

CASE NO. ____
IN THE SUPREME COURT OF THE UNITED STATES

LAQUAN KYLE DUANE SHAKESPEARE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Mr. Shakespeare's five-year mandatory minimum revocation term of imprisonment imposed pursuant to 18 U.S.C. § 3583(k) is valid in light of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369, 2385 (2019), which declared the statutory provision unconstitutional.
2. Whether, under *Marks v. United States*, 430 U.S. 188 (1977), Justice Breyer's Concurrence is the controlling portion of *Haymond* because it represents the narrowest holding in which a majority of this Court agreed.
3. Whether Mr. Shakespeare, in contrast to defendant in *Haymond*, additionally incurred a double jeopardy violation because he was convicted of the substantive offense underlying the § 3583(k) revocation and received a consecutive sentence of 293 months imprisonment for that offense.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION.....	7
I. Mr. Shakespeare’s mandatory minimum revocation sentence is unconstitutional in light of this Court’s decision in <i>United States v. Haymond</i> , __ U.S. __, 139 S.Ct. 2369 (2019).....	7
II. The appeals court’s alternative basis for denying relief was that the plurality opinion authored by Justice Gorsuch represents the controlling portion of <i>Haymond</i> ; however, such rationale is in conflict with this Court’s decision in <i>Marks v. United States</i> , 430 U.S. 188 (1977), and conflicts with other courts of appeals which have determined that Justice Breyer’s concurrence is the controlling portion of <i>Haymond</i>	13
III. A double jeopardy violation was foisted upon Mr. Shakespeare because, unlike the defendant in <i>Haymond</i> , Mr. Shakespeare was convicted of the new	

offense underlying the revocation proceeding and sentenced to 293 months of imprisonment to be served consecutively to his revocation sentence. 16

CONCLUSION..... 20

INDEX TO APPENDICES

(Appendices included at the end of this volume)

Appendix A: Tenth Circuit’s Opinion in *United States v. Shakespeare* 21A

Appendix B: District Court’s Order Revoking Supervised Release..... 31A

Appendix C: Tenth Circuit’s Order denying rehearing..... 34A

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000)..... 7

Johnson v. United States, 529 U.S. 694 (2000) 6, 7, 8, 14, 17, 19

Marks v. United States, 430 U.S. 188 (1977)..... 7, 13

United States v. Addison, 2022 WL 1640689 (11th Cir. May 24, 2022) (unpub.) 15

United States v. Badgett, 957 F.3d 536 (5th Cir. 2020) 15

United States v. Bruley, 15 F.4th 1279 (10th Cir. 2021) 16

United States v. Coston, 964 F.3d 289 (4th Cir. 2020) 14

United States v. Doka, 955 F.3d 290 (2d Cir. 2020) 14

United States v. Ewing, 829 Fed. Appx. 325 (10th Cir. 2020) (unpub.) 15

United States v. Garner, 969 F.3d 550 (5th Cir. 2020)..... 14

United States v. Guillen, 995 F.3d 1095, (10th Cir. 2021) 13, 14

United States v. Haymond, __U.S.__, 139 S.Ct. 2369 (2019)2, 3, 6, 7, 8, 9, 11, 12, 14, 17,

<i>United States v. Haymond</i> , 869 F.3d 1153 (10th Cir. 2017)	18
<i>United States v. Haymond</i> , 935 F.3d 1059 (10th Cir. 2019)	3, 8
<i>United States v. Henderson</i> , 998 F.3d 1071 (9th Cir. 2021)	14, 15
<i>United States v. Ka</i> , 982 F.3d 219 (4th Cir. 2020)	15
<i>United States v. Memmott</i> , 2022 WL 3571420 (10th Cir. Aug. 19, 2022) (unpub.) ...	16
<i>United States v. Moore</i> , 22 F.4th 1258, (11th Cir. 2022)	14
<i>United States v. Salazar</i> , 987 F.3d 1248 (10th Cir. 2021)	15
<i>United States v. Savarese</i> , 842 F.Appx. 448 (11th Cir. 2021) (unpub.)	10, 15
<i>United States v. Seighman</i> , 966 F.3d 237 (3d Cir. 2020)	14
<i>United States v. Shakespeare</i> , 32 F.4th 1228 (10th Cir. 2022)	1, 6, 9, 10, 13, 18
<i>United States v. Stahl</i> , 839 Fed.Appx. 22 (7th Cir. 2021) (unpub.)	15
<i>United States v. Wagers</i> , 2021 WL 7210371 (6th Cir. Dec. 17, 2021) (unpub.)	15
<i>United States v. Walker</i> , 849 Fed. Appx. 822 (11th Cir. 2021) (unpub.)	15
<i>United States v. Watters</i> , 947 F.3d 493 (8th Cir. 2020)	14

Statutes

18 U.S.C. § 1153	4
18 U.S.C. § 2243	4
18 U.S.C. § 2244	4
18 U.S.C. § 3583	2, 5, 7
28 U.S.C. 1254	1

Other Authorities

U.S. Const. Amend. V	2
U.S. Const. Amend. VI	2

PETITION FOR WRIT OF CERTIORARI

Petitioner Laquan Kyle Duane Shakespeare seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Shakespeare*, 32 F.4th 1228 (10th Cir. 2022).

OPINIONS BELOW

The Tenth Circuit's opinion in *United States v. Shakespeare*, cited immediately above, is included in the Appendix at App. A. The Order of the district court revoking supervised release is not published and is included in the Appendix at App. B.

JURISDICTION

The Tenth Circuit issued its opinion affirming Mr. Shakespeare's revocation sentence on April 29, 2022. *See* App. A. The Circuit denied Mr. Shakespeare's timely petition for rehearing on June 13, 2022. *See* App. C. On August 31, 2022, Justice Gorsuch extended the time within which to file a petition for writ of certiorari to and including October 11, 2022. Application No. 22A189. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution states: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be

deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.

2. The Sixth Amendment to the Constitution states: “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.” U.S. Const. Amend. VI.

3. Title 18 U.S.C. § 3583(k) states:

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.

INTRODUCTION

This Court declared the revocation provision at 18 U.S.C. § 3583(k) unconstitutional in *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369, 2385 (2019). In 2021, Mr. Shakespeare’s term of supervised release was revoked pursuant to § 3583(k), and he was sentenced to a mandatory minimum term of 5 years imprisonment in violation of his constitutional rights. In *Haymond*, this Court declined to declare the provision “unconstitutional and unenforceable” as the

appeals court had initially done¹, but remanded so that the question of remedy, if any, could be addressed – whether a jury must find beyond a reasonable doubt the facts relevant to trigger the mandatory provisions of § 3583(k) or if a defendant must have their revocation proceedings conducted simply per the discretionary provisions of § 3583(e)(3) that generally govern the revocation of supervised release. *Haymond*, 139 S.Ct. at 2385. On remand, the Tenth Circuit did not have the opportunity to consider the appropriate remedy because the appeal was dismissed at the request of the government. *United States v. Haymond*, 935 F.3d 1059, 1064 (10th Cir. 2019). Thus, an open question remains as to whether § 3583(k) should be invalidated for violating the Fifth and Sixth Amendments or if any remedy exists so that § 3583(k) may be constitutionally applied to defendants such as Mr. Shakespeare.

Shakespeare seeks *certiorari* review for three reasons: first, because Section 3583(k)'s mandatory minimum provision was unconstitutionally applied to him; second, because the appeals court alternatively denied relief based upon the erroneous determination that Justice Breyer's Concurrence was not the controlling portion of *Haymond*; and third, because the mandatory minimum revocation sentence imposed in combination with a 293 month sentence for the offense underlying the revocation resulted in a double jeopardy violation.

¹ *United States v. Haymond*, 869 F.3d 1153, 1168 (10th Cir. 2017).

STATEMENT OF THE CASE

Mr. Shakespeare pleaded guilty to Sexual Abuse under 18 U.S.C. §§ 2243(a) and 1153, which carried a penalty of not more than 15 years imprisonment. On February 8, 2019, he was sentenced to 15 months imprisonment followed by 10 years of supervised release. Mr. Shakespeare began his term of supervised release on September 20, 2019. A condition of supervised release was that Mr. Shakespeare comply with the requirements of the Sex Offender Registration and Notification Act.

On November 15, 2019, Mr. Shakespeare was charged in Wind River Tribal Court with offenses surrounding sexual conduct with a minor. Mr. Shakespeare pleaded guilty to Sexual Assault – 2nd Offense in the Tribal Court, and all other counts were dismissed. He was sentenced to 365 days confinement, along with fines and fees. Next, on July 23, 2020, Mr. Shakespeare was Indicted in the District of Wyoming for the same conduct underlying the Tribal Court matter. Mr. Shakespeare was charged with Aggravated Sexual Abuse of a Minor and Abusive Sexual Contact in district court case No. CR-20-124-SWS. Mr. Shakespeare pleaded guilty to Abusive Sexual Contact under 18 U.S.C. §§ 2244(a)(5) and 1153, which carried a penalty of up to life imprisonment.

Based upon the conduct forming the basis for the tribal offense and the related federal Indictment, on December 2, 2020, the Probation Office caused a

Petition for Warrant to be filed requesting that Mr. Shakespeare's term of supervised release be revoked. The Probation Office filed a Violation Memorandum directing the district court that it was required to sentence Mr. Shakespeare to a mandatory minimum term of 5 years imprisonment pursuant to 18 U.S.C. § 3583(k) if supervised release were revoked.

On February 24, 2021, at the combined sentencing hearing on the new case and revocation hearing on the old case, the district court adopted the view of the probation office – that revocation was mandatory and that Mr. Shakespeare was subject to a mandatory minimum term of five years imprisonment pursuant to § 3583(k). Neither the district court, prosecuting attorney, nor defense counsel mentioned or discussed the constitutional infirmity of the mandatory provisions of § 3583(k) or otherwise mentioned this Court's decision in *Haymond* at the revocation hearing, despite the same being issued on June 29, 2019, nearly two years before the revocation hearing. The district court revoked Mr. Shakespeare's supervised release based upon the conviction in the new case and imposed what it understood to be a mandatory minimum sentence of 5 years imprisonment to be served concurrently to the 293 month sentence in the new case. *Id.* at 35, 37. Absent application of § 3583(k), Mr. Shakespeare, having initially been convicted of a Class C offense, would have only been subject to a zero to two year term of imprisonment upon revocation. 18 U.S.C. § 3583(e)(3).

Mr. Shakespeare appealed his revocation sentence by arguing (1) that § 3583(k) is unconstitutional for the reasons announced by Justice Breyer in *Haymond*, (2) that Mr. Shakespeare's circumstances additionally present a double jeopardy violation because he was convicted and sentenced for the new offense in addition to the revocation, and (3) that the matter should be remanded to the district court for re-sentencing on the revocation in accordance with § 3583(e)(3) which would tie and limit Mr. Shakespeare's revocation to his initial conviction of a Class C felony and subject him to a term of zero to two years imprisonment. The appeals court denied relief by finding that Mr. Shakespeare was not entitled to the relief afforded in *Haymond* because unlike Mr. Haymond, Mr. Shakespeare admitted the revocation violation. *United States v. Shakespeare*, 32 F.4th 1228, 1230 (10th Cir. 2022). And the appeals court further denied relief of Mr. Shakespeare's double jeopardy claim by stating the venerable maxim that "revocation proceedings are part of the punishment for the initial offense," despite this Court's acknowledgment that § 3583(k) functions unlike the usual revocation proceeding. *Id.* (citing *Johnson v. United States*, 529 U.S. 694, 700-01 (2000)); *Haymond*, 139 S.Ct. at 2386).

REASONS FOR GRANTING THE PETITION

I. Mr. Shakespeare’s mandatory minimum revocation sentence is unconstitutional in light of this Court’s decision in *United States v. Haymond*, __ U.S. __, 139 S.Ct. 2369 (2019).

18 U.S.C. 3583(k) governs imposition of and revocation of supervised release for recidivist sex offenders. Subsection (k) provides in pertinent part:

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.*

(emphasis added). This portion of Section 3583(k) was found unconstitutional in *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019). Because *Haymond* is a plurality opinion, it must be construed as that position taken by the members of the Court who concurred in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Breyer’s concurrence is understood to be the narrowest ground supporting the judgment and therefore represents the holding of the court. *See Haymond*, 139 S.Ct. at 2386 (Alito, J., dissenting) (finding that “today’s holding” “is set out in Justice BREYER’s opinion”).

Justice Breyer’s concurrence declined to “transplant the *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)] line of cases to the supervised-release context” as had been one of the rationales of the plurality opinion. *Haymond*, 139 S.Ct. at 2385. *Apprendi* held that any fact which increases a statutory maximum sentence must be proven to a jury beyond a reasonable doubt. Instead, Justice Breyer reasoned that § 3583(k) operates unlike the usual revocation, because it is less “part of the penalty for the initial offense” and instead more like punishment for a new offense.

Id. at 2386 (citing *Johnson v. United States*, 529 U.S. 694, 700). Justice Breyer identified three features of § 3583(k) supporting his conclusion that it indeed operates to punish commission of a new criminal offense:

First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. Second, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. Third, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of “not less than 5 years” upon a judge's finding that a defendant has “commit[ted] any” listed “criminal offense.”

Id. And, because “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,” Justice Breyer agreed with the plurality that 3583(k) was unconstitutional. *Id.* However, *Haymond* did not decide the question of the appropriate remedy; instead, it remanded to the appeals court to decide whether 3583(k) was “unenforceable” such that defendants like Mr. Shakespeare must be re-sentenced under 3583(e)(3) and without regard to the last two sentences of § 3583(k), or if the “constitutional infirmity can be cured simply by requiring juries acting under the reasonable doubt standard, rather than judges proceeding under the preponderance of the evidence standard, to find the facts necessary to trigger § 3583(k)’s mandatory minimum.” *Id.* at 2385. Upon remand, *Haymond* was dismissed upon motion of the government. *Haymond v. United States*, 935 F.3d 1059, 1064 (10th Cir. 2019).

Thus, it is clear that § 3583(k) is unconstitutional under the Fifth and Sixth Amendments, but an open question remains as to whether any remedy exists so as to give effect to the statute.

Here, Mr. Shakespeare's constitutional rights were violated as result of the district court applying § 3583(k) and imposing a mandatory minimum 60-month revocation term of imprisonment. All of the concerns discussed by Justice Breyer are present here – Mr. Shakespeare had committed a new offense enumerated in § 3583(k); the district court was deprived of its discretion to decide whether Mr. Shakespeare should be imprisoned and for how long; and the district court's discretion was particularly limited by the requirement of a mandatory minimum sentence. *See Haymond*, 139 S.Ct. at 2386. Just as Justice Breyer observed in *Haymond*, Mr. Shakespeare's sentence pursuant to § 3583(k) more closely resembles the punishment for a new offense, but without him being afforded the Due Process protections, including the jury right, that “attend a new prosecution.” *Id.*

The appeals court disagreed and distinguished Mr. Shakespeare's case from *Haymond* on the basis that, unlike Mr. Haymond, Mr. Shakespeare did not contest the revocation allegations. *Shakespeare*, 32 F.4th at 1235-37. The appeals court in making the distinction relied heavily upon the dissenting opinion in an unpublished Eleventh Circuit decision that reversed a Section 3583(k) sentence.

Id. at 1236-37 (citing *United States v. Savarese*, 842 F.Appx. 448 (11th Cir. 2021)). *Savarese* was the only court of appeals opinion that the appeals court could locate that addresses the issue presented here, and likewise, counsel is unable to find any other court of appeals opinions addressing the validity of a Section 3583(k) revocation sentence post-*Haymond*. *Id.* at 1236. The *Savarese* majority remanded to the district court to decide if 3583(k) could be given effect; however, once remanded, the parties therein agreed to resentencing pursuant the general revocation scheme at Section 3583(e)(3). See *United States v. Savarese*, No. CR-18-134-PBG-DCI, Docket No. 74, Joint Motion (M.D. FL. May 12, 2021), and Docket No. 77, Amended Judgment (June 21, 2021). The *Savarese* dissent felt that reversal was unnecessary because Mr. Savarese could not satisfy all three of the factors identified by Justice Breyer in his controlling concurrence. *Id.* at 1236-37 (citing *Savarese*, 842 F. Appx. at 456 (Luck, J., dissenting)). Because, like Mr. Savarese, Mr. Shakespeare admitted the revocation conduct, the appeals court reasoned that Justice Breyer's third factor in *Haymond* had not been met, and because all three of Justice Breyer's factors had not been met, no error occurred. *Id.* Recall that Justice Breyer's third factor making §3583(k) appear more like a penalty for a new offense was that "§ 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of 'not less than 5 years'

upon a judge's finding that a defendant has ‘commit[ted] any’ listed ‘criminal offense.’” 139 S.Ct. at 2386 (emphasis added).

Justice Breyer provided that his three factors “considered in combination” render § 3583(k) more like punishment for a new offense,” but he did not state the factors were exclusive, that all 3 must be met, or that a defendant, like Mr. Shakespeare, who admits the revocation conduct could constitutionally be subject to the 5 year mandatory minimum revocation sentence. *Id.* Further, with the exception of Mr. Shakespeare not contesting the violation which would have required a judicial finding that he had committed the listed offense, Justice Breyer’s factors are still present – (1) Mr. Shakespeare had committed a new offense enumerated in § 3583(k); (2) the district court was deprived of its discretion to decide whether Mr. Shakespeare should be imprisoned and for how long; and (3) the district court’s discretion was particularly limited by the requirement of a mandatory minimum sentence.

Also, it appears that of Justice Breyer’s factors, the first factor that “§ 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute” is of particular importance in causing Mr. Shakespeare’s revocation to look more like the penalty for a new offense. *See id.* (“Section 3583(k)

is difficult to reconcile with [*Johnson's*]¹ understanding of supervised release”). Justice Gorsuch, in his plurality opinion, even mentioned this *new offense* aspect as being unique to Justice Breyer’s concurrence. *Id.* at 2384 n. 9 (“But Justice BREYER’s remaining reason is another story. He stresses that § 3583(k)’s mandatory minimum applies only to a ‘discrete set of federal criminal offenses’”). Given Justice Breyer’s emphasis on the new listed offense aspect of 3583(k), Mr. Shakespeare encountered the same constitutional violation as that at issue in *Haymond*.

The fact of Mr. Shakespeare’s admission/guilty plea to the revocation conduct should not make a difference. As observed by Justice Breyer, Mr. Shakespeare’s revocation served to punish him for the new offense, just as was the case in *Haymond*. And, the revocation penalty was not tied to the severity of the original offense of conviction, as would have been the case with an ordinary revocation proceeding under § 3583(e)(3). *Id.* at 2386 (citing § 3583(e)(3)). Finally, practically speaking an absurd result would be achieved if only those who contest their revocations, such as Mr. Haymond, can escape the mandatory minimum penalty of § 3583(k), while those who admit the violation, such as Mr. Shakespeare,

¹ *Johnson v. United States*, 529 U.S. 694, 700 (2000).

are penalized more severely for saving the government the burden of a contested proceeding.

The appeals court's decision is in conflict with *Haymond* as controlled by Justice Breyer's concurrence. Certiorari should be granted.

II. The appeals court's alternative basis for denying relief was that the plurality opinion authored by Justice Gorsuch represents the controlling portion of *Haymond*; however, such rationale is in conflict with this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977), and conflicts with other courts of appeals which have determined that Justice Breyer's concurrence is the controlling portion of *Haymond*.

As an alternative basis for denying relief, the appeals court held that the constitutional violation incurred as result of Mr. Shakespeare's § 3583(k) revocation sentence did not rise to the level of plain error, because “it is far from plain, clear, or obvious” that Justice Breyer's concurrence represents the “narrowest decisional basis in *Haymond*.” *Shakespeare*, 32 F.4th at 1237 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). And the Panel further found that the narrowest decisional basis for *Haymond* is “arguably” Justice Gorsuch's plurality decision involving “the application of *Apprendi*'s jury-trial rights to contested questions of fact not involving a prior criminal conviction.” *Id.* at 1238. This is so according to the Panel, because the Plurality Opinion is a “logical subset” of Justice Breyer's concurrence. *Id.* (citing *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021)). This alternative holding conflicts with statements of Justices of this Court, not to mention conflicts with every court of appeals' opinion to have

considered which portion of *Haymond* represents the holding of the Court.

The rule of *Marks v. United States*, 430 U.S. 188, 193, is that plurality opinions, such as *Haymond*, must be construed as that position taken by the members of the Court who concurred in the judgment on the narrowest grounds. Justice Alito in his dissenting opinion in *Haymond*, joined by Chief Justice Roberts and Justices Thomas and Kavanaugh found that Justice Breyer's concurrence was controlling. 139 S.Ct. at 2386 (Alito, J., dissenting) (finding that "today's holding" "is set out in Justice BREYER's opinion"); *see also Guillen*, 995 F.3d at 1120 ("From where we sit, the most definitive source of guidance as to the *Marks* rule's application is the Supreme Court's own application of the rule"). Thus, four Justices of this Court have already found Justice Breyer's concurrence to set forth the holding of *Haymond*.

Likewise, with the exception of the appeals court's opinion below, numerous courts of appeals' opinions have found that Justice Breyer's Concurrence is the controlling portion of *Haymond*. *See, e.g., United States v. Henderson*, 998 F.3d 1071, 1076 (9th Cir. 2021); *United States v. Garner*, 969 F.3d 550, 552 (5th Cir. 2020); *United States v. Seighman*, 966 F.3d 237, 242 (3d Cir. 2020); *United States v. Coston*, 964 F.3d 289, 295 (4th Cir. 2020); *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020); *United States v. Watters*, 947 F.3d 493, 497 (8th Cir. 2020); *United States v. Moore*, 22 F.4th 1258, 1268 n.8 (11th Cir. 2022); *Savarese*, 842 Fed. Appx. at

451 n. 2 (11th Cir. 2021); *United States v. Badgett*, 957 F.3d 536, 540 (5th Cir. 2020); *United States v. Walker*, 849 Fed. Appx. 822, 826 n. 3 (11th Cir. 2021) (unpub.); *United States v. Addison*, 2022 WL 1640689, *3 (11th Cir. May 24, 2022) (unpub.); and *United States v. Ka*, 982 F.3d 219, 222-23 (4th Cir. 2020); *United States v. Wagers*, 2021 WL 7210371, *2 (6th Cir. Dec. 17, 2021) (unpub.); *United States v. Stahl*, 839 Fed.Appx. 22, 24 (7th Cir. 2021) (unpub.). The foregoing courts appeals opinions did not, however, address the circumstance presented by Mr. Shakespeare – imposition of the mandatory minimum sentence at Section 3583(k). Instead, in most of those cases the defendant had argued that other revocation provisions within Section 3583 were rendered unconstitutional by *Haymond*. See, e.g., *Henderson*, 998 F.3d at 1076 (“[Henderson’s] revocation sentence was imposed under § 3583(e), not § 3583(k)”).

In any event, the courts of appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh circuits have determined that Justice Breyer’s concurrence is controlling as representing the narrowest grounds in which a majority of the Justices agreed. Also of note is that other panels of the Tenth Circuit have held that Justice Breyer’s concurrence is controlling. See *United States v. Ewing*, 829 Fed. Appx. 325, 329 (10th Cir. 2020) (unpub.) (“We therefore conclude, as have several other opinions, that Justice Breyer's opinion controls.”); *United States v. Salazar*, 987 F.3d 1248, 1259 (10th Cir. 2021) (“Justice Breyer's

concurrence—the narrowest ground supporting the judgment—represents the Court's holding"); *United States v. Bruley*, 15 F.4th 1279, 1284 (10th Cir. 2021) ("We previously recognized Justice Breyer's concurrence in *Haymond* as the holding of the Court"); *United States v. Memmott*, 2022 WL 3571420, *2 (10th Cir. Aug. 19, 2022) (unpub.) ("As Justice Breyer's opinion presents the narrowest grounds to support the judgment, we conclude that Justice Breyer's concurrence represents the opinion of the Court").

Certiorari should be granted because the appeals court's alternative holding that Justice Breyer's Concurrence is not the holding of *Haymond* is in conflict with the decisions of a majority of the other courts of appeals, as well as the appeals court's decision herein being in conflict with *Marks v. United States* and Justice Alito's dissenting opinion in *Haymond*.

III. A double jeopardy violation was foisted upon Mr. Shakespeare because, unlike the defendant in *Haymond*, Mr. Shakespeare was convicted of the new offense underlying the revocation proceeding and sentenced to 293 months of imprisonment to be served consecutively to his revocation sentence.

In addition to the constitutional violations discerned in *Haymond*, Mr. Shakespeare's revocation sentence pursuant to § 3583(k) constitutes a Fifth Amendment double jeopardy violation, because he will effectively be twice punished for the new offense. Mr. Shakespeare was convicted of Abusive Sexual Contact, an offense covered under § 3583(k), and sentenced to 293 months in Case

No. CR-20-124-SWS, in addition to being revoked herein for that same conduct and imprisoned for a mandatory 5 year term. Ordinarily, revocation of supervised release does not raise double jeopardy concerns, because the revocation is viewed as punishment for the original crime of conviction and not as punishment for the violation/new criminal conduct underlying the revocation. *Johnson v. United States*, 529 U.S. 694, 699-700. However, the mandatory punishment at § 3583(k) is not tied to the original crime of conviction, but instead is tied to commission of a new covered offense. Recall, that Justice Breyer took issue with § 3583(k) not being tethered to the initial offense as is the case with revocations under § 3583(e)(3). 139 S.Ct. at 2386 (citing *Johnson*, 529 U.S. 694, 700). And, for this reason, it was “difficult to reconcile” § 3583(k) with the concept of supervised release as § 3583(k) is “more like punishment for a new offense.” *Id.* Likewise, Justice Gorsuch’s Opinion found a § 3583(k) revocation could not be considered as part of the penalty for the initial offense. *Id.* at 2381 (“*Johnson* [] only highlights the Constitutional infirmity of § 3583(k)”).

As demonstration that Mr. Shakespeare’s revocation was punishment for the new offense, if Shakespeare had violated his release conditions by a technical violation or committing a crime not covered by § 3583(k) he would then be subject to revocation under § 3583(e)(3) which is tied to his original crime of conviction. Here, because Mr. Shakespeare was originally convicted of a Class C felony, he

“may not be required to serve on any such revocation . . . more than 2 years in prison if such offense is a class C or D felony” under § 3583(e)(3). Because 3583(k)’s increased punishment of 5 years to life imprisonment only comes into play upon commission of a new covered offense, it serves to punish for new offense as opposed to being part of the penalty for the original offense.

The appeals court observed the double jeopardy ramifications of Section 3583(k), albeit in dicta, in its initial decision in *United States v. Haymond* wherein it found 3583(k) to be “unconstitutional and unenforceable.” 869 F.3d 1153, 1168 (10th Cir. 2017). The appeals court explained § 3583(k) “effectively transforms the revocation proceeding into a criminal prosecution, imposing punishment for new conduct . . . Thus, . . . it raises the possibility that a defendant be charged and punished twice for the same conduct, in violation of the Fifth Amendment.” *Id.* at 1166-67. And, that is exactly what has happened here; Mr. Shakespeare has been twice punished for the same conduct. Strangely, the appeals court in the decision below failed to acknowledge its prior announcement of the potential for a double jeopardy violation and summarily denied Mr. Shakespeare’s double jeopardy argument. *Shakespeare*, 32 F.4th at 1230, 1235 n.7. The appeals court simply stated the general revocation maxim that “revocation proceedings are part of the punishment for the initial offense” and that *Haymond* hadn’t overruled *Johnson v. United States*. *Id.*

Observably, *Haymond* didn't overrule *Johnson v. United States*, 529 U.S. 694; however, the Court found that § 3583(k) couldn't be squared with *Johnson*. *Haymond*, 139 S.Ct. at 2386 ("Section 3583(k) is difficult to reconcile with [*Johnson's*] understanding of supervised release.); see also *id.* at 2381 (Gorsuch, J.) ("This Court's observation that 'postrevocation sanctions' are 'treat[ed] ... as part of the penalty for the initial offense,' *Johnson*, 529 U.S. at 700, only highlights the constitutional infirmity of § 3583(k)"). *Haymond* did not need to overrule *Johnson*; instead, the Court found § 3583(k) unconstitutional, *inter alia*, in light of *Johnson*. Review of *Johnson*, itself, demonstrates constitutional problems posed by § 3583(k); *Johnson* explains that postrevocation penalties must be "attribute[d]" to the original conviction as opposed to serving as punishment for the "violative conduct." 529 U.S. at 700. Here, § 3583(k) serves to punish Mr. Shakespeare for the new offense without being tied to his original conviction, as would have been the case with a § 3583(e)(3) revocation and must be the case to pass constitutional muster under *Johnson*. See *Haymond*, 139 S.Ct. at 2386 ("Consistent with that view, the consequences for violation of 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").

The appeals court's denial of the double jeopardy claim is in conflict with this Court's decisions in both *Haymond* and *Johnson*. Certiorari should be granted.

CONCLUSION

For the reasons above, Petitioner Laquan Kyle Duane Shakespeare respectfully asks this Court to grant his petition for a writ of certiorari.

Dated this 11th day of October, 2022.

Respectfully Submitted,

By: /s/Robert S. Jackson

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Appendix A:

United States v. Shakespeare, 32 F.4th 1228 (10th Cir. 2022)

32 F.4th 1228

United States Court of Appeals, Tenth Circuit.

UNITED STATES of
America, Plaintiff - Appellee,

v.

Laquan Kyle Duane SHAKESPEARE,
Defendant - Appellant.

No. 21-8010

|

FILED April 29, 2022

Synopsis

Background: After defendant entered guilty plea to sexual contact with minor, which was committed while defendant was on supervised release for sexual abuse of minor, Government petitioned to revoke defendant's supervised release based on new offense. The United States District Court for the District of Wyoming, Scott W. Skavdahl, Chief Judge, at combined hearing, sentenced defendant on new offense and then revoked supervised release and imposed additional, mandatory minimum term of five years to be served consecutively to sentence on new offense. Defendant appealed.

[Holding:] The Court of Appeals, Murphy, Circuit Judge, held that statute requiring minimum five-year term of imprisonment upon revocation of supervised release for enumerated sex offense did not violate right to jury trial under *Apprendi* and *Alleyne* as applied to defendant who admitted violation consistent with prior guilty plea.

Affirmed.

West Headnotes (9)

[1] **Jury** 🔑 Sentencing Matters

The right to jury trial under *Apprendi* and *Alleyne* does not apply to the existence of a prior criminal conviction. U.S. Const. Amend. 6.

[2] **Criminal Law** 🔑 Review De Novo

Criminal Law 🔑 Revocation of probation or supervised release

The Court of Appeals generally reviews a district court's decision to revoke supervised release for abuse of discretion, while underlying questions of law are ordinarily reviewed de novo.

[3] **Criminal Law** 🔑 Necessity of Objections in General

When a defendant fails to raise his objection in the district court, the objection is reviewed only for plain error. Fed. R. Crim. P. 52(b).

[4] **Criminal Law** 🔑 Necessity of Objections in General

Criminal Law 🔑 Burden of showing error

It is the defendant's burden to establish the existence of plain error with respect to a claim not raised in the district court, and that burden is a heavy one: the defendant must show (1) an error (2) that is clear or obvious, rather than subject to reasonable dispute, (3) affected his substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings. Fed. R. Crim. P. 52(b).

[5] **Criminal Law** 🔑 Necessity of Objections in General

An error is "plain," within the meaning of the plain-error rule, if it is clear or obvious under current, well-settled law. Fed. R. Crim. P. 52(b).

[6] **Criminal Law** 🔑 Necessity of Objections in General

In general, for an error to be contrary to well-settled law, and therefore "plain," within the meaning of the plain-error rule, either the Supreme Court or the Court of Appeals must have addressed the issue. Fed. R. Crim. P. 52(b).

[7] Jury 🔑 Particular cases in general**Sentencing and Punishment** 🔑 Validity

Statute requiring minimum five-year term of imprisonment upon revocation of supervised release for enumerated sex offenses by defendant subject to registration requirements under Sex Offender Registration and Notification Act (SORNA) did not violate right to jury trial under *Apprendi* and *Alleyne* as applied to defendant who entered guilty plea to sexual contact with minor committed while on supervised release for sexual abuse of minor and who, in subsequent revocation hearing, admitted violation of supervised release consistent with guilty plea, such that there was no judicial fact-finding on offense that triggered mandatory minimum sentence. 18 U.S.C.A. § 3583(k); 34 U.S.C.A. § 20901 et seq.

[8] Double Jeopardy 🔑 Sentence on probation revocation

When the acts that form the basis of a violation of a condition of supervised release are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense; however, treating postrevocation sanctions as part of the penalty for the initial offense avoids these difficulties. U.S. Const. Amend. 5.

[9] Courts 🔑 Number of judges concurring in opinion, and opinion by divided court**Courts** 🔑 Opinion by divided court

A concurring opinion in a splintered Supreme Court decision is the narrowest, and thus produces a determinate holding, when it is a logical subset of the other opinions concurring in the judgment.

Recognized as Unconstitutional

18 U.S.C.A. § 3583(k)

1229 Appeal from the United States District Court for the District of Wyoming (D.C. No. 2:18-CR-00154-SWS-1)*Attorneys and Law Firms**

Robert S. Jackson, Oklahoma City, Oklahoma, for Defendant - Appellant.

Francesco Valentini, Trial Attorney, Appellate Section, Criminal Division, U.S. Department of Justice, Washington D.C. (L. Robert Murray, United States Attorney and Timothy W. Gist, Assistant United States Attorney, District of Wyoming, Lander, Wyoming; Kenneth A. Polite, Jr., Assistant Attorney General, U.S. Department of Justice, Washington, D.C., with him on the briefs), for Plaintiff - Appellee.

Before HARTZ, KELLY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

While Laquan Shakespeare was serving the supervised-release portion of his sentence for violating 18 U.S.C. §§ 1153 and 2243(a) (the “2018 conviction”), he sexually assaulted a fourteen-year-old girl. Based on the events underlying that sexual assault, Shakespeare pleaded guilty to violating 18 U.S.C. §§ 1153 and 2244(a)(5) (the “2020 conviction”). Thereafter, the government moved to revoke Shakespeare's supervised release. The district court set a combined (1) sentencing hearing on the 2020 conviction and (2) revocation hearing on Shakespeare's supervised release. At that combined hearing, the district court first sentenced Shakespeare to a term of imprisonment of 293 months on the 2020 conviction. The district court then recessed the completed proceedings relating to the 2020 conviction¹ and turned to the question *1230 whether Shakespeare's supervised release on the 2018 conviction should be revoked. Acting pursuant to the provisions of 18 U.S.C. § 3583(k), the district court concluded it was obligated to revoke Shakespeare's supervised release and to impose a mandatory-minimum five-year term of imprisonment. For the first time on appeal, Shakespeare argues the district court's application of § 3583(k) violated (1) his jury-trial

rights, as guaranteed by the Fifth and Sixth Amendments; and (2) his Fifth Amendment right to be free of double jeopardy. Shakespeare's arguments are predicated on Justice Breyer's opinion concurring in the judgment in *United States v. Haymond*, — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019).

[1] Shakespeare has failed to demonstrate the district court committed error, let alone plain error. The jury-trial-rights aspect of Shakespeare's claim fails because he admitted all of the facts necessary for the application of § 3583(k). The Supreme Court has made clear that the *Apprendi/Alleyne* line of cases² do not apply to admitted facts, as the *Haymond* plurality specifically recognized. 139 S. Ct. at 2377.³ Nor does the *Apprendi/Alleyne* line apply to the existence of a prior criminal conviction. *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *Haymond*, 139 S. Ct. at 2377 & n.3 (plurality opinion) (recognizing continuing viability of *Almendarez-Torres*). The double-jeopardy aspect of Shakespeare's claim fails because the Court has explicitly held that revocation proceedings are part of the punishment for the initial offense, not a new prosecution. See *Johnson v. United States*, 529 U.S. 694, 700-01, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000). Neither the plurality opinion in *Haymond* nor Justice Breyer's concurring opinion purport to overrule *Johnson*. 139 S. Ct. at 2380 (plurality opinion); *id.* at 2386 (Breyer, J., concurring in the judgment). Shakespeare's reliance on Justice Breyer's separate opinion in an effort to reach a different result is misplaced. The facts underlying Justice Breyer's as-applied *Haymond* analysis are meaningfully distinguishable from the facts at issue here and, importantly, nothing in that analysis supports the conclusion § 3583(k) is unconstitutional as applied to Shakespeare. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the judgment entered by the district court.⁴

II. BACKGROUND

In 2018, Laquan Shakespeare pleaded guilty to sexual abuse of a minor, in violation of 18 U.S.C. §§ 1153 and 2243(a) (the “2018 conviction”). He was sentenced to a fifteen-month term of imprisonment, to be followed by a ten-year term of supervised release. As conditions of his supervised release, the court required Shakespeare to not violate any federal, state, or local law; to “comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C.

§ 20901, et seq.) [(“SORNA”)] as directed by the probation officer”; and to not “associate with children *1231 under the age of 18 ... except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense and who has been approved by the Probation Officer.”

Shakespeare finished his term of imprisonment on the 2018 conviction and began his term of supervised release in September 2019. On November 15, 2019, Shakespeare was charged in tribal court⁵ with sexually assaulting a fourteen-year-old relative. He pleaded guilty to Sexual Assault – Second Offense in tribal court and was sentenced to 365 days’ confinement.

In July 2020, based on the events underlying Shakespeare's tribal court conviction for sexual assault, a federal grand jury charged Shakespeare with two counts of aggravated sexual abuse of a minor. Shakespeare ultimately pleaded guilty, pursuant to a plea agreement, to one count of abusive sexual contact with a minor, in violation of 18 U.S.C. §§ 1153 and 2243(a)(5) (the “2020 conviction”). In his plea agreement and guilty plea, Shakespeare admitted “he did knowingly engage in and cause, or attempt to engage in and cause, sexual contact, that being the intentional touching, either directly or through the clothing, of the genitalia, groin, inner thigh, or buttocks of” the fourteen-year-old victim. Shakespeare's plea agreement contained a binding provision, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that he would receive a sentence between 240 and 360 months’ imprisonment. The district court accepted Shakespeare's Rule 11(c)(1)(C) plea and set a sentencing hearing for February 2021.

In December 2020, the Probation Office filed a petition to revoke Shakespeare's supervised release on the 2018 conviction. The petition alleged Shakespeare committed a new sex offense against a minor, violating the release condition requiring him not to commit another federal, state, or local crime. The petition also alleged that, because Shakespeare committed a new sex offense while subject to registration under SORNA, the court was required to revoke his supervised release and impose a five-year minimum revocation sentence under § 3583(k).⁶

In February 2021, the district court held a combined sentencing hearing on the 2020 conviction and revocation hearing on the 2018 conviction. With respect to the 2020 conviction, the district court sentenced Shakespeare to 293 months in prison, at the top of Shakespeare's advisory

Guidelines range. The district court explained Shakespeare had a “documented history as a sexual predator of minor children as evidenced by the commission of the instant [rape] less than two months following his release from federal prison for another sex-offense conviction.” The court concluded a “lengthy sentence” was “needed in order to protect the public from his future *1232 potential conduct” and “necessary given the prior sentence was insufficient to adequately deter the conduct that he engaged in.” After imposing sentence, the district court recessed the now-completed proceedings on the 2020 conviction.

The district court then turned to the revocation petition on the 2018 conviction. At the outset, Shakespeare confirmed he intended to admit the violation, with his counsel noting “the Court could really take judicial notice of the fact that [Shakespeare] has pled guilty in the other docket to satisfy the violation of supervised release.” The district court insisted, however, on advising Shakespeare as to the rights he would be waiving if he admitted to violating the terms of his supervised release. R. Vol. III at 37 (“All right. And I would take judicial notice for the factual basis. Nonetheless, I will go through and advise him as to his rights and what he would be waiving if he admits to committing that violation.”). The district court confirmed, after placing Shakespeare under oath and confirming his competency and the voluntariness of his admissions, that Shakespeare understood the alleged violation. The district court further advised Shakespeare, among other things, that he (i) faced “a mandatory minimum sentence of five years” under § 3583(k); and (ii) had the right to deny the petition and proceed to both a preliminary hearing and hearing on the merits, at both of which the government would carry the burden of proof. Having been advised of his rights, Shakespeare admitted the alleged supervised-release violation, and the district court took judicial notice of Shakespeare's guilty plea as a factual basis for the admission. At no point did Shakespeare raise an objection under the Fifth or Sixth Amendment or mention *Haymond*. The district court ruled that “a five-year term [was] sufficient and appropriate in this matter consecutive to the sentence in [the 2020 conviction].”

III. DISCUSSION

A. Standard of Review

[2] [3] [4] [5] [6] This Court generally reviews “district court's decision to revoke supervised release for abuse of discretion.” *United States v. LeCompte*, 800 F.3d

1209, 1215 (10th Cir. 2015) (quotation omitted). Underlying questions of law are ordinarily reviewed de novo. *Id.* Because, however, Shakespeare failed to raise relevant objections in the district court, his claim is reviewed only for plain error. *United States v. Penn*, 601 F.3d 1007, 1009 (10th Cir. 2010); Fed. R. Crim. P. 52(b). Importantly, it is Shakespeare's burden to establish the existence of plain error, *United States v. Courtney*, 816 F.3d 681, 683 (10th Cir. 2016), and that burden is a heavy one not often satisfied, *United States v. Crowe*, 735 F.3d 1229, 1242 (10th Cir. 2013). To show plain error, Shakespeare must demonstrate (1) “an error” (2) that is “clear or obvious, rather than subject to reasonable dispute,” (3) “affected [his] substantial rights,” and (4) “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (quotation omitted). “An error is plain if it is clear or obvious under current, well-settled law. In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue.” *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (quotation omitted); see also *United States v. Finnesy*, 953 F.3d 675, 696-97 (10th Cir. 2020) (emphasizing the rigorosity of the plainness prong of the plain error test).

B. Analysis

Shakespeare's claim on appeal is that § 3583(k) identifies, in every possible fact *1233 situation, a separate substantive crime and, therefore, no penalty can be imposed under that provision unless initiated by indictment and tried to a jury, with jeopardy attaching. The exclusive basis for this claim is a grand interpretation of Justice Breyer's opinion concurring in the judgment in *Haymond*. A close reading of Justice Breyer's opinion, however, demonstrates the as-applied analysis set out therein is not applicable to Shakespeare. That is, the three factors, which considered in combination led Justice Breyer to conclude § 3583(k) was unconstitutional as applied to *Haymond*, are not present here. Thus, Shakespeare has not shown error in the district court's application of § 3583(k) to him, let alone plain error.

Haymond, an individual previously convicted of possession of child pornography, was found in possession of what appeared to be child pornography while serving his term of supervised release. *Haymond*, 139 S. Ct. at 2374 (plurality opinion). Rather than bringing charges relating to those new images, the government exclusively sought to revoke *Haymond*'s supervised release. See *id.* (plurality opinion). At a revocation hearing, the district court found, utilizing

the preponderance-of-the-evidence standard, that Haymond possessed thirteen images of child pornography. *Id.* (plurality opinion). Applying § 3583(k), the district court revoked Haymond's supervised release and sentenced him to a mandatory minimum five-year term of imprisonment. *Id.* at 2375 (plurality opinion). Absent the requirements of § 3583(k), the district court would have had the discretion, under 18 U.S.C. § 3583(e)(3), to decline to revoke Haymond's supervised release. And, even assuming the district court chose to exercise its discretion to revoke Haymond's term of supervised release, § 3583(e)(3) would have empowered the district court to sentence Haymond to a term of imprisonment at any point between zero and two years. *Id.* at 2374 (plurality opinion).

On direct appeal, this court remanded the matter to the district court to utilize the revocation procedures set out in § 3583(e)(3). *United States v. Haymond*, 869 F.3d 1153, 1156, 1168 (10th Cir. 2017), *vacated and remanded*, *Haymond*, 139 S. Ct. at 2385 (plurality opinion). We held that “§ 3583(k) is unconstitutional because it changes the mandatory sentencing range to which a defendant may be subjected, based on facts found by a judge, not by a jury, and because it punishes defendants for subsequent conduct rather than for the original crime of conviction.” *Id.* at 1160. To remedy this perceived problem, we held that the “last two sentences of § 3583(k) are unconstitutional and unenforceable” because, read together, they “violate[] the Constitution by increasing the term of imprisonment authorized by statute based on facts found by a judge, not by a jury beyond a reasonable doubt, and by tying the available punishment to subsequent conduct, rather than the original crime of conviction.” *Id.* at 1167-68. Accordingly, we vacated and remanded to the district court with instructions to resentence Haymond “under § 3583(e)(3) without consideration of § 3583(k)’s mandatory minimum sentence provision or its increased penalties for certain subsequent conduct.” *Id.* at 1168.

The Supreme Court granted certiorari and, after plenary review, issued an opinion vacating this court's judgment and remanding for further proceedings on the remedy question. The Court concluded, in a splintered opinion, that as applied to Haymond, § 3583(k) violated his constitutional right to a jury trial. Four Justices concluded that the application of § 3583(k)’s mandatory minimum five-year term of imprisonment based on judicial factfinding, rather than a jury verdict, violated *1234 the Sixth Amendment. *Haymond*, 139 S. Ct. at 2373, 2375-76, 2378 (plurality opinion). In so doing, the plurality appeared to cast doubt on the

assumption that any aspect of revocation proceedings, even those conducted pursuant to § 3583(e)(3), would be exempt from the requirements of the jury-trial rights set out in the Fifth and Sixth Amendments. *See id.* at 2385 (Breyer, J., concurring); *id.* at 2386-91 (Alito, J., dissenting). *But see id.* at 2382 n.7 (plurality opinion) (disclaiming any intent to “pass judgment ... on § 3583(e)’s consistency with *Apprendi*”). Four other Justices concluded that the application of § 3583(k)’s mandatory minimum five-year term based on judicial factfinding was constitutionally permissible. *Id.* at 2391 (Alito, J., dissenting) (likening supervised release to the “old federal parole system” and noting parolees did not have a right to a jury trial or confrontation, a due-process entitlement to proof beyond a reasonable doubt, or protection against double jeopardy).

Justice Breyer supplied the dispositive vote in an opinion concurring in the judgment. *Id.* at 2385-86 (Breyer, J., concurring in the judgment). He agreed “with much of the dissent,” specifically including that the Court should “not transplant” jury-trial-right decisions such as *Alleyne* and *Apprendi* into “the supervised-release context.” *Id.* 2385 (Breyer, J., concurring in the judgment). Nevertheless, he concluded § 3583(k) violated a defendant's right to a jury trial. *Id.* at 2386 (Breyer, J., concurring in the judgment). Justice Breyer reasoned that “three aspects of” § 3583(k), “considered in combination,” led to this conclusion. *Id.* at 2386 (Breyer, J., concurring in the judgment).

First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in [that particular provision.] *Second*, § 3583(k) takes away the [trial] judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. *Third*, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of “not less than 5 years” upon a judge's finding that a defendant has “committed any” listed “criminal offense.”

Id. (Breyer, J., concurring in the judgment) (quoting § 3583(k)) (alteration omitted). “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.” *Id.* (Breyer, J., concurring in the judgment).

As to the appropriate remedy for the different sets of constitutional infirmities identified by the plurality and concurrence, the Court remanded the matter to this court for further proceedings. The government had argued this court's

remedy, which simply invalidated the last two sentences of § 3583(k), swept “too broadly” and “any constitutional infirmity [could] be cured simply by requiring juries acting under the reasonable doubt standard, rather than judges proceeding under the preponderance of the evidence standard, to find the facts necessary to trigger § 3583(k)’s mandatory minimum.” *Id.* at 2385 (plurality opinion). The Supreme Court “decline[d] to tangle with the parties’ competing remedial arguments” because this court “did not address” them and because “it appear[ed] the government did not even discuss the possibility of empaneling a jury in its brief to [the Tenth Circuit].” *Id.* (plurality opinion); see also *id.* at 2386 (Breyer, J., concurring in the judgment) (agreeing that the question of the appropriate remedy should be remanded to this court). Thus, the Court vacated *1235 this court’s judgment and remanded for this court “to address the government’s remedial argument in the first instance, including any question concerning whether that argument was adequately preserved in this case.” *Id.* at 2385 (plurality opinion); see also *id.* at 2386 (Breyer, J., concurring in the judgment).

On remand, the parties notified this court that Haymond had already been resentenced to time served, pursuant to the provisions of § 3583(e), and released from custody. *United States v. Haymond*, 935 F.3d 1059, 1064 (10th Cir. 2019). The government represented it would not seek a jury trial in an effort to reincarcerate Haymond under the provisions of § 3583(k) even if this court adopted its remedial argument. *Id.* Accordingly, this court determined intervening developments rendered Haymond’s appeal moot and dismissed it. *Id.*

[7] [8] Shakespeare is not entitled to relief under the analysis set out in Justice Breyer’s opinion concurring in the judgment.⁷ *Haymond* resolved an as-applied challenge to § 3583(k), meaning the particular background facts are exceedingly relevant. See 935 F.3d at 1063 (opinion on remand from Supreme Court) (“The Supreme Court ultimately determined that, as applied to Haymond, § 3583(k) violated the Fifth and Sixth Amendments.”); see also *United States v. Childs*, 17 F.4th 790, 792 (8th Cir. 2021) (holding that *Haymond* involved an as-applied constitutional challenge to § 3583(k)); *United States v. Ka*, 982 F.3d 219, 222 (4th Cir. 2020) (same); *United States v. Walker*, 849 F. App’x 822, 827 (11th Cir. 2021) (holding that Justice Breyer “joined the plurality in finding § 3583(k) unconstitutional as applied”). Shakespeare does not cite to any authority supporting the assertion Justice Breyer’s as-applied analysis would extend to § 3583(k) revocation proceedings following a knowing and

intelligent guilty plea to a qualifying offense. To be more precise, Shakespeare does not cite to any precedent *1236 indicating Justice Breyer’s as-applied analysis renders § 3583(k) unconstitutional as applied to a situation in which one of his three key factors is absent, i.e., in which the mandatory revocation sentence was not based “upon a judge’s finding that a defendant has committed any listed criminal offense.” *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment) (quotation omitted).

As far as this court can tell, the only court to encounter this question remanded the issue to the district court to consider the question in the first instance. *United States v. Savarese*, 842 F. App’x 448, 452 (11th Cir. 2021). With one critical distinction, the background facts in *Savarese* are materially identical to the facts in this case. See *Savarese*, 842 F. App’x at 449. The distinction is that during his revocation proceedings, Savarese raised the very issue the Supreme Court eventually took up in *Haymond*. *Id.* at 450. After a colloquy in which Savarese indicated he would, nevertheless, admit the violations of his supervised release consistent with his prior guilty plea to a triggering offense, the district court revoked Savarese’s supervised release and imposed a § 3583(k) minimum-mandatory five-year term of imprisonment. *Id.* Between the filing of Savarese’s notice of appeal and appellate briefing, the Supreme Court issued its “fractured” decision in *Haymond*. *Savarese*, 842 F. App’x at 451. Because the district court resolved Savarese’s arguments without the benefit of *Haymond*, the Eleventh Circuit, out of an abundance of caution, remanded the matter to the district court to “decide in the first instance how *Haymond* applies to Savarese.” *Id.* at 452; see also *id.* at 452-53 (Brasher, J., concurring).

The decision to remand in *Savarese* was not unanimous. The *Savarese* dissent concluded remand would be futile because it was undeniable a person in Savarese’s—and Shakespeare’s—position could not obtain relief under Justice Breyer’s concurrence. *Id.* at 456-58 (Luck, J. dissenting). The *Savarese* dissent noted that Justice Breyer’s concurrence made clear that it was the conjunction of three important facts that rendered § 3583(k) unconstitutional as applied to Haymond. *Id.* at 456 (Luck, J., dissenting) (“Savarese’s case is missing one of the three aspects that, ‘considered in combination’ and ‘[t]aken together,’ made the section 3583(k) five-year mandatory sentence in *Haymond* unconstitutional.” (quoting *Haymond*, 139 S. Ct. at 2386 (Breyer, J. concurring in the judgment)) (alterations in original)); see also *United States v. Badgett*, 957 F.3d 536, 540 n.15 (5th Cir. 2020) (observing

that Justice Breyer listed the “three features” of § 3583(k) that were constitutionally “problematic *in conjunction*”).⁸ That key missing element was that the district court’s exercise of discretion was limited by factual findings it made utilizing the preponderance standard. *Savarese*, 842 F. App’x at 456 (Luck, J., dissenting) When, however, a defendant has pleaded guilty, or been found guilty by a jury beyond a reasonable *1237 doubt, limits on the district court’s discretion are not tied to a judge’s findings under a preponderance standard. *Id.* (Luck, J. dissenting).⁹

Consistent with the authorities discussed above, this court concludes Justice Breyer’s as-applied *Haymond* analysis does not apply unless each of the three critical factors identified in his concurrence are present. Because one of those factors is absent here—the imposition of a mandatory sentence based on a trial court’s finding of the existence of a triggering crime under the preponderance standard—the district court did not err, much less plainly err, in applying the provisions of § 3583(k) to the revocation of Shakespeare’s supervised release.

Although the above conclusion is entirely sufficient to resolve Shakespeare’s appeal, it is worth noting that Shakespeare still would not be entitled to prevail on appeal even if he had convinced this court that Justice Breyer’s concurrence renders § 3583(k) unconstitutional as applied to any supervisee who did not receive a full panoply of Fifth and Sixth Amendment rights in the revocation proceeding. That is because, so construed, it is far from plain, clear, and obvious that Justice Breyer’s concurrence would amount to the narrowest decisional basis in *Haymond*. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (holding, in the context of fractured Supreme Court opinions, that of the various opinions concurring in the judgment, the one that sets out the narrowest decisional basis represents the opinion of the Court).

In support of the unexplored assumption that Justice Breyer’s concurring opinion, no matter how broadly construed, controls the disposition of his appeal, Shakespeare merely cites to this court’s decision in *United States v. Salazar*, 987 F.3d 1248, 1259 (10th Cir. 2021).¹⁰ *Salazar* did hold, consistent with several other circuits, that, under *Marks*, Justice Breyer’s concurring opinion is the narrowest ground supporting the judgment in *Haymond* and therefore represents *Haymond*’s holding. *Id.*; see also generally *Childs*, 17 F.4th at 791-92; *United States v. Henderson*, 998 F.3d 1071, 1072, 1076-77 (9th Cir. 2021); *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020). Context, however, is key. In *Salazar*, as

well as each of the other cases cited above, the question was whether the decision *1238 in *Haymond* extended beyond § 3583(k) to render “regular” revocation proceedings under § 3583(e) subject to the *Apprendi* line of cases. *Salazar*, 987 F.3d at 1261; *Childs*, 17 F.4th at 791-92; *Henderson*, 998 F.3d at 1076; *Doka*, 955 F.3d at 292. On this specific point, Justice Breyer’s opinion appears to be decided on narrower grounds than the plurality’s. Indeed, as set out above in describing the three *Haymond* opinions, concern about this very question appears to have motivated Justice Breyer’s refusal to join the *Haymond* plurality. See *Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment).

Shakespeare’s grand reading of Justice Breyer’s concurring opinion would, however, implicate a different and far more esoteric break between the plurality and Justice Breyer. As explained above, the *Haymond* plurality unequivocally holds that the constitutional rights set forth in the *Apprendi* line govern the factual determination of whether a supervisee has committed one of the triggering crimes listed in § 3583(k). See *supra* n.7. On the other hand, as posited by Shakespeare, Justice Breyer’s concurring opinion would treat § 3583(k) as a separate criminal statute in every circumstance, subject to a potentially much wider panoply of procedural and substantive rights than *Apprendi* guarantees. So conceptualized, it is arguable that the approach to § 3583(k) set out in the plurality is the narrowest decisional ground. That is, according to the plurality, the jury-trial rights set out in the *Apprendi* line only apply to a subset of § 3583(k) revocations: when the supervisee has not been convicted of committing a triggering crime in a separate criminal proceeding and does not admit to having committed such a crime. See *Haymond*, 139 S. Ct. at 2377 & n.3. Shakespeare’s interpretation of Justice Breyer’s concurrence would seem to go far beyond this, extending jury-trial rights outside of the subset of cases identified by the plurality.

[9] This court has “clarified that a concurring opinion in a splintered Supreme Court decision is the narrowest under *Marks*, and thus produces a determinate holding, when it is a logical subset of the other opinion(s) concurring in the judgment.” *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021) (quotation omitted). As to the narrow question of § 3583(k), the relief provided by the plurality—the application of *Apprendi*’s jury-trial rights to contested questions of fact not involving a prior criminal conviction—arguably amounts to a logical subset of the relief that would be provided by the grand reading of Justice Breyer’s concurring opinion advocated by Shakespeare. See *id.* (“If

the instances in which a concurring opinion would reach the same result as the splintered decision in future cases form a logical subset of the instances in which the other concurring opinion(s) would reach the same result, that opinion controls.”). That is, providing supervisees with *Apprendi* rights in the context of revocation proceedings (i.e., the plurality approach) appears to be a logical subset of treating § 3583(k) as, invariably, a separate crime, with all the attendant constitutional protections afforded any criminal defendant alleged to have committed an indictable federal offense (i.e., Shakespeare's expansive reading of Justice Breyer's concurrence).

Shakespeare has failed to brief this analytically complex question. Nor has he briefed how this court should go about interpreting § 3583(k) should *Marks* not resolve this question.¹¹ Furthermore, no *1239 court of appeals has addressed these questions because all have treated the applicability of Justice Breyer's as-applied analysis as rising or falling based on the presence or absence of the three factors identified in his separate opinion. Thus, even assuming

Shakespeare correctly interprets Justice Breyer's opinion as treating § 3583(k) as a separate crime requiring full jury-trial rights even if one of Justice Breyer's three factors is missing, an argument we reject for those reasons set out above, Shakespeare has still failed to carry his burden of demonstrating the district court committed an error that was “clear or obvious under current, well-settled law” by applying the five-year mandatory sentence set out in § 3583(k) upon revoking Shakespeare's term of supervised release. *DeChristopher*, 695 F.3d at 1091.

IV. CONCLUSION

For those reasons set out above, the judgment and sentence entered by the United States District Court for the District of Wyoming is hereby **AFFIRMED**.

All Citations

32 F.4th 1228

Footnotes

- 1 *Cf. United States v. Varah*, 952 F.2d 1181, 1183 (10th Cir. 1991) (“Final judgment in a criminal case means sentence. The sentence is the judgment.” (quotation omitted)).
- 2 *See Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).
- 3 *See also United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).
- 4 This case was orally argued on January 19, 2022. Thus, Shakespeare's pending motion to set this matter for oral argument is **denied** as moot.
- 5 Shakespeare is a member of the Northern Arapaho Tribe and, at all relevant times, was a resident of Arapaho, Wyoming, a community located within the Wind River Indian Reservation.
- 6 In relevant part, § 3583(k) specifies that if a defendant required to register under SORNA commits one of several enumerated sex offenses, the district court must revoke his supervised release and require him to serve a minimum term of imprisonment of at least five years:

If a defendant required to register under [SORNA] commits any criminal offense under chapter 109A, [encompassing 18 U.S.C. §§ 2241 to 2248] ..., 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 Such term shall be not less than 5 years.

18 U.S.C. § 3583(k).
- 7 Unsurprisingly, Shakespeare does not argue he is entitled to relief pursuant to *Haymond*'s plurality opinion. Although the *Haymond* plurality based its decision on *Alleyne*, it made clear *Alleyne* sits comfortably within the *Apprendi* pantheon. 139 S. Ct. at 2377-78 (plurality opinion). Importantly, the plurality recognized the *Apprendi* line does not apply to obligate

the government to “prove to a jury the fact of a defendant’s prior conviction.” *Id.* at 2377 n.3 (plurality opinion) (citing to *Almendarez-Torres*). Likewise, the plurality noted that *Apprendi* does not apply to facts “admitted by the defendant.” *Id.* at 2377 (plurality opinion); see also *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (recognizing the right to a jury trial applied in the *Apprendi* line does not extend to facts “admitted by the defendant”); *Cunningham v. California*, 549 U.S. 270, 274-75, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (holding that the “jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by the jury or admitted by the defendant”); *United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005) (“The Sixth Amendment rule announced in *Apprendi* ... is inapplicable where a sentence is determined based on admitted facts.”). Nor could Shakespeare prevail on his double jeopardy claim under the rule set out in the plurality opinion. That is true because the plurality recognized and reaffirmed the holding from *Johnson v. United States*, 529 U.S. 694, 700, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000), that “supervised release punishments arise from and are ‘treated as part of the penalty for the initial offense.’ ” *Haymond*, 139 S. Ct. at 2379-80 (alterations omitted). And, as *Johnson* makes clear, when “the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.” 529 U.S. at 700, 120 S.Ct. 1795.

- 8 For similar reasons, the Third Circuit held that one of these factors was insufficient in itself to render a related revocation provision unconstitutional under Justice Breyer’s *Haymond* analysis “because he emphasized that the three factors he applied are to be considered ‘in combination.’ ” *United States v. Seighman*, 966 F.3d 237, 243-44 (3d Cir. 2020) (quoting *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment)). Several other circuits, including this court, have likewise rejected challenges to that revocation provision, 18 U.S.C. § 3583(g), under Justice Breyer’s conjunctive three-factor approach. See *United States v. Ewing*, 829 F. App’x 325, 330 (10th Cir. 2020) (unpublished disposition cited solely for its persuasive value); see also, e.g., *United States v. Garner*, 969 F.3d 550, 553 (5th Cir. 2020); *United States v. Coston*, 964 F.3d 289, 295-96 (4th Cir. 2020).
- 9 The Savarese dissent offered two additional reasons Justice Breyer’s as-applied analysis did not apply to Savarese. First, because Savarese pleaded guilty to committing an offense that triggered § 3583(k), he “waived his jury-trial rights.” *Id.* at 457 (Luck, J., dissenting). The dissent noted that Justice Breyer specifically reasoned that if all three of his identified aspects were present, this would lead Justice Breyer to conclude “the five-year mandatory sentence was ‘more like punishment for a new offense to which the jury right would typically attach.’ ” *Id.* (Luck, J., dissenting) (emphasis added) (citing *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment)). Because Savarese, like Shakespeare, pleaded guilty to the new substantive offense before that offense was used to revoke his supervised release, he waived his right to the jury trial on whether he violated the terms of his supervised release. *Id.* at 457-58. Second, Justice Breyer’s concurrence did not discuss, let alone purport to overrule, *Almendarez-Torres*, 523 U.S. at 247, 118 S.Ct. 1219, which exempted from the rule in *Apprendi* the fact that a defendant has been convicted of a prior offense. *Savarese*, 842 F. App’x at 458; see also *United States v. Hanson*, 936 F.3d 876, 887 n.10 (9th Cir. 2019) (holding that it was unnecessary to “consider the impact of” *Haymond* because “a jury found that [the defendant] had committed the offense [underlying the § 3583(k) revocation] beyond a reasonable doubt”).
- 10 See Appellant’s Opening Br. at 9 (citing *Salazar* for the following proposition: “Justice Breyer’s concurrence is the narrowest ground supporting the judgment and therefore ‘represents the court’s holding.’ ”).
- 11 See *Guillen*, 995 F.3d at 1115 (“Of course, it is not always possible to identify the opinion that is a logical subset of the other concurring opinion(s). Sometimes there is no discernable implicit consensus or common denominator among the Justices who support the Court’s judgment, making *Marks* an exercise in chasing the wind.” (citations and quotations omitted)).

Appendix B:

United States v. Shakespeare, Order Revoking Supervised Release and
Committing Defendant (D. Wyo Feb. 25, 2021)

FILED

8:11 am, 2/25/21

Margaret Botkins
Clerk of Court

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	18-CR-154-SWS-1
LAQUAN KYLE DUANE SHAKESPEARE,	)	
	)	
Defendant.	)	

ORDER REVOKING SUPERVISED RELEASE AND
COMMITTING DEFENDANT

The above-entitled matter having come before the Court for hearing on February 24, 2021, upon a Petition For Warrant for Offender Under Supervision entered December 3, 2020. Plaintiff appearing by Timothy Gist, Assistant U.S. Attorney, Lander, Wyoming, and the defendant appearing in person and by Deborah Roden, Court-Appointed Counsel, Cheyenne, Wyoming, and the Defendant having admitted to the violation contained in the Petition and the Court having heard the arguments offered in support of and in opposition to the petition, and being fully advised in the premises, FINDS that the defendant, Laquan Kyle Duane Shakespeare, has violated a condition of Supervised Release, and that such violations warrant revocation of said Supervised Release. NOW, THEREFORE, IT IS

ORDERED that the Supervised Release heretofore granted by the Court on February 8, 2019, be, and the same is hereby revoked; it is

FURTHER ORDERED that the defendant, Laquan Kyle Duane Shakespeare, be,

and he is hereby, sentenced to custody for a term of 5 years as arranged by the Bureau of Prisons, to be served consecutive to the sentence imposed in Docket No. 20-CR-00124-SWS-1, with no term of supervised release to follow.

Dated this 24th day of February, 2021.



Scott W. Skavdahl
Chief United States District Judge

Appendix C:

United States v. Shakespeare, Order Denying Rehearing (10th Cir. June 13, 2022)

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 13, 2022

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LAQUAN KYLE DUANE
SHAKESPEARE,

Defendant - Appellant.

No. 21-8010
(D.C. No. 2:18-CR-00154-SWS-1)
(D. Wyo.)

ORDER

Before **HARTZ, KELLY**, and **MURPHY**, 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