**No. 24-**

IN THE

# SUPREME COURT OF THE UNITED STATES

MAURICE KERRICK, JR.,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

On Petition for a Writ of Certiorari to the
District of Columbia Circuit Court of Appeals

## PETITION FOR A WRIT OF CERTIORARI

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December 2, 2024

## QUESTIONS PRESENTED

Whether a defendant's due process rights are violated when he is never informed that he may be sentenced to an additional term of imprisonment for violating supervised release after he was sentenced to, and served, what he was told was the maximum term of imprisonment for the offense–and the D.C. Circuit's opinion affirming his sentence conflicts with decisions of this Court and the Fourth Circuit.

Whether a defendant's double jeopardy and Sixth Amendment rights are violated where he was sentenced to, and served, the maximum term of imprisonment for the offense and was never informed that he could be sentenced to an additional term of imprisonment for violating supervised release.

## PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Maurice Kerrick, Jr.

The Respondent, the appellee below, is the United States of America.

## RELATED PARTIES AND PROCEEDINGS

There are no related cases or proceedings of which petitioner is aware.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**



**STATUTES AND RULES**

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Maurice Kerrick, Jr., petitions this Court for a writ of certiorari to review the final order of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not reported. It is reproduced at Pet. App. 3a-7a. The opinion of the district court was delivered orally. The relevant transcript pages are reproduced at Pet. App. 8a-27a.

## JURISDICTION

The court of appeals entered judgment on April 30, 2024, Pet. App. 3a, and then denied rehearing and rehearing en banc on September 3, 2024. Pet. App. 1a-2a. This Court has jurisdiction over the timely filed petition under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. VI.

## FEDERAL RULES OF CRIMINAL PROCEDURE PROVISIONS

Rule 11(c)(1): PRIOR TO 2002 AMENDMENTS

> **(c) Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> **(1)** the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

Rule 11(b)(1)(H): AFTER 2002 AMENDMENTS AND CURRENTLY

**(b) Considering and Accepting a Guilty or Nolo Contendere Plea.**

**(1) Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

**(H)** any maximum possible penalty, including imprisonment, fine, and term of supervised release;

## INTRODUCTION

Despite being informed at his plea proceeding that five years was the statutory maximum sentence of imprisonment to which he could be sentenced. But, in addition to the five-year sentence that was imposed, petitioner was subsequently sentenced to an additional two years of imprisonment for violating the terms of supervised release.

The D.C. Circuit ruled that defendants may be sentenced to serve more than the statutory maximum sentence prescribed for a crime of conviction without any notice, holding that district courts have no obligation to notify defendants at any time in the proceedings that they may be subject to additional imprisonment after they have fully served the maximum prison sentence authorized for the crime. This holding is unprecedented and conflicts with decisions of this Court and a recent decision of the Fourth Circuit.

In addition, the D.C. Circuit found no double jeopardy or Sixth Amendment issue with sentencing a defendant to an additional term of imprisonment above what the defendant was told was the maximum penalty for the offense. Sentencing a defendant to more than the statutory maximum undermines his clear expectation of finality in his sentence and cannot be squared with double jeopardy and Sixth Amendment principles set forth by this Court.

## BACKGROUND

### A. District Court Proceedings

Pursuant to a plea agreement, Mr. Kerrick pleaded guilty to one count of possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1) & (b)(1)(D), and was informed by the district court that the charge carried a maximum sentence of five years of imprisonment and a term of at least two years of supervised release. He was never notified that he could be sentenced to more imprisonment, above the five-year statutory maximum for the offense of conviction, upon violating supervised release. At sentencing, he was sentenced to five years in prison—the statutory maximum—to be followed by 36 months of supervised release.

After serving his five-year sentence, and while then serving his 36-month term of supervised release, he violated the terms of supervised release by committing a new offense, for which he was convicted in the Superior Court of the District of Columbia. In supervised release revocation proceedings before the district court, Mr. Kerrick argued that he could not be sentenced to more imprisonment consistent with constitutional due process and double jeopardy. Specifically, he argued that because he never received notice that he could serve more than five years in prison, any further imprisonment violated his Fifth Amendment due process rights, and, because he had been told explicitly that five years was the maximum term of prison he faced, further imprisonment punished him a second time for the original offense, in violation of Fifth Amendment double jeopardy principles.

The district court rejected these arguments and revoked Mr. Kerrick's term of supervised release and sentenced him to serve 24 months of imprisonment

consecutive to the Superior Court sentence. The district court held that the Due Process Clause did not require the court to inform Mr. Kerrick that if he violated supervised release he could be sentenced above the statutory maximum for his conviction because a revocation sentence of imprisonment was a collateral consequence of his guilty plea and not a definite, largely automatic result.

### B. The Appeal

On appeal, the main issue presented by Mr. Kerrick was "Whether the district court erred in revoking Mr. Kerrick's term of supervised release and sentencing him to two years in custody, when Mr. Kerrick had been sentenced to, and had served, the maximum sentence for the underlying offense, and had never been advised that he could be sentenced to additional imprisonment beyond the statutory maximum." Mr. Kerrick argued that the district court's failure to advise him about the nature of revocation of supervised release violated due process because due process requires that a defendant be advised about the maximum possible sentence. He argued that supervised release, and its revocation, is a direct, rather than collateral, consequence of a guilty plea because it is "a component of the criminal sentence." Mr. Kerrick argued that sentencing him to an additional term of imprisonment above the statutory maximum without notice violated his Fifth and Sixth Amendment rights. Mr. Kerrick also argued that the Double Jeopardy Clause precluded a sentence above the statutory maximum term.

In response, the government argued that the district court correctly found that it had no duty to advise Mr. Kerrick of the possibility of a additional imprisonment upon revocation of supervised release because it was a collateral consequence, rather

that a "definite, immediate, and largely automatic consequence" of his guilty plea. The government also argued that there was no double jeopardy issue with sentencing Mr. Kerrick for a violation of supervised release.

In reply, Mr. Kerrick argued that the issue on appeal was not whether his guilty plea was valid when entered, but rather whether it now "violates due process to imprison him for a sentence he was never told was possible, . . . after he served a sentence that he was told was the maximum possible sentence." Mr. Kerrick further argued that the concepts that "a sanction can be 'part of the penalty for the initial offense,' yet be a 'collateral consequence'" were irreconcilable.

### C. The D.C. Circuit Judgment

In an unpublished judgment issued on April 30, 2024, the D.C. Circuit affirmed Mr. Kerrick's two-year term of imprisonment above the statutory maximum. The court of appeals held that the district court was under no constitutional obligation to inform Mr. Kerrick of the potential consequences of violating the conditions of supervised release, including the potential for a term of imprisonment above the maximum sentence, because a term of imprisonment following revocation of supervised release, like the revocation of probation, is a collateral consequence of the plea. The panel also held that because supervised release punishments arise from and are treated as part of the penalty for the initial offense, at sentencing a defendant has at least constructive knowledge that a term of imprisonment is a potential consequence for violating a condition of supervised release, and he has no legitimate expectation of finality in a sentence subject to a term of supervised release.

The court of appeals summarized its holding in the case:

> The punishment for violating a condition of supervised release is part of the penalty for the offense of conviction. Accordingly, imposition of a term of imprisonment for violating a condition of supervised release does not trigger the Double Jeopardy clause, nor does it violate the Fifth Amendment. Because a possible supervised release punishment is a collateral rather than a direct consequence of a guilty plea, due process does not require that a defendant be informed about it.

The two concepts referenced by the court of appeals are internally inconsistent and are irreconcilable with this Court's cases and cases from other circuits—the court of appeals never explained how a part of the penalty for the offense of conviction can be a collateral consequence.

## REASONS FOR GRANTING THE WRIT

### I. THE D.C. CIRCUIT INCORRECTLY HELD THAT REVOCATION OF SUPERVISED RELEASE RESULTING IN THE IMPOSITION OF ADDITIONAL PRISON TIME IS A COLLATERAL, NOT DIRECT, CONSEQUENCE OF A PLEA.

This Court has repeatedly made clear that "supervised release *punishments* arise from and are treat[ed] … as part of the penalty for the offense." *United States v. Haymond*, 588 U.S. 634, 648 (2019) (emphasis added) (quoting *Johnson v. United States*, 529 U.S. 694, 700 (2000)). "Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment *as part of the same sentence*." *Mont v. United States*, 587 U.S. 514, 524 (2019) (emphasis added). If supervised release revocation and imprisonment were treated as new punishment for the violation of its conditions, as opposed to part of the penalty for the original offense, "serious constitutional questions . . . would be raised." *Johnson*, 529 U.S. at 700. "Treating post revocation sanctions as part of the penalty for the initial offense, however," avoids any such constitutional "difficulties." *Id.* Thus, it is not just

imposition of a term of supervised release that is part of the sentence, it is also its revocation and any subsequent sanctions. Moreover, it is the "sentencing court" that "oversees the defendant's postconfinement monitoring" during the term of supervised release. *Gozlon-Peretz v, United States*, 498 U.S. 395, 401 (1991).

In *Chaidez v. United States*, 568 U.S. 342, 349 (2013), the Court stated that while "there is some disagreement among the courts over how to distinguish between direct and collateral consequences," a "*component of the criminal sentence*" is a direct consequence. (Emphasis added) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). As discussed above, the Court has specifically held that a supervised release revocation sentence constitutes a "component of the criminal sentence."

In addition to conflicting with the cases of this Court, the D.C. Circuit's decision directly conflicts with *United States v. King*, 91 F. 4th 756, 760 (4th Cir. 2024), in which the Fourth Circuit held:

> "For a guilty plea to be *constitutionally valid*, a defendant must be made aware of all the *direct*, but not the collateral, consequences of his plea," *United States v. Nicholson*, 676 F.3d 376, 381 (4th Cir. 2012) (quoting *Meyer v. Branker*, 506 F.3d 358, 367-68 (4th Cir. 2007)). Direct consequences have a "definite, immediate and largely automatic effect on the range of the defendant's punishment," whereas collateral consequences are those for which the result is "uncertain or beyond the direct control of the court." *Id*. In relevant part, the current version of rule 11 mandates that the district court advise the defendant of "any maximum penalty, including imprisonment, fine, and term of supervised release," attached to the offense to which the defendant intends to plead guilty. Fed. R. Crim. P. 11(b)(1)(H).

(Emphasis added). Thus, the court in *King* decided that Rule 11:

> requires the district court to explain the significance of supervised release during a guilty plea colloquy. The specter of additional prison time upon a supervised release violation above the statutory maximum allowed for the underlying offense certainly *constitutes a part of "any maximum possible penalty*."

*Id*. (emphasis added).

The court in *King* reached its conclusion that advising the defendant of the possibility of revocation of supervised release was required because an additional prison sentence was a direct, not a collateral consequence of a plea, and was required in order to make the plea "constitutionally valid." *See also United States ex rel. Russo v. Atty. Gen. of Illinois*, 780 F.2d 712, 719 (7th Cir. 1986) (failure to advise defendant of a mandatory parole term violated defendant's "due process rights" and required "eliminating" the "mandatory parole term"); *United States v. Gonzalez*, 820 F.2d 575, 580 (2d Cir. 1987) ("fairness—as well as the express terms of Rule 11(c)(1)—requires that a defendant be informed of the potentially grave consequences of special parole").

The D.C. Circuit tried to distinguish *King* on the basis that the "procedure embodied in Rule 11 has not been held to be constitutionally mandated" (quoting *McCarthy v. United States*, 394 U.S. 459, 465 (1969)). But whatever the general rule is regarding other provisions of Rule 11, correct advice regarding the maximum possible penalty *is* constitutionally required. *Boykin v. Alabama*, 395 U.S. 238, 242, 244 & n.7 (1969) (for a guilty plea to be valid, it must be "intelligent and voluntary." The accused must have a "full understanding of what the plea connotes and of its consequence," including "the permissible range of sentences.") (quoting *Commonwealth ex rel. West v. Rundel*, 428 Pa. 102, 705-06 (1968)). Yet Mr. Kerrick was told only that the maximum possible sentence was five years—which was the sentence imposed and which he served. He had no notice that additional time could be imposed beyond that.

In addition, the D.C. Circuit's reliance on the quotation from *McCarthy* that "the procedure embodied in Rule 11 has not been held to be constitutionally

mandated" is misleading. The court in *McCarthy* specifically stated at the beginning of its discussion that, "we do not reach any of the constitutional arguments" raised by the defendant, 394 U.S. at 464 —thus, the quotation relied upon by the D.C. Circuit was simply an observation of a circuit opinion, not even dicta. Furthermore, that observation did not relate to the advice regarding the maximum punishment for the offense, as the defendant had in fact been advised of that in *McCarthy*. *Id.* at 461. The D.C. Circuit also failed to note that the Court in *McCarthy* stated that if a "guilty plea is not voluntary and knowing, it has been obtained in violation of due process." *Id*. at 466. It is difficult to think of a more important factor that would make a plea not voluntary and knowing than that a person could be imprisoned for more than what they were advised was the maximum sentence.

Citing *United States v. Lewis*, 519 F.3d 822, 825 (8th Cir. 2008), and *Parry v. Rosemeyer*, 64 F.3d 110, 117 (3d Cir. 1995), the D.C. Circuit held that "[a] term of imprisonment following revocation of supervised release, like the revocation of probation, is a collateral consequence of the plea because it is not definite, immediate, or largely automatic." As a result, the D.C. Circuit reasoned that due process did not require the district court "to inform [Mr.] Kerrick of the potential consequences of violating the conditions of his supervised release, including the potential for a term of imprisonment." As discussed above, this is flatly inconsistent with a number of this Court's cases as well as *King*. Furthermore, in *Lewis*, the defendant *was* advised "that a violation of the conditions of supervised release conditions could result in revocation and imprisonment for up to 2 years." 519 F.3d at 825.

And, it is a false equivalency to compare revocation of a term of supervised

release with revocation of a term of probation. In the former, the defendant has already fully served the sentence for the offense—in Mr. Kerrick's case, the maximum statutory sentence—and the sentence is increased by the revocation term. This is completely different than revocation of probation, where the defendant has not served any imprisonment, and if the term is revoked, an original sentence is imposed, not an additional sentence. Probation (and parole) are a relief from punishment, while supervised release is an additional penalty.

## II. THE D.C. CIRCUIT'S RULING DENYING MR. KERRICK'S DOUBLE JEOPARDY AND SIXTH AMENDMENT CLAIMS WAS ALSO FLAWED.

In rejecting Mr. Kerrick's Double Jeopardy claim, the D.C. Circuit relied primarily upon *United States v. DiFrancesco*, 449 U.S. 117 (1980). The court of appeals quoted sentences from *DiFrancesco*, *id.* at 137, regarding the limit of a defendant's punishment and that Double Jeopardy does not apply to revocation of probation. But in the very next sentence in *DiFrancesco*, the Court reasoned:

> While these criminal sanctions do not involve the increase of a final sentence, and while the defendant is aware at the original sentencing that a term of imprisonment later may be imposed, the situation before us is different in no critical respect.

*Id.* The court of appeals omits this sentence, which is not surprising because it refutes the panel's reliance on *DiFrancesco*, as this is exactly what distinguishes Mr. Kerrick's case.

Punishment for revocation of supervised release does increase a final sentence, exactly what *DiFrancesco* describes as a Double Jeopardy violation. In addition, Mr. Kerrick was not "aware at the original sentencing that a term of imprisonment later may be imposed." Moreover, the D.C. Circuit was incorrect in equating revocation of

supervised release with revocation of probation, especially in Mr. Kerrick's case. A supervised release revocation sentence is imposed as an additional sentence after the sentence for the offense is completed, which in Mr. Kerrick's case was the maximum sentence. Probation is where the sentence for the offense was never served, but was suspended, and would be imposed if probation was violated.

This Court has indicated that a term of imprisonment above the maximum provided in the statute is impermissible. In response to the plurality opinion in *United States v. Haymond*, 588 U.S. 634, 666 (2019), Justice Alito stated that under the plurality's "rule, a term of supervised release could never be ordered for the defendant who is sentenced to the statutory maximum term of imprisonment." (Alito, J., dissenting). Justice Gorsuch replied for the plurality that:

> In most cases (including this one), combining a defendant's initial and post-revocation sentences issued under § 3583(e)(3) 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 bout 1% of defendants receive the maximum), and revocation penalties under § 3583(e)(3) are only a small fraction of those available under § 3583(k). So even if § 3583(e)(3) 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.

*Id.* at 655. Justice Gorsuch noted in *Haymond* that, "unlike parole [and probation] supervised release wasn't introduced to replace a portion of the defendant's prison term, but rather to run after the completion of his term." *Id.* at 652. Indeed, Justice Scalia had made the same distinction in *Johnson v. United States*, 529 U.S. 694, 725

(2000) (Scalia, J. dissenting).

Mr. Kerrick's situation is one of the rare cases where he had already served the maximum sentence for the offense and thus, he should not have been sentenced to an additional term of imprisonment, a possibility about which he was never told.

## CONCLUSION

For all the above reasons, Mr. Kerrick respectfully requests that this Court grant the writ of certiorari and reverse the decision of the D.C. Circuit. Telling a defendant what the maximum term of imprisonment is, imposing that term, and then imprisoning the person for an additional period of time with no notice of such a possibility is a plain violation of due process, double jeopardy, and the Sixth Amendment

Respectfully submitted,

/s/

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December 2 2024

# APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 22-3014** **September Term, 2024**

**1:07-cr-00111-TJK-1**

**Filed On:** September 3, 2024

United States of America,

Appellee

v.

Maurice Kerrick, Jr.,

Appellant

**BEFORE:** Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Ginsburg, Senior Circuit Judge

**O R D E R**

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 22-3014** **September Term, 2024**

**1:07-cr-00111-TJK-1**

**Filed On:** September 3, 2024

United States of America,

Appellee

v.

Maurice Kerrick, Jr.,

Appellant

**BEFORE:** Rao and Childs, Circuit Judges; and Ginsburg, Senior Circuit Judge

**O R D E R**

Upon consideration of appellant's petition for panel rehearing filed on August 2, 2024, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 22-3014** **September Term, 2023**

FILED ON: APRIL 30, 2024

UNITED STATES OF AMERICA,
APPELLEE

v.

MAURICE KERRICK, JR.,
APPELLANT

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Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cr-00111-1)

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Before: RAO and CHILDS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

**JUDGMENT**

This appeal was presented to the court and briefed and argued by counsel. The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

**ORDERED AND ADJUDGED** that the judgment of the district court be **AFFIRMED**.

## I. Introduction

Maurice Kerrick appeals the district court's revocation of his supervised release and the two-year custodial sentence that followed. He argues the district court violated his rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States by failing to notify him at sentencing that his sentence entailed the possibility of additional prison time were he to violate a condition of his supervised release. Kerrick also argues the two-year sentence imposed upon revocation of his supervised release violates his rights under the Fifth and Sixth Amendments because it would result in a total sentence greater than the five-year, statutory-maximum sentence for the crime of which he was convicted. Because we hold that Kerrick's constitutional rights were not violated, we affirm the judgment of the district court.

## II. Background

In 2007, Maurice Kerrick was indicted on various drug and weapons charges. He entered into an agreement whereby he would plead guilty to one count of unlawful possession with intent to distribute cannabis, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(D). At the plea hearing, the district court notified Kerrick that, under the plea agreement, he could be sentenced up to the statutory maximum term of five years to be followed by a term of supervised release. During the plea colloquy, the court asked Kerrick if there was "anything about the potential penalty in this case resulting from this plea and conviction" that he was "unclear about," but the court did not explain to Kerrick that he could be subject to prison time were he to violate any of the conditions of his supervised release. The district court ultimately sentenced Kerrick to the statutory-maximum five years in prison, followed by three years of supervised release. One of the conditions of Kerrick's supervised release was that he not "possess a firearm" nor "commit any other federal, state, or local crime."

A few months after Kerrick was released from custody, having served his five-year sentence (and a consecutive state sentence) and begun his term of supervised release, he was arrested and ultimately pleaded guilty in the Superior Court for the District of Columbia to first degree burglary and possession of a firearm during a crime of violence. The United States Probation Office petitioned the district court for revocation of Kerrick's supervised release. In the revocation proceeding**,** Kerrick argued that, because he had already received and served the statutory maximum five-year sentence for the original offense to which he had pleaded guilty, he could not be sentenced to an additional term of imprisonment for violating a condition of his supervised release. Kerrick's challenge to the revocation of his supervised release comprised three constitutional arguments: He was denied due process because he did not receive adequate notice of the potential for imprisonment if he violated a condition of his supervised release; being sentenced to a term of imprisonment for violating a condition of his supervised release would run afoul of the Double Jeopardy Clause of the Fifth Amendment; and the revocation proceeding being conducted solely by the court without a jury violated his rights under the Fifth and Sixth Amendments, as explicated in *United States v. Haymond*, 139 S. Ct. 2369 (2019), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The district court rejected Kerrick's arguments on the ground that the revocation of supervised release is but a collateral consequence of a guilty plea, and therefore the Due Process Clause does not require that the defendant be informed about it. The court also held Kerrick's being sentenced for violating a condition of supervised release did not violate the Double Jeopardy Clause because Kerrick had no legitimate expectation of finality in his sentence and because imprisonment for violating a condition of supervised release was "part of the penalty for the initial offense" rather than an unconstitutional second punishment.

The district court rejected Kerrick's Fifth and Sixth Amendment challenges under *Haymond* and *Apprendi* for three reasons: "[V]iolation of supervised release is not a separate fact creating an additional penalty on top of a defendant's original sentence that may go beyond the statutory maximum"; even assuming *Haymond* and *Apprendi* applied, Kerrick's case would come under

the exception in *Apprendi* for the fact of a prior conviction; and Kerrick had admitted that his D.C. offenses qualified as violations of the conditions of his supervised release, wherefore that fact did not need to be proved to a jury beyond a reasonable doubt. The court then revoked Kerrick's supervised release and sentenced him to 24 months in prison.

## III. Standard of Review

Because the issues presented by this appeal are purely legal, our review is de novo. *United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019).

## IV. Analysis

On appeal, Kerrick argues the district court erred in holding that revocation of supervised release is a collateral rather than a direct consequence of a guilty plea, and therefore not covered by the due process notice requirement. He also renews his argument that a two-year sentence, in addition to the five-year statutory maximum sentence he had already served, violates the Double Jeopardy Clause and his Fifth and Sixth Amendment rights under *Haymond* and *Apprendi*. Assuming that Kerrick's challenges are procedurally appropriate, *but see Bousley v. United States*, 523 U.S. 614, 621 (1998) ("even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review"); *United States v. Sanchez*, 891 F.3d 535, 538 (4th Cir. 2018) – upon which we offer no opinion – Kerrick's arguments fail on the merits.

"Engrained in our concept of due process is the requirement of notice." *Lambert v. California*, 355 U.S. 225, 228 (1957). Due process requires that a defendant entering a plea of guilty be "fully aware of the direct consequences" of his plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). This requirement, however, "exclude[s] *collateral* consequences" of a plea. *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971); *United States v. Ocasio-Cancel*, 727 F.3d 85, 89 (1st Cir. 2013) ("a defendant need not be informed of all the collateral consequences of a guilty plea"). "Whether a consequence of a plea is direct or collateral depends upon whether the undesired consequence is definite, immediate, and largely automatic." *United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) (cleaned up); *Ocasio-Cancel*, 727 F.3d at 89.

A term of imprisonment following revocation of supervised release, like the revocation of probation, is a collateral consequence of the plea because it is not definite, immediate, or largely automatic. *United States v. Lewis*, 519 F.3d 822, 825 (8th Cir. 2008) (holding the sentence imposed after revocation of supervised release is a collateral consequence of a guilty plea); *Parry v. Rosemeyer*, 64 F.3d 110, 117 (3d Cir. 1995) ("sentencing judge was not constitutionally required to explain in detail the potential effects of probation, including that if it is violated, a prison sentence . . . can be imposed"); *cf. Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) ("revocation of parole is a collateral rather than a direct consequence of a defendant's guilty plea").

Kerrick relies upon the recent case of *United States v. King*, 91 F.4th 756 (4th Cir. 2024).

There the Fourth Circuit addressed a challenge to a guilty plea under Rule 11 based upon the district court's failure to advise the defendant about the significance of a term of supervised release. *Id.* at 759–60. Building upon Fourth Circuit precedent regarding special parole, the court held that "Rule 11 mandate[d] that the district court advise a defendant who intends to plead guilty of the effect of supervised release." *Id.* at 762. The Fourth Circuit declined to vacate the defendant's guilty plea, however, because "the record did not show that he would have declined to plead guilty if he had been advised about the significance of supervised release." *Id.* at 762 (cleaned up).

We need not decide today whether Rule 11 indeed requires a district court to advise a defendant of the significance of violating a condition of supervised release. Kerrick raises a due process challenge rather than a challenge under Rule 11; although the rule "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary," the "procedure embodied in Rule 11 has not been held to be constitutionally mandated." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). The district court was under no constitutional obligation, therefore, to inform Kerrick of the potential consequences of violating the conditions of his supervised release, including the potential for a term of imprisonment.

Kerrick's arguments under *Haymond* and *Apprendi* are likewise unavailing. *Apprendi* and its progeny do not apply to the revocation of supervised release, as is made clear in Justice Breyer's controlling opinion in *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019) ("in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context"). Even assuming *Apprendi* applied, however, it would be of no use to Kerrick: A fact admitted by the defendant need not be found by a jury, *id.* at 2377 (plurality opinion), and Kerrick has admitted that his D.C. offenses qualified as violations of the conditions of his supervised release.

Finally, Kerrick's Double Jeopardy argument fails because he lacked a legitimate expectation of finality in his sentence. "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980). We have therefore held that "the application of the Double Jeopardy Clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence." *United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987) (cleaned up). For example, "there is no double jeopardy protection against revocation of probation and the imposition of imprisonment." *DiFrancesco*, 449 U.S. at 137. So, too, with the imposition of punishment pursuant to revocation of supervised release. Far from a second punishment, "supervised release punishments arise from and are treated as part of the penalty for the initial offense." *Haymond*, 139 S. Ct. at 2379–80 (cleaned up). Therefore, at sentencing, a defendant has at least constructive knowledge that a term of imprisonment is a potential consequence for violating a condition of supervised release, and he has no legitimate expectation of finality in a sentence subject to a term of supervised release. *See Fogel*, 829 F.2d at 87 ("a defendant has a legitimate expectation in the finality of a sentence unless he is or should be aware at sentencing that the sentence may permissibly be increased").

## V. Summary and Conclusion

The punishment for violating a condition of supervised release is part of the penalty for the offense of conviction. Accordingly, imposition of a term of imprisonment for violating a condition of supervised release does not trigger the Double Jeopardy clause, nor does it violate the Fifth Amendment. Because a possible supervised release punishment is a collateral rather than a direct consequence of a guilty plea, due process does not require that a defendant be informed about it.

Although not constitutionally required, we think the better practice is for the district court in future sentencing proceedings to inform the defendant that violating a condition of supervised release may subject him or her to an additional sentence beyond the statutory maximum for the crime underlying his or her conviction. The burden on the court will be trivial, whilst the benefit to the community in terms of additional deterrence may be substantial.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

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**UNITED STATES OF AMERICA** — **CR No. 1:07-cr-00111-TJK-1**

**v.** — **Washington, D.C.**
**Wednesday, February 16, 2022**

**MAURICE KERRICK, JR.,** — **10:00 a.m.**

**Defendant.**

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**TRANSCRIPT OF FINAL REVOCATION HEARING**
**HELD BEFORE THE HONORABLE TIMOTHY J. KELLY**
**UNITED STATES DISTRICT JUDGE**

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**Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.**

to move forward. I just ask for your mercy. I'm asking you, please, can you run my time together, Your Honor.

THE COURT: Thank you, Mr. Kerrick.

All right. Before I go into my consideration of the statutory factors that I need to consider and impose a sentence, I'm going to go ahead and, sort of, up front, talk about the legal arguments the parties have made regarding whether I can sentence Mr. -- despite what the statute says, whether I can sentence Mr. Kerrick to any time at all -- any period of incarceration at all.

In summary, I do think I can constitutionally sentence Mr. Kerrick to an additional period of incarceration.

So first, Mr. Kerrick argues that he did not receive adequate notice in his original criminal proceedings that he could be sentenced to an additional term of incarceration for supervised release conditions -- for supervised release violations even though he already served the maximum sentence of incarceration prescribed in 21 United States Code Section 841 for his offense of conviction. So he claims that the Due Process Clause of the Fifth Amendment prohibits me from imposing a revocation sentence of incarceration because of his lack of notice of this potential consequence.

In general, the requirement of notice is, quote,

Engrained in the concept of due process, closed quote. That's Lambert v. California, 355 United States 225 at 228. It's a Supreme Court case from 1957. But a more -- at a more granular level, the Due Process Clause is not violated when a defendant's supervised release is revoked and he is sentenced to a term of imprisonment, even if the defendant did not receive notice that this was a potential consequence of supervised release violations. And that conclusion holds true even in the circumstances here, in my view, when Mr. Kerrick already served the maximum sentence of imprisonment prescribed in the statute of conviction.

In Brady v. United States, another Supreme Court case, the Supreme Court held that a defendant must be made, quote, Fully aware of the direct consequences, closed quote, of pleading guilty to a crime for the guilty plea to comport with the requirements of due process. Brady is 397 U.S. 742 at 755. It's a Supreme Court case from 1970. Then in United States v. Sambro, the D.C. Circuit explained that Brady, quote, Meant what it said when it used the word "direct." By doing so, it excluded collateral consequences, closed quote. 4 -- that's 454 F.2d 918 at 922, a D.C. Circuit case from 1971. In other words, under the Due Process Clause, the collateral consequences of a guilty plea, quote, Need not be explained to the defendant, closed quote. That's United States v. Russell, 686 F.2d 35 at 38,

a D.C. Circuit case from 1982. That case was abrogated in part on other grounds by Padilla v. Kentucky, 559 U.S. 356 by the Supreme Court in 2010.

But -- so the question, then, arises, what is a direct consequence and what is a collateral consequence? I couldn't find case law from the D.C. Circuit precisely answering this question, but it appears that the general rule is that a direct consequence is a, quote, Definite, immediate, and largely automatic, closed quote, result of a guilty plea whereas a collateral consequence is a contingent possibility rather than a certainty. See, for example, United States v. Salerno, 66 F.3d 544 at 551, a Second Circuit case from 1995 where the "definite, immediate, and largely automatic" language is taken from. And then the Ninth Circuit, in a case called Torrey v. Estelle, provided helpful examples of direct and collateral consequences, pointing out that a, quote, Mandatory special parole term, closed quote, is a direct consequence but the, quote, Possibility of revocation of parole, closed quote, is a collateral consequence. The cite for that case is 842 F.2d 234 at 236. It's a Ninth Circuit case from 1988. In that case, Torrey v. Estelle, the Ninth Circuit noted that collateral consequences include those that are, In the hands of the defendant himself, closed quote; meaning, that whether they happen depends on the defendant's conduct in

the future.

United States v. Williams, a 2009 decision in this District, further illustrates this distinction. That case is 630 F. Supp. 2d at -- F. Supp. 2d 28. It's a D.D.C. case from 2009. In Williams, the defendant raised a due process challenge to a recidivist sentencing enhancement he received, arguing that he had been uninformed that his prior, plea-based convictions could later form the basis for that sentencing enhancement. Judge Hogan rejected this argument, following decisions from six other Circuits in reasoning that, quote, Neither the Constitution nor the Federal Rules of Criminal Procedure require that -- the District Court or counsel to advise the defendant that his guilty plea carries the collateral consequence of a future sentencing enhancement, closed quote. That's 32 -- Page 32, 33 of that case. Although Judge Hogan did not explain his ruling further, the decisions he cited show that the sentencing enhancement was a collateral rather than a direct consequence because it depended on whether the defendant committed crimes in the future. Take -- again, I cite to Salerno, 66 F.3d at 551.

So in light of this body of case law, I do conclude that the revocation sentence of imprisonment Mr. Kerrick now faces is a collateral consequence of his guilty plea; meaning, that the Due Process Clause did not

require that he be informed of this consequence during the plea or sentencing proceedings in this case. A revocation sentence of imprisonment was not a definite and largely automatic result of his guilty plea. Instead, back in 2007, supervised release revocation was merely a possibility that would arise only if Mr. Kerrick chose to violate his supervised release conditions. Because revocation was dependent on the speculative contingency that Mr. Kerrick would violate the terms of his supervised release, any revocation sentence he now receives is a collateral consequence of his guilty plea, and he did not need to be informed of that other -- under the Due Process Clause. And that Mr. Kerrick has now served the statutory maximum does not change the application of this principle here. Mr. Kerrick's revocation sentence, even if it results in a total incarceration in excess of five years, is still a collateral consequence.

In arguing otherwise, Mr. Kerrick relies primarily on United States v. Cook, an unpublished Third Circuit decision from 2019. That's 775 Federal Appendix 44, a Third Circuit case from 2019. There, the Third Circuit rejected a due process argument much like the one Mr. Kerrick raises here because it found that the defendant had notice that, quote, Continued violations of his supervised release might result in aggregate imprisonment, closed quote, exceeding

the maximum prescribed by the statute of conviction. Mr. Kerrick observes that the Cook court appears to have assumed the validity of the premise that notice was required and simply rejected the claim on its facts.

But in my view, Mr. Kerrick reads too much into Cook's cursory analysis of this issue and, of course, Cook is not even precedential in the Third Circuit, let -- never mind binding on me here. Besides, in a 1995 precedential decision, the Third Circuit held squarely that the consequences of revocation of probation are collateral consequences that a defendant need not be warned of under the Due Process Clause before pleading guilty to the underlining -- underlying crime of conviction. That case is Parry v. Rosemeyer, 64 F.3d 110 at 114, a Third Circuit case from 1995. It was superseded in part on other grounds by statute at 28 United States Code Section 2254. In any event, the Parry court held as much because, quote, Revocation of probation may or may not occur sometime in the future, and whether it occurs is dependent on the actions of the defendant, closed quote. Of course, the exact same is true for supervised release revocation. Thus, it seems evident to me that had the Cook court considered the issue fully rather than, sort of, tersely rejecting the argument on its own terms, it would have held that notice was not required at least as a constitutional matter.

Most of the other authorities Mr. Kerrick relies on merely illustrate the direct/collateral distinction and don't undermine the conclusion that I reach here. For example, in United States v. Fernandez and United States v. Padilla, the issue in those cases was the District Court's failure to inform the defendant about an applicable mandatory minimum. The Fernandez case is 205 F.3d 1020 at 1030; the Padilla case, 23rd -- 23 F.3d 1220 at 1222 through 1223. And in United States ex rel. Russo v. Attorney General of Illinois, the issue was the trial court's failure to inform the defendant of a mandatory parole term accompanying his prison sentence. And that case is 780 F.2d 712 at 719. It's a Seventh Circuit case from 1986. The mandatory consequences at issue in these cases are types of direct consequences for which due process requires notice. They are not like the contingent consequence at issue in this case for which due process does not require notice.

Finally, Mr. Kerrick also argues that United States v. Gonzalez -- 820 F.2d 575; it's a Second Circuit case from 1987 -- supports his position. But Gonzalez is inapt because it turned on Rule 11 of the Federal Rules of Criminal Procedure which, at that time, required a District Court to conform -- to inform a defendant during a plea colloquy of, quote, The effect of any special parole term, closed quote. As the Third Circuit observed in Parry, the

requirement of such advice was, quote, The result of a rule of procedure, not constitutional doctrine, closed quote. That's 64 F.3d at 116. And in any event, that rule has since been amended and no longer requires such notice. See Rule 11(b). True, the Gonzalez court added in dicta that fairness required notice of the, quote, Potentially grave consequences of special parole, closed quote. 820 F.2d at 580. But that dictum is a very slender reed for Mr. Kerrick's due process claim and does not comport with the direct/collateral distinction recognized by the many cases that I've mentioned here.

So in sum, the revocation sentence of incarceration Mr. Kerrick now faces is a collateral consequence of his guilty plea in this case and that it would mean that Mr. Kerrick could end up serving, all in all, more than the five-year statutory maximum does not change the collateral nature of the consequence. Thus, the Due Process Clause did not require Judge Urbina to inform him of this potential consequence, and Mr. Kerrick's due process challenge to a revocation prison sentence fails.

So the second argument Mr. Kerrick makes is that sentencing him to a term of imprisonment for his supervised release violations would contravene the Double Jeopardy Clause of the Fifth Amendment. Based on -- upon how Mr. Kramer framed this argument in his filings and orally, I

understand Mr. Kerrick to make -- to be making two distinct double jeopardy arguments. First, he argues that a revocation sentence of imprisonment would violate the Double Jeopardy Clause because he -- Mr. Kerrick had a, Legitimate expectation -- that phrase in quotes -- that the five-year statutory maximum he served was all the prison time he would ever have to serve in this case. That legitimate expectation concept comes from, for example, United States v. Fogel, 829 F.2d 77 at 87, a D.C. Circuit case from 1987. Second, though, Mr. Kerrick also argues that a revocation sentence of imprisonment would be an impermissible, quote, Multiple punishment, closed quote, for his crime of conviction because he already served the maximum term of imprisonment for that crime. That's United States v. Sumler, 136 F.3d 188 at 189, a D.C. Circuit case from 1998.

The, quote, Legitimate expectation, closed quote, argument fails because the Supreme Court has recognized that there can be no legitimate expectation of finality in a sentence received when, quote, Congress has specifically provided, closed quote, that the sentence later could be increased. That's United States v. DiFrancesco, 449 U.S. 117 at 139, a Supreme Court case from 1980. Here, at the time Mr. Kerrick was sentenced, Section 3583 specifically provided that he could be sentenced to a prison term if he were to violate his supervised release conditions.

Mr. Kerrick has not identified any provision of Section 3583 or any other statute that even suggests that a revocation sentence of imprisonment would be prohibited were he to serve the maximum prison sentence prescribed in the statute of conviction. In fact, by the time of Mr. Kerrick's sentencing in 2007, it was well settled that under Section 3583, a court could impose a revocation sentence of incarceration for supervised release violations even if that sentence resulted in a total amount of incarceration exceeding the statutory maximum for the underlying offense. I cite for that proposition United States v. Wirth, 250 F.3d 165 at 170, Footnote 3, a Second Circuit case from 2001. Thus, Mr. Kerrick could, Not -- quote -- could, Not -- well, Mr. Kerrick could, quote, Not have a legitimate expectation that his sentence would not be increased in the event of revocation, closed quote. That's United States v. Casseday, 807 Federal Appendix 5 at 7, a D.C. Circuit case from 2020.

The multiple punishment argument also fails. This argument is based on Johnson v. United States, where the Supreme Court recognized that, quote, Postrevocation sanctions are part of the penalty for the initial offense, closed quote, rather than a penalty for the supervised release violations. That's 529 U.S. 694 at 700, a Supreme Court case from 2000. Mr. Kerrick points out that his statute of conviction capped the penalty for his offense to

a five-year prison sentence which he has already served. Because postrevocation sanctions are part of the penalty for the initial offense and because Mr. Kerrick has served that maximum prison sentence for that offense, he argues that a revocation sentence of imprisonment would amount to an unconstitutional double punishment for his crime of conviction. Not so.

In enacting 35 -- Section 3583, quote, Congress, quote, Authorized two separate punishments, closed quote, for federal offenses like Mr. Kerrick's, the punishment prescribed by the statute of conviction and the punishment prescribed by Section 3583. That's United States v. Celestine, 905 F.2d 59 at 60. It's a Fifth Circuit case from 1990. In other words, conceptually, Section 3583 authorizes a sentence of incarceration that may exceed the sentence of incarceration prescribed in the statute of conviction, but that revocation sentence is still part of the penalty for the underlying offense. See United States v. Soto-Olivas, 44 F.3d 788 at 790, a Ninth Circuit case from 1995. And where, as here, quote, The legislature intends to impose multiple punishment, imposition of such sentences does not violate double jeopardy. That's United States v. McLaughlin, 164 F.3d 1 at 8. That's the D.C. Circuit in 1998. Thus, Mr. Kerrick's double jeopardy rights are not violated here if I impose a revocation sentence of

incarceration.

The last set of arguments Mr. Kerrick makes have to do with his Fifth, Sixth -- Fifth and Sixth Amendment rights to due process and right to a jury trial.

So finally, Mr. Kerrick argues that a revocation sentence of imprisonment would violate his Fifth and Sixth Amendment right recognized in Apprendi v. United States to have, quote, Any fact that increases the penalty for a crime beyond the prescribed statutory maximum submitted to a jury and proved beyond a reasonable doubt, closed quote. That's 530 U.S. 466 at 490. It's a Supreme Court case from 2000. He relies heavily on dicta from the plurality opinion in United States v. Haymond, 139 Supreme Court 2369, a Supreme Court case from 2019, to support that argument. I first note that, as several Circuits have already recognized, Justice Breyer's concurrence in Haymond is the narrowest ground supporting the judgment and thus constitutes the court's -- the Supreme Court's holding under Marks v. United States, 430 U.S. 188 at 193 in 1977; meaning, that the plurality opinion is not the law. See, for example, United States v. Salazar, 987 F.3d 1248 at 1259. That's a 10th Circuit case from 2021. That point aside, Mr. Kerrick's argument along these lines is flawed both legally and factually.

The argument is flawed legally for two reasons.

First, as the Seventh Circuit held when addressing this very argument, quote, Apprendi does not apply here. That's United States v. McIntosh, 630 F.3d 699 at 702. It's a Seventh Circuit case from 2011. As the McIn- court -- as the McIntosh court explained, quote, A violation of supervised release is not a separate fact creating an additional penalty on top of a defendant's original sentence that may go beyond the statutory maximum. Rather, supervised release, and the subsequent possibility of reimprisonment after a violation of that release, is a part of the original sentence imposed. That's the McIntosh case at 703. That is, for Apprendi purposes, the statutory maximum authorized by the prior conviction consists of whatever maximum was authorized by the offense of conviction plus whatever maximum is authorized by Section 3583. Thus, quote, Findings at a revocation hearing do not increase the penalty for a crime beyond the prescribed statutory maximum, closed quote. That's Salazar, 987 F.3d at 1261. As the 10th Circuit explained in Salazar, this analysis remains good law post-Haymond because Justice Breyer's concurrence in Haymond constitutes the judgment of the court and Justice Breyer explicitly rejected the Haymond plurality's attempts to, quote, Transport [sic] the Apprendi line of cases to the supervised release context, closed quote. That's Haymond, 139 Supreme Court at 2385.

Second, even assuming Apprendi applied here, it would not be violated by my imposing a revocation sentence of incarceration on Mr. Kerrick, assuming he has served the statutory maximum. By its own terms, Apprendi requires facts increasing a sentence beyond a statutory maximum to be proved to a jury beyond a reasonable doubt except for, quote, The fact of a prior conviction, closed quote. 530 U.S. at 490. And this prior conviction exception includes, quote, Determinations regarding the nature of those prior convictions, closed quote, as long as those determinations are based on judicial records like the judgment of conviction in that prior case. See, for example, United States v. Barrett [sic], 398 F.3d 516 at 524, a Sixth Circuit case from 2005. Here, Mr. Kerrick's revocation sentence of imprisonment is triggered by the fact that his -- of the -- by the fact of his recent D.C. conviction and the nature of that conviction as shown by the judgment of conviction in that case which is ECF No. 52. Thus, the facts giving rise to his revocation sentence are not the sort of facts that must be proved to a jury beyond a reasonable doubt.

The argument is also flawed factually. As the Supreme Court has repeatedly explained, if the facts increasing a sentence beyond the statutory maximum are, quote, Admitted by the defendant, closed quote, then under

Apprendi, those facts do not need to be proved to a jury beyond a reasonable doubt. See United States v. Booker, 543 U.S. 220 at 224 [sic], of course, a Supreme Court case from 2005. Here, Mr. Kerrick has admitted that his D.C. offenses qualify as violations of his supervised release conditions. Thus, the facts needed for me to impose a revocation sentence of imprisonment under Section 3583(e)(3) and 3583(g)(2) have been admitted by Mr. Kerrick and would not need to be proved by [sic] a jury under Apprendi even if Apprendi applied in this context.

Moving on, I note that although Mr. Kerrick did not discuss in his briefs any constitutional issues specifically with the mandatory revocation under Section 3583(g)(2), Mr. Kramer did suggest at oral argument in these proceedings that this provision might pose its own set of problems. Presumably, this is because under Alleyne v. United States, the rule of Apprendi applies to, quote, Facts increasing the mandatory minimum, closed quote, a defendant faces. That's 570 U.S. 99 at 112, a Supreme [sic] case from 2013. But this argument fares no better than Mr. Kerrick's Apprendi argument for mostly the same reasons.

First, Justice Breyer's controlling concurrence in Haymond explicitly rejected the Haymond plurality's attempts to, quote, Transport [sic] the Apprendi line of cases to the supervised release context, closed quote. Alleyne is part

of that Apprendi line. So it does not apply in this context. See, for example, United States v. Coston, 964 F.3d 289 at 295, a Fourth Circuit case from 2020. And Section 3583(g)(2) does not violate the test set forth in Justice Breyer's concurrence in Haymond. There, Justice Breyer found that Section 3583(k) -- found Section 3583(k) unconstitutional because of three features that, quote, Taken together, closed quote, made the revocation sentence authorized in that provision more, quote, Closely resemble the punishment of new criminal offenses, rather than, quote, Part of the penalty for the initial offense, closed quote. That's 139 Supreme Court at 2386, internal quotation marks omitted. Those three features were, one, that Section 3583(k) applied only when the defendant committed a discrete set of federal criminal offenses specified in the statute; two, that Section 3583(k) took away the judge's discretion to decide whether a violation of a condition of supervised release should result in imprisonment and for how long; and, three, that Section 3583(k) limited the judge's discretion in a particular manner by requiring a five-year mandatory minimum term to be imposed on any defendant who violated the terms of the statute. While 3583(g)(2) does take away a court's discretion to decide whether a defendant should be sentenced to a term of incarceration at all, it contains none of the other problems that Justice Breyer had with

Section 3583(k). See, for example, the Coston -- the analysis in the Coston case, 964 F.3d at 296. Also, a revocation sanction under Section 3583(g) is, quote, Limited by the severity of the original crime of conviction, not the conduct that revolt -- that results in conviction [sic], closed quote. See Haymond, 139 Supreme Court at 2386. Again, that's the Breyer concurrence. Thus, I have no trouble concluding that Section 3583(g)(2) passes Justice Breyer's test.

Second, even if Alleyne applied here, it would not be violated by my imposing a revocation sentence of incarceration on Mr. Kerrick, again, in this case where he has served the statutory maximum. Like the rule of Apprendi, the rule of Alleyne contains an exception for, quote, The fact of a prior conviction, closed quote. And, again, this -- that's Alleyne, 570 U.S. at 111, Note 1. And, again, this exception includes determinations regarding the nature of those prior convictions based on judicial records like the judgment of conviction in that prior case. See, for example, United States v. Elliott, 757 F.3d 492 at 497, a Sixth Circuit case from 2014. Here, Mr. Kerrick's revocation sentence of imprisonment, again, is triggered by the fact of his recent D.C. conviction and the nature of that conviction as shown by the judgment of conviction in that case. Thus, the facts giving rise to his revocation

sentence are not the sort of facts that must be proved to a jury beyond a reasonable doubt.

Third, as with Apprendi, so too with Alleyne, if the facts triggering a mandatory minimum are, quote, Admitted by the defendant, closed quote, then those facts do not need to be proved to a jury beyond a reasonable doubt. See, for example, United States v. Scharber, 772 F.3d 1147 at 1151, an Eighth Circuit case from 2014. Again, Mr. Kerrick has admitted that his D.C. offenses qualify as violations of his supervised release conditions. And thus, the facts needed for me to impose a revocation sentence of imprisonment have been admitted by Mr. Kerrick and would not need to be proved to a jury under Alleyne even if Alleyne applied in this context.

So to sum up -- and I'm sorry it took so long, but, Mr. Kramer, you threw a lot at me -- to summarize, under the Due Process Clause, Judge Urbina did not have to inform Mr. Kerrick that he could face a revocation sentence of incarceration, even one that could impose a total amount of incarceration beyond the statutory maximum if he violated his supervised release conditions; two, I will not violate Mr. Kerrick's double jeopardy rights by imposing a revocation sentence of incarceration on him; and, three, I will not violate Mr. Kerrick's constitutional rights recognized in Apprendi or Alleyne by imposing a revocation

sentence of incarceration on him either.

All right. Turning back, then, to the factors I do have to consider, having resolved those legal issues the way I did.

The statutory factors that govern revocation of supervised release appear at Title 18, Section 3583(e) of the U.S. Code. After calculating the revocation sentencing range, hearing the statements made by counsel and Mr. Kerrick, I must consider these statutory factors to ensure that I impose a revocated [sic] -- revocation sentence that is, quote, Sufficient, but not greater than necessary, closed quote, to comply with the applicable purposes of sentencing.

Section 3583(e) incorporates nearly all the standard Section 3553(a) factors, including the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public, and to provide the defendant with needed correctional treatment in the most effective manner. And in addition to the applicable policy statements, I have to consider the nature and circumstances of the offense; the history and characteristics of the defendant; the need to avoid unwanted sentence disparities among defendants with similar records who have engaged in similar conduct; and the need to provide restitution.

The only 3553(a) factors that are omitted from the