No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

JONATHAN LEE OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

RACHEL JULAGAY
Federal Defender for the District of Montana
*JOHN RHODES
Assistant Federal Defender
Federal Defenders of Montana
125 Bank St., Ste. 710
Missoula, Montana 59802-9380
(406) 721-6749
*Counsel of Record

SUBMITTED: October 20, 2022

QUESTIONS PRESENTED

Did the district court's unindicted, non-jury, preponderance of the evidence fact-finding that Mr. Oliver committed a new federal offense to conclude Mr. Oliver violated a condition of his supervised release violate the Fifth and Sixth Amendments?

When serving a term of supervised release, did Mr. Oliver's false statements on financial disclosure forms required by the United States Probation Office fall under the "judicial procedure" exception in 18 U.S.C. §1001(b)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES AND RULES

United States Code

Federal Rules of Criminal Procedure

United States Sentencing Guidelines

United States Constitution

Other Sources

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

JONATHAN LEE OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Jonathan Lee Oliver ("Mr. Oliver") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The court of appeals published its opinion affirming the district court's judgment and denying Mr. Oliver's request for appellate relief on July 22, 2022. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment is reported at *United States v. Oliver*, 41 F.4th 1093 (9th Cir. 2022). Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, and Section 1001 of Title 18 of the United States Code. Appendices B, C, and D.

STATEMENT OF THE CASE

Mr. Oliver appeals his judgment, challenging: 1) the district court's failure to apply the judicial proceedings exception at 18 U.S.C. § 1001(b) to the criminal conduct alleged in the amended revocation petition; and 2) the district court's unindicted, non-jury, preponderance of the evidence fact-finding that Mr. Oliver committed a new federal offense when concluding Mr. Oliver violated a condition of his supervised release, in violation of the Fifth and Sixth Amendments.

Mr. Oliver requests this Court grant his petition for certiorari.

PRIOR PROCEEDINGS

On July 22, 2014, the court imposed concurrent prison sentences of 100 months for wire fraud, 100 months for money laundering, and 60 months for

financially structuring to avoid currency reporting on Mr. Oliver. Those prison terms were followed by three concurrent three-year terms of supervised release.

Mr. Oliver was released from prison and began serving those three concurrent three year terms of supervised release on October 8, 2020. On April 6, 2021, a petition to revoke Mr. Oliver's supervised release was filed, alleging that Mr. Oliver left the District of Montana without first informing his probation officer and that Mr. Oliver failed to provide the probation office with a complete and accurate account of his finances.

An amended petition was filed on April 30, 2021. It included five additional alleged violations, including Violation #7, an allegation that Mr. Oliver had violated 18 U.S.C. § 1001 by making false statements to the probation office on his monthly financial reports.

The district court found Mr. Oliver was responsible for each of the seven violations, and continued the disposition of the final revocation hearing to May 18, 2021. As an alleged non-violent crime with a potential penalty of up to five years, under the United States Sentencing Guidelines, Violation #7 constituted a "Class B" violation and raised the revocation guidelines from 7-to-13 to 18-to-24 months. U.S.S.G. §§ 7B1.1(a)(2) and 7B1.4(a); *see also* 18 U.S.C. § 3583(e) (setting statutory maximum revocation imprisonment at two years for a Class C felony). The district court ordered the parties to submit briefing and proposed findings of fact and

conclusions of law regarding 1) the application of 18 U.S.C. § 1001(b)'s "judicial procedure" exception to Mr. Oliver's alleged false statements to the probation office and 2) whether the non-jury, preponderance of the evidence fact-finding performed by the district court in adjudicating an alleged "new criminal conduct" violation of the terms of supervised release violated Mr. Oliver's Fifth and Sixth Amendment rights, particularly in light of this Court's decision in *United States v. Haymond*, 139 S.Ct. 2369 (2019).

The district court reconvened the final revocation hearing for disposition of Mr. Oliver's supervised release violations on May 18, 2021. The district court revoked all three of Mr. Oliver's terms of supervised release, and sentenced him to 24 months imprisonment on Count 1, two months on Count 97, and two months on Count 105, with sentences to run concurrently. Upon release from imprisonment, Mr. Oliver is subject to 12 months of supervised release on Count 1, 32 months of supervised release on Count 97, and 32 months of supervised release on Count 105, with the terms to run concurrently.

Mr. Oliver appealed to the Ninth Circuit. Following briefing, the court heard oral argument on March 9, 2022. The court ordered supplemental briefing on June 1, 2022. On July 22, 2022, the Ninth Circuit affirmed the district court's judgment. *United States v. Oliver*, 41 F.4th 1093 (9th Cir. 2022).

This petition follows.

FACTUAL BACKGROUND

Relevant to this appeal, the revocation petition alleged as Violation #7:

> Mandatory condition #2: You must not commit another federal, state, or local crime.
> On March 25, 2021, the defendant submitted a Monthly Supervision Report for the month of March. The report provides a warning, "Any false statements may result in revocation of probation, supervised release, or parole, in addition to 5 years imprisonment, a $250,000 fine, or both. Per 18 U.S. C. § 1001." The defendant signed and dated on the signature line acknowledging he certifies that all information furnished is complete and correct. The undersigned officer reviewed the document. The monthly report reflected the following false statements to include the following:
>
> • False statements about vehicles owned or driven by the defendant.
> • False statements about bank accounts.
> • False statements about storage units.
> • False statement about net earnings.
>
> The defendant's false statements on his monthly report constitute a violation of 18 U.S.C. § 1001 False Statements, punishable by a term of imprisonment of up to 5 years, a $250,000 fine, or both.

The district court found Mr. Oliver committed Violation #7. Mr. Oliver appealed. Following oral argument, and supplemental briefing, the Ninth Circuit published an opinion affirming the district court.

On the issue of the "judicial proceedings" exception to 18 U.S.C. § 1001(b), the court ruled:

> By its plain language, the judicial proceeding exception only protects statements made "by [the] party ... to the judge or magistrate"—not statements made to others in the judicial branch. Taking an expansive view of "submission" would threaten to swallow the rule. After all,

> Congress broadly proscribed false statements made in "any matter" of the "judicial branch of the Government of the United States." 18 U.S.C. § 1001(a). And extending "submission" to all judicial employees under the supervision of a judge or magistrate would undermine Congress's will. The same goes for a statement that eventually makes its way—without the party's direction—to a judge or magistrate. That others in the judicial branch independently deem a statement worthy of a judge's attention does not satisfy the submission requirement. In other words, if a party sends a statement to a judicial employee for the employee's consideration, study, or decision, then the party is *not* presenting it to a judge for the judge's consideration, study, or decision.

Oliver, 41 F.4th at 1098 (emphasis in original). The court went on to distinguish its holding from the court's prior decision in *United States v. Horvath*, 522 F.3d 904 (9th Cir. 2008).

> None of *Horvath*'s exceptions apply here. Oliver lied on a monthly supervision report provided to his probation officer during his term of supervised release. Oliver's false statements were not made in a pre-sentencing interview where the probation officer "act[s] as a neutral information gatherer for the judge." *Id*. at 1078 (simplified). Nor did Oliver use the probation officer to deliver the report to the judge, like a courier or clerk would.
>
> Rather, Oliver's false statements were made in the context of the probation officer's statutory duty to "keep informed" of his supervisee's "conduct and condition" and "report [such] conduct and condition to the sentencing court."

Oliver, 41 F.4th at 1098-99. The court continued, explaining that "the general requirement to 'report' to the court does not transform the probation officer into a 'mere conduit.'" *Id*. at 1099 (quoting *Horvath*, 492 F.3d at 1079). The court ruled

the requirement that probation officers "'promptly report to the court any alleged' criminal violation" does not trigger the judicial proceedings exception. *Id*.

The Ninth Circuit also addressed Mr. Oliver's constitutional arguments. The court relied on its prior post-*Apprendi* decisions "that imposing a term of imprisonment for violating supervised release is 'part of the original sentence authorized by the fact of conviction and does not constitute additional punishment.' *United States v. Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir. 2006) (citing *United States v. Liero*, 298 F.3d 1175, 1178 (9th Cir. 2002)). And so there's 'no right to a jury trial for such post-conviction determinations.' *Id*." *Oliver*, 41 F.4th at 1101.

The court went on to note:

> Even after *Haymond*, we reaffirmed that the Fifth and Sixth Amendments do not prohibit a § 3583(e) post-revocation prison sentence based on judicial findings under a preponderance standard. *See United States v. Henderson*, 998 F.3d 1071 (9th Cir. 2021). We again explained that when a defendant receives a post-revocation sentence, we treat the "new sentence[ ] ..., for constitutional purposes, 'as part of the penalty for the initial offense.' " *Id*. (quoting *Johnson v. United States*, 529 U.S. 694, 700, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000)). As such, a custodial term for supervised release violations "does not trigger the [same] constitutional analysis" as a term imposed at initial sentencing. *Id*. at 1074. So a revocation sentence that prolongs a defendant's total sentence "beyond the maximum sentence for the underlying crime" does not offend *Apprendi*. *Id*. And after carefully examining *Haymond*, we concluded that the Court did not "hold that the right to jury findings proved beyond a reasonable doubt recognized in *Apprendi* extends to a revocation of supervised release hearing." *Id*. at 1072.

Id. at 1101-02.

The Ninth Circuit affirmed the district court's judgment. This petition follows.

REASONS FOR GRANTING THE PETITION

Under the Fifth and Sixth Amendment, judicial preponderance of the evidence fact-finding to revoke supervised release and imprison a defendant for a new, unindicted criminal offense as a violation of the conditions of supervised release, is unconstitutional. *See United States v. Haymond*, 139 S.Ct. 2369 (2019).

Furthermore, Mr. Oliver's alleged criminal conduct falls under 18 U.S.C. § 1001(b)'s "judicial proceedings" exception, and thus Mr. Oliver did not commit a new criminal offense as alleged in the amended revocation petition.

A. Due Process and the Right to Jury Trial require the government to gain a grand jury indictment and then convince a jury that the elements of an alleged offense have been proven beyond a reasonable doubt before subjecting a defendant to punishment.

Article III, § 2, cl. 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

The Fifth Amendment to the Constitution assures: "No person shall be held to answer for a capital, or otherwise infamous crime, . . . unless on a presentment or indictment of a Grand Jury. . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const., amend. VI.

"The prosecution bears the burden of proving all elements of the offense charged[.]" *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952)). The government "must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish those elements." *Id*. at 278 (citing *In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100,104 (1972)). In *Winship*, the Court held: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 365. The "verdict must be based upon the evidence developed at trial." *Turner v. Louisiana*, 379 U.S. 466, 471 (1965) (comparing *Thompson v. City of Louisville*, 362 U.S. 199 (1960)).

The Court in *Turner* linked this requirement to trial by jury. "The requirement that a jury's verdict 'must be based on the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id*. at 472 (footnote omitted). "In the constitutional sense, trial by jury in

a criminal case necessarily implies at the very least that 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Id*. at 472-73.

"Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[.]'" *Cunningham v. California*, 549 U.S. 270, 289 (2007) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When 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, 303-304, (2004) ((quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)).

In *Apprendi*, the Court held "any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and proved beyond a reasonable doubt" or admitted by the defendant. *Apprendi*, 530 U.S. at 495. After *Apprendi*, the Court extended this principle to a number of different contexts. *See Ring v. Arizona*, 536 U.S. 584 (2002) (imposition of death penalty based on judicial fact finding); *Blakely v. Arizona*, 542 U.S. 296 (2004) (mandatory state sentencing

guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines based on judicial fact finding). In *Alleyne v. United States*, 570 U.S. 99, 112 (2013), the Court extended the rationale of *Apprendi* to hold that any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury for a finding beyond a reasonable doubt.

In *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224-1225 (9th Cir. 2006), the court of appeals ruled: "It is clear from *Booker* that there is no Sixth Amendment *Apprendi* violation so long as the Guidelines are advisory. 543 U.S. at 226-27, 125 S.Ct. 738. . . . Nor does a judge's finding, by a preponderance of the evidence, that defendant violated the conditions of supervised release raise Sixth Amendment concerns. There is no right to a jury trial for such post-conviction determinations." (citations omitted). *See also United States v. Gavilanes-Ocaranza*, 772 F.3d 624, 626 (9th Cir. 2014) (affirming validity of *Huerta-Pimental*).

Both defendants admitted the violation conduct in *Huerta-Pimental* and *Gavilanes-Ocaranza* and neither defendant made a Fifth Amendment claim. *Huerta-Pimental*, 445 F.3d at 1221-1222; *Gavilanes-Ocaranza*, 772 F.3d at 626-627.

United States v. Henderson, 998 F.3d 1071, 1072 (9th Cir. 2021), similarly resolved a distinct issue: whether a supervised release revocation can extend

"incarceration beyond the maximum term of imprisonment for [the] underlying conviction, without findings of fact proved to a jury beyond a reasonable doubt."

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

The Supreme Court invalidated Haymond's sentence. *Haymond*, 139 S.Ct. at 2384-85. Writing for a four-justice plurality, Justice Gorsuch reviewed the history underlying the Sixth Amendment's right to trial by jury. At common law, crimes carried specific penalties. After a defendant was found guilty, the judge simply

imposed the sentence required by the offense of conviction. *Id.* at 2376. Even in those cases where the judge had sentencing discretion, he could not '"swell the penalty above what the law ha[d] provided for the acts charged"' and found by the jury. *Id.* (citing and quoting *Apprendi*, 530 U.S., at 519 (Thomas, J., concurring) (quoting 1 Bishop §85, at 54); *see also* 1 J. Bishop, Criminal Law §§933-934(1), p. 690 (9th ed. 1923) ("[T]he court determines in each case what within the limits of the law shall be the punishment" (emphasis added))). As time passed, laws were adopted that permitted judges and parole boards to suspend all or part of defendants' sentences and afford a period of conditional liberty as "an act of grace." But, even then, the sanction for violating the terms of conditional release could not result in an overall sentence that exceeds the initial term of incarceration authorized by the jury's verdict. As a result, "these developments did not usually implicate the historic concerns of the Fifth and Sixth Amendments." *Id.* at 2377.

Unlike a defendant facing revocation of a suspended sentence or parole, however, Haymond was charged with violating his supervised release. His original crime carried a potential penalty of zero to ten years imprisonment. But, based on the nature of his supervised release violation, the trial court judge, acting without a jury, determined by a preponderance of the evidence that he violated the terms of his supervision and sentenced him to mandatory minimum five years in prison as required by 18 U.S.C. § 3583(k).

Justice Gorsuch opined § 3583(k)'s minimum mandatory provision rendered it unconstitutional in light of *Alleyne*. The plurality rejected the government's attempt to dodge the demands of the Fifth and Sixth Amendments by relabeling a criminal prosecution as a "sentence enhancement" or, as in *Haymond*, what the government referred to as a "post-judgement sentence administration proceeding." *Id.* at 2379. In doing so, Justice Gorsuch wrote the Court had repeatedly explained that any increase in punishment contingent on a finding of fact requires a jury and proof beyond a reasonable doubt. *Id.* (citing *Ring*, 536 U.S. at 602). "Any increase in a defendant's authorized punishment contingent on a finding of fact requires a jury and proof beyond a reasonable doubt, no matter what the government chooses to call the exercise." *Id.*

The plurality went on to note that its opinion did not "say anything new" when it acknowledged that a sentence includes any sentence imposed on supervised release. *Id.* In *Cornell Johnson v. United States*, 529 U.S. 694, 700 (2000), the Court held that supervised release sentences "arise from and are treated as part of the penalty for the initial offense." *Haymond*, 139 S.Ct. at 2379-80 (quoting *Cornell Johnson*, 529 U.S. at 700). Although that "does not mean a jury must find every fact in a revocation hearing that may affect the judge's exercise of discretion," it "does mean that a jury must find any facts that trigger a new mandatory minimum prison term." *Id.* (emphasis in original).

The plurality rejected the notion that Haymond's revocation sentence was authorized by the jury's earlier finding of guilt. It is true that the offense of conviction authorized a term of supervision, which was subject to judicial revocation and a mandatory prison sentence. But the sentence imposed at Haymond's revocation hearing was based on a judicial finding of fact. Because the mandatory minimum arose only as a result of additional judicially-made factual findings, it violated *Alleyne*. *Id*. at 2381.

Finally, the plurality rejected the government's attempt to equate supervised release revocations to revocation of parole. Prior to the Sentencing Reform Act of 1984, the federal parole system allowed a defendant, who had violated the terms of his supervision, to be returned to prison. Importantly, however, such defendants could only be sent back to prison to serve their original sentence which could not exceed the statutory maximum fixed for their offense of conviction. *Id.* at 2382. Therefore, a defendant could not be imprisoned for a period longer than the jury's factual findings allowed – a result "harmonious with the Fifth and Sixth Amendments." *Id.* Supervised release, by contrast, does not replace a portion of a defendant's prison term with community release; it is served after the defendant has fully discharged his prison term. While revocation of parole exposed a defendant to the remainder of his prison term, § 3583(k) exposes a defendant to a mandatory term beyond that authorized by the jury's verdict. *Id.* This "structural difference bears

constitutional consequences" and required a finding that § 3583(k) is unconstitutional. *Id.*

Justice Breyer, who cast the fifth vote in favor of striking down the law, opined on narrower grounds. He doubted that Congress intended supervised release to be distinguished on the grounds set out by the plurality, and feared the "potentially destabilizing consequences" if *Apprendi* were fully applied to the supervised release context. He nevertheless concluded that § 3583(k) was unconstitutional due to the combination of three conditions: (1) that it applies only when the defendant commits one of a discrete set of criminal offenses; (2) that it takes away a judge's discretion to decide whether a violation should result in imprisonment; and (3) that it requires the court to impose a mandatory-minimum term. *Id.* at 2386 (Breyer, J., concurring in judgment). The combination of these factors, he concluded, "more closely resembled the punishment of new criminal offenses" and, for that reason, he determined the statute violated *Alleyne*. *Id.*

Haymond deserves such a lengthy exposition because it drives the analysis in this case. It is true that at several points in the plurality opinion, Justice Gorsuch emphasized the Court's decision was limited to § 3583(k). *Haymond*, 139 S.Ct. at 2379 n.4 ("Because we hold that this mandatory minimum sentence rendered Mr. Haymond's sentence unconstitutional in violation of *Alleyne v. United States*, we need not address the statute's effect on his maximum sentence under *Apprendi v.*

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

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

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

Justice Gorsuch made clear that the plurality was "not pass[ing] judgment one way or another on § 3583(e)'s consistency with *Apprendi*." *Id*. at n.7.

Perhaps Justice Alito's dissent prompted that exclusion. The dissent began by noting the plurality opinion "sports rhetoric with potentially revolutionary implications[,]" and then forecast "[t]he plurality opinion appears to have been

carefully crafted for the purpose of laying the groundwork of *much* broader scope." *Id*. at 2386 (Alito, J., dissenting) (italics in original).

That groundwork details Mr. Oliver's argument: "Many passages in the opinion suggest that the entire system of supervised release, which has been an integral part of the federal criminal justice system for the past 35 years, is fundamentally flawed in way that cannot be fixed." *Id*. at 2386-87 (Alito, J., dissenting).

The dissent elaborated:

> Many statements and passages in the plurality opinion strongly suggest that the Sixth Amendment right to a jury trial applies to *any* supervised-release revocation proceeding. Take the opinion's opening line: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Ante*, at ___, 204 L. Ed. 2d, at 900. In a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that "take[s] a person's liberty," *ibid.,* in the sense that the defendant is sent back to prison. Later, after noting that the Sixth Amendment applies to a "criminal prosecution," the plurality gives that term a broad definition that appears to encompass any supervised-release revocation proceeding. The plurality defines a "crime" as any "'ac[t] to which the law affixes . . . punishment,'" and says that a "prosecution" is "'the process of exhibiting formal charges against an offender before a legal tribunal.'" *Ante*, at ___, 204 L. Ed. 2d, at 903. These definitions explain what the terms in question mean in general use, but they were not formulated for the purpose of specifying what "criminal prosecution" means in the specific context of the Sixth Amendment. The plurality, however, uses them for precisely that purpose, and in so doing boldly suggests that every supervised-release revocation proceeding is a criminal prosecution. See *ante,* at ___, 204 L. Ed. 2d, at 907 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is

> imposed. . . . [A]n accused's final sentence includes any supervised release sentence he may receive").

Id. (italics in original) (underlines added).

The dissent further detailed the plurality's Fifth and Sixth Amendment indictment of supervised release revocation imprisonment.

> Later statements are even more explicit. Quoting *Blakely* v. *Washington*, 542 U. S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), out of context, the plurality states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Ante*, at ___, 204 L. Ed. 2d, at 903 (internal quotation marks and alteration omitted). <u>If sending a defendant found to have violated supervised release back to prison is "punishment," then the thrust of the plurality's statement is that any factual finding needed to bring that about must be made by a jury, not by a judge, as is currently done</u>.
>
> * * *
>
> [T]he plurality huffs that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d]" "by the simple expedient of relabeling a criminal prosecution a . . . 'sentence modification' imposed at a 'postjudgment sentence administration proceeding.'" *Ante*, at ___, 204 L. Ed. 2d, at 906. The meaning of this statement is unmistakable and cannot have been inadvertent: <u>A supervised-release revocation proceeding is a criminal prosecution and is therefore governed by the Sixth Amendment (and the Fifth Amendment to boot)</u>. And there is more. See *ante*, at ___, 204 L. Ed. 2d, at 907 ("any accusation triggering a new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt"); *ante*, at ___, 204 L. Ed. 2d, at 908 ("a jury must find *all* of the facts necessary to authorize a judicial punishment").

Id. at 2387-88 (Alito, J., dissenting) (italics in original) (underlines added).

The dissent elucidates Mr. Oliver's argument (other than the viability of supervised release proceedings). "The intimation in all these statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment – which means that the defendant is entitled to a jury trial, which means that as a practical matter supervised-release revocation proceedings cannot be held." *Id*. at 2388.

Mr. Oliver, of course, tempers his argument to the Fifth and Sixth Amendment's requiring jury beyond a reasonable doubt fact-finding to determine he committed an alleged new crime. The plurality opinion supports his argument, as the dissent noted.

> Where the plurality is headed is demonstrated – ironically – by its insistence that it is not going all the way—for now. The plurality writes: "[O]ur opinion," *ante,* at ___, ___, 204 L. Ed. 2d, at 911, 911, does "not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*," *ante,* at ___, n. 7, 204 L. Ed. 2d, at 910. Section 3583(e) sets out the procedure to be followed in *all* supervised-release revocation proceedings, so if that provision is not consistent with *Apprendi*, the whole idea of supervised release must fall. The strategy of the plurality opinion is only thinly veiled. It provides the framework to be used in ending supervised release. It provides no clear ground for limiting the rationale of the opinion so that it does not lead to that result. And then it says: We are not doing that *today*.

Id. (italics in original); *see also id*. at 2389 (Alito, J., dissenting) ("the previously quoted statements pointing to a broader understanding remain, and the plurality does

nothing to disavow that reading. To the contrary, the plurality doubles down, assuring us that this broader understanding would not be too disruptive.").

The constitutional violations here are compounded because the judge's preponderance of the evidence fact-finding to determine Mr. Oliver committed a new crime enhanced the Guidelines range from 7-to-13 to 18-to-24 months and the court sentenced Mr. Oliver at the high-end of that enhanced range 24 months, which was also the statutory maximum sentence. 18 U.S.C. § 3583(e).

B. The judicial proceedings exception in 18 U.S.C. § 1001 applies, thus Mr. Oliver did not commit a new federal offense as alleged in Violation #7.

The district court ruled Mr. Oliver violated 18 U.S.C. § 1001(a), which criminalizes false statements to the government:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully–
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> >
> > (2) makes any materially false, fictitious, or fraudulent statement or representation; or
> >
> > (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section

> 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

18 U.S.C. § 1001(a). Subsection (b) exempts statements, representations, writings or documents submitted in judicial proceedings:

> Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

18 U.S.C. § 1001(b).

District courts appoint probation officers to serve "under the direction of the court making the appointment." 18 U.S.C. § 3602(a).

Rule 32 of the Federal Rules of Criminal Procedure commands the probation officer to make multiple inquiries and to provide – or withhold – the resulting information to the district court. *See* Fed.R.Crim.P. 32(c)(1)(A) ("must conduct…"); Rule 32(c)(1)(B) ("must conduct…"); Rule 32(d)(1) ("[t]he presentence report must…"); Rule 32(d)(2) ("[t]he presentence report must also…"); Rule 32(d)(3) ("[t]he presentence report must exclude…"); Rule 32(g) ("the probation officer must submit to the court…"). These commands illustrate that, when performing these functions, a probation officer is an "intermediary" of the Court. *United States v. Horvath*, 492 F.3d 1075, 1081 (9th Cir. 2007).

Similar commands are found in the statute controlling the supervisory and reporting duties of federal probation officers.

A probation officer shall –

***

> (2) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

***

> (7) keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision and report thereon to the court placing such person on probation and report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked;

***

> (10) perform any other duty that the court may designate.

18 U.S.C. §§ 3603(2); (7); (10) (underlines added). These subsections of § 3603 obligate a supervising probation officer to monitor an offender's compliance with conditions of release and report that conduct to the court.

> Under this statutory framework, therefore, the probation officer is under a continuing obligation to keep the court informed of the activities of persons under its supervision. She is essentially an investigative and supervisory "arm of the court," *United States v. Johnson*, 935 F.2d 47, 49 (4th Cir. 1991), or, as another court has put it, she serves as the "eyes and ears" of the court. *Schiff v. Dorsey*, 877 F. Supp. 73, 78 (D. Conn. 1994). There is a close working relationship between the probation officer and the sentencing court.

United States v. Burnette, 980 F.Supp. 1429, 1433 (M.D. Ala. 1997).

Those Congressional commands are part of the statutory duties of a probation officer. Generally speaking, "[i]n performing those tasks, a probation officer exercises varying degrees of discretion and, except in certain narrow circumstances, labors under no statutory mandate to report particular comments to a judge." *Horvath*, 492 F.3d at 1078. The false statements at issue here are the ones described by the Ninth Circuit in *Horvath* as "certain narrow circumstances," defined by "statutory mandate." The "probation officer is required by law," *Horvath*, 492 F.3d at 1076, to "report" Mr. Oliver's conduct to the Court, most especially alleged violation of the conditions of release, including restitution, ordered by the Court. 18 U.S.C. §§ 3603(2) and (7); *see also* U.S.S.G. § 7B1.2(a) (obligating probation officer to report the alleged Grade B, false statement violation, to the court).

The United States Probation Office was required to "keep informed, to the degree required by the conditions specified by" and "report his conduct and condition to" this Court, including Mr. Oliver's financial status. 18 U.S.C. § 3603(2). The United States Probation office was required to "keep informed concerning […] the payment of a fine or restitution of [Mr. Oliver] and report

thereon to the court." 18 U.S.C. § 3603(7).[1] "In filing a petition to revoke supervised release, the probation officer merely acts as an agent for the district court and gives the court information necessary to make that determination." *United States v. Cofield*, 233 F.3d 405, 408 (6th Cir. 2000) (citation omitted).

Federal probation officers fall under the remit of the district court, and when a probation officer is compelled to act by statute or court order, they act as a conduit of the district court, and "in certain narrow circumstances," *supra*, their actions are a judicial proceeding. Here, the probation office, while supervising Mr. Oliver, inquired with him about his finances to execute Mr. Oliver's sentence.

This information-gathering was undertaken at the direction of Congress and the court to assist the court in enforcing the conditions of supervised release ordered by the court as part of Mr. Oliver's sentence. The probation officer's "mission is to *execute the sentence*[.]" *United States v. Reyes*, 283 F.3d 446, 455 (2d Cir. 2002) (quoting Supervision of Federal Officers, Monogram 109, Probation and Pretrial Services Division, Administrative Office of the United States Courts, August 11,

[1] Although § 3603(7) refers only to "probationers," other courts, and Mr. Oliver, interpret that phrase to include persons on supervised release, within the context of the statute. *See United States v. Inman*, 2013 WL 2389814 (E.D. Ky. 2013); *United States v. Nickson*, 2010 WL 745689 (M.D. Fla. 2010); *United States v. Melendez-Santana*, 353 F.3d 93 (1st Cir. 2003); *United States v. Eddie Smith*, 45 F.Supp.2d 914 (M.D. Ala. 1999); *United States v. Victoria Johnson*, 48 F.3d 806 (4th Cir. 1995) (all supervised release cases referencing § 3603(7)).

1993, at 1) (italics in *Reyes*). This execution of the sentence, and obligatory reporting, makes the inquiry a judicial proceeding within the meaning of 18 U.S.C. § 1001(b).

> Consistent with his role as a neutral, information-gathering agent of the court, the probation officer in this case reported, without superimposing any analysis of his own, both that "[D]efendant informed this officer that he was enlisted in the U.S. Marine Corps" and that the probation officer had "requested documentation from the U.S. Marine Corps ... [but that, a]t the time of this writing[,] documentation or a DD214 was not available to this officer." It is clear from the neutral reporting in this PSR that the probation officer exercised no discretion in including Defendant's false statement made during the presentence interview.

Horvath, 492 F.3d at 1079.

Horvath concerned a defendant who lied about past military service to the probation officer during a 2001 presentence investigation interview. *Id*. at 1076. The lie was uncovered in 2006. *Id*. at 1076-77. Horvath was subsequently charged with false statement, pursuant to 18 U.S.C. § 1001(a)(2). *Id*.

Horvath filed a motion to dismiss, claiming that prosecution was precluded by the "judicial proceedings" exception at 18 U.S.C. § 1001(b). The motion to dismiss was denied; Horvath ultimately pled guilty, preserving his right to appeal the denial of his motion to dismiss. The Court reversed, ruling:

> Because Rule 32 required the probation officer to submit Defendant's false statement of personal history to the judge, and because the probation officer exercised no discretion in doing so, he was acting as a conduit between Defendant and the judge. We therefore conclude that § 1001(b) protects Defendant's false statement.

Id. at 1080.[2]

Here, because Congress mandated the probation officer to report Mr. Oliver's financial false statement to the court, the probation officer acted as "essentially an investigative and supervisory arm of the court." *Burnette*, 980 F.Supp. at 1433 (quotation and italics omitted). The judicial proceeding exception in § 1001(b) applies.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 20th day of October, 2022.

/s/ John Rhodes
RACHEL JULAGAY
Federal Defender for the District of Montana
*JOHN RHODES
Assistant Federal Defender
Federal Defenders of Montana
125 Bank St., Ste. 710
Missoula, Montana 59802-9380
(406) 721-6749
*Counsel of Record

[2] *But see United States v. Vreeland*, 684 F.3d 653, 666 (6th Cir. 2012) (declining to extend *Horvath* and holding that meeting between supervisee and probation officer did not constitute a "judicial proceeding"); *United States v. Manning*, 526 F.3d 611, 621 (10th Cir. 2008) (declining to apply *Horvath* and holding that "judicial proceedings exception" in 18 U.S.C. § 1001(b) does not extend to false statements made during PSR interview).