

No. --

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IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
DEREK RAY KING,

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

\_\_\_\_\_  
On Petition for Writ of Certiorari  
To The United States Court of Appeals for the Fifth Circuit  
\_\_\_\_\_

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Whether violations of supervised release that require or permit additional imprisonment must be proven to a jury beyond a reasonable doubt, placed in the indictment, and subjected to cross-examination?

PARTIES

Derek Ray King is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Derek Ray King, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. King*, 749 Fed. Appx. 309 (5th Cir. January 30, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment of conviction and sentence was entered February 1, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on January 30, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 3583 of Title 18 of the United States Code provides in relevant part:

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

\*\*\*



(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

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(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release;

or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

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 subsection (e)(3).

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or

naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

### **A. District Court Proceedings**

In 2012, Petitioner Derek Ray King suffered conviction for conspiring to possess stolen mail under 18 U.S.C. §371, an offense that carries a five year maximum term of imprisonment and three years of supervised release. *See* Record in the Court of Appeals, at pp.70-73. His term of supervised release was revoked in 2015, resulting in six months imprisonment and a new term of release. *See* Record in the Court of Appeals, at pp 82-83.

On September 21, 2017, the United States Probation Office filed a Petition for Offender Under Supervision (the Petition). *See* Record in the Court of Appeals, at p.88. The Petition alleged Mr. King violated his conditions of supervised release by committing another crime, possessing a controlled substance, and possessing and using a controlled substance. *See* Record in the Court of Appeals, at p.88). The district court conducted a hearing on revocation on November 2, 2017. *See* Record in the Court of Appeals, at p.99. Mr. King entered a plea of “True” to the allegations in the Petition. *See* Record in the Court of Appeals, at p.99. The district court found that Mr. King violated the terms of supervised release, and district court ordered his supervised release t conditions to be modified. *See* Record in the Court of Appeals, at p.99. The district court added a “mental health condition to [defendant's] current conditions of release” and recessed the case for 90 days. *See* Record in the Court of Appeals, at p.99.

Later, the probation officer filed an Addendum to Petition for Offender Under Supervision (the Addendum) on January 26, 2018. *See* Record in the Court of Appeals, at pp.103-104. The Addendum alleged that Mr. King violated the conditions of supervised release by using and possessing methamphetamine. *See* Record in the Court of Appeals, at p.103. More specifically, it alleged that he submitted two urine specimens in December 2018 which tested positive for methamphetamine. *See* Record in the Court of Appeals, at p.103.

The district court reconvened the revocation hearing on February 1, 2018. *See* Record in the Court of Appeals, at p.111. Mr. King pleaded “Not True” to the allegations in the Addendum. *See*

Record in the Court of Appeals, at p.113). The district court judge explained:

As I told you at the time we recessed that if you came back with any dirty UAs, we would more than likely go ahead and proceed to sentencing. Before I do that, though, I would like to hear from your counsel and see if there is any change that I need to be aware of, or any additional facts that I need to be aware of.

Record in the Court of Appeals, at p.113.

At the hearing, United States Probation Officer Bradley Holmes testified. See Record in the Court of Appeals, at pp.113-118. Defense counsel conducted direct examination of United States Probation Officer (USPO) Holmes. See Record in the Court of Appeals, at pp.113-116. The testimony related to the progress Mr. King had made in mental health treatment. See Record in the Court of Appeals, at pp.113-116. At the conclusion of direct examination by the defense, the trial court asked USPO Holmes if he had supplied the trial judge with an affidavit supporting the allegations that Mr. King tested positive for methamphetamine. See Record in the Court of Appeals, at pp. 116-117. The USPO answered in the affirmative. See Record in the Court of Appeals, at p. 117. Defense counsel contemporaneously objected to the trial court's reliance on the affidavit citing a violation of Mr. King's due process right to cross examination and confrontation. See Record in the Court of Appeals, at p. 117.

The district court found that Mr. King violated several conditions of supervision and sentenced him to 10 months of imprisonment and an additional term of supervised release of 20 months. See Record in the Court of Appeals, at pp. 105,107, 123. The district judge found, inter alia, that Mr. King used and possessed methamphetamine in December 2017 in violation of his conditions of supervised release. See Record in the Court of Appeals, at p. 107. Defense counsel objected to the sentence based on the trial judge's finding the allegations in the Addendum were true. See Record in the Court of Appeals, at p. 123.

## **B. Proceedings in the Court of Appeals**

On appeal, Petitioner contended that his rights to due process and confrontation were violated when the district court considered urinalyses without affording him the right to cross-examine their author. See Appellant's Brief in *United States v. King*, 18-10193, 2018 WL 4050280, at \*1 (5th Cir.

Filed August 15, 2018).

The court of appeals rejected this claim. It held that revocation was mandatory under 18 U.S.C. §3583(g) due to Petitioner's repeated positive drug tests and possession of methamphetamine. *See* [Appx. A]; *United States v. King*, 749 Fed. Appx. 309, 310 (5th Cir. 2019)(unpublished). And it held that he had no right of confrontation, citing *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006), which holds that there is no right of confrontation at sentencing. *See* [Appx. A]; *King*, 749 Fed. Appx. at 310.

### REASON FOR GRANTING THE PETITION

**There is a reasonable probability of a different result in this case if *United States v. Haymond*, 17-1672, \_\_U.S.\_\_,139 S.Ct. 398 (2018), is decided favorably to the Respondent in that case.**

In federal cases, and other than a prior conviction, any fact that increases the possible punishment beyond the otherwise applicable statutory maximum must be placed in an indictment, and proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *United States v. Cotton*, 535 U.S. 625, 627 (2002). *Specht v. Patterson*, 386 U.S. 605 (1967), suggests that such facts must also be established on the basis of witnesses the defendant may cross-examine. *Specht*, 386 U.S. at 609-610. Lower courts addressing the issue in the capital context have also held that confrontation follows the right to a jury trial, proof beyond a reasonable doubt, and indictment. *See United States v. Mills*, 446 F.Supp.2d 1115 (C.D.Cal.2006); *United States v. Gray*, 362 F.Supp.2d 714, 725 (S.D.W.Va.2005); *United States v. Jordan*, 357 F. Supp. 2d 889, 902-904 (E.D. Va. 2005); *United States v. Bodkins*, 2005 WL 1118158, at \*5 (W.D. Va. May 11,2005) (unpublished). Finally, facts that trigger a mandatory minimum punishment must likewise be treated as elements of the defendant's offense for constitutional purposes. *See Alleyne v. United States*, 570 U.S. 99, 102 (2013).

Here, a jury found by a preponderance of the evidence that Petitioner used and possessed methamphetamine. This fact was not placed in the indictment, and was established by hearsay in spite of an objection from the defense.

That factual finding increased the defendant's maximum punishment in two senses. First, it elevated the maximum punishment from five years in prison and three years supervised release, to a cumulative total of seven years imprisonment and (cumulatively) more than three years of supervised release. *See* 18 U.S.C. §§371, 3559, 3583(a),(e). Second, the district court lacked the power to increase the term of imprisonment imposed at the initial sentencing in the absence of a finding that Petitioner violated his conditions of release. *See* Fed. R. Crim. P. 35 (noting the circumstances in which a sentence may be altered after it is imposed); 18 U.S.C. §3582(same). As

such, the initial term of imprisonment, once imposed, became the maximum term of imprisonment. But the finding of a violation authorized the court to impose another two years imprisonment. *See* 18 U.S.C. §3583(e).

Further, the finding of a violation plainly generated a new minimum punishment. A defendant convicted of 18 U.S.C. §371 need not receive any jail time. Certainly, he or she need not receive any term of imprisonment in excess of that imposed at the initial sentencing, in the absence of a finding that he or she violated the terms of release. *See* 18 U.S.C. §3583(e). But once the district court finds that he or she possessed methamphetamine (and/or tested positive on three occasions), the defendant must receive a term of imprisonment. *See* 18 U.S.C. §3583(g).

In *United States v. Haymond*, 17-1672, this Court will address these constitutional issues. The defendant in *Haymond* suffered conviction for possessing child pornography and received 38 months imprisonment, together with five years supervised release. *United States v. Haymond*, 869 F.3d 1153, 1156 (10th Cir. 2017), *cert granted* \_\_U.S.\_\_, 139 S.Ct. 398 (2018). After the defendant's release, however, the court found by a preponderance of the evidence that he had again possessed child pornography. *See Haymond*, 869 F.3d at 1157. Because 18 U.S.C. §3583(k) requires a mandatory five years imprisonment if a defendant required to register a sex offender possesses child pornography on supervised release, the district court imposed this mandatory minimum. *See id.* The court of appeals, however, held that 3583(k) violates the defendant's right to due process, because "it imposes heightened punishment on sex offenders based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt." *Id.* at 1156. The government petitioned for review, which this Court granted.

If Respondent prevails (or even secures favorable dicta) in *Haymond*, this will call the result below into question. *Haymond* entreats this Court to determine whether a court, rather than a jury, may find a violation of the terms of the defendant's release, and whether the court may do so by a preponderance of the evidence, rather than beyond a reasonable doubt. At a minimum, it requires the whether it may make this finding under these terms if the result is a mandatory term of

imprisonment. Here, too, the district court's factual finding, made without a jury, without indictment, by a preponderance of the evidence, and without confrontation, authorized a higher cumulative maximum and imprisonment in addition to that imposed at the original sentencing. Further, that finding generated a required term of imprisonment. *See* [Appx. A]; *United States v. King*, 749 Fed. Appx. 309, 310 (5<sup>th</sup> Cir. 2019)(unpublished); 18 U.S.C. §3583(g).

Below, Petitioner requested relief because his use and possession of methamphetamine were established by witnesses not subject to cross-examination. *See* Appellant's Brief in *United States v. King*, 18-10193, 2018 WL 4050280, at \*1 (5<sup>th</sup> Cir. Filed August 15, 2018). *Haymond* has not directly raised that question. But the right to confront witnesses that establish a fact has been held to follow the right to a jury trial and proof beyond a reasonable doubt. And, in any case, the Fifth Circuit has sometimes afforded limited review of claims for the first time in a petition for certiorari, provided they rest on newly issued precedents of this Court. *See United States v. Clinton*, 256 F.3d 311, 313 (5<sup>th</sup> Cir. 2001).

Finally, it is of little or no significance that Petitioner admitted the use or possession of methamphetamine in a prior proceeding. For whatever reason, the court chose to continue the term of release rather than immediately revoke him. *See* Record in the Court of Appeals, at p.99. Under the terms of the court's order, then, Petitioner possessed a conditional right of release, that could not, and certainly need not, be revoked in the absence of the court's factual finding. *Haymond* is likely to show what procedural protections were due at the second hearing.

This Court "regularly hold(s) cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting). Ultimately, GVR is appropriate if the decision "reveal(s) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence*, 516 U.S. at 167. The Court's forthcoming decision



in *Haymond* suggests that the Court should hold the instant petition in light of the decision in that case.

**CONCLUSION**

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, vacate the judgment below, and remand for reconsideration in light of *Haymond*. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 29th day of April, 2019.

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