

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
) Petitioner,)
) v.) No. 17-1672
ANDRE RALPH HAYMOND,)
) Respondent.)
- - - - -

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Place: Washington, D.C.
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9
 10 Washington, D.C.
 11 Tuesday, February 26, 2019

12
 13 The above-entitled matter came on for
 14 oral argument before the Supreme Court of the
 15 United States at 10:06 a.m.

16
 17 APPEARANCES:
 18 ERIC J. FEIGIN, Assistant to the Solicitor General,
 19 Department of Justice, Washington, D.C.;
 20 on behalf of the Petitioner.
 21 WILLIAM D. LUNN, ESQ., Tulsa, Oklahoma;
 22 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-1672,
5 the United States versus Haymond.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONER

9 MR. FEIGIN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 There's no dispute that the district
12 judge's finding by a preponderance of the
13 evidence that Respondent possessed child
14 pornography was constitutionally sufficient to
15 revoke his supervised released and reimprison
16 him under Section 3583(e)(3). The court of
17 appeals --

18 JUSTICE SOTOMAYOR: Is there any other
19 area of the law in which we permit imprisonment
20 by a preponderance of the evidence?

21 MR. FEIGIN: Well, Your Honor, there
22 is -- there are areas where -- I mean --

23 JUSTICE SOTOMAYOR: Whether it's a
24 jury --

25 MR. FEIGIN: -- that are precisely

1 analogous to this --

2 JUSTICE SOTOMAYOR: Right.

3 MR. FEIGIN: -- for example, parole
4 and probation revocation.

5 JUSTICE SOTOMAYOR: Well, in parole,
6 the original sentence was already X number of
7 years, and the state granted a benefit and
8 said, instead of serving 10 years, we'll let
9 you serve eight if you behave. If you don't,
10 you've got to finish serving the two that we
11 imposed originally.

12 But where do we ever permit someone to
13 be jailed for an additional period of time
14 other than their original sentence?

15 MR. FEIGIN: Well, Your Honor --

16 JUSTICE SOTOMAYOR: On a preponderance
17 of the evidence?

18 MR. FEIGIN: -- there was no jail for
19 an additional period of time here.

20 Petitioner's original sentence, which was
21 authorized by the jury's verdict, included a
22 10-year period of supervised release, which is
23 precisely analogous to a 10-year term of
24 automatic parole.

25 His reimprisonment upon revocation of

1 his supervised release was only five years,
2 which was --

3 JUSTICE SOTOMAYOR: Well, that's the
4 facts of --

5 MR. FEIGIN: -- less than the 10-year
6 --

7 JUSTICE SOTOMAYOR: That's -- that's
8 almost like harmless error argument. If his
9 term -- there's no question now that his term
10 of supervised release extends further than his
11 original sentence, no?

12 MR. FEIGIN: Your -- Your Honor, it
13 does not extend further than his original
14 sentence. His original sentence --

15 JUSTICE SOTOMAYOR: Well, his jail
16 sentence does.

17 MR. FEIGIN: No, Your Honor, it does
18 not. His original sentence was 38 months of
19 imprisonment, which he served, to be followed
20 by 10 years of supervised release. On
21 revocation, he received a five-year term of
22 reimprisonment, to be followed by five further
23 years of supervised release, an exchange of 10
24 for 10.

25 The Court was clear in Morrissey

1 against Brewer, where it held that a jury
2 finding beyond a reasonable doubt is not
3 required for parole revocation, that a
4 defendant whose parole is revoked doesn't get
5 credit for time he spent out in the community
6 on parole.

7 The circumstance of this case --

8 JUSTICE SOTOMAYOR: But we're still
9 back to the same --

10 MR. FEIGIN: -- is precisely
11 analogous.

12 JUSTICE SOTOMAYOR: We're still -- no,
13 it's not quite, because he was sentenced
14 originally to the 38 months, not to another
15 term of jail. Now we're adding on to that an
16 additional term of incarceration and an
17 additional term of supervised release, so we've
18 stretched the maximum of his earlier term.

19 MR. FEIGIN: Your Honor, I don't think
20 we have any more than would be true under a
21 parole system.

22 JUSTICE SOTOMAYOR: But you're trying
23 to mix -- to compare apples and oranges. In
24 the parole situation, the original sentence was
25 the additional sentence that he got. Here, he

1 only got the 38 months. A jury didn't find
2 facts sufficient to give him the additional
3 years he received by the judge's finding.

4 MR. FEIGIN: Well, let me say two
5 things about that, Justice Sotomayor. The
6 first is that his original sentence, if you
7 look at the judgment, does include the 10 years
8 of supervised release. He was fully aware that
9 supervised release could be reinvoked and he
10 could be reimprisoned for violating its
11 conditions. And that is, in fact, what
12 happened here. It's --

13 JUSTICE SOTOMAYOR: Well, let --
14 let's talk about this. Could Congress impose a
15 system that says on the day of sentencing,
16 you're going to be sentenced to X number of
17 years, but if a judge finds that you committed
18 X act, you can be sentenced to -- instead of 38
19 months, to eight years? Can a judge do that
20 under Apprendi?

21 MR. FEIGIN: Well, Your Honor, I --
22 I'd need to know a little bit more about --

23 JUSTICE SOTOMAYOR: Not a charged
24 crime; it's just an act. Whatever the act may
25 be.

1 MR. FEIGIN: So, Your Honor, if your
2 question is can a judge impose a sentence that
3 says you'll, for example, spend five years in
4 prison and then there will be some period after
5 that during which if you -- a judge finds if
6 you commit a certain act --

7 JUSTICE SOTOMAYOR: No, no, no. We
8 know under Apprendi, I think it's pretty clear
9 under Apprendi, that if the sentence says you
10 committed X crime, you get five years, but if
11 you did it with racial hatred, Apprendi, and a
12 judge finds that by a preponderance of the
13 evidence, you get eight years.

14 Apprendi says no, you can't do that.
15 The jury has to find that you did that
16 additional element, correct?

17 MR. FEIGIN: That's right.

18 JUSTICE SOTOMAYOR: I'm trying to
19 figure out why a judge now gets to say, after
20 you've been sentenced to the five years,
21 instead of five years for the original crime,
22 I'm going to find by a preponderance of the
23 evidence, after you've been sentenced to the
24 five years, that we really should have given
25 you eight years.

1 MR. FEIGIN: Well, Your --

2 JUSTICE SOTOMAYOR: Because you've now
3 committed a new crime or a new -- not a new
4 crime, but a new -- well, a new crime or a new
5 act, whatever that act may be.

6 MR. FEIGIN: Your Honor, and that's
7 not what's happening here. What's happening
8 here is that the judge is finding a violation
9 of the sentence that the judge imposed.

10 This is different from Apprendi in
11 that it is precisely analogous to parole, a
12 proceeding in which -- parole revocation, a
13 proceeding in which the Court has squarely
14 held --

15 JUSTICE SOTOMAYOR: You know, if it
16 looks like --

17 JUSTICE ALITO: Mr. Feigin, I -- I'd
18 like to understand what question we are
19 deciding here. What Justice Sotomayor is
20 raising is really a revolutionary argument that
21 would bring down the entire system of
22 supervised release, which has been the law for,
23 what, 35 years? Is that the issue that is
24 before us in this case?

25 MR. FEIGIN: No, Your Honor. I

1 think that's --

2 JUSTICE ALITO: Is Mr. -- is Mr. Lunn
3 making that argument?

4 MR. FEIGIN: No, Your Honor, and, in
5 fact, I don't think that issue is properly
6 before the Court because the relief he sought
7 in the court of appeals and the relief the
8 court of appeals granted was reimprisonment
9 under Section 3583(e)(3). He didn't
10 cross-petition. So the only question before
11 this Court is whether there's really some
12 difference between reimprisonment under
13 3583(e)(3) and Section 3583(k). And there
14 really isn't any difference between those two.

15 JUSTICE GINSBURG: But what about the
16 fact that, without finding that he committed a
17 violation of 3583(k), without that, the minimum
18 term of imprisonment -- the minimum term would
19 be zero years, but, with that factual finding,
20 it becomes five years?

21 MR. FEIGIN: Well, let -- let me say a
22 few things about that.

23 First of all, the Court held in
24 Morrissey that these kinds of sentence
25 administration proceedings, where what the

1 judge is looking at is whether there was a
2 violation of the terms of the sentence, is a
3 proceeding to which the Sixth Amendment doesn't
4 apply.

5 So Apprendi is a Sixth-Amendment-based
6 rule, and, therefore, it doesn't apply by its
7 terms in the circumstance.

8 JUSTICE GORSUCH: Would that be true
9 if, instead of a five-year minimum, the minimum
10 sentence was a sentence of death? Would the
11 government take the position that the Sixth
12 Amendment doesn't apply there either?

13 MR. FEIGIN: Your Honor, I think,
14 first of all, there might be some Eighth
15 Amendment -- particularized Eighth Amendment
16 concerns.

17 JUSTICE GORSUCH: I didn't ask about
18 an Eighth Amendment question, Mr. Feigin. I
19 asked about the Sixth Amendment.

20 MR. FEIGIN: So, assuming that the
21 original sentence that was imposed, that had
22 the death condition on it for certain
23 violations, didn't itself violate the Eighth
24 Amendment, I don't think there would be a --
25 necessarily a Sixth Amendment problem with

1 this -- with this proceeding.

2 JUSTICE GORSUCH: I think that has to
3 be your answer, right? Yeah.

4 MR. FEIGIN: Yeah. There -- I --
5 could well, Your Honor, be due process issues
6 or other Eighth Amendment issues, but I don't
7 think it would be a Sixth Amendment issue.

8 JUSTICE BREYER: Can I ask you this --

9 MR. FEIGIN: The second --

10 JUSTICE BREYER: -- issue. Remind me
11 what Apprendi said because I kept dissenting
12 and --

13 (Laughter.)

14 JUSTICE BREYER: -- and so -- so I
15 thought that it says this --

16 MR. FEIGIN: We're fine if you stick
17 with that, Justice Breyer.

18 (Laughter.)

19 JUSTICE BREYER: All right. All
20 right. Look at the statute. You look at the
21 statute and you see if, in fact, there is a
22 fact that permits, doesn't require, but permits
23 the judge to go higher than the statute says.
24 Does it permit him? If it does, the jury has
25 to find it.

1 The question is can he go beyond the
2 10 years that the statute says if and only if X
3 exists? And if that's the case, you have to
4 find it. Is that Apprendi?

5 MR. FEIGIN: Well, there's an
6 exception, Your Honor, for the fact of a prior
7 conviction. And Apprendi only applies --

8 JUSTICE BREYER: Yeah, all right. And
9 that's because of the -- that's because it --

10 MR. FEIGIN: And I -- I think one
11 thing that this case --

12 JUSTICE BREYER: Forget the exception.
13 I wrote that one.

14 MR. FEIGIN: -- points up is that
15 Apprendi only applies in a context -- because
16 the Sixth Amendment based rule under the text
17 of the Sixth Amendment, it only applies in the
18 context of a criminal prosecution.

19 One thing --

20 JUSTICE BREYER: All right. But this
21 is -- I've not got to my question. I have to
22 think I -- I'm a good follower of Apprendi now.

23 I look at the statute. The statute
24 says 10 years. We can sentence more -- unless
25 you find X. Then it's 15.

1 So that X has to be found by a jury.
2 That's Apprendi as I understand it.

3 Now, if that's the case, I look at the
4 statute here. What does the statute say? I
5 think it says 10 years. Right? So, if, in
6 fact, it's 10 years, then because of tradition,
7 cases, E, he served five, he has supervised
8 release of five, and so you can send him back
9 to jail because of fact X as long as you don't
10 go beyond 10.

11 But, if you go beyond 10, just as you
12 needed to find the fact by a jury in basic
13 Apprendi, so you should have to find the fact
14 by the jury here, because there's no real
15 distinction.

16 Now is -- does my argument make sense?

17 MR. FEIGIN: Well, Your Honor, that
18 argument was raised in the court of appeals and
19 even the court of appeals rejected it because
20 the 10-year maximum is only for one part of the
21 sentence for the original term of imprisonment.

22 There's also a separate --

23 JUSTICE BREYER: Yeah, yeah.

24 MR. FEIGIN: -- portion of the
25 sentence for supervised release.

1 JUSTICE BREYER: Correct. Now --

2 MR. FEIGIN: And the sentence -- let
3 me just preface this by saying, even if you
4 thought that was the rule, we should --

5 JUSTICE BREYER: Yeah.

6 MR. FEIGIN: -- win because he spent
7 38 years -- 38 months, excuse me, in prison on
8 his original sentence, and the reimprisonment
9 term is only 60 months.

10 JUSTICE BREYER: Well, that -- that
11 might be. That might be.

12 MR. FEIGIN: So we're only at 98
13 months at that point.

14 JUSTICE BREYER: Maybe you should.

15 MR. FEIGIN: But I --

16 JUSTICE BREYER: But I want to know
17 the answer to my question. And the reason that
18 I thought it was the same is, once you revoke
19 supervised release, that means he's right back
20 in jail. And so, if his total time in jail is
21 greater than the statute allows because of the
22 finding of a fact that wasn't found by the
23 jury, no, and that's where the line should be
24 drawn.

25 Now I have the problem of having to

1 write or agree to an opinion, which is not
2 yours, but I would like to know what your
3 opinion is of that.

4 MR. FEIGIN: Well, Your Honor, I don't
5 think that's the right way to think about it.
6 And that's not even the argument they're
7 making. That's not the argument any of the --
8 their amici are making.

9 JUSTICE BREYER: That's true.

10 MR. FEIGIN: And that's because, I
11 think, they recognize, consistent with this
12 Court's decision in Morrissey against Brewer,
13 which addressed the parole context, and it was
14 reiterated in Gagnon against Scarpelli, which
15 addressed the probation context.

16 There are multiple parts to this
17 sentence. One was the original term of
18 imprisonment. Another was the term of
19 supervised release. And this --

20 JUSTICE KAGAN: Mr. Feigin, you keep
21 talking about the parole cases, but the parole
22 cases are cases that are very different from
23 Justice Breyer's hypothetical because, by
24 definition in parole, you cannot serve longer
25 than your original sentence.

1 So you never get to the question in
2 the parole cases that Justice Breyer is asking
3 you about, which is whether, once the
4 judge-made finding takes you above the original
5 authorized sentence, it creates an Apprendi
6 problem.

7 Isn't that right? Isn't that the
8 difference between parole cases, is that you
9 can never get into this problem of -- of
10 serving longer than the original authorized
11 sentence?

12 MR. FEIGIN: Well, two -- two things,
13 Justice Kagan. Once again, as I was saying to
14 Justice Sotomayor, we don't actually have a
15 reimprisonment term here that is longer than
16 the original sentence because the original term
17 of supervised release was 10 years and his
18 reimprisonment is for five.

19 And the second thing I'd say, which I
20 think may more directly --

21 JUSTICE KAGAN: Well, that just
22 incorporates a different argument about how the
23 supervised release is baked into the original
24 sentence.

25 But I'm talking about in normal terms.

1 People think: Oh, this statute authorizes a
2 punishment of up to 10 years.

3 Now what Justice Breyer is saying is
4 now maybe somebody -- it might not be this
5 person -- but somebody is serving 12 years
6 instead because of a judge-made finding. And I
7 would have thought that that's a pretty simple
8 case under Apprendi.

9 I also would have thought it's a
10 pretty simple case under Apprendi if all of a
11 sudden a mandatory minimum pops up as a result
12 of a judge's finding. That's a pretty simple
13 case under Alleyne, which was also a pretty
14 simple case under Apprendi.

15 So you have two problems here. One is
16 a mandatory minimum is suddenly popping up
17 because of a judge-made finding, and one is a
18 longer sentence than originally authorized is
19 suddenly popping up because of a judge-made
20 finding.

21 MR. FEIGIN: Your Honor, I don't think
22 this is a longer sentence than was originally
23 authorized. Let me draw the analogy to parole
24 more explicitly.

25 I don't think there's any difference

1 here between the 38-month term of imprisonment
2 to be followed by 10 years of supervised
3 release and a sentence to 158 months of
4 imprisonment with mandatory parole after 38
5 months.

6 JUSTICE GORSUCH: Well, counsel,
7 Congress thought there was a difference, right?
8 I mean, we had parole systems previously,
9 probation systems previously, and Congress
10 chose to abandon that system. And why doesn't
11 that choice have consequences? And why isn't
12 one of those consequences the jury right? And
13 why is the government so anxious to avoid
14 having the involvement of citizens in this
15 process?

16 MR. FEIGIN: Well, Your Honor --

17 JUSTICE GORSUCH: It would be a rather
18 simple thing to convene a jury, wouldn't it?

19 MR. FEIGIN: We don't think it would
20 be simple to convene a jury, although that
21 would be a better remedy than facially striking
22 down the statute. But, historically, there has
23 never been a jury involved in this type of
24 post-judgment --

25 JUSTICE GORSUCH: And historically --

1 MR. FEIGIN: -- sentence
2 administration context.

3 JUSTICE GORSUCH: -- there's never
4 been this kind of system before. Congress
5 self-consciously created this system. And I
6 guess I'm -- I'm -- I'm just struggling. I
7 just don't understand why the government
8 resists the involvement of a jury of a man's or
9 woman's peers.

10 MR. FEIGIN: Well, first of all, Your
11 Honor, we are relying on this Court's decisions
12 in Morrissey and in Gagnon that make clear that
13 there can be reimprisonment for a violation of
14 conditions of a previously imposed sentence
15 that was authorized by the jury's verdict.

16 They don't even dispute that. And --

17 JUSTICE GORSUCH: Maybe -- maybe we'll
18 put it --

19 MR. FEIGIN: -- for reasons I've
20 explained to Justice Alito --

21 JUSTICE GORSUCH: I mean, we're just
22 talking. There's a lot of words. But, you
23 know, if you could -- you know, does the choice
24 of Congress to move away from parole and
25 probation have no consequence?

1 MR. FEIGIN: It doesn't have any
2 consequence that's relevant here.

3 JUSTICE GORSUCH: Okay. If we
4 disagree with you, do you lose?

5 MR. FEIGIN: Well, it would depend how
6 you disagreed with me, Your Honor.

7 (Laughter.)

8 MR. FEIGIN: If you disagree with me
9 such that you think that Respondent here had a
10 jury trial right, then I --

11 JUSTICE GORSUCH: But they're not the
12 same thing.

13 MR. FEIGIN: Yeah.

14 JUSTICE GORSUCH: They are different.
15 The Congress, when it bothered to revamp
16 sentencing in this country radically, it
17 actually intended to and accomplished
18 something, as opposed to doing, effectively,
19 nothing.

20 MR. FEIGIN: So, Your Honor, one way
21 in which I think supervised release is
22 different -- and this gets back to Justice
23 Kagan's question -- is that there is a way
24 under the supervised release statute for the
25 term of reimprisonment to exceed even the

1 period of conditional liberty that's
2 represented by the supervised release itself.

3 And let me suggest --

4 JUSTICE ALITO: Well, that -- that's
5 an interesting -- it's an interesting question
6 and I -- I think it's a hard one, and it's not
7 briefed, and I -- I just don't -- I'm having
8 enough trouble with what I understood to be the
9 issue presented by this case without deciding
10 whether we should overrule an enormous amount
11 of precedent and wipe out probation and parole
12 or decide this novel question which isn't
13 presented here.

14 It -- it -- Mr. -- Mr. Haymond has to
15 make an as-applied challenge to the part of the
16 statute to which he objects, and he -- his --
17 he is not in this situation, where he is
18 required -- he's required to serve a term of
19 imprisonment that exceeds the statutory
20 maximum.

21 MR. FEIGIN: That's right, Your Honor.
22 And I think that would be --

23 JUSTICE KAGAN: He's certainly in the
24 situation of the mandatory minimum. You agree
25 with that?

1 MR. FEIGIN: So let me say a few
2 things about the -- about that, Your Honor.

3 The first thing I would say is, again,
4 because this is a context in which the Sixth
5 Amendment doesn't apply, I don't think Apprendi
6 would by its own force apply.

7 The second thing is that the jury's
8 verdict authorizes reimprisonment under (k)
9 just the same as the conceded authorization of
10 reimprisonment under (e)(3).

11 The third thing I would say is that
12 what they're really asking for here, even if
13 Apprendi applied, is a bespoke application of
14 the Apprendi rule.

15 Apprendi does not say that if you are
16 subject to a heightened sentencing range that
17 you are entitled to an even higher standard of
18 proof than would apply to other kinds of fact
19 findings. It says you receive the same
20 standard of proof.

21 And they agree that the standard of
22 proof in a revocation proceeding like this is a
23 finding of fact by a judge by a preponderance
24 of the evidence. That's what they concede
25 would be relevant under (e)(3).

1 And the fourth thing I would say, just
2 very quickly, Your Honor, is there is no
3 additional fact finding that is required under
4 (k). The exact same finding of fact that he
5 possessed child pornography by a preponderance
6 of the evidence is the same finding of fact
7 that would lead to revocation under (e)(3) as
8 to revocation under (k).

9 CHIEF JUSTICE ROBERTS: Could I go to
10 your --

11 MR. FEIGIN: The only difference is
12 the legal consequence. I'm sorry.

13 CHIEF JUSTICE ROBERTS: -- what I
14 think was number two on your list, which is,
15 well, the jury found this and the jury's
16 finding includes whatever (k) allows and,
17 therefore, there's a -- I mean, that's kind of
18 a, like, bitter with the sweet argument. You
19 know, you're going to get supervised release,
20 but if you do, you're going to have to buy into
21 what might present constitutional problems.

22 And simply because the jury found -- I
23 mean, it can't be the case that what --
24 whatever was provided for sentencing upon a
25 conviction by the jury is -- is, you know, home

1 free regardless of any constitutional problems
2 it might -- might entail.

3 MR. FEIGIN: Well, Your Honor, there
4 -- there may be limits, but there -- they
5 concede in their brief that the jury's verdict
6 authorized reimprisonment under (e)(3) based on
7 a judicial finding by a preponderance of the
8 evidence. And I think they had to concede that
9 under this Court's precedents.

10 And what they're trying to do is to
11 draw a distinction between (e)(3) and (k), and I
12 don't think there's a distinction to be drawn
13 there.

14 CHIEF JUSTICE ROBERTS: No, but I'm --
15 I'm not sure that's responsive. My -- my
16 question is -- yes, of course, under -- the
17 jury's verdict did include this and this,
18 that's how the statute reads, but that doesn't
19 automatically mean that it's -- it's blessed
20 with -- it's sort of like a waiver.

21 I mean, simply because the jury's
22 sentence includes it doesn't mean that
23 everything that follows is necessarily
24 constitutional.

25 MR. FEIGIN: No, Your Honor, and that

1 -- that's -- that's not our argument. But
2 they're trying to make an argument that the
3 jury didn't authorize these kinds of revocation
4 proceedings. And our point is that if they're
5 acknowledging that the jury's verdict does
6 allow -- does include this term of supervised
7 release, which comes with conditions and
8 consequences for violating those conditions,
9 (k) is one of those conditions.

10 JUSTICE SOTOMAYOR: Mr. Feigin, I -- I
11 have, I guess, a fundamental problem. The way
12 this provision reads, it basically says, if you
13 commit X crime, you get a minimum of X number
14 of years reimprisonment and we lift the cap on
15 your supervised release.

16 You know, if it looks like a duck,
17 quacks like a duck, walks like a duck, it's a
18 duck. And what it seems to be saying is, if
19 you commit this crime, you go to jail for this
20 minimum number of years.

21 I thought that it was baked into our
22 criminal system that if a judge is going to
23 make a finding like that, that you committed a
24 crime, and that it's going to increase either
25 your minimum or your maximum of whatever the

1 original jury -- jury or whatever the jury
2 found, that you're entitled to a jury to find
3 that fact beyond a reasonable doubt.

4 So you say Apprendi was Sixth
5 Amendment, but Apprendi was both the Fifth and
6 Sixth Amendment, and the two interacted in the
7 Apprendi decision, was a due process concern as
8 well.

9 And so I have a due process concern as
10 well as a Sixth Amendment concern, which is, if
11 we're asking a judge to find you committed a
12 crime under the Fifth Amendment, how can we
13 permit reimprisonment, something as drastic as
14 reimprisonment on such a low burden of proof?

15 MR. FEIGIN: Well, Your Honor, as a
16 due process matter, that's exactly the issue
17 that was facing the Court in Morrissey against
18 Brewer in the parole context, where someone
19 who's on parole for life could potentially be
20 reimprisoned for life, and the Court set out
21 some minimum due process --

22 JUSTICE SOTOMAYOR: But we -- we've
23 already talked --

24 MR. FEIGIN: -- protections that were
25 provided here.

1 JUSTICE SOTOMAYOR: -- about the
2 differences between parole and this. In
3 parole, he was sentenced to life. He was given
4 a benefit to be gotten out early or go back to
5 jail to finish his term.

6 It's a very different situation than
7 being told you're going to serve 10 years, 15,
8 20, you've done with the jail time, and now, if
9 you go out, we can now reimprison you for 50
10 years minimum, as opposed to 20.

11 MR. FEIGIN: So, Your Honor, let me
12 explain a few reasons why you shouldn't
13 consider this a new criminal prosecution.

14 First, it arises in the context of
15 active supervision by probation officers.
16 They're not simply reacting to arrests.
17 They're going out and supervising and trying to
18 reintegrate these defendants into the
19 community.

20 Second, the revocation proceedings are
21 initiated by probation officers, not by
22 prosecutors. Prosecutors could ask the
23 probation officers to do it, but it's
24 ultimately up to the probation officers whether
25 to do so.

1 Third, there are both substantive and
2 procedural limits baked into the statute, as
3 well as possible as-applied due process limits,
4 that prohibit the judge from imposing a
5 sanction for the violation of the supervised
6 release conditions that is punishment for the
7 offense that gave rise to the violation.

8 JUSTICE SOTOMAYOR: But I don't see
9 how a minimum can be anything but.

10 MR. FEIGIN: Your Honor --

11 JUSTICE SOTOMAYOR: Because, here, the
12 judge very clearly -- the judge and the court
13 of appeals very clearly said that if this had
14 been a crime that would be determined beyond a
15 reasonable doubt, they don't think the
16 government could win.

17 And the judge even said that he
18 thought the sentence was inappropriate to the
19 nature of the allegations and proof in this
20 case.

21 MR. FEIGIN: Well, Your Honor, the
22 question -- the -- the guidelines themselves
23 adopt this philosophy that in sanctioning the
24 violation of supervised release, there -- it
25 goes on a breach of trust theory.

1 So what you're trying to do is to
2 deter violation --

3 JUSTICE SOTOMAYOR: But how does --
4 how does a mandatory minimum, the Alleyne
5 problem, where we said that really should be
6 determined by a jury, not a judge, how does a
7 mandatory minimum deal with a breach of trust?
8 Once you've tied a judge's hands in the
9 sentence, then how does that promote --

10 MR. FEIGIN: So the Court has -- the
11 Court has addressed --

12 JUSTICE SOTOMAYOR: -- the respect for
13 the breach of trust? If the judge doesn't
14 believe that's the right sentence, why would
15 that promote the needs of the community?

16 MR. FEIGIN: Well, I think Congress
17 should have some leeway to decide that these
18 are particularly egregious types of breaches of
19 trust by defendants as to whom it's
20 particularly concerned that, when they get back
21 into the community, will commit crimes that
22 resemble their previous crimes and are
23 harmful --

24 JUSTICE KAGAN: Well, but the question
25 is where --

1 MR. FEIGIN: -- to the population.

2 JUSTICE KAGAN: -- where Congress's
3 leeway stops because the Constitution kicks in.
4 And that's what we've talked about in Apprendi
5 and then in Alleyne. And where we've said the
6 Constitution kicks in is that judge-made
7 findings are not good enough to trigger
8 mandatory minimums or to trigger changes in the
9 statutorily authorized range.

10 And both of these -- at least
11 mandatory minimums is present in this case.
12 And the arguments that you're presenting also
13 raise questions about moving the statutory
14 range.

15 And it just seems if this isn't a
16 clear-cut violation of Apprendi and Alleyne,
17 like, what is? A judge here is making a
18 finding -- and not only any old finding, a
19 finding of a statutory violation. And he's --
20 a judge, not a jury, by a preponderance rather
21 than by a reasonable doubt, and the result is
22 somebody spends a very significant amount of
23 time in prison.

24 MR. FEIGIN: So, Your Honor, let me
25 just very quickly, before I reserve the

1 remainder of my time, address the -- the
2 mandatory nature of this, which this Court has
3 also addressed in the parole context.

4 If you look at Black against Romano,
5 which is cited in our briefs, this Court has
6 recognized that, in some circumstances, but it
7 depends on the facts and circumstances, a
8 defendant might be able to claim that the
9 mandatory revocation of a period of conditional
10 liberty is a substantive constitutional
11 violation.

12 And the Court, in fact, found one,
13 such a violation in Bearden against Georgia,
14 where there was mandatory revocation of
15 probation based on the failure of a defendant
16 to pay fines that he just didn't have the means
17 to pay.

18 JUSTICE KAVANAUGH: But revocation --

19 MR. FEIGIN: But we're a far cry from
20 that here.

21 JUSTICE KAVANAUGH: Revocation of
22 parole seems to me seems like a denied benefit,
23 whereas revocation of supervised release seems
24 like a penalty.

25 MR. FEIGIN: Your Honor, I really

1 don't think there is any difference between --

2 JUSTICE KAVANAUGH: Because you're at
3 -- you're denying the period of liberty and
4 reimposing the sentence up to -- the prison
5 sentence up to what it was, so denying that
6 benefit. Here, though, by adding a chunk of
7 time on, potentially, it seems more like a
8 penalty rather than a denied benefit, at least
9 if you look at it in that way.

10 MR. FEIGIN: Well, as a period of
11 conditional liberty that's included in the
12 sentence, this is exactly like the type of
13 automatic parole that existed at the time of
14 Morrissey, as we've pointed out in our brief.

15 And this Court has considered things
16 like revocation of good time credits to be the
17 denial of a right and, nevertheless, not
18 attached full protections to them. And it's
19 considered the revocation of conditional
20 liberty to implicate a defendant's liberty
21 rights in the parole context and, nevertheless,
22 not attached full due process, let alone Sixth
23 Amendment, protections.

24 If I might reserve the remainder of my
25 time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Lunn.

4 ORAL ARGUMENT OF WILLIAM D. LUNN
5 ON BEHALF OF THE RESPONDENT

6 MR. LUNN: Mr. Chief Justice, and may
7 it please the Court:

8 I liked the verb that Justice
9 Sotomayor used at the beginning, "stretches."
10 What 3583(k) does is that it stretches what the
11 original conviction -- the -- the amount of
12 sentence that was authorized by the jury's
13 verdict in this case.

14 It aggravates the punishment in the
15 sense that it -- where the original verdict
16 allowed only a zero- to 10-year sentence that a
17 judge could have imposed, to a mandatory
18 five-year sentence, all the way up to life in
19 prison.

20 And I also think that Justice
21 Gorsuch's comment that when -- if -- if the
22 Sixth Amendment didn't apply, would this also
23 apply if you had a -- if the sentence was a
24 death penalty?

25 And the potential life in prison

1 without parole, which 3583(k) allows, is the
2 second-most serious punishment that's allowed
3 in the law.

4 And those types of heightened
5 punishments that 3583(k) allows create
6 tremendous due process problems and they also
7 create tremendous problems with regard to the
8 right to a jury trial.

9 JUSTICE GINSBURG: What about the
10 government's argument that you are conceding
11 that revocation and reimprisonment under (e)(3)
12 is okay?

13 MR. LUNN: The -- the -- (e)(3) reads
14 that the Court may revoke a defendant's
15 supervised release to allow him to serve in
16 prison all or part of the term of supervised
17 release.

18 The term of supervised release is --
19 has a very minimal -- it's a fairly minimal
20 sanction in that it's designed to rehabilitate
21 a prisoner who has just finished his -- his
22 prison sentence, and to retransition that
23 prisoner back into the community.

24 JUSTICE KAVANAUGH: Is (e)(3) okay?

25 MR. LUNN: (e)(3) is okay to the

1 point --

2 JUSTICE KAVANAUGH: Yes? It's just a
3 yes or no on that if you can.

4 MR. LUNN: Yes with regard to Mr.
5 Haymond. And it -- to the extent that it is a
6 sanction that has the non-punitive purpose of
7 rehabilitation and reintegrating a defendant
8 back into the community, then to --

9 JUSTICE KAGAN: Just to understand
10 what you mean there, yes with regard to Mr.
11 Haymond because Mr. Haymond can't be brought --
12 he's not going beyond the statutory maximum
13 here? Is that what you mean?

14 MR. LUNN: Yes.

15 JUSTICE KAGAN: So he has -- he has no
16 -- he -- he himself has no claim that the
17 statutory maximum is being stretched?

18 MR. LUNN: That's -- well, the -- the
19 -- the statutory minimum is being stretched --

20 JUSTICE KAGAN: Yes, that's what I
21 said.

22 MR. LUNN: -- obviously, with regard
23 to him.

24 JUSTICE KAGAN: He has no claim that
25 the statutory maximum is being stretched.

1 MR. LUNN: That's correct essentially.

2 JUSTICE KAGAN: So that when you said
3 to Justice Kavanaugh yes with respect to Mr.
4 Haymond, that's why?

5 MR. LUNN: Yes. So to the extent that
6 (e)(3) allows an effective supervised release
7 -- supervised release regime, it -- it doesn't
8 necessarily equate with criminal punishment.

9 But, when it does equate with criminal
10 punishment, in other words, when you have a
11 situation that there is no rational connection
12 between the non-punitive purpose of supervised
13 release and actual punishment for an underlying
14 crime, which is what's happening in this
15 situation, then -- then you can have a
16 situation that could create a problem.

17 JUSTICE SOTOMAYOR: So why couldn't a
18 remedy, instead of requiring a jury trial or
19 striking down this part of this provision,
20 which the Tenth Circuit did, why couldn't a
21 simple remedy in your view be adequate that
22 says the judge can do anything within the
23 original sentence?

24 MR. LUNN: Because --

25 JUSTICE SOTOMAYOR: And if your -- if

1 your reincent -- if your reimposition requires
2 a minimum of five years and that's what you
3 got, we'll strike that down. The judge doesn't
4 have to do that. He can do whatever he wants
5 within the original imprisonment time or the
6 original terms of supervised release, maximum
7 terms.

8 MR. LUNN: That -- that would not be a
9 violation of Apprendi, but it could be -- you
10 could still have due process problems with that
11 type of situation.

12 For instance, if someone had been
13 sentenced to one year and then the judge by a
14 preponderance of the evidence was allowed to
15 impose a far more restrictive -- a far more
16 punishment-related sentence, let's say, of nine
17 years, he might very well have an argument that
18 that was a violation of due process rights,
19 because he's looking at a -- certainly a
20 heightened incapacity as a result of -- of that
21 type of sentence.

22 JUSTICE BREYER: The -- the -- let me
23 try this again. Apprendi. Any fact that by
24 law increases the penalty for a crime is an
25 element that must be submitted to the jury.

1 All right. Now your basic argument is
2 mandatory is something that increases the
3 penalty for a crime.

4 MR. LUNN: Yes.

5 JUSTICE BREYER: Okay. Got that one.
6 Whatever I say here would also affect (e)(3),
7 and I think it would for this reason. It would
8 raise this question. Statute: Ten years
9 imprisonment, five years supervised release.
10 Okay?

11 Now he serves a sentence, nine years,
12 which he serves. Supervised release. He then
13 -- after a year passes, supervised release is
14 revoked on the basis of a fact. Now it could
15 be the fact he didn't report. It could be any
16 fact.

17 At that point, when he's sent back, he
18 will be on the basis of that fact in prison for
19 more than 10 years. But the statute said 10
20 years. And so he is being put in prison on the
21 basis of a fact that was not found by a jury.

22 Now, if I decide for you, this may be
23 an unusual case. You know, (e) doesn't --
24 isn't that serious normally, but -- but -- but
25 it would create a complication. You would have

1 to do something like call a jury in those few
2 cases.

3 Now what do you think of that?

4 MR. LUNN: The Sentencing Reform Act
5 when it was initially enacted in 1984 may be
6 the answer for you in that type of situation
7 because the Sentencing Reform Act allowed
8 exclusively, if a person violated a new law,
9 the -- it's a violation of their supervised
10 release.

11 JUSTICE BREYER: Yeah, yeah.

12 MR. LUNN: The judge could hold them
13 in contempt. So, if you have someone who's
14 been sentenced to nine years, it would allow a
15 judge -- and they're on the brink of getting to
16 the sentence that was authorized by the jury --
17 the judge could still find him in contempt, but
18 you wouldn't necessarily -- he -- he would not
19 be in a situation where he would be finding
20 facts that would go beyond the period of
21 incarceration that was authorized by the jury's
22 verdict.

23 That would be how you would deal with
24 that situation, I think.

25 JUSTICE GINSBURG: And how long could

1 the contempt penalty be?

2 MR. LUNN: Well, if you're dealing
3 with contempt, there are rules under this
4 Court's holding in Bloom that, if you're
5 looking at more than six months, then you're
6 entitled to a jury trial.

7 JUSTICE ALITO: Well, can I ask you
8 about Alleyne? What Alleyne held is that the
9 touchstone for determining whether a fact must
10 be found by a jury beyond a reasonable doubt is
11 whether the fact constitutes an element of the
12 charged offense.

13 So you're saying that all of the
14 conditions of supervised release are elements
15 of the charged offense?

16 MR. LUNN: All of the -- well, it --
17 my understanding of Alleyne is that if you
18 increase the mandatory minimum or you increase
19 the maximum that was authorized by the jury,
20 that that, in effect, creates a -- you
21 aggravate the punishment by creating a new
22 element, and that makes an entirely new crime.

23 JUSTICE ALITO: Right. So all of the
24 -- all of the conditions in Mr. Haymond's
25 supervised release were elements of the

1 offense?

2 MR. LUNN: They -- well, the
3 conditions that are imposed are not unlike a
4 contempt situation. You're told to do certain
5 things. And if you don't do those certain
6 things in a court order, then -- then you may
7 be found in contempt or, in this instance, you
8 -- you may even be sentenced to prison, if
9 necessary, for a very limited period of time,
10 so long as it still is designed to reintegrate
11 the former prisoner back into the community and
12 is designed for rehabilitation purposes.

13 JUSTICE BREYER: But your answer's no,
14 there are not elements of offense in the -- in
15 the -- in the standard case, where 10 years in
16 prison is the statute --

17 MR. LUNN: Yes.

18 JUSTICE BREYER: -- plus five years
19 supervised release. That plus (e) makes clear
20 that if supervised release is violated, and the
21 whole thing doesn't exceed 10 years in prison,
22 plus supervised release, you don't need a jury.

23 You need a jury when you give him a
24 punishment that exceeds, because of a fact,
25 what the initial punishment was in the statute.

1 That, I thought, was Apprendi.

2 MR. LUNN: Yes.

3 JUSTICE BREYER: So the answer, I
4 guess, is?

5 MR. LUNN: Alleyne obviously adds to
6 that with regard to a mandatory minimum.

7 JUSTICE BREYER: Right.

8 MR. LUNN: So you have a situation in
9 Alleyne, and this is how this -- Alleyne
10 applies directly to Mr. Haymond's situation.
11 Alleyne holds that by aggravating the
12 punishment, either the mandatory minimum or
13 heightening the maximum, that you create a
14 situation that heightens the loss of liberty
15 and it empowers the prosecutor to get the judge
16 to do something that the judge wouldn't
17 ordinarily do.

18 And that's precisely what happened in
19 this case. The judge did not want to impose a
20 five-year mandatory minimum because it --

21 JUSTICE ALITO: But what -- what does
22 the Sixth Amendment protect? Does it protect
23 the rights of -- the rights of -- of people to
24 have a jury of their peers, or does it protect
25 the rights of judges to exercise discretion?

1 MR. LUNN: The -- the Sixth Amendment
2 provides further assurances to the right to
3 jury trial that had already been guaranteed in
4 the Constitution under Article III, Section 2,
5 Clause 3.

6 And -- and the Sixth Amendment, in
7 fact, was not needed to ensure trial by jury in
8 cases of crimes. That's the Wood case cited in
9 the reply.

10 JUSTICE ALITO: I mean, I thought the
11 right -- the reason for the jury trial right
12 was fundamentally distrust of judges. They
13 didn't want these things to be in the hands of
14 judges who had historically been appointed by
15 the crown and were thought to be beholden to
16 the crown. They wanted it to be in the hands
17 of ordinary citizens.

18 So how does that get turned into a
19 regime that protects the prerogatives of a
20 judge to decide what the term of imprisonment
21 should be?

22 MR. LUNN: You're talking about
23 supervised release? I'm -- I'm --

24 JUSTICE ALITO: Well, you're saying
25 that there's a problem with the mandatory five,

1 because it ought to be up to the discretion of
2 the district judge.

3 MR. LUNN: Yes.

4 JUSTICE ALITO: And that's based on
5 the Sixth Amendment right to a jury trial.

6 MR. LUNN: Yes.

7 JUSTICE ALITO: Okay. So what you're
8 -- what you want is the judge to have the
9 discretion to impose something less than five?

10 MR. LUNN: Yes.

11 JUSTICE ALITO: How do you connect
12 that with the right to a jury trial?

13 MR. LUNN: Again, a jury trial applies
14 when someone has committed a serious or
15 atrocious crime under Callan versus Wilson,
16 going all the way back to 1888. Or any public
17 wrong, which is the Bloom case, which is a case
18 that didn't necessarily involve a criminal
19 prosecution because it dealt with a contempt.

20 So the right to a jury trial is when
21 you are looking at a -- what amounts to a
22 prosecution for a serious or atrocious crime.
23 And it doesn't matter what label you put on it,
24 whether it's revocation or a sentencing
25 guideline or contempt or whatever.

1 That's what the holding in Ring is.
2 This is nothing more than a label for what
3 really amounts to the -- the trial of a crime.

4 JUSTICE BREYER: I thought of a way of
5 putting this question, this case, is let's
6 imagine a statute that says up to 10 years in
7 prison for possession of drugs with intent,
8 okay? A certain amount.

9 Then the statute adds the following:
10 If the offender had a gun, there is a
11 three-year mandatory minimum, but in no event
12 will the total sentence exceed 10 years. Have
13 you got that? So it's no more than 10 years no
14 matter what, but it has to be at least three if
15 there's a gun.

16 Now does the jury have to find whether
17 or not there was the gun?

18 MR. LUNN: I -- I believe they do.

19 JUSTICE BREYER: Is there any
20 authority on that?

21 MR. LUNN: Well, to some extent, it
22 may be the O'Brien case. It's somewhat
23 similar. It's a situation where there was a
24 gun, and then the issue became whether or not
25 it was a machine gun. And the Court said that

1 the drastic increase from five years to 30
2 years actually created a substantive offense,
3 and that needed to be presented to the jury.
4 So I think this is similar.

5 If you have a drug offense and then
6 there is the issue of whether or not you have a
7 gun, then, in that situation, that has to be
8 presented by the jury if that's going to cause
9 him to have a mandatory minimum three years.

10 JUSTICE GINSBURG: What do you think
11 of the government's proposal as a fallback
12 that, rather than strike down the statute, you
13 convene a jury and have the jury make the
14 finding?

15 MR. LUNN: There are two responses.

16 First of all, it's just a simple
17 question as to why you need to do it at all,
18 which is if -- if you really are looking at a
19 situation that is -- you want to prosecute
20 someone for -- by guilt beyond a reasonable
21 doubt, why don't you just prosecute them by
22 indicting them?

23 But, beyond that, if you then want to
24 bring the jury trial system into the revocation
25 system, it creates immense difficulties. It

1 really does potentially transform --

2 JUSTICE KAVANAUGH: Well, that's what
3 you want, though. You're saying the violation
4 is the lack of a jury, yet you're saying as a
5 remedy you don't want a jury.

6 MR. LUNN: Well, I understand that.
7 And -- and we obviously believe that this type
8 of situation, based on the allegations that are
9 being made, are something that needs to be
10 presented to a jury.

11 JUSTICE KAVANAUGH: If you're -- if
12 you're not satisfied with -- with the jury as a
13 remedy, that raises the suspicion that the
14 mandatory minimum is really what you're
15 objecting to, not the lack of a jury.

16 MR. LUNN: But there are problems.
17 And this Court has looked at that type of
18 situation, for instance, in both the Jackson
19 case and in the Pennsylvania Board of Parole
20 versus Scott, where it -- it describes what
21 happens when you -- when the court tries to
22 create that jury in the revocation process.

23 You would have burden of proof issues,
24 you'd have confrontation issues, you'd have
25 potential double jeopardy issues that would

1 arise. There would be potential
2 self-incrimination issues. You'd be dealing
3 with whether there needs to be something
4 presented to the grand jury in the first place.

5 So those are things that Congress
6 really needs to deal with, rather than for this
7 Court to try to create some type of -- that --
8 the type of remedy that the government is
9 talking about.

10 And -- and, frankly, if -- if this
11 Court gives its blessing to this -- this
12 statute, you know, you -- you look at all of
13 the crimes that are included here, and they
14 include A, B, C, and D crimes and -- that are
15 applied in 3583(k). The lowest one here is
16 2425 under Title 18, which carries only a
17 five-year sentence and a 10-year sentence if
18 you committed a second crime.

19 We're looking at a potential life
20 without parole, and you're creating a situation
21 that would transform revocations, which would
22 be a -- a situation that has always been highly
23 discretionary and it has been something that
24 you are -- is focused on the individual
25 defendant and what he needs.

1 And you would change it into a
2 potential adversarial system. There's no
3 reason to believe that if the Court were to
4 agree that this -- that this 3583(k) was
5 appropriate, that you wouldn't have, for
6 instance, drug offenses find themselves as a 35
7 -- as a 3583(k)(2) provision.

8 JUSTICE KAGAN: Mr. Lunn, you're
9 raising a lot of objections, but, I mean, you
10 can't argue with the proposition that such a
11 system would cure the constitutional violation
12 that you're complaining of, isn't that right?

13 MR. LUNN: If -- if you had a jury
14 trial, assuming that you -- you get around
15 these constitutional problems, such as
16 presentment to a grand jury, that the judge is
17 the party that's initiating all of this --

18 JUSTICE KAGAN: The constitutional
19 violation that you're complaining of, the
20 Apprendi/Alleyne constitutional --

21 MR. LUNN: Yes.

22 JUSTICE KAGAN: -- problem, a jury
23 would cure, is that right?

24 MR. LUNN: A jury in a revocation
25 hearing, if that's where the Court wanted to

1 go, and if you thought that that is what
2 Congress would do in this situation --

3 JUSTICE KAGAN: That's what I was --

4 MR. LUNN: -- then very well.

5 JUSTICE KAGAN: I think that's right.
6 I think it is what Congress wanted to do. I
7 mean, the -- that question should be thought of
8 much in the way we think of whether to sever
9 unconstitutional provisions as -- as a -- as a
10 question of congressional intent. Which system
11 would Congress rather? Would they want this
12 whole -- would they want this provision severed
13 or would they want the whole statute to fall?

14 Similarly, would they want a jury
15 impaneled or would they want the statute to
16 fall? And how can we think that Congress would
17 not have rather impaneled a jury?

18 MR. LUNN: Because the entire
19 tradition of supervised release, and, in fact,
20 parole and probation, has always been highly
21 discretionary because -- and Congress has --
22 has recognized that throughout the time and, in
23 fact, in terms of when it -- when it enacted
24 the Sentencing Reform Act in 1984.

25 CHIEF JUSTICE ROBERTS: It seems to me

1 that now you're arguing against yourself on the
2 merits. I mean, you're -- you have all these
3 objections to what the remedy will be. Oh,
4 it's going to interfere with the discretion of
5 the judge and all that. But, if you made those
6 arguments when you were talking about the
7 merits, they would certainly cut against you.

8 MR. LUNN: Clearly the Court can say
9 that -- that a jury should impose -- be imposed
10 in a revocation hearing. But it would
11 fundamentally alter the way in which
12 revocations have been handled throughout --

13 JUSTICE KAGAN: It would alter it. It
14 would make it constitutional.

15 (Laughter.)

16 MR. LUNN: Well, but it -- it would
17 create an adversarial system, potentially, that
18 would be quite a bit different from what we've
19 known for revocation proceedings --

20 JUSTICE ALITO: Do you have any idea
21 how many revocation proceedings there are every
22 year?

23 MR. LUNN: There are -- are numerous
24 revocation proceedings. There aren't many
25 revocation proceedings under 3583(k), I don't

1 believe.

2 JUSTICE ALITO: But the total number
3 of revocation proceedings, maybe Mr. Feigin has
4 an idea, so we know what we're dealing with
5 with some of these potential arguments.

6 MR. LUNN: And -- and that's one of
7 the problems that you have. If you put juries
8 into those revocation proceedings, it would
9 create immense problems. It's something that a
10 court would really need to think about how --
11 how all of the ramifications and how these
12 would be done.

13 That's really not something the Court
14 should be doing. It's something that Congress
15 should be doing, if that's what they really
16 want to do.

17 JUSTICE GINSBURG: So your question is
18 who would be the prosecutor, for example?

19 MR. LUNN: Well, you have the issue as
20 to whether or not, if you allowed a jury trial,
21 whether or not there would be any -- you would
22 still allow any type of contact between the
23 probation office and -- and the United States
24 Attorney's Office.

25 And you have a lot of additional

1 issues that -- that may very well come up if
2 you were to decide that a jury trial should be
3 allowed in these cases.

4 This is a case where the defendant in
5 the initial -- with -- with his -- he -- he was
6 given a 38-month sentence. And this -- under
7 3583(k), he was given a five-year revocation
8 sentence, which is more than what he received.

9 He was looking at a ten-year maximum,
10 but in this, under 3583(k), he is now looking
11 at a sentence of life without parole.

12 If the United States Attorney had
13 actually prosecuted Mr. Haymond under the
14 recidivist statute of -- he would have been
15 looking at a maximum of 20 years in prison.

16 This system under 3583(k) essentially
17 circumvents the tried and true system of
18 indictment and it makes it somewhat a dead
19 letter in these --

20 JUSTICE KAVANAUGH: If --

21 MR. LUNN: -- types of situations.

22 JUSTICE KAVANAUGH: If there were no
23 mandatory minimum here and everything else,
24 though, stayed the same in terms of what the --
25 what was imposed, would there be a

1 constitutional problem?

2 MR. LUNN: There would be because of
3 the -- the maximum penalty of life without
4 parole. That creates immense problems under
5 the due process clause. And under this Court's
6 holding in *Winship*, you look at the permanency
7 of the threatened loss.

8 Obviously a person -- you also
9 consider the nature of the privacy interest.

10 The -- the most sacred privacy
11 interest that a person has is their own
12 liberty. And yet you're looking at a potential
13 life without parole prison sentence. So yes.

14 And the same thing applies looking at
15 the maximum sentence under the -- the Sixth
16 Amendment and Article III, Section 2.

17 JUSTICE ALITO: Are -- are you
18 representing a client who was given life
19 without parole?

20 MR. LUNN: No, but he was -- it
21 doesn't matter. What does matter is that he
22 was looking at a maximum sentence of life
23 without parole.

24 And the Court's cases in *Frank*, *Duncan*
25 and *Blanton versus City of Las Vegas* all point

1 out to the fact that, when you consider the
2 right to jury trial, you look at what the
3 maximum prison sentence could be.

4 And the same thing applies with the
5 due process right.

6 If there are no more further
7 questions, I'll --

8

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. LUNN: -- waive the rest of my
12 time.

13 CHIEF JUSTICE ROBERTS: Thank you.
14 Two minutes, Mr. Feigin.

15 REBUTTAL ARGUMENT OF ERIC J. FEIGIN
16 ON BEHALF OF THE PETITIONER

17 MR. FEIGIN: Thank you, Mr. Chief
18 Justice.

19 I just want to make two very important
20 but fairly quick points. One is that they're
21 defending a judgment under which this statute
22 was struck down as facially unconstitutional.
23 It cannot be applied no matter what the
24 original offense was, or what the supervised
25 release violation was.

1 So someone who kidnapped a minor and
2 then kidnaps a minor again, an offense that
3 even a prosecutor under the criminal laws would
4 subject the defendant to 20 years to life
5 imprisonment, would have to be treated the same
6 way.

7 What we're talking about in this case
8 is an as-applied -- as applied in this case,
9 and this is the second point, we're talking
10 about just a five-year sentence, which is the
11 only kind of sentence -- the only kind of
12 reimprisonment term we are familiar with under
13 this statute, with a few exceptions that are
14 listed in our reply brief, and there may be one
15 more we're aware of, everyone agrees that the
16 jury's verdict authorized reimprisonment for
17 possessing child pornography.

18 The only question is just what the
19 legal significance of that fact was.

20 When the judge was reimprisoning,
21 should the judge look at (e)(3) or should the
22 judge look at (k)? The only distinction
23 Respondent has drawn between (e)(3) and (k),
24 the one that he's emphasizing, the only
25 distinction applicable to him, is the absence

1 of discretion.

2 As I was explaining earlier, that is
3 an issue where you could potentially make a
4 substantive claim that, under particular
5 circumstances, the application of a five-year
6 minimum sentence would be unlawful under this
7 Court's decision in Bearden, as explained in
8 Black against Romano. That's not the claim
9 they're making.

10 They're trying to defend the statute
11 -- a judgment under which this statute was
12 struck down as facially unconstitutional by
13 hypothesizing punishments to which he was never
14 subjected, to which no defendant we're aware of
15 has ever been subjected.

16 JUSTICE SOTOMAYOR: Subjected to under
17 (k)?

18 MR. FEIGIN: Your Honor, if only (k)
19 --

20 JUSTICE SOTOMAYOR: And he didn't --

21 MR FEIGIN: -- stood, I don't see how
22 they would have a claim. Let's just assume
23 (e)(3) didn't exist and the default penalty
24 under (e)(3) were five years to life. I don't
25 see how they'd have a claim.

1 They don't have some free-floating
2 claim that a five-year minimum reimprisonment
3 term is too much for violation of supervised
4 release.

5 Indeed, under some circumstances
6 (e)(3) would allow a five-year term of
7 reimprisonment for a violation --

8 JUSTICE SOTOMAYOR: It's too much for
9 the --

10 MR FEIGIN: -- of supervised release.

11 JUSTICE SOTOMAYOR: -- original crime
12 that didn't require it.

13 MR. FEIGIN: Well, so, Your Honor, the
14 original crime authorized the period of
15 supervised release --

16 JUSTICE SOTOMAYOR: Authorized it but
17 didn't require a minimum.

18 MR. FEIGIN: Well, Your Honor, I don't
19 understand what principle they're relying on to
20 say that there is no -- may I finish, Mr. Chief
21 Justice?

22 CHIEF JUSTICE ROBERTS: Sure.

23 MR. FEIGIN: -- to say that it is
24 unconstitutional for Congress to proscribe a
25 five-year minimum period of revocation for very

1 serious crimes for very serious defendants.

2 JUSTICE SOTOMAYOR: Are you --

3 CHIEF JUSTICE ROBERTS: Answer -- Mr.
4 Feigin, you didn't get to your second of the
5 two points.

6 MR. FEIGIN: I kind of weaved it in
7 there, Your Honor.

8 (Laughter.)

9 MR. FEIGIN: But the second -- the
10 main point I was trying to make on the second
11 point is just that everyone agrees that
12 reimprisonment was authorized.

13 And so a lot of the arguments that are
14 being made here, as Justice Alito pointed out
15 earlier, would call into question not only the
16 constitutionality of supervised release in
17 general, but also the constitutionality of
18 parole and probation, which this Court has
19 upheld in its precedents.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:03 a.m., the case
24 was submitted.)

25

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