

## APPRENDI'S TWO CONSTITUTIONAL RIGHTS\*

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*The Sixth Amendment right to a jury trial applies “in all criminal prosecutions.” But when does a “criminal prosecution” end? In United States v. Haymond, the latest in the line of Apprendi v. New Jersey cases, the U.S. Supreme Court fractured on the question of whether postsentence revocations of supervised release fall within the Sixth Amendment right’s scope. With Haymond as its vantage point, this Article suggests that the Court’s post-Apprendi jurisprudence has intertwined the Sixth Amendment jury right with Fifth Amendment due process and that the constitutional law of sentencing would be well served by disentangling these two fundamental protections and refocusing on due process.*

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### INTRODUCTION

In *Apprendi v. New Jersey*,<sup>1</sup> the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment and the Jury Trial Clause of the Sixth Amendment require that “any fact,” other than a prior conviction, “that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”<sup>2</sup> While I have always admired Justice Stevens’s majority opinion,<sup>3</sup> I have found it curious that subsequent cases treated the *jury* and *reasonable doubt* requirements as

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1. 530 U.S. 466 (2000).

2. *Id.* at 490.

3. See generally Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 211, 240–51 (2005) (focusing on Justice Stevens’s position in *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi*, 530 U.S. at 466; and several important earlier cases including *United States v. Watts*, 519 U.S. 148 (1997); *Witte v. United States*, 515 U.S. 389 (1995); and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

though they were a single right, joined at the hip. As recounted in detail elsewhere in this symposium issue,<sup>4</sup> the most significant of these subsequent decisions invalidated state mandatory sentencing guidelines<sup>5</sup> and rendered the Federal Sentencing Guidelines advisory only.<sup>6</sup> Eventually, and finally, the Court extended *Apprendi*'s logic to any fact that increases either the maximum or the minimum punishment for a crime.<sup>7</sup>

While *Apprendi* and its progeny have, on balance, made sentencing fairer, the doctrine's conflation of a defendant's two underlying adjudicatory rights generates conceptual issues for proceedings that cannot reasonably be considered part of the "criminal prosecution"<sup>8</sup> for Sixth Amendment purposes. Might due process nonetheless require proof beyond a reasonable doubt of facts that result in significant additional imprisonment? Focusing on the most recent case in the *Apprendi* line, *United States v. Haymond*,<sup>9</sup> this Article discusses some of the problems with *Apprendi*'s fusion of these rights. I suggest that decoupling them will clarify the roles of the Fifth, Sixth, and Fourteenth Amendments in postconviction criminal procedure.

#### I. WHEN DOES THE "CRIMINAL PROSECUTION" END?

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."<sup>10</sup> The text tells us nothing about when the "criminal prosecution" ends. Does it end when a court accepts a jury's verdict or a defendant's plea of guilty? Perhaps not. Maybe the criminal prosecution continues until a court pronounces a sentence and enters a judgment? Or even longer? Might the "criminal prosecution" continue even after the sentencing and judgment?

The U.S. Supreme Court grappled with these questions in a little-noticed case decided in the final days of October Term 2018.<sup>11</sup> In *Haymond*, the

4. See, e.g., Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195, 1201–08 (2021).

5. See *Cunningham v. California*, 549 U.S. 270, 293 (2007); *Blakely*, 542 U.S. at 313–14.

6. *United States v. Booker*, 543 U.S. 220, 246 (2005).

7. *Alleyne v. United States*, 570 U.S. 99, 103 (2013), *overruling* *Harris v. United States*, 536 U.S. 545 (2002), *abrogating* *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *Harris v. United States*, 536 U.S. 545 (2002), had been the Court's only significant retreat from *Apprendi*. See Stith, *supra* note 3, at 251–52.

8. U.S. CONST. amend. VI.

9. 139 S. Ct. 2369 (2019).

10. U.S. CONST. amend. VI.

11. The U.S. Supreme Court issued decisions on politically charged census and gerrymandering cases—two more consequential criminal justice issues—and an important takings case all within a week of the *Haymond* decision. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2561 (2019) (deciding whether a question about citizenship on the 2020 census was constitutional); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019) (deciding whether claims of excessive partisanship constitute unconstitutional gerrymandering); *United States v. Davis*, 139 S. Ct. 2319, 2323–24 (2019) (deciding whether a statute concerning long prison sentences was too vague); *Flowers v. Mississippi*, 139 S. Ct.

defendant was convicted of possession of child pornography, a crime carrying a maximum sentence of ten years in prison.<sup>12</sup> Pursuant to a provision of the PROTECT Act,<sup>13</sup> as amended by the Adam Walsh Child Protection and Safety Act of 2006 (“Walsh Act”),<sup>14</sup> he also faced an enhanced term of supervised release between five years and life.<sup>15</sup> Haymond, a first-time offender, was sentenced to thirty-eight months’ imprisonment and ten years of supervised release.<sup>16</sup>

While Haymond was under supervision, a search of his digital devices turned up images of child pornography.<sup>17</sup> A hearing followed on the probation officer’s allegation of five supervision violations, including possession of fifty-nine images of child pornography.<sup>18</sup> Using the federally required evidentiary standard,<sup>19</sup> the judge found by a preponderance of the evidence that Haymond knowingly possessed thirteen images and revoked his supervised release.<sup>20</sup> Had the usual statute governing supervised release revocations applied,<sup>21</sup> the judge said that he “probably would have sentenced in the range of two years or less.”<sup>22</sup> But, under a further provision of the Walsh Act, the judge, having revoked supervised release, was required to sentence Haymond to an additional prison

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2228, 2235 (2019) (finding a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), in the peremptory strike of a Black juror at the defendant’s sixth trial); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (overruling the state’s litigation requirement in takings jurisprudence). Surrounded by these attention grabbers, *Haymond* is easy to brush aside because its immediate impact is insignificant. From the date that the provision at issue in *Haymond* became law in 2006, up to the date that the provision was struck down in 2019—one month shy of thirteen years—Westlaw reflects that federal courts cited 18 U.S.C. § 3583(k) a total of 264 times, an average of only twenty times per year. See Westlaw Search Results, <https://1.next.westlaw.com> [<https://perma.cc/QA2Q-WM8Z>] (search “18 U.S.C. 3583(k)”; narrow to federal cases and orders; narrow date range to July 27, 2006, through June 26, 2019). In the same period, federal courts cited 18 U.S.C. § 3583(e), the general supervised release statute, 4,527 times—a whopping seventeen times as often. *Id.* (search “18 U.S.C. 3583(e)”; narrow to federal cases and orders; narrow date range to July 27, 2006, and June 26, 2019).

12. *Haymond*, 139 S. Ct. at 2373.

13. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.); see *id.* § 101, 117 Stat. at 651–52 (codified as amended at 18 U.S.C. § 3583(k)).

14. Pub. L. No. 109-248, 120 Stat. 587 (2003) (codified as amended in scattered sections of 18 U.S.C. and 34 U.S.C.); see *id.* § 141(e)(2), 120 Stat. at 603 (codified as amended at 18 U.S.C. § 3583(k)).

15. See 18 U.S.C. § 3583(k).

16. *United States v. Haymond (Haymond II)*, 869 F.3d 1153, 1156 (10th Cir. 2017), *vacated*, 139 S. Ct. 2369 (2019).

17. *Haymond*, 139 S. Ct. at 2374.

18. *Id.*

19. *Id.*; see also 18 U.S.C. § 3583(e)(3) (requiring that to revoke probation, the court must find “by a preponderance of the evidence that the defendant violated a condition of supervised release”).

20. *Haymond*, 139 S. Ct. at 2375.

21. See § 3583(b), (e)(3). This provision was in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and the Federal Rules of Criminal Procedure) from its inception in 1984.

22. *Haymond*, 139 S. Ct. at 2375.

term of between five years and life.<sup>23</sup> While the sentencing judge found this provision “repugnant,” he still sentenced Haymond, as required by law, to the mandatory minimum of five additional years in prison.<sup>24</sup>

The Tenth Circuit reversed, holding the mandatory term unconstitutional under *Alleyne v. United States*,<sup>25</sup> in which the Court had applied *Apprendi*’s requirements to increases in the minimum lawful sentencing range.<sup>26</sup>

On June 26, 2019, the U.S. Supreme Court affirmed.<sup>27</sup> However, *Haymond*, like virtually all the decisions in the *Apprendi* line, fractured the Court: three Justices joined Justice Gorsuch’s plurality opinion,<sup>28</sup> another three Justices joined Justice Alito’s dissent,<sup>29</sup> and Justice Breyer concurred only in the result.<sup>30</sup> These three opinions warrant careful attention since they raise important questions about why *Apprendi* treated two discrete constitutional requirements—proof beyond a reasonable doubt and the right to trial by jury—as one.

According to Justice Gorsuch’s opinion for the plurality, which included Justices Ginsburg, Sotomayor, and Kagan, *Apprendi* and *Alleyne* together teach that a defendant has a right to have a jury determine whether the government has met its burden of proof beyond a reasonable doubt as to any fact that increases the floor or ceiling of the lawful sentencing range.<sup>31</sup> Haymond was sentenced to five additional years of imprisonment on the basis of factfinding by a judge, not a jury, even though both the sentencing judge<sup>32</sup> and the Tenth Circuit<sup>33</sup> found that the government had barely met the preponderance standard of proof as to the issue of whether Haymond had knowingly possessed child pornography.

Inconveniently for Justice Gorsuch, the additional five-year sentence was imposed in a revocation proceeding that took place *years* after Haymond’s original sentencing.<sup>34</sup> Justice Gorsuch reasoned that Haymond’s sentence was not yet “final” under *Apprendi* and *Alleyne*—and thus the Sixth Amendment

23. This is the first sentence of the statute cited above, 18 U.S.C. § 3583(k) (requiring a sentence of “not less than 5 [years], or life,” for any of the enumerated offenses involving a minor victim).

24. *Haymond*, 139 S. Ct. at 2375.

25. 570 U.S. 99 (2013).

26. *Haymond II*, 869 F.3d 1153, 1162 (10th Cir. 2017), *vacated*, 139 S. Ct. 2369 (2019).

27. *Haymond*, 139 S. Ct. at 2382 (citing *Alleyne*, 570 U.S. at 117–18).

28. *See id.* at 2373–85 (plurality opinion).

29. *See id.* at 2386 (Alito, J., dissenting).

30. *See id.* at 2385–86 (Breyer, J., concurring).

31. *Id.* at 2381 (plurality opinion).

32. *United States v. Haymond*, No. 08-CR-201, 2016 WL 4094886, at \*13 (N.D. Okla. Aug. 2, 2016) (“The United States . . . failed to prove Haymond knowingly possessed any of the 59 images beyond a reasonable doubt. If this were a criminal trial and the Court were the jury, the United States would have lost.”), *aff’d in part*, 869 F.3d 1153 (10th Cir. 2017), *vacated*, 139 S. Ct. 2369 (2019).

33. *Haymond II*, 869 F.3d 1153, 1157–60 (2017).

34. *Haymond*, 139 S. Ct. at 2373, 2375 (plurality opinion).

right to a jury applied—until the judge imposed the additional sentence.<sup>35</sup> The plurality brushed past the Court's well-established holdings that other aspects of the Sixth Amendment, such as an unqualified right to counsel, do not apply to probation or parole revocation proceedings.<sup>36</sup>

It is not clear whether Justice Gorsuch paused to consider the profound implications of his argument for the full panoply of Sixth Amendment rights—right to a jury trial, right to counsel, right to confrontation, and others. Focusing solely on *Apprendi*'s double-constitutional rights, the plurality asserted that the government could not trump these rights by simply delaying the proof of certain sentence-enhancing facts far beyond the completion of a defendant's original sentencing proceeding, even if those facts had not yet occurred at the time of that proceeding.<sup>37</sup>

## II. "POTENTIALLY DESTABILIZING CONSEQUENCES"

Answering the question posed above—when does a “criminal prosecution” end—Justice Gorsuch wrote that “criminal prosecution continues . . . until a final sentence is imposed,”<sup>38</sup> which “includes any supervised release sentence [a defendant] may receive.”<sup>39</sup> And he pronounced the foundational principle that he thought *Apprendi* stands for: “[A]ny accusation triggering a new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt.”<sup>40</sup>

If these broad dicta were to be accepted by a majority of the Court—that is, if the entire *Apprendi* line of cases were transplanted to postsentencing proceedings—our present understandings of probation, parole, suspended sentences, and supervised release would be thrown to the wind. Indeed, Justice Gorsuch appeared to throw down this very gauntlet in his portentous opening line: “Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty.”<sup>41</sup> As Justice Alito's powerful dissent—joined by Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh—pointed out, “taking a person's liberty” is exactly what any revocation of probation, parole, or

35. *Id.* at 2379–80.

36. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (“Probation revocation . . . is not a stage of a criminal prosecution.”); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (“[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.”).

37. *Haymond*, 139 S. Ct. at 2379 (plurality opinion) (“[We] reject[] efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of . . . [c]alling part of a criminal prosecution a ‘sentence modification’ imposed at a ‘postjudgment sentence-administration proceeding’ . . .”).

38. *Id.*

39. *Id.*

40. *Id.* at 2380.

41. *Id.* at 2373.

supervised release does.<sup>42</sup> Justice Gorsuch's approach is radical; if followed to its logical conclusion, there would be a right to a jury in every probation or parole revocation proceeding.<sup>43</sup>

Because of what Justice Breyer politely called the "potentially destabilizing consequences"<sup>44</sup> of Justice Gorsuch's opinion, he declined to join it and expressed agreement with "much of the dissent."<sup>45</sup> Although Justice Breyer provided the fifth vote in *Haymond*'s favor, he did so on the narrowest of grounds.<sup>46</sup>

Justice Breyer noted that the Court had always proceeded on the understanding that sanctions following supervision revocation are "not 'for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct'" but, rather, are an additional sentence for the underlying crime of conviction.<sup>47</sup> That is exactly right, as all nine Justices seemed to agree.<sup>48</sup>

But the Walsh Act provision is different, Justice Breyer said.<sup>49</sup> The requirement of a new prison sentence of at least five years more "closely resemble[s] the punishment of [a] new criminal offense[]." <sup>50</sup> And under the Constitution, the government may not prosecute a new criminal offense without providing for a jury trial and proof beyond a reasonable doubt.<sup>51</sup> Therefore, Justice Breyer concluded, *Haymond*'s mandatory new five-year sentence was unconstitutional.<sup>52</sup>

42. *Id.* at 2387 (Alito, J., dissenting); *see also* 18 U.S.C. § 3142 (providing for pretrial detention of defendants in certain circumstances).

43. Justice Gorsuch denied this is where his logic would lead. *See Haymond*, 139 S. Ct. at 2382 (plurality opinion) (suggesting that his logic applies only to a revocation that "requires a substantial increase in the minimum sentence to which a defendant may be exposed"). In the next paragraph, however, Justice Gorsuch asserted that the government cannot "send a free man back to prison for years based on judge-found facts." *Id.*

44. *Id.* at 2385 (Breyer, J., concurring).

45. *Id.*

46. *Id.* at 2386.

47. *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. 3(b) (U.S. SENT'G COMM'N 2018)). Justice Breyer might have pointed out that if revocation sanctions were punishment for the revocation conduct, that conduct could not be separately pursued in a new prosecution without violating double jeopardy protections. The Court has clearly said such new prosecutions are permitted. *See Johnson v. United States*, 529 U.S. 694, 700 (2000) ("Where 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 postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.").

48. *See Haymond*, 139 S. Ct. at 2384 (plurality opinion); *id.* at 2390 (Alito, J., dissenting).

49. *See id.* at 2386 (Breyer, J., concurring).

50. *Id.*

51. *See, e.g., Patterson v. New York*, 432 U.S. 197, 215–16 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975); *In re Winship*, 397 U.S. 358, 364 (1970).

52. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

Although Justice Breyer's opinion is short—even cryptic—it does succinctly capture why the *Apprendi* line of cases cannot apply broadly to all revocations of parole, probation, or supervised release.<sup>53</sup> So, before moving on to Justice Alito's dissenting opinion, I will pause here to explicate more than Justice Breyer does on how his understanding of *Apprendi* and *Allelyne* would play out in the situation of revocation rules that do not “closely resemble the punishment of [a] new criminal offense[.]”<sup>54</sup>

### III. DISENTANGLING APPRENDI'S RIGHTS

If we understand revocation sanctions to be part of the punishment for the original crime—and, again, that is the long-held understanding as well as the understanding of all nine members of the *Haymond* Court—then the severity of revocation sanctions is constitutionally “limited by the severity of the original crime.”<sup>55</sup> Here, Haymond's child pornography conviction exposed him to a maximum term of ten years' imprisonment and five years to life of supervised release.<sup>56</sup> So the highest term of imprisonment Haymond could constitutionally receive on the revocation of his supervised release was the maximum provided in the statute of conviction: ten years minus the three years and two months to which he was originally sentenced.<sup>57</sup> This comes out to six years and ten months.

But wait—Haymond's new sentence was only five years, which is *less* than what would be constitutionally permitted. Even after adding a new sentence to the original sentence, the total was less than the maximum authorized for the offense of conviction. Sure, the Walsh Act permitted the judge in his discretion to impose up to a life sentence.<sup>58</sup> But the judge did not exercise that discretion. So why was Haymond's final sentence of ninety-eight months unconstitutional, where the crime of conviction permitted up to 120 months? The answer seems to be that both Justice Gorsuch and Justice Breyer understood the factfinding that triggered the mandatory five-year minimum as *retroactively increasing* the minimum of the lawful sentencing range that Haymond faced, which *Allelyne* barred.<sup>59</sup>

53. Since Justice Breyer's opinion resolved the case on the narrowest grounds, it supplies the holding per *Marks v. United States*, 430 U.S. 188 (1977), which mandates that the only binding part of a fragmented Court decision is the “position taken by those members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). *But see* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1943 (2019) (arguing that the *Marks* rule should be abandoned because it “shifts costly interpretive burdens to later courts, privileges outlier views among the Justices, and discourages desirable compromises”).

54. *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring).

55. *Id.*

56. *Id.* at 2378 (plurality opinion).

57. *See id.* at 2373.

58. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 603 (codified at 18 U.S.C. § 3583(k)).

59. *See Haymond*, 139 S. Ct. at 2378 (plurality opinion); *id.* at 2386 (Breyer, J., concurring).

Was the majority in *Haymond* right, at least as to a narrow understanding of its holding, that imposing a new mandatory term of imprisonment upon supervision revocation based on new judicial factfinding violates *Alleyne*? Justice Alito and the three Justices who joined him did not think so.<sup>60</sup> Justice Alito did a fine job of highlighting the potentially far-reaching consequences of Justice Gorsuch’s dicta—which indicate that *any factfinding* that leads the judge to impose an additional deprivation of liberty upon supervision revocation is unconstitutional, whether or not it involves triggering a mandatory minimum or altering the maximum lawful sentence.<sup>61</sup>

Justice Alito was both careful and convincing in his interpretation of the Sixth Amendment: that it does not speak to supervision revocations at all.<sup>62</sup> The question posed at the beginning of this Article—when does the “criminal prosecution” referenced in the Sixth Amendment end?—is actually more complicated than it may appear. That is because some Sixth Amendment rights are of longer duration than others. A supervision-violation proceeding certainly happens *after* a defendant’s “speedy trial” right has come to an end; the Court has made clear that the Speedy Trial Clause does not even apply to the sentencing proceeding.<sup>63</sup> Moreover, as Justice Alito pointed out, the Sixth Amendment states that an “accused” enjoys the right to jury trial.<sup>64</sup> But once a verdict or guilty plea is entered, a defendant is no longer *accused* of being guilty; they have been *found* guilty.<sup>65</sup>

Likewise, it seems to me, the revocation hearing is clearly *after* the “criminal prosecution” has ended—even as other constitutional protections do apply. Take, for instance, the right to counsel. That right features prominently in the Sixth Amendment.<sup>66</sup> But the conditional right to counsel at certain parole revocation hearings, recognized in *Gagnon v. Scarpelli*,<sup>67</sup> was not the Sixth Amendment right to counsel.<sup>68</sup> Scarpelli had a right to counsel because the Fourteenth Amendment demands due process of law.<sup>69</sup>

I want to end by considering *Haymond*’s due process rights. We do well to remember that the *Apprendi* line of cases connects two different constitutional

60. *Id.* at 2386 (Alito, J., dissenting).

61. *Id.* at 2388.

62. *Id.* at 2394–95.

63. *Betterman v. Montana*, 136 S. Ct. 1609, 1617–18 (2016).

64. *Haymond*, 139 S. Ct. at 2398 (Alito, J., dissenting).

65. *See id.* at 2395, 2398 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

66. U.S. CONST. amend. VI.

67. 441 U.S. 778 (1973).

68. *Id.* at 790–91.

69. *Id.* Similarly, the right to counsel pointedly mentioned in the warnings resulting from *Miranda v. Arizona*, 384 U.S. 436 (1966), is not found in the Sixth Amendment; rather, *Miranda*’s right to counsel is related to the accused’s Fifth Amendment privilege against compelled self-incrimination. *See id.* at 469 (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . .”).



rights: the right to trial by jury and the right to proof beyond a reasonable doubt as recognized in *In re Winship*.<sup>70</sup> It is time that we decouple these rights. They are different. The latter requirement, proof of every element beyond a reasonable doubt, is not a Sixth Amendment right.<sup>71</sup> It is a due process right.<sup>72</sup> I do not mean the Sixth Amendment as incorporated through the Fourteenth Amendment; I mean the stand-alone Due Process Clauses of the Fifth and Fourteenth Amendments.

I submit that *Haymond* was a missed opportunity for the Court to disentangle the two *Apprendi* rights. *Haymond*'s revocation and new sentence did not violate or touch upon his right to a jury trial in a criminal prosecution because the criminal prosecution was over. Still, it seems unjust that the district court was compelled by the Walsh Act to sentence *Haymond* to an additional five years in prison—at least—upon finding by a bare preponderance that, recently, *Haymond* knowingly possessed thirteen images of child pornography.

Why is that not a violation of *In re Winship*? The adjudication in that case was, like *Haymond*'s revocation hearing, a proceeding at which there was no Sixth Amendment right to jury trial.<sup>73</sup> I urge that we consider whether revocation proceedings are more like juvenile proceedings than they are like, say, bail hearings.<sup>74</sup>

I urge you also to look again at Justice Stevens's dissenting opinion in *McMillan v. Pennsylvania*.<sup>75</sup> That 1986 dissent—about the legislative specification of a factor that, if found by the judge, required imposition of a mandatory minimum sentence<sup>76</sup>—was, in my view, the first in the *Apprendi* line. Justice Stevens explained that where the legislature finds a sentencing factor that raises the lawful minimum sentence, proof beyond a reasonable doubt is

70. 397 U.S. 358, 363 (1970); see *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) (“As we made clear in *Winship*, the ‘reasonable doubt’ requirement ‘has [a] vital role in our criminal procedure for cogent reasons.’ . . . We thus require this, among other, procedural protections in order to ‘provid[e] concrete substance for the presumption of innocence . . . .’” (alterations in original) (quoting *Winship*, 397 U.S. at 363)).

71. U.S. CONST. amend. VI.

72. *Winship*, 397 U.S. at 364 (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . .”).

73. See *id.* at 368; see also *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that the Sixth Amendment jury trial right does not apply to juvenile delinquency proceedings).

74. Under the Federal Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.), if a court finds by a preponderance of the evidence that a defendant is a flight risk, it must order detention. See 18 U.S.C. § 3142(e); *United States v. Shakur*, 817 F.2d 189, 191, 195 (2d Cir. 1987).

75. 477 U.S. 79 (1986); *id.* at 95–104 (Stevens, J., dissenting).

76. *Id.*

required.<sup>77</sup> The opinion was about due process.<sup>78</sup> Justice Stevens only mentioned the jury in footnotes and did not make a big deal about it.<sup>79</sup>

Many of the decisions that came after *Apprendi* obscured the fact that the decision was as much about the constitutional guarantees of due process as it was about the right to trial by jury.<sup>80</sup> Indeed, Justice Stevens's majority opinion in *Apprendi* paid more attention to the due process right to proof beyond a reasonable doubt, established in *In re Winship*, than to the right to trial by jury established in the Sixth Amendment, as incorporated against the states through the Fourteenth Amendment.<sup>81</sup> Justice Stevens realized that the *Apprendi* rule would not, in fact, result in significantly more jury trials, though it would strengthen a defendant's hand in plea negotiations and agreements.<sup>82</sup> At bottom for Justice Stevens, this line of cases was not about juries but about a fairer playing field where, most importantly, a defendant could not be whipsawed by pleading guilty to one crime only to be sentenced by the judge for a greater crime.<sup>83</sup> Justice Scalia, on the other hand, had an almost obsessive fascination with the jury—famously asserting in *Blakely v. Washington*<sup>84</sup> that the jury was the “circuitbreaker in the State’s machinery of justice.”<sup>85</sup>

77. *Id.* at 96.

78. *Id.*

79. *Id.* at 97 n.1, 99 n.3.

80. Compare *Blakely v. Washington*, 542 U.S. 296, 298 (2004) (characterizing the issue before the Court as “whether [judicial determination of ‘deliberate cruelty’] violated petitioner’s Sixth Amendment right to trial by jury”); *United States v. Booker*, 543 U.S. 220, 248 (2005) (referring to the merits-majority as imposing a “constitutional jury trial requirement”); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (stating that the “sole issue” before the Court “is whether the Sixth Amendment . . . precludes” judicial determination of whether sentences should be concurrent or consecutive); *id.* at 168 (stating that *Apprendi*’s “animating principle is the preservation of the jury’s historic role as a bulwark between the State and the accused”); *Dillon v. United States*, 560 U.S. 817, 829 (2010) (citing *Apprendi* and asserting that “Dillon’s Sixth Amendment rights were not violated” by the trial judge’s exercise of sentencing discretion within the amended Federal Sentencing Guidelines range); *S. Union Co. v. United States*, 567 U.S. 343, 349 (2012) (stating that “*Apprendi*’s ‘core concern’ is to reserve to the jury ‘the determination of facts that warrant punishment for a specific statutory offense’”); *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (stating that under *Apprendi*, “a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense”); and *Pereida v. Wilkinson*, No. 19-438, 2021 WL 816351, at \*9 (U.S. Mar. 4, 2021) (concluding that because “Sixth Amendment concerns are not present in the immigration context,” noncitizens may bear the burden of proof when seeking to cancel their removal order), *with Alleyne v. United States*, 570 U.S. 99, 104 (2013) (noting that both the right under the Sixth Amendment to a trial “by an impartial jury” and the right under the Due Process Clause requires proof beyond a reasonable doubt).

81. See *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000). Justice Stevens’s *Apprendi* opinion described the right to trial by jury as the “associated jury protections” to a core due process right. *Id.*

82. See *Booker*, 543 U.S. 273–74, 285, 289 (Stevens, J., dissenting).

83. *Id.* at 288–89.

84. 542 U.S. 296 (2004).

85. *Id.* at 306; see also *Haymond v. United States*, 139 S. Ct. 2369, 2380 (2019) (plurality opinion).

Justice Gorsuch's even greater preoccupation with juries is unfortunate. For all nine members of the Court, *Haymond* was about the limits on the right to trial by jury. This is too bad, considering that, in the United States, we do not often have jury trials.<sup>86</sup> But we do have many final proceedings, beyond the occasional criminal trial, in which the government seeks to prove a fact that will require or authorize a significant infringement on a person's liberty.<sup>87</sup> In these situations, to which the Sixth Amendment does not apply, we need to honestly face the question of whether due process of law requires the government to prove its allegations to a heightened standard of proof—perhaps even beyond a reasonable doubt.

#### CONCLUSION

In *Haymond*'s wake, I find it doubtful that the Sixth Amendment is the right vehicle for delivering procedural protections after sentencing, or even at sentencing in the overwhelming number of cases, where defendants have explicitly waived their right to trial by jury (indeed, trial itself). Due process, on the other hand, still applies with full force.

Perhaps that is looking too far ahead. For now, it is at least fair to say that the plurality decision in *Haymond* appends to its narrow holding about a recondite portion of the supervised release statute a great deal of dicta that enunciates a far-reaching, though not fully fleshed-out, vision of the postconviction applicability of *Apprendi*, *Alleyne*, and the Sixth Amendment. Justice Gorsuch's *Haymond* opinion lays down the beginnings of an ambitious effort to extend the *Apprendi* line well beyond its present confines.

Whether he will accomplish this remains to be seen. Some of the Justices who joined the plurality opinion might balk at a challenge to other provisions of the supervised release statute (which have state counterparts), even where challengers put forward similar arguments to those that the *Haymond* plurality articulated.<sup>88</sup>

86. For instance, from July 1, 2019 to June 30, 2020, the federal courts disposed of cases involving 79,997 defendants. Of those, only 1,365 (1.7%) were convicted or acquitted at a jury trial. See U.S. CTS., STAT. & REPORTS, *Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending June 30, 2020* (2020), <https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2020/06/30> [https://perma.cc/D3C8-TDWH]. Similarly, jury and bench trials constitute less than three percent of criminal case dispositions in nearly every state. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR.: FACT TANK (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [https://perma.cc/Q5F7-XBCH].

87. These include, among others, civil commitment and deportation proceedings, both of which require proof only by clear and convincing evidence. See *Addington v. Texas*, 441 U.S. 418, 432–33 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (deportation).

88. So far, the federal circuit courts have rebuffed such arguments, though some have implicitly conceded that the plurality's logic implicates portions of the supervised release statute other than

On the occasion of *Apprendi*'s twentieth anniversary, *Haymond* gives us a glimpse into *Apprendi*'s future—and prompts us to consider whether either case got the rule right. One thing seems certain: we have not seen the last of *Apprendi*.

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§ 3583(k). *See, e.g.*, *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020) (“*Haymond* did not undermine our clear precedent on the constitutionality of § 3583(e)(3).”); *United States v. Seighman*, 966 F.3d 237, 243–44 (3d Cir. 2020) (declining to extend *Haymond* to § 3583(g)); *United States v. Garner*, 969 F.3d 550, 552–53 (5th Cir. 2020) (same); *United States v. Eagle Chasing*, 965 F.3d 647, 651 (8th Cir. 2020) (“Until the Supreme Court invalidates § 3583(e)(3), we must follow our precedent and hold that the revocation of [the defendant’s] release did not violate his constitutional rights.”). State courts have rejected similar challenges to their probation systems based on *Haymond*. *See, e.g.*, *People v. Schaffer*, 267 Cal. Rptr. 3d 666, 670–74 (Cal. Ct. App. 2020) (analyzing *Haymond* at length and concluding that it did not affect the constitutionality of a 180-day jail sentence imposed on the defendant for his parole violation of failing to keep his GPS device charged); *State v. Dunlap*, 225 A.3d 1068, 1079–80 (N.J. Super. Ct. App. Div. 2020) (“[W]e read the *Haymond* plurality and dissenting opinions to be consistent with our conclusion that *Apprendi*, *Blakely*, *Allelyne*, and *Ring* focus exclusively on prison sentences and simply do not apply to non-custodial probationary sentences.”).