No. 18-9062

IN THE SUPREME COURT OF THE UNITED STATES

DEREK RAY KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to appellate relief on his claim that the district court violated his Sixth Amendment right to a jury trial or his due process right to confrontation when it revoked his supervised release under 18 U.S.C. 3583(g) and imposed ten months of reimprisonment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. King, No. 11-cr-200 (Feb. 2, 2018)

United States Court of Appeals (5th Cir.):

United States v. King, No. 18-10193 (Jan. 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 749 Fed. Appx. 309.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2019. The petition for a writ of certiorari was filed on April 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to possess stolen mail, in violation of 18 U.S.C. 371 and 1708. C.A. ROA 70, 139. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Id. at 71. The district court subsequently revoked petitioner's supervised release twice after finding that he had violated conditions of that release. Id. at 83, 107. After the first revocation, the court ordered reimprisonment for six months, to be followed by 30 months of supervised release. Id. at 84. After the second revocation, the court ordered reimprisonment for ten months, to be followed by 20 months of supervised release. Id. at 108. The court of appeals affirmed. Pet. App. A1-A2.

1. Between March and July 2011, petitioner and several associates stole mail from U.S. Post Office collection boxes through a technique called "fishing." C.A. ROA 53; see id. at 52. "Fishing is accomplished by placing an object, covered with a sticky substance and attached by a string or other item," into a collection box. Id. at 53. "Once mail attaches to the sticky object, the object is removed along with the stolen mail." Ibid. Petitioner and his associates "target[ed] mail matter that appeared to contain monetary instruments, including checks and money orders." Ibid. They then "alter[ed] and forge[d] stolen money orders by a method called 'washing,'" which "is accomplished

by removing ink from the payee and payer section of the monetary instrument with chemicals, such as acetone," and entered their own names so that they could pass the instruments at financial institutions. Ibid.; see id. at 142. When postal inspectors arrested petitioner, they found $8479 in stolen checks and money orders in his car, as well as glue sticks and a global positioning system device with markers for the locations of various postal collection boxes. Id. at 144-145.

Petitioner pleaded guilty to conspiracy to possess stolen mail, in violation of 18 U.S.C. 371 and 1708. C.A. ROA 127. That offense carries a statutory maximum sentence of five years of imprisonment, see 18 U.S.C. 1708, and the court at sentencing may include a term of supervised release of up to three years, see 18 U.S.C. 3559(a)(4), 3583(b)(2). The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. C.A. ROA 71. Among other conditions, the order of supervised release provided that petitioner "shall not commit another federal, state, or local crime," "shall not possess illegal controlled substances," and "shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer." Id. at 67-68; see 18 U.S.C. 3583(d) (requiring those terms as "explicit condition[s] of supervised release"). Petitioner acknowledged that he "underst[oo]d" the conditions,

"agree[d] to be bound by them," and would be "subject to revocation" of his supervised release "for violation of any of them." Id. at 68.

Petitioner did not appeal his conviction or sentence. He completed his prison term and commenced his supervised release in August 2014. C.A. ROA 187.

2. In August 2015, the district court revoked petitioner's supervised release after he admitted to violating three of his supervised-release conditions. C.A. ROA 81-83. Specifically, petitioner admitted that he had violated the conditions of his supervised release by (1) using and possessing methamphetamine, (2) committing another crime by using and possessing illegal controlled substances, and (3) failing to make restitution and child-support payments. Id. at 83, 187-190. The court ordered six months of reimprisonment, to be followed by 30 months of supervised release. Id. at 84.

3. In September 2017, the Probation Office petitioned the district court to revoke petitioner's supervised release again, citing his use and possession of methamphetamine, failure to submit to substance-abuse testing, and failure to pay restitution. C.A. ROA 88-90. According to the probation officer, petitioner submitted urine samples that tested positive for methamphetamine on five different occasions between April 2016 and July 2017. Id. at 89. On four of those occasions, petitioner admitted to the

probation officer "that he used methamphetamine" shortly before the urine tests. Ibid.

At a revocation hearing in November 2017, petitioner admitted the violation. C.A. ROA 99. The district court found that petitioner had violated his supervised release, modified petitioner's supervised release to add a mental health condition, and recessed the case for 90 days. Id. at 99, 101.

In January 2018, the probation officer filed an addendum to the revocation petition, alleging that petitioner had again violated his supervised release by using and possessing methamphetamine. C.A. ROA 103-104. Specifically, the officer alleged that petitioner had submitted urine samples that tested positive for methamphetamine three times in December 2017. Ibid.

At a revocation hearing in February 2018, petitioner pleaded "not true" to the allegations in the addendum to the revocation petition. C.A. ROA 113; see id. at 111. The probation officer testified that that he had provided the district court and the defense with an affidavit from a toxicology company that supported the allegations in the addendum to the revocation petition. Id. at 116-117. Petitioner's counsel objected "to the [c]ourt's reliance on the affidavit," asserting a "due process right to cross examine the declarant of the affidavit or any of the attached reports." Id. at 117. The court overruled the objection. Id. at 118.

The district court found that petitioner had violated numerous conditions of his supervised release, including "that he not commit another federal, state or local crime," "that he not possess illegal controlled substances," and "that he participate in a program approved by the probation office for the treatment of drug dependency that would include testing." C.A. ROA 121. The court revoked petitioner's supervised release and ordered ten months of reimprisonment, to be followed by 20 months of supervised release. Id. at 108, 122.

Petitioner's counsel objected to the district court's order "to the extent it's based on a finding of true on the addendum to the petition" and "to the extent that the [c]ourt lengthened or gave any term of imprisonment to provide a stint of sobriety to help with [petitioner's] rehabilitation." C.A. ROA 123-124. In response to the objection, the district court explained that it had not lengthened the prison term to provide rehabilitation. Id. at 124. The court added that, "[a]s far as your point about the three dirty UAs [urinalyses], please remember there was * * * a basis to revoke before that, and I came very close to doing that anyway." Ibid.

4. Petitioner appealed, and the court of appeals affirmed. Pet. App. A1-A2. The court noted that "revocation and imprisonment were mandatory," id. at A2, under 18 U.S.C. 3583(g)(1) and (4). Those provisions provide that if a defendant either "possesses a controlled substance in violation of the condition" in his

supervised-release order prohibiting such possession, 18 U.S.C. 3583(g)(1), or, "as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year," 18 U.S.C. 3583(g)(4), the "court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under [18 U.S.C. 3583(e)(3)]," 18 U.S.C. 3583(g). Section 3583(e)(3) in turn sets maximum terms of reimprisonment corresponding to an offender's crime of conviction. For an offender who, like petitioner, was convicted of a class D felony, Section 3583(e)(3) sets a maximum reimprisonment term of two years. 18 U.S.C. 3583(e)(3); see 18 U.S.C. 3559(a)(4). The court of appeals explained that Sections 3583(g)(1) and (4) both applied to petitioner because he had "conceded that he had violated the condition of his supervised release that he not possess illegal controlled substances," and had further "conceded that he had tested positive for illegal substances more than three times in a year's period." Pet. App. A2. The court also noted that the district court's reasons for ordering revocation and reimprisonment for a period of ten months were "sufficient under any standard." Ibid. (citation omitted).

Given that those "bases supported" the order of revocation and reimprisonment, the court of appeals declined to address "whether the district court infringed [petitioner's] due process right of confrontation." Pet. App. A1. The court of appeals added

that, to the extent petitioner could "be understood to argue that the district court was influenced in its sentence by the allegation of an addendum to the petition for revocation and the testimony related to th[e] allegations," petitioner was "entitled to no relief." Id. at A2.

ARGUMENT

In a petition for a writ of certiorari filed before this Court's decision in United States v. Haymond, 139 S. Ct. 2369 (2019), petitioner contends (Pet. 7-10) that Haymond could call into question the court of appeals' decision to the extent that it relies on 18 U.S.C. 3583(g), and that this Court should accordingly grant his petition for a writ of certiorari, vacate the decision below, and remand to apply Haymond. That contention lacks merit. Petitioner did not argue below that he was entitled to a jury finding on whether he violated the conditions of his supervised release, so his claim would be reviewed for plain error. See Fed. R. Crim. P. 52(b). And he cannot show plain error. Haymond involved only 18 U.S.C. 3583(k), not 18 U.S.C. 3583(g), and the narrow ground on which Haymond invalidated the application of Section 3583(k) -- articulated in Justice Breyer's controlling opinion concurring in the judgment -- does not apply to Section 3583(g), let alone plainly so. In addition, petitioner admitted conduct justifying revocation under Section 3583(g), so any error did not affect his substantial rights. Review is equally

unwarranted on petitioner's confrontation claim, which the court of appeals did not resolve and which lacks merit in any event.

1. After the court of appeals' decision in petitioner's case, this Court decided Haymond. There, four Justices concluded that the application of 18 U.S.C. 3583(k), which requires a district court to revoke supervised release and order reimprisonment for a minimum of five years for sex offenders who violate their supervised release by committing specified additional sex offenses, had violated a defendant's jury-trial right. 139 S. Ct. at 2373, 2378 (opinion of Gorsuch, J.). Four other Justices concluded that the application of Section 3583(k) had been constitutionally permissible. Id. at 2386 (Alito, J., dissenting).

Justice Breyer supplied the dispositive vote in an opinion concurring in the judgment. Haymond, 139 S. Ct. at 2385-2386; see Marks v. United States, 430 U.S. 188, 193 (1977). Justice Breyer agreed "with much of the dissent," including that the Court should "not transplant" jury-trial-right cases such as Alleyne v. United States, 570 U.S. 99 (2013), and Apprendi v. New Jersey, 530 U.S. 466 (2000), into "the supervised release context." Haymond, 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment). Justice Breyer nevertheless concluded that the "specific provision of the supervised-release statute" at issue in Haymond, Section 3583(k), was "unconstitutional" because it operated "less like ordinary revocation and more like punishment for a new offense, to

which the jury right would typically attach." Id. at 2386. Justice Breyer explained that "three aspects of" Section 3583(k), "considered in combination," led to his conclusion. Ibid. "First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute." Ibid. "Second, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long." Ibid. "Third, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.'" Ibid. (quoting 18 U.S.C. 3583(k)) (brackets in original). Justice Breyer stated that, "[t]aken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." Ibid.

2. Petitioner did not argue below that he was entitled to a jury finding on whether he violated the conditions of his supervised release. Petitioner's claim that his revocation and reimprisonment under 18 U.S.C. 3583(g) deprived him of his jury-trial and related constitutional rights can accordingly be reviewed only for plain error. See Fed. R. Crim. P. 52(b). To show plain error, petitioner must demonstrate (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable

dispute," (3) that "affected [his] substantial rights," and (4) that "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Olano, 507 U.S. 725, 736 (1993)) (citation omitted; second set of brackets in original). Petitioner cannot establish plain error, because Haymond does not undermine the constitutionality of Section 3583(g), and certainly does not provide a basis for finding plain error here.

a. As explained above, Justice Breyer's controlling opinion in Haymond concurred in the constitutional invalidation of the application of Section 3583(k) to the defendant in that case because the provision operates "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach," for three reasons "considered in combination." 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment). None of those reasons applies to Section 3583(g).

First, whereas Section 3583(k) "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute," Haymond, 139 S. Ct. at 2386 (Breyer, J,. concurring in the judgment), Section 3583(g) can apply in cases of noncriminal conduct, such as "refus[ing] to comply with drug testing imposed as a condition of supervised release" or "test[ing] positive for illegal controlled substances more than 3 times over the course of 1 year," 18 U.S.C. 3583(g)(3)-(4). Second, whereas Section 3583(k)

"takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long," Haymond, 139 S. Ct. at 2386 (Breyer, J,. concurring in the judgment), Section 3583(g) requires only that a court "require the defendant to serve" some unspecified "term of imprisonment not to exceed the maximum term of imprisonment authorized under" the default revocation provision, Section 3583(e)(3), 18 U.S.C. 3583(g). Third, whereas Section 3583(k) "limits the judge's discretion * * * by imposing a mandatory minimum term of imprisonment of 'not less than 5 years' upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense,'" Haymond, 139 S. Ct. at 2386 (Breyer, J,. concurring in the judgment) (quoting 18 U.S.C. 3583(k)) (brackets in original), Section 3583(g) does not specifically prescribe a particular "mandatory minimum term of imprisonment," nor does it require a court to find that the defendant has committed any particular listed criminal offense, ibid., as opposed to a noncriminal supervised-release violation.

Section 3583(g) thus operates "like ordinary revocation" by sanctioning the defendant's "'breach of trust' -- his 'failure to follow the court-imposed conditions' that followed his initial conviction,'" rather than as "punishment for a new offense." Haymond, 139 S. Ct. at 2386 (Breyer, J,. concurring in the judgment) (citation omitted); see Johnson v. United States, 529 U.S. 694, 700 (2000) (explaining that supervised-release

revocation is constitutional as "part of the penalty for the initial offense"). Application of Section 3583(g) to petitioner is thus constitutional under Justice Breyer's controlling opinion in Haymond.

b. Petitioner also could not show that Section 3583(g) is unconstitutional under the positions adopted in the two four-Justice opinions issued in Haymond.

Justice Alito's dissenting opinion for four Justices concluded that a supervised-release revocation proceeding is not part of a "'criminal prosecution' within the meaning of the Sixth Amendment," so the jury-trial right does not apply. Haymond, 139 S. Ct. at 2391. Justice Alito and the three other dissenters would have upheld Section 3583(k) for that reason, id. at 2391-2392, and Section 3583(g) is constitutional on the same basis.

Justice Gorsuch's opinion for four Justices concluded that Section 3583(k) violated the jury-trial right by requiring a minimum term of reimprisonment of five years based on judicial factfinding. 139 S. Ct. at 2373. That opinion, however, made clear that its reasoning was "limited to § 3583(k)" and expressly stated that it did not adopt "a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g), which requires courts to impose 'a term of imprisonment' of unspecified length." Id. at 2382 n.7, 2383. The opinion, moreover, noted the "substantial" five-year minimum term of reimprisonment required by Section 3583(k). Id. at 2382; see ibid. (stating that Section

3583(k) requires a court to send a defendant "back to prison for years based on judge-found facts"). That concern does not apply to Section 3583(g), which requires no specific minimum term of reimprisonment, and in fact limits the amount of reimprisonment that a district court can order by cross-referencing the caps on reimprisonment in the default revocation provision, Section 3583(e)(3). 18 U.S.C. 3583(g); see 18 U.S.C. 3583(e)(3) (limiting petitioner's reimprisonment term to two years based on his initial commission of a class D felony).

Justice Gorsuch's opinion also states that, to the extent ordering reimprisonment under Section 3583(e) based on judicial factfinding could violate the jury-trial right, it would not do so where the "defendant's initial and post-revocation sentences issued under § 3583(e) [do] not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction." 139 S. Ct. at 2384. Here, petitioner's initial sentence of imprisonment was 36 months, C.A. ROA 71, and the district court ordered six months of reimprisonment at his first revocation proceeding, see id. at 84, for a total of 42 months of reimprisonment. The ten months of reimprisonment ordered by the court at the second revocation proceeding -- the one at issue here -- brings petitioner's total period of imprisonment to 52 months. Id. at 108. That does not "exceed[] the statutory maximum term of imprisonment" for petitioner's crime of conviction, which is five years. Haymond,

139 S. Ct. at 2384 (opinion of Gorsuch, J.); see 18 U.S.C. 1708. At a minimum, therefore, no plain error occurred in petitioner's case even under the reasoning of Justice Gorsuch's opinion.

Petitioner identifies no decision of any court that has held Section 3583(g) unconstitutional, and he does not urge plenary review on that issue. He instead seeks (Pet. 7-10) a remand for reconsideration of his forfeited claim in light of Haymond. But as just discussed, Haymond does not support his claim of error, let alone plain error. And remand is unwarranted for the further reason that petitioner cannot show the other prerequisites for plain error relief -- that the error "affected [his] substantial rights," Puckett, 556 U.S. at 135, by creating "'a reasonable probability that, but for the error,' the outcome of the proceeding would have been different," Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-1905 (2018) (citations omitted), and that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," Olano, 507 U.S. at 736 (citation omitted).

3. In any event, this case is an unsuitable vehicle to consider the constitutionality of Section 3583(g) for other reasons. First, even the four Justices who took the broadest view of the jury-trial right in Haymond acknowledged that, under Apprendi, "'[a]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum' * * * 'must be submitted to a jury, and proved beyond a reasonable doubt' or admitted by

the defendant." Haymond, 139 S. Ct. at 2377 (opinion of Gorsuch, J.) (emphasis added; citation omitted). Here, petitioner "admitted," ibid., facts that support his revocation separate and apart from any judicial findings of fact. Specifically, petitioner admitted that he had used methamphetamine five times between April 2016 and July 2017 and had failed to submit to substance abuse testing as directed. C.A. ROA 89, 99. As the district court pointed out, there was "a basis to revoke before" the failed tests in December 2017, and the court "came very close" to revoking petitioner's supervised release at the earlier time. Id. at 124. Thus, to the extent the court considered the contested drug test results from December 2017, any error did not prejudice petitioner because his own admitted conduct already supported revocation.

Second, the record illustrates that Section 3583(g) did not affect the district court's resolution of the supervised-release violations at issue here. After petitioner had been released from the first term of reimprisonment imposed for supervised-release violations and had again violated the conditions of his release, the court did not immediately revoke petitioner's supervised release, even though Section 3583(g) would have required the court to do so. See. C.A. ROA 99, 101. Rather, the court apparently viewed itself as having discretion in the matter. Ibid. And when the court did revoke supervised release for a second time, it ordered a ten-month term of reimprisonment, indicating that it deemed a lengthy term warranted in the exercise of its discretion.

Nothing suggests that Section 3583(g) influenced the result, and no further review is warranted.

4. Petitioner's confrontation claim likewise does not warrant review.

a. In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that defendants in parole-revocation proceedings possess a limited due process "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Id. at 489. The Court emphasized that a revocation proceeding "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Ibid. Courts of appeals have long applied Morrissey to reject confrontation claims in supervised-release revocation proceedings. See, e.g., United States v. Henry, 852 F.3d 1204, 1206-1207 (10th Cir. 2017) (Gorsuch, J.); United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir.), cert. denied, 546 U.S. 1080 (2006); see also Haymond, 139 S. Ct. at 2395 n.7 (Alito, J., dissenting) (collecting cases).

Nothing in Haymond supports a departure from that settled principle. Although four Justices in Haymond rejected the analogy between parole and supervised release for purposes of the jury-trial right, they did so on grounds -- that the "prison sentence a judge or parole board could impose for a parole or probation violation normally could not exceed the remaining balance of the

term of imprisonment already authorized by the jury's verdict" -- that have no application in the context of the confrontation right. 139 S. Ct. at 2376-2377 (opinion of Gorsuch, J.), And the other five Justices, including Justice Breyer in his controlling opinion, all reinforced the strong similarities between parole and supervised release. See id. at 2385 (Breyer, J., concurring in the judgment); id. at 2391 (Alito, J., dissenting).

b. The confrontation right set out in Morrissey has been codified in Federal Rule of Criminal Procedure 32.1. As amended in 2002, Rule 32.1(b)(2)(C) provides, with respect to probation and supervised-release revocation hearings, that the defendant is entitled to an opportunity to question adverse witnesses "unless the court determines that the interest of justice does not require the witness to appear." Fed. R. Crim. P. 32.1(b)(2)(C). The Advisory Committee Notes accompanying the 2002 amendment explain that this provision "recognize[s] that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses" and that the "court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it." Fed. R. Crim. P. 32.1(b)(2)(C) advisory committee's note (2002 Amendment).

In this case, the district court did not explicitly find good cause for denying petitioner the opportunity to confront the person or persons who signed the toxicology-related affidavit and the

attached reports. But it had ample basis for doing so. As the court noted, it had a preexisting "basis to revoke" before the three failed tests in December 2017, and the court had come "very close" to revoking petitioner's supervised release earlier based on his own admitted conduct. C.A. ROA 124. The court could readily find "good cause" not to call the affiant where petitioner's prior in-court admissions to using and possessing methamphetamine and failing to submit to drug testing already justified (and indeed required) revocation.

The court of appeals ultimately found ample evidence to support revocation even apart from the affidavit, and thus had no reason to address petitioner's confrontation claim. Pet. App. A1. Accordingly, even if petitioner's claim were successful, it would not change the result in his case. No sound reason exists to review his factbound claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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