

# Sex Offenders and Supervised Release Revocation: Constitutional?

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The U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) recently ruled that a portion of the federal supervised release statute addressing sex offenders violates the [Fifth](#) and [Sixth](#) Amendments of the U.S. Constitution. In a 2-1 decision issued in [United States v. Haymond](#), the Tenth Circuit held that a provision in the statute, establishing a mandatory minimum prison term for convicted sex offenders that commit sex offenses while on supervised release, impermissibly strips the sentencing judge of discretion to impose punishments within the original crime’s statutorily prescribed range. Moreover, the court faulted the statute for imposing additional punishments on a sex offender who commits a new sex offense while on supervised release, but not providing for his conviction for the new sex offense based on proof beyond a reasonable doubt. The *Haymond* decision is the most recent in a series of appellate court decisions, discussed [here](#) and [here](#), that have struck down post-conviction measures addressing convicted sex offenders based on perceived constitutional infirmities.

When sentencing a criminal defendant, courts generally have discretion to impose a [period of supervised release](#) to follow the period of incarceration. [18 U.S.C. § 3583](#) establishes certain mandatory conditions for supervised releases, including that the defendant not commit another crime (whether federal, state, or local) during the period of supervision. A court may revoke supervised release and impose a term of reimprisonment if the court “finds by a preponderance of the evidence that the defendant violated a condition of supervised release.” When a court revokes supervised release, the potential term of reimprisonment depends on the severity of the *original* crime of conviction, rather than the offense that triggered revocation. Likewise, if a defendant is reimprisoned, the court may impose an additional term of supervised release, but the potential duration of that term reflects the original crime of conviction rather than the offense triggering revocation.

The federal supervised release statute establishes special requirements for sex offenders. Under [18 U.S.C. § 3583\(k\)](#), supervised release for sex offenders is mandatory with a five-year minimum term and a maximum term of life. If a court finds that the defendant has violated a condition of his release by committing an enumerated federal sex offense, the defendant is subject to mandatory reimprisonment for at least five years and up to life.

*Haymond* involved a defendant convicted of a [federal child pornography offense](#) and initially sentenced to 38 months’ imprisonment followed by 10 years of supervised release. During

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Haymond's supervised release, his probation officer found child pornography in his possession. The probation officer moved to have Haymond's supervised release revoked. Using the statutorily prescribed preponderance of the evidence standard, the sentencing court found that Haymond had violated the conditions of his supervised release by possessing child pornography, which triggered a mandatory five-year minimum term of imprisonment required for sex offenders under [18 U.S.C. § 3583\(k\)](#).

## Author Information

Alison M. Smith  
Legislative Attorney

A three-judge Tenth Circuit panel found the mandatory term of imprisonment required under [18 U.S.C. § 3583\(k\)](#) to be constitutionally invalid on several grounds. First, the court found that the provision ran afoul of the Sixth Amendment right to trial by jury. In making this determination, the Tenth Circuit focused on a series of cases (*Apprendi v. New Jersey*, *Alleyne v. United States*, and *United States v. Booker*) where the Supreme Court held that the right to trial by jury bars judges from imposing sentences beyond the prescribed statutory maximum unless a jury has found the facts supporting an increased sentence to be proved beyond a reasonable doubt. In *Booker*, the Court expanded its judicial fact-finding jurisprudence to federal sentencing determinations, holding that the Sentencing Guidelines must be construed as advisory, not mandatory, to avoid violating the Sixth Amendment.

In reviewing the statute, the Tenth Circuit concluded that supervised release is “part of the sentence for the defendant’s original crime of conviction.” Relying on *Booker*, the court found that sentencing judges must retain discretion over supervised release revocations and subsequent terms of imprisonment, noting that 18 U.S.C. § 3583(k) mandates *at least* five years imprisonment for revocations triggered by sex offenses while giving courts discretion to impose sentences of up to five years for revocations triggered by non-sex offenses. Because the statute provides for judges to increase sentences based on a preponderance of the evidence, rather than proof beyond a reasonable doubt, the Tenth Circuit found it to violate the Sixth Amendment.

The Tenth Circuit also found the statute unconstitutional because it impermissibly increased punishment for subsequent conduct rather than the “original crime for which the defendant was properly convicted ....” If Haymond had committed a crime not enumerated under § 3583(k), he would have been subject to revocation under § 3583(e)(3) and additional imprisonment of up to two years. Instead, under § 3583(k), Haymond faced additional imprisonment for a *minimum* term of five years to life, which the Tenth Circuit likened to transforming revocation into criminal prosecution. Thus, the Tenth Circuit found that the court punished Haymond for an offense for which he was not tried by a jury or found guilty beyond a reasonable doubt in violation of the Sixth Amendment.

While the court also found § 3583(k) unconstitutional under the Fifth Amendment, it did not discuss these violations in depth. Under the Fifth Amendment’s [Double Jeopardy Clause](#), individuals cannot be prosecuted more than once or receive multiple punishments for the same offense. Generally, prosecutors have discretion to prosecute supervised release offenses in separate proceedings despite the offense having triggered revocation of defendant’s supervised release and his additional imprisonment for the initial offense. Because conduct triggering revocation may be prosecuted in a separate proceeding, the

*Haymond* court found that the statute “raises the possibility that a defendant would be charged and punished twice for the same conduct, in violation of the Fifth Amendment.”

Dissenting from the *Haymond* majority’s ruling that § 3583(k) is unconstitutional, Judge Paul Kelly argued that the majority’s reasoning would seem applicable to all revocation proceedings. Specifically he stated “if a defendant is sentenced to any term of supervised release, the fact that the release can then be revoked and the defendant be sent back to prison for an additional term means that ‘the penalty to which a defendant may be subjected’ has been increased based on facts not found by a jury.” Judge Kelly argued that *Booker* was not applicable to revocation proceedings and that the majority acted prematurely in resolving a perceived tension between the Supreme Court’s judicial fact finding jurisprudence and the characterization of supervised release. Judge Kelly emphasized the Supreme Court’s decision in *Johnson v. United States*, which recognized that revocation of supervised release normally should be treated “as part of the penalty for the initial offense.” As such, the *Johnson* Court declared, revocation “need not be criminal and need only be found by a judge under a preponderance of evidence standard, not by a jury beyond a reasonable doubt.” According to Judge Kelly, establishing more significant revocation consequences for those who subsequently commit sex offenses is well within Congress’s power and does not transform § 3583(k) revocation proceedings into criminal prosecutions.

The Supreme Court may be asked to determine whether the revocation scheme for sex offenders is constitutional. While *Haymond* calls into question revocation based on judicial fact finding, it seems to identify the statute’s major infirmity as the mandatory nature of revocation for sex offenders. With other violations of supervised release conditions, revocation under § 3583 is discretionary rather than mandatory. *Haymond* arguably continues a trend of examining closely how the judicial process treats sex offenders. Courts have invalidated overly broad statutes regarding conditions of supervised release including [accessing social networking sites](#), [Internet bans](#), and [residency restrictions](#). These decisions may provide guidance in crafting legislation regarding post-conviction controls of sex offenders.

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