High Court Takes On Supervised Release Revocations

By **Alan Ellis, Mark Allenbaugh, Doug Passon and Jonathan Edelstein** (February 4, 2019)

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As U.S. Supreme Court Justice Neil Gorsuch recently observed in Hester v. U.S., "[i]f you're charged with a crime, the Sixth Amendment guarantees you the right to a jury trial. From this, it follows that the prosecutor must prove to a jury all of the facts legally necessary to support your term of incarceration."[1]

That is, unless you're one of the more than 130,000 individuals currently on federal supervised release[2] or probation. Then, all that is required to incarcerate is proof of a violation of a term of supervised release, to a single judge, by a mere preponderance of the evidence,[3] with no allegiance to the rules of evidence or the right to confrontation.[4]

"Although such violations often lead to reimprisonment, the violative conduct need not [even] be criminal," wrote the Supreme Court in Johnson v. U.S.[5] In fact, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution," in addition to the revocation, without violating the prohibition against double jeopardy. This de facto end run around the Constitution will soon be before the U.S. Supreme Court.

On Feb. 26, 2019, the court will hear argument in United States v. Haymond,[6] to determine whether "the U.S. Court of Appeals for the Tenth Circuit erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. § 3583(k) that required the district court to revoke the respondent's 10-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that the respondent violated the conditions of his release by knowingly possessing child pornography."[7]

In short, the court will determine whether the Constitution precludes a judge from imposing "heightened punishment on [defendants out on supervised release] based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt."[8] As we argue below, should the court affirm Haymond and hold such a revocation and reimprisonment unconstitutional, the decision will have far-reaching implications not just for sex offenders, but for the tens of thousands of individuals currently on supervised release and perhaps even add another nail in the coffin of judicial sentencing based on uncharged conduct not found beyond a reasonable doubt.[9]

A Brief History of Supervised Release

Pursuant to the Sentencing Reform Act of 1984,[10] supervised release replaced parole as a mechanism for easing inmates back into society after a term of incarceration. Where parole could be awarded at some indeterminate time during a period of incarceration — and thereby significantly shorten the term of incarceration — supervised release occurs after a set term of incarceration has been served; importantly,

therefore, supervised release does not shorten a term of imprisonment, but rather is an additional component of a sentence.

The length of supervised release is commensurate with the seriousness of the offense of conviction and can be anywhere from one year to life, though most terms are five years or less.[11] As supervised release is purportedly intended to assist former inmates as they transition back into society, it was designed to allow the probation department to closely monitor a "supervisee" during this period. For example, probation officers require those under their charge to report regularly, obtain approval for major life choices such as where to live, travel and work, and most pertinently, refrain from committing "another federal, state, or local offense."[12]

Should a supervisee violate any of the set conditions of release, a judge may do nothing, add additional terms of supervised release, extend the term, or, for serious violations as noted above, revoke supervised release altogether and impose a term of (re)imprisonment.[13] While the U.S. Sentencing Commission "cannot state with certainty how often revocations are based on new crimes versus technical violations," the commission nonetheless estimates, per a recent study, that "between 38.9 percent and 77.5 percent of the revocations studied were for new crimes, and between 22.5 and 61.1 percent were for technical violations."[14]

Haymond the Game Changer?

In Haymond, the defendant was convicted at trial of possessing child pornography, which carried a 10-year statutory maximum term of imprisonment. The district court sentenced Haymond to 38 months' imprisonment followed by 10 years' supervised release. After serving his term of imprisonment, but while on supervised release, a probation officer conducting a surprise search of Haymond's apartment found a cellphone containing, once again, child pornography, which, of course, violated the express terms of his supervised release.

Generally, when a supervisee commits a felony punishable by no more than 10 years' imprisonment a judge is authorized to impose up to two years of reimprisonment per 18 U.S.C. § 3583(e)(3). However, 18 U.S.C. § 3583(k) provides for a five-year mandatory minimum term of imprisonment where a supervisee is a sex offender and commits another sex offense while on supervised release. The district court imposed the mandatory minimum term of imprisonment followed by another five years' supervised release. However, "[t]he sentencing judge stated on the record that, 'were there not this statutory minimum, the court ... probably would have sentenced in the range of two years or less.'"[15]

On appeal, the Tenth Circuit "conclude[d] that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished."[16]

Citing Alleyne v. United States,[17] United States v. Booker[18] and Apprendi v. New Jersey,[19] the Tenth Circuit observed that these precedents require any fact that triggers a mandatory minimum penalty to be determined by a jury at trial, not a judge during a revocation hearing. Likewise, "18 U.S.C. § 3583(k) is unconstitutional because it circumvents the protections of the Fifth and Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct."[20]

In Johnson v. United States,[21] the Supreme Court made clear that, in order to avoid "serious constitutional concerns,"[22] revocation of supervised release must be viewed as punishment for the original crime of conviction, not as "punishment for the violation of the conditions of supervised release."[23] In short, by mandating five years' incarceration for new conduct determined at a revocation hearing, but simply designating it as punishment for the original conviction, § 3583(k) performs an end run around that most fundamental guarantee and protection of one's liberty against arbitrary state action: the right to trial by jury.

Should the Supreme Court affirm Haymond, the holding has the potential to extend far beyond repeat sex offenders. First, 18 U.S.C. § 3583(g) provides that for any offender on supervised release, if caught possessing a controlled substance or firearm in violation of a term of supervised release, then "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment." Haymond's holding would appear, therefore, to invalidate that subsection of the statue inasmuch as it imposes a mandatory term of imprisonment for subsequent conduct.

Taking the Tenth Circuit's reasoning to its logical conclusion, we argue that any time a court decides to revoke supervised release — even in a discretionary setting — the second prong of Haymond would preclude imprisonment because the basis of the re-imprisonment manifestly is "new conduct." As recognized in Johnson, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating post-revocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties."[24]

But that ipse dixit[25] — merely declaring reimprisonment as a penalty for the "initial offense" as opposed to a violation of a term of supervised release — is a rather weak justification for doing an end run around the Constitution. Such a rationale would have made sense in the days of parole where the term of imprisonment had been shortened by the early release from prison of the offender. There, the bargain was that in exchange for good behavior and efforts at reform, an offender could be released early provided that the offender complied with certain conditions of release, otherwise the full term of imprisonment would have to be served.

In contrast, in the post-parole/supervised release era, the offender has already served his total term of imprisonment (less any good conduct credit) by the time he begins serving his term of supervised release. Accordingly, revocation of supervised release (as opposed to parole) by definition entails serving a completely new term of imprisonment. In other words, the revocation sentence is not the completion of a term of imprisonment originally imposed, it is a new and additional term of incarceration. Thus, any facts triggering revocation of supervised release under any circumstances ought to comply with the Fifth and Sixth Amendments.

But even if the court does not go so far as to hold that any and all supervised release violation proceedings are subject to Apprendi — even if the court affirms Haymond narrowly and finds, in accordance with Johnson and Alleyne, that a Sixth Amendment violation occurs only when a supervised release violation triggers a mandatory minimum sentence — the effects could still be far-reaching.

As discussed above, the sex-offense provision at issue in Haymond, which imposes a mandatory minimum of five years, may be the most outstanding of the circumstances under which imprisonment is required, but the controlled-substance and firearm provisions also

involve a statutory minimum, albeit a subtler one. Although they do not impose a minimum sentence of years or months, they do make some imprisonment mandatory; zero is not an option for a district judge who is sentencing a defendant for one of these violations, and there is thus a mandatory minimum of at least one day. Given that any amount of imprisonment is an injury cognizable under the Sixth Amendment, an affirmance in Haymond might well restore judicial discretion to forgo imprisonment for these violations as well.

Conclusion

Not only could Haymond be a groundbreaking decision, but it will be the first major federal sentencing guidelines case the two newest justices — Gorsuch and Brett Kanavaugh — will participate in. In **previous** Law360 **articles**, we discussed the concern of both justices about the use of "relevant conduct" to circumvent the Sixth Amendment.[26] We expect they will voice the same concerns here and predict an affirmance, an affirmance that may result in a far broader impact than on recidivist sex offenders alone. If the protections guaranteed by the Fifth and Sixth Amendments are to mean anything, it is fundamental that imprisonment, regardless of the context, ought not rest on a judicial determination by a mere preponderance of the evidence, but rather the full weight and procedure of a trial by jury.

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[1] Hester v. United States, 2019 U.S. LEXIS 9, *1 (Gorsuch, J., dissenting from denial of certiorari).

[2] Administrative Offices of the U.S. Courts, Federal Probation System Statistical Tables for the Federal Judiciary (June 30, 2018) tbl. E-2 available at https://www.uscourts.gov/statistics/table/e-2/statistical-tables-federal-judiciary/2018/06/30.

[3] See 18 U.S.C. § 3583(e)(3).

[4] See Fed. R. Evid. 1101(d)(3).

[5] Johnson v. United States, 529 U.S. 694, 699 (2000).

[6] United States v. Haymond, 869 F.3d 1153 (10th Cir. 2017).

[7] Brief of the United States, "Question Presented," United States v. Haymond, 17-1672 available at https://www.supremecourt.gov/DocketPDF/17/17-1672/76420/20181217125903969_17-1672tsUnitedStates.pdf.

[8] 869 F.3d at 1162.

[9] See Alan Ellis, Mark H. Allenbaugh & Doug Passon, "Does an Acquittal Now Matter at Sentencing? Reining in Relevant Conduct Through a Recent Restitution Ruling," 102 CrL 366 (Jan. 17, 2018).

[10] Pub. L. 98-473, 98 Stat. 1987.

[11] U.S. Sentencing Comm'n, Federal Offenders Sentenced to Supervised Release 51-52 (July 2010) available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

[12] 18 U.S.C. § 3583(d).

[13] See USSG Ch. 7, Pt. A.

[14] U.S. Sentencing Comm'n, "Revocations Among Federal Offenders," 2-3 (Jan. 2019), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf.

[15] 869 F.3d at 1162.

[16] Id.

[17] Alleyne v. United States, 570 U.S. 99 (2013).

[18] United States v. Booker, 543 U.S. 220 (2005).

[19] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[20] 869 F.3d at 1165.

[21] Johnson v. United States, 529 U.S. 694 (2000).

[22] Haymond, 869 F.3d at 1165.

[23] Id.

[24] Johnson, 529 U.S. at 700.

[25] Ipse dixit is a Latin phrase meaning "he said it himself." It is a critical expression used to identify an assertion that lacks proof. See Wikipedia, "Ipse dixit" available

at https://en.wikipedia.org/wiki/Ipse_dixit. As the late Justice Scalia famously quipped, "he who lives by the ipse dixit dies by the ipse dixit." Morrison v. Olson, 487 U.S. 654, 726 (Scalia, J., dissenting).

[26] See Alan Ellis & Mark H. Allenbaugh, "Gorsuch May Bring Needed Changes to Federal Sentencing," Law360 (Mar. 3, 2017); Alan Ellis & Mark H. Allenbaugh, "Sentencing May Change with 2 Kennedy Clerks on High Court," Law360 (July 26, 2018).