No. --

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL DE LEON,

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 and placed in the indictment, and subjected to cross-examination?

PARTIES

Daniel De Leon 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, Daniel De Leon, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. De Leon,* 749 Fed. Appx. 309 (5th Cir. March 13, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The written judgment imposing sentence of imprisonment was entered August 9, 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The judgment and unpublished opinion of the United States Court of Appeals for the Fifth Circuit were filed on March 13, 2019. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The case is not moot, even though the defendant was released last month to begin his new term of release. The received a 36 month term of supervised release at his original sentencing, much of which had been completed. After his revocation, however, he received a 51 month term of imprisonment. The finding of a violation and the revocation of the term of release thus extended the term of supervised release.

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.

***

(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

Petitioner Daniel De Leon suffered conviction for drug trafficking, and began a term of supervised release in 2016. (Record in the Court of Appeals, at 25). After a year and a half of success on supervised release – during which time he held a job and otherwise complied with the terms of release – he began using marijuana.(Record in the Court of Appeals, at 27, 70-71). After eight positive tests, Probation and the government moved to revoke his term of release. (Record in the Court of Appeals, at 26-27).

Probation prepared a Report, advising the court that revocation was mandatory under these circumstances. (Record in the Court of Appeals, at 27). Petitioner pleaded true to the allegation without being advised that he had a right to a jury trial on the question of whether he used marijuana, nor that he had a right to proof of that fact beyond a reasonable doubt. (Record in the Court of Appeals, at 67-70). The court revoked his term of released and imposed nine months of imprisonment followed by 51 months of additional release. (Record in the Court of Appeals, at 76). This represented the maximum of the advisory range of imprisonment, followed by the maximum allowable term of additional release. (Record in the Court of Appeals, at 27); USSG §7B1.4; 18 U.S.C. §3583(h).

B. Proceedings in the Court of Appeals

On appeal, Petitioner contended that the court erred in concluding that revocation was mandatory under these circumstances. The court of appeals rejected the claim for want of an objection because it did not think any error "plain." [Appx. A].

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). 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, the defendant pleaded true to the allegation that he used and possessed marijuana. This fact was of course not placed in the indictment (since it hadn't yet occurred), and the defendant was never told that he had a right to a jury trial, nor proof beyond a reasonable doubt. Indeed, the statute expressly denies him these rights, committing the finding of a violation to the district court by a preponderance of the evidence. *See* 18 U.S.C. §3583(e). If revocation defendants in fact possess these rights, they must be advised of them. Otherwise, their pleas of true are not voluntary. *See Boykin v. Alabama*, 393 U.S. 820 (1968). And in any case, the fact of the defendant's use of marijuana was indisputably not found by a grand jury and placed in an indictment.

That factual finding increased the defendant's maximum punishment in two senses. First, it elevated the maximum punishment from 40 years in prison (the maximum for trafficking in more than 500 gams of cocaine, the offense pleaded in the indictment, see Record in the Court of Appeals, at 14), to a cumulative total of 43 years imprisonment (40 years plus the three year maximum upon revocation in the case of a Class B felony. *See* 18 U.S.C. §§841(b)(1)(B), 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 who has served his term of imprisonment 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 marijuana (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 securing a waiver of jury

trial or of the right to proof beyond a reasonable doubt, and without indictment, 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];18 U.S.C. §3583(g).

Below, Petitioner challenged his mandatory sentence of imprisonment on the ground that the district court did not consider a potential exception under 18 U.S.C. §3583(d). *See* [Appx. A]. A victory in *Haymond* would therefore open up a distinct challenge to the mandatory revocation. Even if the Fifth Circuit does not believe the new rationale for his position offered by *Haymond* are encompassed within the briefing below, it 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 (5th Cir. 2001).

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 reconisderation in light of *Haymond*. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 4th day of June, 2019.

/s/ Kevin Joel Page
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