No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

PATRICK LAWRENCE HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

Whether Henderson's revocation sentence violates *Apprendi* and its progeny because he has been forced to serve a sentence beyond the statutory maximum provided for his offense of conviction without being afforded the right to a jury that would determine whether his violations have been proven beyond a reasonable doubt.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Other

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Petitioner, Patrick Lawrence Henderson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

The opinion of the Ninth Circuit is published at *United States v. Henderson*, 998 F.3d 1071 (9th Cir. 2021). It is included in the appendix. (App., infra, 1a-18a). The Ninth Circuit's order denying rehearing is also included in the appendix. (App., infra, 1b).

Jurisdiction and Timeliness of Petition

The opinion of the court of appeals was filed on June 3, 2021. (App., infra, 1a-18a). After being granted an extension of time, Petitioner filed a petition for rehearing/rehearing *en banc*,

which was denied on August 10, 2021. (App., infra, 1b). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Fifth and Sixth Amendments to the United States Constitution provide, in pertinent part, as follows:

> **Fifth Amendment** – No person shall be . . . deprived of life, liberty, or property, without due process of law . . .
>
> **Sixth Amendment** – 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 . . .
>
> **18 U.S.C. § 3583(e)(3)** – [A court] may . . . 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 post-release supervision, if the court . . . 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 five years in prison if the offense that resulted in the term of supervised release is a class A felony, more than three years in prison if such offense is a class B felony, more than two years in prison if such offense is a class C or D felony, or more than one year in any other case.

Preliminary Statement

This case presents an issue of exceptional importance – whether, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, a defendant, who has violated the terms of his supervised release, can be sentenced to a term of imprisonment that, when combined with his original sentence, exceeds the statutory maximum authorized for his underlying conviction, when the defendant has not been afforded the right to a jury or the right to have the violations proven beyond a reasonable doubt.

In *Apprendi*, this Court held that "[o]ther than the fact of conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Thirteen years later, the Court extended the rule announced in *Apprendi* to any fact that increases a statutory minimum sentence. *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

More recently, the Court struggled with the impact of *Apprendi* and *Alleyne* on 18 U.S.C. § 3583(k), which provides special rules for defendants convicted of a sex offense. *See, United States v. Haymond*, 139 S.Ct. 2369, 2375-79 (2019)(plurality); *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). Justice Gorsuch, writing for the plurality, found that § 3583(k) violated *Alleyne* because "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 concurrence. *Haymond*, 139 S.Ct. at 2385. Echoing 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.* But, he agreed with the plurality's conclusion that §3583(k) is unconstitutional based on his belief that the provision was "less like ordinary revocation and more like punishment for a new offense." *Id.* at 2386.

In this case, the Petitioner, Patrick Henderson, was convicted of being a felon in possession of a firearm – an offense that carries a statutory maximum sentence of 120 months imprisonment – and was sentenced to a term of 117 months. After he served his 117 month sentence, he violated the terms of his supervised released and was sentenced to serve an additional fifteen months imprisonment. He objected to the fifteen month sentence on the grounds that it violated *Apprendi* and its progeny because he was forced to serve a sentence beyond the statutory maximum provided for his offense of conviction without being afforded the right to a jury or the right to have his violations proven beyond a reasonable doubt. The district court overruled his objection and he appealed. *United States v. Henderson*, 998 F.3d 1071, 1072-73 (9th Cir. 2021).

Two members of the panel hearing Henderson's appeal voted to affirm the district court. The third member dissented. The majority affirmed because, in its view, it was bound by the Ninth Circuit's decision in *United States v. Purvis*, 940 F.2d 1276 (9th Cir. 1991), a case that preceded *Apprendi* by almost ten years.

Because the majority opinion wrongly resolved an issue of exceptional importance, rehearing is warranted and should be granted.

Statement of the Case

A. Proceedings in District Court

In January of 2010, the Appellant, Patrick Lawrence Henderson, was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and was sentenced to a term of 117 months imprisonment, just three months shy of the statutory maximum. *See*, 18 U.S.C. § 924(a)(2). Ten months after Henderson was released from prison, he violated the terms of his supervised release in three respects: (1) he failed to appear for drug testing; (2) he failed to appear

for a mental health assessment as directed by his probation officer; and (3) he pled guilty to several crimes in state court. *Henderson*, 998 F.3d at 1073.

As a result of these violations, the United States Probation Office filed a petition seeking revocation of his supervised release. At his revocation hearing, the district court advised Henderson that he was entitled to contest the allegations in the petition and, if he chose to do so, he would be entitled to a hearing before the judge at which the Government would have to prove the alleged violations by a preponderance of the evidence. Henderson agreed to give up those rights and admit the violations. *Henderson*, 998 F.3d at 1079 (Rakoff, J. dissenting).

Before the court imposed sentence, Henderson argued that he could not be sentenced to any more than three months imprisonment. A sentence of more than three months would require him to serve a total aggregated term of imprisonment that exceeds the 120 month maximum set for his offense of conviction. He maintained that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, specifically *United States v. Haymond*, 139 S.Ct. 2369 (2019), he could not be sentenced to more than the statutory maximum prescribed for his underlying firearms offense based on judicial fact-finding under a preponderance of the evidence standard. The district court overruled his objection and sentenced him to serve fifteen months in prison.

B. <u>Proceedings in the Ninth Circuit</u>

Henderson appealed and a three judge panel affirmed his sentence by a two to one margin. As stated earlier, the two member majority affirmed because, in its view, it was bound by *United States v. Purvis*, 940 F.2d 1276 (9th Cir. 1991).

In *Purvis*, the defendant was sentenced to one year of imprisonment – the statutory maximum allowed for his offense – followed by a term of supervised release. After he violated

his supervised release, Purvis argued that he could not be sentenced to further incarceration. His argument in this regard was two-fold. First, he argued that the statute that governs supervised release revocation proceedings, 18 U.S.C. § 3583(e)(3), does not permit a district court to revoke a term of supervision and impose a sentence that, when aggregated with the sentence imposed for the original offense, results in a period of incarceration that exceeds the statutory maximum. *Purvis*, 940 F.2d at 1278. Second, he argued that his aggregated sentence violated the Indictment Clause of the United States Constitution, *see* U.S. Const. amend. V, cl. 1, because it exceeded one year, and he had been charged by an information rather than by an indictment returned by a grand jury. *Id.* at 1279-80. The Ninth Circuit rejected both of Purvis's arguments and 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 1279.

The majority in Henderson's case determined *Purvis* had not been overruled or undermined by *Apprendi* or *Haymond* and was therefore binding. In coming to this conclusion, the panel relied on Justice Breyer's concurring opinion in *Haymond*, which it deemed to be "controlling." *Henderson*, 998 F.3d at 1076.

The *Haymond* plurality determined that § 3583(k) is unconstitutional under *Apprendi* and its progeny – particularly *Alleyne.* It also opined that § 3583(e)(3) could raise *Apprendi* "issues in a small set of cases," when "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.

Although he agreed that § 3583(k) is unconstitutional, Justice Breyer was unwilling to embrace the plurality's reasoning. Rather than relying on *Apprendi* and *Alleyne*, he found "three aspects" of § 3583(k) that when "considered in combination" led him to conclude that "it is less like ordinary revocation and more like punishment for a new offense" – namely, that § 3583(k): (1) "applies only when a defendant commits a discrete set of federal offenses specified in the statute;" (2) "takes away the judge's discretion to decide whether violation of a condition should result in revocation and for how long;" and (3) "limits the judge's discretion in a particular manner[] by imposing a mandatory minimum term of imprisonment" upon the judge's finding that it is more likely than not that the defendant committed a criminal offense listed in the statute. *Id.* at 2386.

Because Justice Breyer's concurring opinion did not adopt the plurality's reasoning and because *Haymond* did not directly hold that *Apprendi* applies to revocation proceedings, the majority upheld Henderson's sentence under *Purvis*. Dissenting, Judge Rakoff took the majority to task for its failure "to afford plenary review to the important constitutional questions" raised by Henderson. *Henderson*, 998 F.3d at 1079 (Rakoff, J., dissenting). In doing so, he rejected the majority's determination that it was bound by *Purvis* to reject Henderson's arguments. *Purvis*, he pointed out, "did not consider, let alone address and decide, the constitutional issues pressed by Henderson." *Id.* at 1080. Because *Purvis* did not consider Henderson's constitutional arguments, Judge Rakoff argued that the panel could – and, in fact, was obligated to – reach their merits.

Turning to the merits, Judge Rakoff conceded that Henderson's case is not controlled by *Haymond* because the plurality and Justice Breyer did not agree on a single rationale. And, because "Justice Breyer's concurring opinion is not a logical subset of the plurality's (or vice-versa)," the plurality opinion did not dictate the outcome of Henderson's case. But, that being said, Judge

Rakoff noted that this Court's "fractured decision" left open the question raised in Henderson's appeal. That question, he wrote, should under "the logic of *Apprendi* and its progeny, not to mention the plain dictates of the Sixth Amendment, compel [the panel to] vacate the judgment" in Henderson's case. *Id.* at 1083.

Henderson petitioned for rehearing and rehearing *en banc*. Rehearing was denied in a written order filed on August 10, 2021. (App., infra, 1b).

Reasons for Granting the Petition

Henderson's revocation sentence violates *Apprendi* and its progeny because he has been forced to serve a sentence beyond the statutory maximum provided for his offense of conviction without being afforded the right to a jury that would determine whether his violations have been proven beyond a reasonable doubt.

In *Apprendi*, the defendant was sentenced to twelve years imprisonment under a New Jersey statute that increased the maximum term of imprisonment from ten years to twenty years if it was shown by a preponderance of the evidence that he committed his crime with a racial bias. *Apprendi*, 530 U.S. at 470. The finding of racial bias was made by a judge at a special evidentiary hearing held after Apprendi was found guilty of his underlying crime. In defending this sentencing scheme, the state argued that the legislature could define racial bias as a sentencing factor that can be found by a judge. This Court, however, rejected the state's argument, based on its conclusion that the post-guilt finding violated the Sixth Amendment by depriving *Apprendi* of his right to trial by jury. *Id.* at 491-92. In arriving at this conclusion, the Court held that "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" or admitted through a guilty plea after a defendant knowingly waived his right to a trial. *Apprendi*, 530 U.S. at 490.

In light of *Apprendi* and its progeny, it is now clear that, regardless of the particular context in which a sentence is imposed, "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. 296, 304 (2004). The question in this case is whether the rule of *Apprendi* should apply in the supervised release context when a defendant's supervision is revoked and his resulting sentence, when aggregated with the sentence imposed for his original crime, exceeds that allowed under the statute of conviction. The answer to this question, under a straight-forward reading of *Apprendi* and the Sixth Amendment, is yes.

It is well established that supervised release sanctions are "part of the penalty for the initial offense." *Johnson v. United States*, 529 U.S. 694, 700 (2000). It is also well accepted that supervised release revocation can result in a new, additional term of incarceration. Therefore, a supervised release revocation proceeding should be regarded as a "sentencing proceeding," and the same constitutional protections afforded by *Apprendi* and its progeny at the initial sentencing should attach. *Haymond*, 139 S.Ct. at 2377-80 (plurality).

The vast majority of revocation proceedings do not give rise to *Apprendi* concerns. This is because "in most cases . . . combining a defendant's initial and post-revocation sentences under § 3583(e) will not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime." Because courts rarely sentence defendants to the statutory maxima, a defendant who has had his supervision revoked will rarely suffer an overall, combined sentence that exceeds that authorized for his original offense. *Haymond*, 139 S.Ct. at 2384 (plurality). Therefore, in the mine run of cases, supervised release

and parole revocation proceedings are similar in that they will not force a defendant to serve a sentence that exceeds that allowed for his offense of conviction.

The problem arises where, as here, a revocation sentence operates as an enhancement that increases a defendant's sentence beyond the statutory maxima. In these situations, the differences between supervised release and parole come into sharp focus. "[U]nlike parole, supervised release wasn't introduced to replace a portion of the defendant's prison term;" it is intended "only to encourage rehabilitation *after* the completion of [his] prison term." *Id.* at 2382. Parole, on the other hand, was intended to allow for early release so that a defendant could serve a portion of his custodial sentence in the community. If parole was revoked, "the prison sentence a judge or parole board could impose . . . normally would not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict." *Id.* at 2377.

But, because Henderson's fifteen-month revocation sentence must be "treated as part of the penalty for his original offense," *Johnson*, 529 U.S. at 700, it follows that the district court could not require him to serve a sentence greater than ten years unless he was afforded the right to have a jury determine his guilt of the alleged violation beyond a reasonable doubt.

In upholding Henderson's 132 month sentence, the majority reasoned that it was conditionally authorized by his original conviction. The problem with this reasoning is that it is foreclosed by a straightforward reading of *Apprendi.* Under *Apprendi* and its progeny, a defendant's conviction does not allow a court to impose a sentence that exceeds the normal statutory maximum based on subsequent factual findings made by a judge. As Justice Gorsuch put it:

> . . . on the strength of the jury's findings the judge was entitled to impose as punishment a term of supervised release; and, in turn, that term of supervised

> release was from the outset always subject to the possibility of judicial revocation and § 3583(k)'s mandatory prison sentence. Presto: [the government argues] Sixth Amendment problem solved.
>
> But we have been down this road . . . In *Apprendi* and *Alleyne*, the jury's verdict triggered a statute that authorized a judge at sentencing to increase the defendant's term of imprisonment based on judge-found facts. This Court had no difficulty rejecting that scheme as an impermissible evasion of the historic rule that a jury must find all of the facts necessary to authorize a judicial punishment. And what was true there can be no less true here.

Haymond, 139 S.Ct. at 2380-81 (plurality).

Henderson's conviction did not authorize the district court to impose a revocation sentence that would require him to serve a term of imprisonment greater than that called for by his original offense any more than the "special evidentiary hearing" allowed New Jersey to sentence *Apprendi* to a greater sentence based on judicial findings of racial animus. Henderson's conviction allowed the court to impose a sentence of 120 months, but no more.

Conclusion

Judge Rakoff's dissent got it right. Contrary to the majority's conclusion, the result in this case is dictated by a straightforward application of *Apprendi*. Based on his original conviction, Henderson could be imprisoned for no more than 120 months. To be sure, the district court had statutory authority to find that he violated the conditions of his supervised release and send him back to prison. But when the district court imposed a sentence over and beyond that authorized by Henderson's original conviction without affording him the right to have his guilt determined by a jury beyond a reasonable doubt, it violated his rights under the Fifth and Sixth Amendments.

Because the majority opinion wrongly resolved an issue of exceptional importance, this Court should grant certiorari.

Respectfully submitted,

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