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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 release 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 circumstances of this case --

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

10 MR. FEIGIN: -- are 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's 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 could well,  
5 Your Honor, be due process issues or other  
6 Eighth Amendment issues, but I don't think it  
7 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  
7           tradition, cases, E, he served five, he has  
8           supervised release of five, and so you can send  
9           him back to jail because of fact X as long as  
10          you don't 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 -- an as-applied challenge to the part  
16 of the statute to which he objects, and he --  
17 his -- 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  
21 into what might present constitutional  
22 problems.

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

1 conviction by the jury is -- is, you know, home  
2 free regardless of any constitutional problems  
3 it might -- might entail.

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

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

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

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

1           MR. FEIGIN: No, Your Honor, and that  
2 -- that's -- that's not our argument. But  
3 they're trying to make an argument that the  
4 jury didn't authorize these kinds of revocation  
5 proceedings. And our point is that if they're  
6 acknowledging that the jury's verdict does  
7 allow -- does include this term of supervised  
8 release, which comes with conditions and  
9 consequences for violating those conditions,  
10 (k) is one of those conditions.

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

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

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

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

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

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

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

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

25 MR. FEIGIN: -- protections that were

1 provided here.

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

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

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

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

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

1 to do so.

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

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

11 MR. FEIGIN: Your Honor --

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

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

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

1 goes on a breach of trust theory.

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

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

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

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

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

25 JUSTICE KAGAN: Well, but the question

1 is where --

2 MR. FEIGIN: -- to the population.

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

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

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

25 MR. FEIGIN: So, Your Honor, let me



1 just very quickly, before I reserve the  
2 remainder of my time, address the -- the  
3 mandatory nature of this, which this Court has  
4 also addressed in the parole context.

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

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

19           JUSTICE KAVANAUGH: But revocation --

20           MR. FEIGIN: So we're a far cry from  
21 that here.

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

1                   MR. FEIGIN: Your Honor, I really  
2 don't think there is any difference between --

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

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

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

25                   If I might reserve the remainder of my

1 time.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Lunn.

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

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

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

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

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

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

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

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

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

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

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

1 MR. LUNN: (e)(3) is okay to the  
2 point --

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

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

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

15 MR. LUNN: Yes.

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

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

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

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

25 JUSTICE KAGAN: He has no claim that

1 the statutory maximum is being stretched.

2 MR. LUNN: That's correct essentially.

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

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

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

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

25 MR. LUNN: Because --

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

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

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

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

1 element that must be submitted to the jury.

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

5 MR. LUNN: Yes.

6 JUSTICE BREYER: Okay. Got that one.

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

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

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

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



1 it would create a complication. You would have  
2 to do something like call a jury in those few  
3 cases.

4 Now what do you think of that?

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

12 JUSTICE BREYER: Yeah, yeah.

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

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

1 JUSTICE GINSBURG: And how long could  
2 the contempt penalty be?

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

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

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

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

24 JUSTICE ALITO: Right. So all of the  
25 -- all of the conditions in Mr. Haymond's

1 supervised release were elements of the  
2 offense?

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

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

18 MR. LUNN: Yes.

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

24 You need a jury when you give him a  
25 punishment that exceeds, because of a fact,

1 what the initial punishment was in the statute.  
2 That, I thought, was Apprendi.

3 MR. LUNN: Yes.

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

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

8 JUSTICE BREYER: Right.

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

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

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

1 the rights of judges to exercise discretion?

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

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

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

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

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

25 JUSTICE ALITO: Well, you're saying

1 that there's a problem with the mandatory five,  
2 because it ought to be up to the discretion of  
3 the district judge.

4 MR. LUNN: Yes.

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

7 MR. LUNN: Yes.

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

11 MR. LUNN: Yes.

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

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

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

1 guideline or contempt or whatever.

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

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

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

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

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

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

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

1 it was a machine gun. And the Court said that  
2 the drastic increase from five years to 30  
3 years actually created a substantive offense,  
4 and that needed to be presented to the jury.  
5 So I think this is similar.

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

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

16 MR. LUNN: There are two responses.

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

24 But, beyond that, if you then want to  
25 bring the jury trial system into the revocation



1 system, it creates immense difficulties. It  
2 really does potentially transform --

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

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

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

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

24 You would have burden of proof issues,  
25 you'd have confrontation issues, you'd have

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

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

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

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

1 defendant and what he needs.

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

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

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

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

22 MR. LUNN: Yes.

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

25 MR. LUNN: A jury in a revocation

1 hearing, if that's where the Court wanted to  
2 go, and if you thought that that is what  
3 Congress would do in this situation --

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

5 MR. LUNN: -- then very well.

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

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

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

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

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

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

16 (Laughter.)

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

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

24 MR. LUNN: There are -- are numerous  
25 revocation proceedings. There aren't many

1 revocation proceedings under 3583(k), I don't  
2 believe.

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

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

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

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

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

1 Attorney's Office.

2 And you have a lot of additional  
3 issues that -- that may very well come up if  
4 you were to decide that a jury trial should be  
5 allowed in these cases.

6 This is a case where the defendant in  
7 the initial -- with -- with his -- he -- he was  
8 given a 38-month sentence. And this -- under  
9 3583(k), he was given a five-year revocation  
10 sentence, which is more than what he received.

11 He was looking at a -- a 10-year  
12 maximum, but in this, under 3583(k), he's now  
13 looking at a sentence of life without parole.

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

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

22 JUSTICE KAVANAUGH: If --

23 MR. LUNN: -- types of situations.

24 JUSTICE KAVANAUGH: -- if there were  
25 no mandatory minimum here and everything else,

1     though, stayed the same in terms of what the --  
2     what was imposed, would there be a  
3     constitutional problem?

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

10            Obviously, a person -- you also  
11     consider the nature of the privacy interest.

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

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

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

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



1                   And the Court's cases in Frank,  
2                   Duncan, and Blanton versus City of Las Vegas  
3                   all point out to the fact that, when you  
4                   consider the right to jury trial, you look at  
5                   what the maximum prison sentence could be.

6                   And the same thing applies with the  
7                   due process right.

8                   If there are no more further  
9                   questions, I'll --

10                   CHIEF JUSTICE ROBERTS: Thank you,  
11                   counsel.

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

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

16                   REBUTTAL ARGUMENT OF ERIC J. FEIGIN

17                   ON BEHALF OF THE PETITIONER

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

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

1 release violation was.

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

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

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

1 distinction applicable to him, is the absence  
2 of discretion.

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

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

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

19           MR. FEIGIN: Your Honor, if only (k)  
20 --

21           JUSTICE SOTOMAYOR: And he didn't --

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

1 see how they'd have a claim. They don't have  
2 some free-floating claim that a five-year  
3 minimum reimprisonment term is too much for a  
4 violation of supervised 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 prescribe a  
25 five-year minimum period of revocation for very

1 serious crimes for very serious defendants.

2 Thank you.

3 JUSTICE SOTOMAYOR: Are you --

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

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

9 (Laughter.)

10 MR. FEIGIN: But the -- the second --  
11 the -- the main point I was trying to make on  
12 the second point is just that everyone agrees  
13 that reimprisonment was authorized. And so a  
14 lot of the arguments that are being made here,  
15 as Justice Alito pointed out earlier, would  
16 call into question not only the  
17 constitutionality of supervised release in  
18 general but also the constitutionality of  
19 parole and probation, which this Court has  
20 upheld in its precedents.

21 Thank you.

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

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

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