No. 18-9567

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL DE LEON, 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 when it revoked his supervised release under 18 U.S.C. 3583(g) and imposed nine months of reimprisonment after he admitted the facts that supported revocation and reimprisonment.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. De Leon, No. 14-CR-222 (Nov. 11, 2014) (original judgment)

United States v. De Leon, No. 18-CR-125 (Aug. 9, 2018) (revocation judgment)

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

United States v. De Leon, No. 18-11100 (Mar. 13, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 756 Fed. Appx. 494. The judgment of revocation and reimprisonment (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2019. The petition for a writ of certiorari was filed on June 4, 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 Southern District of Texas, petitioner was convicted of possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). C.A. R.E. 16. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Id. at 17-18. His supervision was subsequently transferred to the Northern District of Texas. Id. at 2. The district court revoked his supervised release after finding that he had violated conditions of that release. The court ordered reimprisonment for nine months, to be followed by 51 months of supervised release. Pet. App. B1-B2. The court of appeals affirmed. Id. at A1-A2.

1. In March 2014, petitioner tried to drive a vehicle containing about two kilograms of cocaine through a port of entry in Cameron County, Texas. Plea Agreement 10. After authorities discovered the cocaine, petitioner admitted that he was aware of its presence in the car and stated that he was going to be paid $2000 for transporting it. Ibid.

Petitioner subsequently pleaded guilty to possessing with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). C.A. R.E. 16. The statutory minimum sentence for that offense is generally five years. See 21 U.S.C. 841(b)(1)(B). But the district court relied on 18 U.S.C. 3553(f) -- which allows for sentences below the statutory minimum

for certain less-culpable drug offenders -- to sentence petitioner to 36 months of imprisonment, to be followed by three years of supervised release. C.A. R.E. 17-18; 14-CR-222 Minute Entry (S.D. Tex. Sep. 24, 2014). As required by 18 U.S.C. 3583(d), the conditions on petitioner's term of supervised release included that petitioner "shall not commit another federal, state or local crime," "shall not unlawfully possess a controlled substance," "shall refrain from any unlawful use of a controlled substance," and "shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court." C.A. R.E. 18.

Petitioner did not appeal his conviction or sentence. He completed his prison term and commenced his supervised release in October 2016. C.A. R.E. 25. His supervision was transferred to the Northern District of Texas in June 2018. Id. at 2.

2. In July 2018, the Probation Office petitioned the district court to revoke petitioner's supervised release, alleging that petitioner had violated his release conditions. C.A. R.E. 25-28. Specifically, the officer alleged that petitioner had repeatedly submitted urine samples that tested positive for marijuana and had admitted verbally and in writing that he had used marijuana. Id. at 26-27. The government similarly filed a motion to revoke petitioner's supervised release, citing the same alleged violations. Id. at 42-45.

The general provision governing revocation of supervised release, 18 U.S.C. 3583(e)(3), specifies that a court "may * * * revoke [the defendant's] term of supervised release, and require" a term of reimprisonment when the court finds by a preponderance of the evidence that the defendant has violated one or more supervised-release conditions. Under 18 U.S.C. 3583(g), "the court shall revoke the term of supervised release and require the defendant to serve a term of" reimprisonment "not to exceed the maximum term" authorized by Section 3583(e)(3) if the defendant violates the conditions of supervised release in particular ways, including "possess[ing] a controlled substance in violation of" a supervised-release condition, 18 U.S.C. 3583(g)(1), and "test[ing] positive for illegal controlled substances more than 3 times over the course of 1 year" as part of a court-imposed drug-testing program, 18 U.S.C. 3583(g)(4). Under 18 U.S.C. 3583(d), a court "considering any action against a defendant who fails a drug test" "shall consider whether the availability of appropriate substance abuse treatment programs * * * warrants an exception * * * from the rule of section 3583(g)."

The district court held a revocation hearing, where it confirmed that petitioner was aware of the allegations against him and of the potential penalties if he admitted to the alleged violations of his supervised release. 8/9/18 Hr'g Tr. 4-6. Petitioner then admitted to all of the violations alleged in the government's motion. Id. at 7 ("Do you admit that everything

stated and alleged in this Motion to Revoke Term of Supervised Release is true? THE DEFENDANT: Yes, Your Honor."); see id. at 9 ("I decided to cope with those problems by using marijuana."). The court revoked petitioner's supervised release and ordered reimprisonment for nine months, to be followed by 51 months of supervised release. C.A. R.E. 54.

3. The court of appeals affirmed. Pet. App. A1-A2. The court explained that revocation of petitioner's supervised release was mandatory under 18 U.S.C. 3583(g)(1) and (4) based on his failed drug tests and "admission that he used and possessed marijuana." Pet. App. A2. The court rejected petitioner's contention, which he acknowledged could be reviewed only for plain error, that the district court "erred by treating revocation as mandatory despite the command in 18 U.S.C. § 3583(d) to consider alternatives to revocation in cases where a supervised release violation involves failing a drug test." Id. at A1-A2. The court of appeals explained that petitioner could not show plain error because it was "'unclear'" under Fifth Circuit precedent whether a court can consider the alternatives to revocation discussed in Section 3583(d) when a defendant's supervised release is revoked based "not only on his failed drug tests but also on his admission that he used and possessed" a controlled substance. Id. at A2 (citation omitted).

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. 5-8) 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 for reconsideration in light of Haymond. That contention lacks merit. Petitioner did not argue below, as he now does by invoking Haymond, 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), which he cannot show. 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. And in any event, petitioner's own admissions, rather than judicial factfinding, provided the basis for revocation of his supervised release and reimprisonment under Section 3583(g).

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 certain additional sex offenses, had violated the 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 decisions 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 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. 7-8) a remand for reconsideration in light of Haymond. But although petitioner invokes Haymond in this Court, he did not argue below that he was entitled to a jury finding on whether he violated the conditions of his supervised release. His 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). Haymond does not support plain-error relief based on the application of Section 3583(g), which was not at issue in Haymond, to petitioner's case.

a. As just explained, 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. 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. Furthermore, petitioner 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 other dissenters would have upheld Section 3583(k) for that reason, id. at 2391-2392, and Section 3583(g) would be 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. Haymond, 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." Haymond, 139 S. Ct. at 2384. Here, petitioner's initial sentence of imprisonment was 36 months. C.A. R.E. 17-18. The nine months of reimprisonment ordered by the district court after revoking his supervised release, id. at 54, brings petitioner's total period of imprisonment to 45 months. That does not "exceed[] the statutory maximum term of imprisonment" for petitioner's crime of conviction, which is 40 years. Haymond, 139 S. Ct. at 2384 (opinion of Gorsuch, J.); see 21 U.S.C. 841(b)(1)(B). At a minimum, therefore, no plain error occurred in petitioner's case even under the reasoning of Justice Gorsuch's opinion.

c. Finally, even if the jury-trial right at issue in Haymond applied to 18 U.S.C. 3583(g), that right would be not violated here because petitioner admitted the facts that supported his

revocation and reimprisonment. In Haymond, the district court found by a preponderance of the evidence -- over the defendant's objection -- that he had violated the conditions of his supervised release by possessing child pornography and was therefore subject to mandatory revocation and reimprisonment under Section 3583(k). 139 S. Ct. at 2374-2375 (opinion of Gorsuch, J.). Here, by contrast, petitioner did not dispute the facts that required revocation under Section 3583(g); he "admi[tted]" to those facts in open court after stating that he understood the consequences of doing so. Pet. App. A2; see 8/9/18 Hr'g Tr. 4-6.

The jury-trial right applied in Haymond and previous decisions like Apprendi does not extend to facts "admitted by the defendant." Haymond, 139 S. Ct. at 2377 (opinion of Gorsuch, J.); see Apprendi, 530 U.S. at 490. Petitioner suggests (Pet. 5-7) that his admission of the facts supporting his revocation and reimprisonment was invalid because he "was never told that he had a right to a jury trial," and the district court never "secur[ed] a waiver of [the] jury trial right or of the right to proof beyond a reasonable doubt." But even if petitioner did have the jury-trial right that he now asserts, a misapprehension of the burden of proof would not affect the validity of his admissions in open court that he in fact engaged in the conduct supporting revocation and reimprisonment. See, e.g., United States v. Ruiz, 536 U.S. 622, 630 (2002) (noting that the Constitution "permits a court to accept a guilty plea, with its accompanying waiver of various

constitutional rights, despite various forms of misapprehension under which a defendant might labor"); Brady v. United States, 397 U.S. 742, 757 (1970) (rejecting a claim that "a defendant must be permitted to disown his solemn admissions in open court * * * simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions"). In all events, those admissions illustrate that plain-error relief is unwarranted in this case. See Olano, 507 U.S. at 736 (explaining that plain-error relief is not appropriate unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings") (citation omitted; brackets in original).

CONCLUSION

The petition for a writ of certiorari should be denied.*

Respectfully submitted.

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* The pending petition for a writ of certiorari in King v. United States, No. 18-9062 (filed Apr. 29, 2019), presents a similar question.