release). In *Rhodes*, on the other hand, the defendant could "assert an

actual injury" because "he remain[ed] subject to supervised release." 676 F.3d at 933. But because *Rhodes* was a habeas case, the court concluded that the defendant's injury was not redressable. The court explained that in this circuit, habeas courts lack jurisdiction to shorten a term of supervised release—so a favorable appellate decision *could not* reduce the defendant's term of supervised release. *Id.* In other words, even if the appellate court were to grant relief on Rhodes's claim of a too-long prison sentence, the district court would have no power to modify the defendant's term of supervised release.[2] *See id.* Such is not the case here.[3]

In summary, although Salazar has served his prison sentence, he has not yet served his term of supervised release. And a favorable appellate decision could potentially reduce that term of supervised release. Thus, Salazar's case is not moot.

II. Merits

Having concluded that Salazar's case presents a live controversy, we turn to the merits. Salazar argues that the district court imposed an illegal sentence following

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[2] Additionally, the *Rhodes* court concluded that the possibility of a separate district court granting discretionary relief under § 3583(e)(1) was too remote to be a collateral consequence of success in the defendant's habeas proceeding. 676 F.3d at 935.

[3] We also agree with the government that *United States v. Miller*, 891 F.3d 1220 (10th Cir. 2018), does not command a different result. There, citing only *Meyers* and *Rhodes* rather than *Castro-Rocha*, *Montgomery*, or *Westover*, the court found a sentencing appeal moot without acknowledging the defendant's unexpired term of supervised release and without analyzing whether the district court could reduce or eliminate that term on remand. *Miller*, 891 F.3d at 1225, 1242. To the extent that *Miller* is inconsistent with *Castro-Rocha*, *Montgomery*, and *Westover*, "the earlier decision[s] control[]." *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014).

the revocation of his supervised release. A subsection of the supervised-release statute, § 3583(e)(3), enables a court, after finding that the defendant violated the terms of supervised release, to "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." It also sets the maximum term of reimprisonment based on the classification of the crime of conviction. For example, here, Salazar's crime of conviction is a class C felony, so § 3583(e)(3) limits any term of imprisonment imposed after revocation to no more than two years. *See* 18 U.S.C. § 3559(a)(3) (classifying felonies with maximum sentences between ten and 25 years as class C); § 924(a)(2) (establishing ten-year maximum prison sentence for being felon in possession). And Salazar's ten-month prison sentence falls well within the two-year maximum established in § 3583(e)(3).

Nevertheless, on appeal, Salazar argues that the maximum two-year term specified in § 3583(e)(3) is eclipsed by the maximum term of imprisonment for his crime of conviction; in other words, he contends that the original term of imprisonment plus any term of reimprisonment imposed following revocation of supervised release can never exceed the maximum term permitted by the statute of conviction. Thus, he maintains that his ten-month term of imprisonment following the revocation of his supervised release is illegal because—when aggregated with his prior 115-month prison term—it exceeds the 120-month statutory maximum for his crime of conviction.

We rejected this same argument in *Robinson*, 62 F.3d 1282. There, proceeding under § 3583(e), the district court revoked the defendant's supervised release and ordered him to serve one year in prison, even though the defendant had already served the statutory maximum prison sentence for his crime of conviction. *Robinson*, 62 F.3d at 1283–84. On appeal, we rejected the defendant's argument that "because he had served the maximum . . . prison term provided in the statute under which he was convicted, the [district court] had no authority to impose the additional sentence for imprisonment under the supervised[-]release statute." *Id.* at 1283 (citation omitted). Reasoning that "supervised release is a separate part of the original sentence," we held "that § 3583 authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute." *Id.* at 1285–86 (quoting *Purvis*, 940 F.2d at 1279).

Because Salazar seeks relief based on the same argument that we rejected in *Robinson*, he necessarily asks this panel to overrule *Robinson*. *See United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014). Our ability to do so is limited. A three-judge panel may overrule a precedent without en banc consideration in light of a statutory change or intervening Supreme Court precedent. *See id.*; *United States v. Jones*, 818 F.3d 1091, 1100 (10th Cir. 2016). This is true even if the intervening Supreme Court case is not directly on point: "The question . . . is not whether an intervening Supreme Court case is on all fours with our precedent, but rather whether

the subsequent Supreme Court decision contradicts or invalidates our prior analysis." *Brooks*, 751 F.3d at 1209–10 (emphasis omitted); *see also United States v. Bettcher*, 911 F.3d 1040, 1046–47 (10th Cir. 2018) (overruling decision of prior panel where "our reasoning . . . lost viability after" intervening Supreme Court precedent). Thus, we may overrule *Robinson* if subsequent controlling law undermined its reasoning.

Recognizing as much, Salazar asserts that we can and should overrule *Robinson* because of a statutory change in § 3583(e) and several intervening Supreme Court cases: *Johnson v. United States*, 529 U.S. 694 (2000), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Haymond*, 139 S. Ct. 2369 (2019). Our review is de novo. *Brooks*, 751 F.3d at 1209 (noting de novo review over whether to overrule precedent); *United States v. LeCompte*, 800 F.3d 1209, 1215 (10th Cir. 2015) (noting de novo review of "[l]egal questions relating to the revocation of supervised release"). We consider each of Salazar's arguments in turn.

A. The 1994 Amendment to § 3583(e)(3)

Salazar first asserts that the 1994 amendment to § 3583(e)(3) justifies overruling *Robinson*. *See Jones*, 818 F.3d at 1100 ("We may depart from precedent without en banc review when an amendment to an applicable rule or statute creates a new standard."). Before the amendment, § 3583(e)(3) permitted courts to "revoke a term of supervised release[] and require the person to serve in prison *all or part of the term of supervised release*." § 3583(e)(3) (Supp. V 1993) (emphasis added). After the amendment, the statute permitted courts to "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." § 3583(e)(3) (1994) (emphasis added). According to Salazar, this new language "unlink[ed] reimprisonment from the term of supervised release imposed at sentencing" and instead "link[ed] it to the term of supervised release 'authorized by statute for the offense that resulted in the term of supervised release.'" Aplt. Br. 15 (emphasis omitted) (quoting § 3583(e)(3) (1994)); *see also United States v. Lamirand*, 669 F.3d 1091, 1096–97 (10th Cir. 2012) (explaining that 1994 amendment changed "the reference point for determining the maximum post[]revocation terms of imprisonment" from "the originally imposed supervised-released term" to "the statute authorizing supervised-release terms").

But as the government points out, the 1994 amendment preceded *Robinson*, and Salazar's argument—that the amendment undermines *Robinson*'s analysis—is precluded by the language of *Robinson* itself. There, we specifically recognized the statutory amendment and noted that we "s[aw] no substantive difference in the language [of the amended statute] . . . that would impact on the issue submitted." *Robinson*, 62 F.3d at 1284 n.2. Despite *Robinson*'s explicit recognition of the amendment, Salazar argues that the court in *Robinson* nevertheless analyzed the prior version of the statute because the court "omitt[ed] the 'authorized by statute' language" in its subsequent discussion. Rep. Br. 22 (quoting § 3583(e)(3) (1994)). On the contrary, we view the absence of this language as consistent with *Robinson*'s conclusion that the amended language made no substantive difference to its analysis.

Because *Robinson* based its holding on the amended statute, the 1994 amendment provides no basis to overrule *Robinson*. *Cf. Jones*, 818 F.3d at 1100 (departing from precedent based on subsequent statutory amendment).

B. *Johnson*, 529 U.S. 694

Next, Salazar argues that the Supreme Court's decision in *Johnson* undermines our reasoning in *Robinson*. In *Johnson*, the defendant violated the terms of his supervised release, and the district court imposed a term of reimprisonment followed by another term of supervised release. 529 U.S. at 698. The defendant argued that the second term of supervised release violated the Ex Post Facto Clause because he was sentenced for his original crime of conviction before Congress enacted § 3583(h), which provides explicit authority to impose an additional term of supervised release following revocation of the initial term of supervised release and subsequent reimprisonment. *Id.* The Sixth Circuit found that the additional term of supervised release was not ex post facto because "revocation of supervised release was punishment for [the defendant's] violation of the conditions of supervised release, which occurred after" Congress enacted § 3853(h). *Id.* at 698–99.

The Supreme Court affirmed, but for different reasons. *Id.* at 713. In rejecting the Sixth Circuit's rationale, the Court pointed out that treating revocation of supervised release as punishment for the violation of the conditions of supervised release would raise (1) Sixth Amendment issues because the "violative conduct . . . need only be found by a judge under a preponderance of the evidence standard" and (2) Double Jeopardy Clause issues if a defendant's violative conduct results in both

revocation of supervised release and independent criminal prosecution. *Id.* at 700. The Court noted that "[t]reating postrevocation sanctions as part of the penalty for the initial offense . . . (as most courts have done)[] avoids these difficulties." *Id.* And it "therefore attribute[d] postrevocation penalties to the original conviction."[4] *Id.* at 701.

Citing this language, Salazar asserts that "*Johnson* adopted an aggregation approach to imprisonment upon revocation." Aplt. Br. 15. In other words, Salazar argues that under *Johnson*'s "attribut[ion of] postrevocation penalties to the original conviction," 529 U.S. at 701, "a term of imprisonment imposed upon revocation of supervised release aggregates with the term of imprisonment imposed for the offense of conviction" and "[t]his aggregate term can never exceed the statutory maximum term of imprisonment . . . provided for in the statute of conviction," Rep. Br. 9. But nothing in *Johnson* states or even suggests that a term of imprisonment and a term of

[4] The Court further held that because Congress provided no clear intent to apply § 3583(h) retroactively, that subsection did not apply "and the ex post facto question does not arise." *Johnson*, 529 U.S. at 701–02 (italics omitted). Instead, the Court framed the question as "whether § 3583(e)(3)"—rather than subsection (h)—"permitted imposition of supervised release following a recommitment." *Id.* at 702–03. The Court answered this question affirmatively, ruling that despite the absence of an express provision allowing a court to impose a term of supervised release after revoking supervised release and imposing reimprisonment, the district court nevertheless retained such authority. *Id.* at 704, 712–13. In so holding, the Court expressly abrogated *United States v. Rockwell*, 984 F.2d 1112 (10th Cir. 1993). *Johnson*, 529 U.S. at 698 n.2, 712–13; *see also United States v. Garfinkle*, 261 F.3d 1030, 1032 (10th Cir. 2001) (recognizing that *Johnson* overruled *Rockwell*). Salazar cites *Garfinkle* to support his position that *Johnson* undermined *Robinson*, but *Garfinkle* stands only for the unremarkable proposition that the Supreme Court can expressly overrule Tenth Circuit precedent. It does not establish that *Johnson* also undermined *Robinson*.

reimprisonment must be aggregated. Indeed, as the government notes, the Court in *Johnson* pointed out that under § 3583(e)(3), "the gravity of the initial offense determines the maximum term of reimprisonment" without mentioning the maximum term of the statute of conviction. 529 U.S. at 708. Because *Johnson* did not adopt or endorse an aggregation approach, we reject Salazar's argument that *Johnson* undermined the logic of *Robinson*.

Relatedly, Salazar contends that *Robinson* relies on the "now-discredited view"—discredited in *Johnson*, specifically—"that revocation penalties are punishments for violating supervised release." Aplt. Br. 18; *see also United States v. Collins*, 859 F.3d 1207, 1216 (10th Cir. 2017) (noting that "the penalty for violating terms of supervised release 'relate[s] to the original offense'" (alteration in original) (quoting *Johnson*, 529 U.S. at 701)). But Salazar mischaracterizes the relevant statement in *Robinson*. *Robinson* merely stated that "supervised release is a separate part of the original sentence." 62 F.3d at 1286. That concept is distinct from the expressly disapproved proposition that "revocation of supervised release 'imposes punishment'" for violating the conditions of supervised release. *Johnson*, 529 U.S. at 699–700 (quoting *United States v. Page*, 131 F.3d 1173, 1176 (6th Cir. 1997)). Instead, as the government asserts, *Johnson*'s statement that "postrevocation penalties relate to the *original* offense," 529 U.S. at 701 (emphasis added), is compatible with *Robinson*'s statement that "supervised release is a separate part of the *original* sentence," 62 F.3d at 1286 (emphasis added). As such, we reject Salazar's contention that *Robinson* does not survive *Johnson* on this basis.

Our conclusion that *Johnson* did not undermine *Robinson* is further bolstered by several analogous, if not precisely on point, out-of-circuit cases cited by the government. First, in *United States v. Cenna*, 448 F.3d 1279 (11th Cir. 2006), the Eleventh Circuit upheld the defendant's sentence of the statutory maximum sentence plus a term of supervised release. *Cenna*, 448 F.3d at 1280. In doing so, it explicitly rejected the defendant's *Johnson*-based argument that her sentence violated the statutory maximum sentence for her crime of conviction "because any imprisonment given for violating supervised release would result in a greater period of incarceration than permitted by the statute of conviction." *Id.* The court pointed out that "the settled law pre-*Johnson* was that a court may impose the maximum term of imprisonment under the statute of conviction and a term of supervised release, *because supervised release is an independent part of a defendant's sentence*." *Id.* (emphasis added). And in declining to alter this settled law, the court noted that the defendant had "not pointed to any case from any circuit that supports [the] argument that the reasoning in *Johnson* mandates a finding that her sentence is illegal."[5] *Id.* at 1281. Although *Cenna* involved a direct appeal from a defendant's original sentence and not reimprisonment following the revocation of supervised release, its rationale applies equally here.

[5] Salazar contends that this statement is dictum. But the determination that the sentence was not illegal was necessary to affirm the defendant's sentence, so it was not dictum. *See Tuttle v. United States (In re Tuttle)*, 291 F.3d 1238, 1242 (10th Cir. 2002) (explaining that dicta are statements "not necessarily involved nor essential to determination of the case" (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995))).

Notably, *Cenna* relied in part on *United States v. Wirth*, 250 F.3d 165 (2d Cir. 2001). *See id.* There, the Second Circuit concluded that "[n]othing in the *Johnson* Court's retroactiv[ity] discussion compels us to depart from the well-settled rule that punishment for a violation of supervised release, when combined with punishment for the original offense, may exceed the statutory maximum for the underlying substantive offense." *Wirth*, 250 F.3d at 170 n.3. Salazar points out that this statement was dictum because the holding in *Wirth* turned on the district court's prior error in modifying rather than terminating the defendant's term of supervised release. *See id.* at 167. Although we don't disagree with Salazar's characterization of *Wirth*'s footnote as dictum, the footnote nevertheless supports our reading of *Johnson*.[6]

Additionally, we note that the Third Circuit—albeit in an unpublished decision—recently affirmed a defendant's postrevocation prison sentence even though his aggregate prison terms exceeded the statutory maximum for his crime of conviction. *See United States v. Cook*, 775 F. App'x 44, 48–49 (3d Cir. 2019) (unpublished). In rejecting the defendant's *Johnson*-based aggregation argument, the

[6] The government also cites *United States v. Work*, 409 F.3d 484 (1st Cir. 2005). There, the First Circuit rejected the defendant's argument that when a revocation of supervised release "leads to additional imprisonment above and beyond the top of the original [United States Sentencing G]uideline[s] . . . range, the facts underlying the revocation must be proven to a jury beyond a reasonable doubt." *Work*, 409 F.3d at 486. In so doing, the court explained that "a federal criminal sentence [need not] be aggregated for all purposes" because a "sentence contains distinct aspects." *Id.* at 489. Although *Work* was issued after *Johnson*, its rationale is consistent with *Robinson*. But because *Work* did not consider *Johnson*, it offers little guidance on the question we face here—whether *Johnson* contradicts or invalidates our analysis in *Robinson*.

Cook court explained that, under *Johnson*, "[s]upervised release, and penalties for violating its terms, are attributable to the original offense." *Id.* at 47–48. But the court added that "it does not follow that the term of supervised release (or imprisonment for violating its terms) is limited by the original offense's maximum sentence. While supervised release attaches to the original conviction, a separate statute governs its mechanics and outlines penalties that may result when its conditions are violated." *Id.* at 47. Thus, "because § 3583(e)(3)—rather than the underlying statute [for the crime of conviction]—provides the relevant limitation on revocation imprisonment, a defendant who has served the statutory maximum sentence may face additional imprisonment for violating the terms of supervised release." *Id.* at 49.

These out-of-circuit cases consistently support our conclusion here: that *Johnson* is limited to its circumstances and does not disturb *Robinson*'s holding that a prison sentence following the revocation of supervised release, when combined with the prison term for the crime of conviction, may exceed the statutory maximum prison sentence for the crime of conviction.

C. *Apprendi*, 530 U.S. 466, and *Haymond*, 139 S. Ct. 2369

Next, Salazar argues that *Robinson* is no longer good law after *Apprendi* and *Haymond*. Because his arguments based on these two cases overlap, we begin by summarizing the cases before turning to Salazar's arguments.

In *Apprendi*, the Supreme 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." 530 U.S. at 490. The Supreme Court later extended this reasoning to any fact that increases a statutory minimum sentence. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013).

In *Haymond*, the Supreme Court wrestled with the impact of *Apprendi* and *Alleyne* on a portion of the supervised-release statute, § 3583(k). *See* 139 S. Ct. at 2378–79 (plurality opinion); *id.* at 2385–86 (Breyer, J., concurring); *id.* at 2386–87 (Alito, J., dissenting). Section 3583(k) provides that if "a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses," then "the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction." *Id.* at 2374 (plurality opinion). The *Haymond* plurality accordingly reasoned that § 3583(k) violated *Alleyne*, explaining that "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Id.* at 2379 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

Justice Breyer authored a short concurrence. *Id.* at 2385. Because he shared the dissent's concern about the "potentially destabilizing consequences" of "transplant[ing] the *Apprendi* line of cases to the supervised-release context," he declined to expressly rely on *Alleyne*. *Id.* Nevertheless, he agreed with the plurality

that § 3583(k) was unconstitutional, concluding that the provision was "less like ordinary revocation and more like punishment for a new offense." *Id.* at 2386.

Salazar first argues that *Apprendi* undermines *Robinson*. According to Salazar, *Apprendi* forbids an increase in a statutory maximum sentence based on judge-found facts, and *Robinson* permits just that: a prison sentence that exceeds the statutory maximum for the offense of conviction based on judge-found facts at a revocation hearing. But the government rightly contends that binding circuit precedent forecloses Salazar's argument. In particular, it points out that in *United States v. Cordova*, 461 F.3d 1184 (10th Cir. 2006), this court explicitly held that *Apprendi* does not impact § 3583(e)'s application. In *Cordova*, we explained that "[i]t is well-settled that supervised release is 'part of the penalty for the initial offense' and that 'once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence [have not been] subject to Sixth Amendment protections.'" *Cordova*, 461 F.3d at 1186 (second alteration in original) (citation omitted) (first quoting *Johnson*, 529 U.S. at 700; and then quoting *Work*, 409 F.3d at 491); *see also United States v. McIntosh*, 630 F.3d 699, 702–03 (7th Cir. 2011) (stating that "*Apprendi* does not apply to a sentence imposed under § 3583 following the revocation of a supervised release"; rejecting argument that Seventh Circuit's equivalent to *Robinson* was "no longer controlling because it was decided before *Apprendi*'s release").

Salazar distinguishes *Cordova* on the basis that it did not involve a term of reimprisonment that, when combined with the initial term of imprisonment, would

exceed the statutory minimum for the crime of conviction. And he relies on *Haymond* to assert that *Cordova* cannot stand for the broad principle that *Apprendi* has no role to play in revocation hearings. Yet *Haymond* doesn't offer Salazar the relief he seeks from *Cordova*'s holding.

The plurality in *Haymond* did rely on *Alleyne*, which is part of the *Apprendi* line of cases, to conclude that § 3583(k) was unconstitutional. 139 S. Ct. at 2378–79. But Justice Breyer's concurrence refused to go so far; he agreed that § 3583(k) was unconstitutional, but he "would not transplant the *Apprendi* line of cases to the supervised-release context." *Id.* at 2385–86. And Justice Breyer's concurrence—the narrowest ground supporting the judgment—represents the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that narrowest ground supporting judgment provides controlling rule); *Haymond*, 139 S. Ct. at 2386 (Alito, J., dissenting) (stating that Justice Breyer's concurrence contains "today's holding"); *United States v. Watters*, 947 F.3d 493, 497 (8th Cir. 2020) ("Justice Breyer's opinion is the narrower opinion[] and therefore controls."); *United States v. Ewing*, 829 F. App'x 325, 329 (10th Cir. 2020) (unpublished) (noting "that Justice Breyer's opinion controls").

Moreover, even the plurality in *Haymond* explicitly disclaimed any ruling as to *Apprendi*'s impact on § 3583(e): "[W]e do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*." *Id.* at 2382 n.7; *see also id.* at 2383–84

(emphasizing that its "decision [was] limited to § 3583(k)").[7] Thus, even if the plurality provided the controlling rule, Salazar's argument would fail.

Other circuits have also rejected the argument that *Haymond* undermines prior holdings that *Apprendi* has no role to play in supervised-release proceedings. *See United States v. Coston*, 964 F.3d 289, 296 (4th Cir. 2020) ("[G]iven that no majority of the Supreme Court endorsed the application of *Alleyne* in the supervised[-]release context, we remain bound by this [c]ourt's prior decision that it does not."), *cert. denied*, 2021 WL 161125 (Jan. 19, 2021); *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020) ("*Haymond* did not undermine our clear precedent on the constitutionality of § 3583(e)(3)."); *United States v. Eagle Chasing*, 965 F.3d 647, 650–51 (8th Cir.) (concluding that *Haymond* did not undermine prior precedent holding *Apprendi* inapplicable to revocation proceedings), *cert. denied*, 141 S. Ct. 575 (2020); *United States v. Cameron*, 808 F. App'x 1020, 1021 (11th Cir.) (unpublished) (same), *cert. denied*, 2020 WL 7132576 (Dec. 7, 2020).

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[7] The plurality did speculate that "§ 3583(e)(3) [*could*] *turn*[] *out to* raise Sixth Amendment issues in a small set of cases" where "combining a defendant's initial and post[]revocation sentences issued under § 3583(e) will . . . yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction." *Haymond*, 139 S. Ct. at 2384 (emphasis added). Salazar's case, of course, is one such case. Justice Alito suggested in his dissent in *Haymond* that the plurality's contemplative comments regarding § 3583(e) may have been "carefully crafted" to lay the groundwork for a later decision "much broader [in] scope." 139 S. Ct. at 2386 (emphasis omitted). That may well be. But in light of the plurality's explicit language limiting its decision to § 3583(k) and refusing to consider § 3583(e)'s consistency with *Apprendi*, this statement does not undermine our holding in *Robinson*. 139 S. Ct. at 2382 n.7, 2383. Moreover, Justice Breyer's controlling concurrence stepped back even further, refusing to join the plurality's reliance on *Alleyne*. *See id.* at 2385–86.

Moreover, they have even done so in the same factual circumstances presented here, where a defendant's aggregate time in prison exceeded the statutory maximum for the crime of conviction. *See United States v. Seighman*, 966 F.3d 237, 244–45 (3d Cir. 2020) (explaining that "Justice Breyer's refusal to 'transplant the *Apprendi* line of cases to the supervised-release context' forecloses" *Apprendi*-based aggregation argument; noting that "Justice Breyer's opinion is consistent with our own precedent, where we have rejected" aggregation arguments (quoting *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring))); *United States v. Patterson*, 829 F. App'x 917, 918, 920–21 (11th Cir. 2020) (unpublished) (concluding that *Haymond* did not undermine precedent holding *Apprendi* inapplicable to supervised-release proceedings, even where defendant's total imprisonment exceeded statutory maximum for crime of conviction). We have held the same, albeit in an unpublished decision. *Ewing*, 829 F. App'x at 329–30 (noting that defendant failed to "present[] any binding authority holding that *Apprendi* applies to revocation proceedings even when, as here, the initial and post[]revocation sentences add up to a term that exceeds the statutory maximum term for the crime of conviction"). Thus, *Haymond*'s limited ruling about "an unusual provision" of the supervised-release statute does not impact our prior holding in *Cordova* that *Apprendi* does not apply to standard revocation proceedings under § 3583(e)—even when a defendant's aggregate time in prison exceeds the

statutory maximum sentence for the crime of conviction. 139 S. Ct. at 2383 (plurality opinion).[8]

In sum, contrary to Salazar's arguments, neither *Apprendi* nor *Haymond* represent intervening authority that undermines *Robinson*. *Robinson* opined that "supervised release is *a separate part* of the original sentence." 62 F.3d at 1286 (emphasis added). And the *Haymond* plurality similarly explained that the "defendant receives a term of supervised release thanks to [the] initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for [the] crime." 139 S. Ct. at 2380. The differing result in *Haymond* arose because the provision at issue there was *not* part of the final sentence for the initial crime. *See id.* But the provision at issue here, § 3583(e)(3), ties the term of reimprisonment to the crime of conviction, and therefore the ranges for each part of a sentence—the initial sentence, supervised release, and any reimprisonment if that release is violated—are all fixed by the jury's initial determination. As such, findings at a revocation hearing

[8] Salazar's citation to *United States v. Rodriguez*, 945 F.3d 1245 (10th Cir. 2019), does not alter our conclusion. There, we noted that "[t]he right to a jury trial does not apply in a supervised[-]release revocation hearing where the maximum sentence 'could not exceed the remaining balance of the term of imprisonment already authorized by the [original conviction].'" *Rodriguez*, 945 F.3d at 1250 n.5 (second alteration in original) (quoting *Haymond*, 139 S. Ct. at 2377). Not only was this statement dictum, and thus not controlling, but *Rodriguez* quoted *Haymond* out of context. In the relevant passage, the Court merely explained why parole and probation proceedings historically did not implicate the Fifth or Sixth Amendments: "[T]he prison sentence a judge or parole board could impose for a parole or probation violation normally could not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict." 139 S. Ct. at 2377. Thus, *Rodriguez* does not assist Salazar's argument here.

do not "increase[] the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Thus, neither *Apprendi* nor *Haymond* disturb our holding in *Robinson* that § 3583(e)(3) authorizes the revocation of a defendant's supervised release and reimprisonment even if the resulting incarceration, when combined with the time the defendant already served in prison for his substantive offense, exceeds the statutory maximum term of imprisonment for the substantive offense.[9]

Conclusion

Because *Robinson* remains controlling precedent, the district court did not err in imposing a ten-month prison sentence after revoking Salazar's term of supervised release, even though his aggregate time in prison—125 months—exceeded the 120-month statutory maximum for his original crime of conviction.

Affirmed.

[9] We note that the government argues that "[e]ven if this [c]ourt were writing on a blank slate and were free to reconsider its precedent, *Apprendi* does not place into doubt the legality of the [ten]-month postrevocation penalty the district court imposed here." Aplee. Br. 44. Because we have concluded that we are not "writing on a blank slate," we will not speculate as to whether, if we were free to reconsider *Robinson*, we would arrive at the same conclusion.

our memorandum that was filed last week, Your Honor. Happy to answer any questions the court may have.

THE COURT: Anything else?

MR. BURDICK: No, Judge.

THE COURT: Give me a moment please. We're back on the record. Mr. Salazar, did you kind of understand what was taking place? It's a legal issue that Mr. Burdick has presented on your behalf in regards to your sentence. So, it's -- it's significant, because if the court goes along with what you're arguing, then it would find that the most you could be sentenced to would be that five months. Again, if the court doesn't, then you could be sentenced up to 24 months. So, I wanted to make sure I took time to go over this before I make our -- my -- my ruling. So, I all ready had the benefit of going over what was filed. This morning, Mr. Burdick further adds to his argument by asking this court to consider another Supreme Court case that is presently pending. It has almost very similar issues, and he also made some further argument in regards to what he believes, again, is support for his position on your behalf. So, I heard that, and then I heard the government disagree with that. So, I wanted to take some time to go over that. So, I'm going to address the legal issue first. And in regards to the legal issue, for the record, again, the court is being asked by defendant to impose a term of imprisonment not more than five months, which is the amount

remaining on the maximum sentence of defendant's underlying conviction. Again, defendant argues that the Supreme Court's recent opinion in United States versus Haymond, as well as the other legal arguments, including what was offered this morning requires this reduced maximum sentence. The government asks the court to impose a term of imprisonment of not more than 24 months, and that's the maximum allowed in this case under 18 USC Section 3583 E 3, and the government asks this court to view Haymond differently than defendant, and argues that the ruling in Haymond does not apply to the section that controls defendant's sentence. The court has reviewed the Supreme Court's opinion in Haymond, as well as multiple circuit opinions that have previously addressed this issue, and specifically, the First, Third, Seventh and Ninth Circuits, as well as the Tenth Circuit, and in regards to that, let me try to address it for the following on the record, and again, this would be the court's interpretation of the constitutional law issues that may be involved with this ruling, and in that regard, court's being asked to follow Justice Breyer's concurrence, and find that his concerns controls Haymond's application. As counsel knows, that was a plurality opinion, and in regards to that, the court in regards to its interpretation, application of constitutional law not only looked at the plurality, but also the dissent, and found again, if there is an opinion or a ruling the court can apply in this

case based on that in regards to the position of defendant this morning, the court would agree with defendant's counsel that not all of Breyer's concurrence controls. The court does understand what the Marks case held, and the court would find that as the court reads Marks, it does agree on that point or argument from defendant that only the narrowest part of concurrence combines with the plurality. To the extent that defendant believes that the plurality controls beyond striking that one position as unconstitutional, the court, again, upon review, would respectfully disagree. Court believes that Breyer -- Justice Breyer and the four-justices in dissent rejected exactly the theory defense counsel on behalf of defendant is advancing. With that, the court is going to find that Justice Breyer's concurrence controls Haymond's application, and again, Justice Breyer's concurrence rejects defendant's arguments. The court would find as a result, it would have the discretion to impose a sentence of up to the 24 months. Anything else from defendant regarding either the finding or the court's proposed findings of fact and tentative sentence. Mr. Burdick?

MR. BURDICK: Judge, I think, obviously, we disagree with the court's findings based on our previous argument and sentencing memorandum, but will wait, I think, for the court to announce its sentence before making any further record with regard to our objections and the constitutional issues.

AO 245B (Rev. 03/2007) - Judgment in a Criminal Case

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
SHAUN J. SALAZAR

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:08CR20084-001

USM Number: 11905-031

Defendant's Attorney Ronald E. Wurtz

THE DEFENDANT:

[x] pleaded guilty to count(s): 1 of the Indictment .
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	January 19, 2008	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

January 3, 2011
Date of Imposition of Judgment

s/ Monti L. Belot
Signature of Judge

Honorable Monti L. Belot, Senior U. S. District Judge
Name & Title of Judge

January 3, 2011
Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case---Imprisonment

DEFENDANT: SHAUN J. SALAZAR
CASE NUMBER: 2:08CR20084-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 115 months .

Count 1: 115 months.

[x] The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be allowed to participate in the 500 hour intensive drug treatment program, if eligible.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before _ on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years .

Count 1: 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

[x] The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

[ ] The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. (Check if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check if applicable)

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing, outpatient and/or residential treatment, and share in the costs, based on the ability to pay. The defendant shall abstain from the use of alcohol and other intoxicants during said treatment program as directed by the Probation Office.

2. The defendant shall participate in an approved program for mental health treatment, which may include psychological counseling and prescribed medication. The defendant shall share in the costs, based on the ability to pay, at the direction of the U.S. Probation Officer.

3. The defendant/offender shall participate in any Curfew Program established by the United States Probation Office during the term of supervision. During this time, you will remain at your place of residence except for employment and other activities approved in advance by the United States Probation Office. As instructed by the United States Probation Office, you may be required to maintain a telephone at your place of residence without "call forwarding", modem, "caller I.D.", "call waiting", portable cordless telephones, answering machines/service, or any other feature or service which would interfere with the operation of electrical monitoring equipment for the above period. You may be required to wear an electronic monitoring device, which may include Global Positioning System and/or Random Tracking, and follow electronic monitoring procedures specified by the United States Probation Office. Additionally, the U.S. Pretrial & Probation Officer may restrict you from certain areas within the community, and you will comply with this restriction. You shall assist in the costs of home confinement, based on the ability to pay, at the direction of the probation officer.

4. During the course of supervision, the defendant shall make regular monthly child support payments in accordance with any payment plan established by state authorities.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 100	$ -0-	$ -0-

[ ] The determination of restitution is deferred until _. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _	$ _	

[ ] Restitution amount ordered pursuant to plea agreement $ _

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than ____, or

[ ] in accordance with ( ) C, ( ) D, ( ) E, or ( ) F below; or

B [x] Payment to begin immediately (may be combined with ( ) C, ( ) D, or (x) F below); or

C [ ] Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years to commence __ days after the date of this judgment; or

D [ ] Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years, to commence __ days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within _ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Shaun J Salazar

JUDGMENT IN A CRIMINAL CASE
(For **Revocation** of Probation or Supervised Release)

Case Number: 2:08CR20084 - 001
USM Number: 11905-031
Defendant's Attorney: Tim Burdick

THE DEFENDANT:

☐ admitted guilt to violation of condition(s) ___ of the term of supervision.
☒ was found in violation of condition(s) standard and mandatory after denial of guilt.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Violation Ended
1	New Law Violation	06/10/19
2	Association with Persons Convicted of a Felony	06/10/19

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) ___ and is discharged as to such violation(s) condition.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Last Four Digits of Defendant's Soc. Sec. No.: 5702

Defendant's Year of Birth: 1979

City and State of Defendant's Residence:
Leavenworth, KS

09/23/2019
Date of Imposition of Judgment

/s/ Carlos Murguia
Signature of Judge

Honorable Carlos Murguia, U.S. District Judge
Name & Title of Judge

9/26/2019
Date

DEFENDANT: Shaun J Salazar
CASE NUMBER: 2:08CR20084 - 001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 10 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ___ on ___.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Shaun J Salazar
CASE NUMBER: 2:08CR20084 - 001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 1 year.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended based on the court's determination that you pose a low risk of future substance abuse. *(Check if applicable.)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Shaun J Salazar
CASE NUMBER: 2:08CR20084 - 001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).

11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining court approval, require you to notify the person about the risk and you must comply with that instruction.

13) You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Shaun J Salazar
CASE NUMBER: 2:08CR20084 - 001

SPECIAL CONDITIONS OF SUPERVISION

1. During the course of supervision, you must make regular monthly child support payments in accordance with any payment plan established by state authorities.

2. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing and/or outpatient treatment, and share in the costs based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

3. You must participate as directed in a cognitive behavioral program, which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost of any program, to the extent you are financially able to do so, as determined by the U.S. Probation Officer.

4. You must participate in an approved program for mental health treatment, and follow the rules and regulations of that program, which may include psychological counseling. If mental health medication is deemed appropriate by mental health staff or your treating physician, you must take prescribed medication as directed, and you must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.

5. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

FILED
United States Court of Appeals
Tenth Circuit

April 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH M. UMAN,

Defendant - Appellant.

No. 20-3004
(D.C. No. 2:06-CR-20122-KHV-JPO-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.**

This matter is before the court on the "Joint Motion for Summary Disposition/Affirmance." The parties jointly move for summary affirmance of the district court's judgment based on this court's recent published decision in United States v. Salazar, 987 F.3d 1248 (10th Cir. 2021), *en banc reh'g denied* Apr. 12, 2021. The parties acknowledge that this court's decision in Salazar resolves Defendant-Appellant Uman's appeal in the government's favor, but the parties note

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** Because this matter is being decided on a joint motion for summary affirmance, the panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

that Mr. Uman preserves the issue on appeal for review in the United States Supreme Court.

Accordingly, the joint motion for summary affirmance is GRANTED. Based on this court's decision in Salazar, the judgment of the district court is AFFIRMED.

The Clerk is directed to issue the mandate forthwith.

Entered for the Court

Per Curiam

reasons set forth in paragraph 28, which is a Grade B violation, and the various crimes that are encompassed within paragraph 32, which would be a Grade A violation.

So we would be looking at a situation where the highest grade of violation is A, and the criminal history category is six for a custody range of 31 to 41 month -- 33 to 41 months under the nonbinding Chapter 7 policy statements.

I'm also prepared to disregard what's in paragraph 33, so that would be moot as far as sentencing today is concerned.

So are you ready to go forward?

MS. RAMSEY: Yes, Your Honor, based on the Court's announcement, I believe we can go forward. I think the only thing left prior to the Court pronouncing its sentence is to address defendant's sentencing memorandum, which is Document 119 filed back on October regarding the application of *Johnson*, *Apprendi*, and *Hayman* to this particular case. We'd ask for the Court's ruling on that.

We, at the end, believe, based on our arguments in that document and sentencing memorandum, that this Court should either sentence -- should continue Mr. Uman on supervised release or terminate his supervised release and anything more would violate the Fifth and Sixth Amendments of the United States Constitution. So I think that is the only issue left for the Court.

THE COURT: I have reviewed your sentencing

memorandum, and I have previously rejected this exact challenge to the constitutionality of Section 3583(e)(3) based on the reasoning in *Hayman*. That decision was just four days before you filed your sentencing memo, and so I'm not expecting that you would have been aware of that at the time.

But I'm also taking into account the Tenth Circuit decision in *United States v. Cordova*, 461 F.3d 1184 (10th Cir. 2006). I don't see anything in your memorandum which changes my view on this issue, and I've checked to see what other circuits are doing, and I don't see that any of them have concluded that *Hayman* would find a basis to challenge the constitutionality of Section 3583(e)(3) in the context of this case.

So I think we are ready to go forward with sentencing. And would you come forward with your client, please?

As I understand it, the applicable range cannot exceed 24 months here because that's the sentence which is authorized by statute.

So where -- what do you think we should do at this point?

MS. RAMSEY: Your Honor, we can -- cannot deviate from our request under *Hayman* at this point. So we do still assert to the Court that we believe that the Court -- the only thing the Court can do in this particular circumstance is to either continue him on supervised release or to terminate his

AO 245B (Rev. 03/2007) - Judgment in a Criminal Case

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
JOSEPH M. UMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:06CR20122-001-KHV

USM Number: 11634-031

Defendant's Attorney Jay D. DeHardt

THE DEFENDANT:

[x] pleaded guilty to count: 2 of the 2-Count Indictment .
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(j) and 924(a)(2)	Possession Of A Stolen Firearm, a Class D felony	04/12/2006	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___.

[x] Count 1 of the 2-Count Indictment is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

December 28, 2009
Date of Imposition of Judgment

s/ Kathryn H. Vratil
Signature of Judge

Honorable Kathryn H. Vratil, Chief U. S. District Judge
Name & Title of Judge

December 29, 2009
Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case---Imprisonment

DEFENDANT: JOSEPH M. UMAN
CASE NUMBER: 2:06CR20122-001-KHV

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months .

[x] The Court makes the following recommendations to the Bureau of Prisons: The court recommends designation to a facility in Leavenworth, KS, or Terre Haute, IN, in order to facilitate family visits.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ on ___.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before _ on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

[x] The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

[ ] The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. (Check if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check if applicable)

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or other dangerous weapon.

2. The defendant shall successfully participate in an approved program for substance abuse, which may include drug/alcohol testing, counseling and inpatient treatment, and share in the costs, based on the ability to pay. The defendant shall abstain from the use of alcohol during the term of supervision.

3. The defendant shall successfully participate in an approved program for mental health, which may include psychological counseling, and share in the costs, based on the ability to pay.

DEFENDANT: JOSEPH M. UMAN
CASE NUMBER: 2:06CR20122-001-KHV

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$ 0	$ 0

[ ] The determination of restitution is deferred until _. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals:	$ _	$ _	

[ ] Restitution amount ordered pursuant to plea agreement $ _

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev.06/05) Judgment in a Criminal Case---Criminal Monetary Penalties

DEFENDANT: JOSEPH M. UMAN
CASE NUMBER: 2:06CR20122-001-KHV

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than ____, or

[ ] in accordance with ( ) C, ( ) D, ( ) E, or ( ) F below; or

B [x] Payment to begin immediately (may be combined with ( ) C, ( ) D, or (x) F below); or

C [ ] Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years to commence __ days after the date of this judgment; or

D [ ] Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years, to commence __ days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within _ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Joseph M. Uman

JUDGMENT IN A CRIMINAL CASE
(For **Revocation** of Probation or Supervised Release)

Case Number: 2:06CR20122 - 001
USM Number: 11634-031
Defendant's Attorney: Chekasha Ramsey

THE DEFENDANT:

☒ admitted guilt to violation of condition(s) standard and mandatory of the term of supervision.
☐ was found in violation of condition(s) ___ after denial of guilt.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Violation Ended
1	**Standard Condition #7:** Use of Methamphetamine	03/25/2019
2	**Mandatory Condition:** New Law Violation	04/23/2019

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) ___ and is discharged as to such violation(s) condition.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Last Four Digits of Defendant's Soc. Sec. No.: 7750

Defendant's Year of Birth: 1981

City and State of Defendant's Residence:
Independence, MO

01/13/2020
Date of Imposition of Judgment

s/ Kathryn H. Vratil
Signature of Judge

Honorable Kathryn H. Vratil, U.S. District Judge
Name & Title of Judge

1/16/2020
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ___ on ___.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 1 year.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended based on the court's determination that you pose a low risk of future substance abuse. *(Check if applicable.)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).

11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining court approval, require you to notify the person about the risk and you must comply with that instruction.

13) You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You shall be placed on curfew for a period of 120 days, to commence within 10 business days. During this time, you are restricted to your residence as directed by the U.S. Probation Officer. You may be required to wear a location monitoring device, which may include Radio Frequency, Global Positioning System and/or Random Tracking at the discretion of the probation officer, and you shall abide by all technology requirements. You must follow all location monitoring procedures specified by the probation officer, and you must contribute toward the cost, to the extent you are financially able to do so, as directed by the court and/or probation officer.

2. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing and/or outpatient treatment, and share in the costs based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

3. You must not be a member of any street or prison gang, participate in any gang-related activities, or knowingly associate with any gang members during the term of supervision, without first gaining permission of the probation officer.

4. You must participate as directed in a cognitive behavioral program, which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost of any program, to the extent you are financially able to do so, as determined by the U.S. Probation Officer.

5. You must participate in an approved program for mental health treatment, and follow the rules and regulations of that program, which may include psychological counseling. If mental health medication is deemed appropriate by mental health staff or your treating physician, you must take prescribed medication as directed, and you must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.

6. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

FILED
United States Court of Appeals
Tenth Circuit

April 12, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAUN J. SALAZAR,

Defendant - Appellant.

No. 19-3217
(D.C. No. 2:08-CR-20084-CM-1)
(D. Kan.)

ORDER

Before **HOLMES**, **SEYMOUR**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

18 U.S.C.A. § 3583

§ 3583. Inclusion of a term of supervised release after imprisonment

Effective: December 16, 2016
Currentness

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider 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).

(d) Conditions of supervised release.--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required

to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(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.

(f) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.--When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates.--Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(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.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1999; amended Pub.L. 99-570, Title I, § 1006(a)(1) to (3), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-646, § 14(a), Nov. 10, 1986, 100 Stat. 3594; Pub.L. 100-182, §§ 8, 9, 12, 25, Dec. 7, 1987, 101 Stat. 1267, 1268, 1272; Pub.L. 100-690, Title VII, §§ 7108, 7303(b), 7305(b), Nov. 18, 1988, 102 Stat. 4418, 4464, 4465; Pub.L. 101-647, Title XXXV, § 3589, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title II, § 20414(c), Title XI, § 110505, Title XXXII, § 320921(c), Sept. 13, 1994, 108 Stat. 1831, 2016, 2130; Pub.L. 105-119, Title I, § 115(a)(8)(B)(iv), Nov. 26, 1997, 111 Stat. 2466; Pub.L. 106-546, § 7(b), Dec. 19, 2000, 114 Stat. 2734; Pub.L. 107-56, Title VIII, § 812, Oct. 26, 2001, 115 Stat. 382; Pub.L. 107-273, Div. B, Title II, § 2103(b), Title III, § 3007, Nov. 2, 2002, 116 Stat. 1793, 1806; Pub.L. 108-21, Title I, § 101, Apr. 30, 2003, 117 Stat. 651; Pub.L. 109-177, Title II, § 212, Mar. 9, 2006, 120 Stat. 230; Pub.L. 109-248, Title I, § 141(e), Title II, § 210(b), July 27, 2006, 120 Stat. 603, 615; Pub.L. 110-406, § 14(b), Oct. 13, 2008, 122 Stat. 4294; Pub.L. 114-22, Title I, § 114(d), May 29, 2015, 129 Stat. 242; Pub.L. 114-324, § 2(a), Dec. 16, 2016, 130 Stat. 1948.)

VALIDITY

<The United States Supreme Court in United States v. Haymond, (U.S. 2019) 139 S. Ct. 2369, 204 L.Ed. 2d 897, held that as applied, subsection (k) of this section governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, rather than beyond a reasonable doubt, violated the Due Process Clause and the Sixth Amendment right to jury trial.>

Notes of Decisions (1051)

18 U.S.C.A. § 3583, 18 USCA § 3583
Current through PL 117-15 with the exception of PL 116-283, Div. A, Title XVIII.

End of Document