NO. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2019

ALBERT DUVAL GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the writ should issue so that this Court may decide whether Petitioner's revocation sentence violated the Fifth and Sixth Amendments to the United States Constitution.

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Albert Duval Gray

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. United States District Court for the Eastern District of North Carolina, No. 4:12-CR-34, *United States v. Albert Duval Gray*. Original criminal judgment entered November 11, 2012. Order granting motion for revocation of supervised release and sentencing Petitiioner to imprisonment for a term of 24 months entered August 16, 2018.

2. United States Court of Appeals for the Fourth Circuit, No. 18-4588, *United States v. Albert Duval Gray*. Judgment affirming district court entered April 8, 2019.

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on April 8, 2019.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is found at 765 Fed. Appx. 938 (4th Cir. 2019)(unpublished) and is attached at Pet. App. 1a. The original judgment of the United States District Court for the Eastern District of North Carolina sentencing Petitioner to 78 months in prison is attached hereto as Pet. App. 2a. The order of the same United States District Court revoking Petitioner's supervised release is attached hereto as Pet. App. 3a.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming

Petitioner's sentence issued on April 8, 2019. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in pertinent part as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI provides in pertinent part as follows:

> 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.

18 U.S.C. § 3583(e) provides as follows:

> (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 post-release 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.

. **STATEMENT OF THE CASE**

In 2012, the United States District Court for the Eastern District of North Carolina sentenced Petitioner to imprisonment for a term of 78 months following his conviction for possession with intent to distribute crack cocaine. (J.A. 5 #30, 10), Pet. App. 2a.. The court also ordered that Petitioner serve a three-year period of supervised release. (J.A. 5 #30, 12).

In June 2018, after Petitioner had been released from prison and had begun his term of

supervision, the probation office filed a violation memo alleging he had tested positive for marijuana use. (J.A. 16). The motion requested that Petitioner be subject to random drug testing, that he undergo a substance abuse assessment, and that he comply with any treatment recommendations. (J.A. 16).

The following month, in July 2018, the probation office moved to revoke Petitioner's release. (J.A. 6 #41, 16). The probation office subsequently filed two amended motions for revocation. (J.A. 67 #44 and #50, 17, 20). Following a hearing on August 13, 2018, the district court revoked Petitioner's supervised release and sentenced him to imprisonment for a term of 24 months. (J.A. 8 #52 and #53, 23, 32, 34), Pet. app. 3a.

The initial revocation motion alleged that Petitioner, after testing positive for marijuana use, had agreed to have a substance abuse assessment, to participate in any recommended treatment, and to submit to random drug testing (J.A. 16). In accordance with that agreement, the probation office sent documents for Petitioner to sign and return to the office. (J.A. 16). When the documents did not come back, the probation officer asked Petitioner the reason, and the latter said he did not believe he should be subject to testing, that he would not attend treatment, and that he wanted to be released from supervision. (J.A. 16). The revocation motion charged him with failing to follow the instructions of his probation officer. (J.A. 16).

A few days later, the probation office filed an amended motion. (J.A. 17). This motion alleged Petitioner had engaged in criminal conduct by possessing with the intent to sell or distribute marijuana, an offense for which he had been arrested. (J.A. 17). The motion also alleged a second violation: that he had possessed marijuana some five days following his arrest. (J.A, 17).

The probation office later filed a second amended revocation motion to add another allegation of criminal conduct (that conduct again being possession with intent to sell or distribute marijuana) and a second charge of possessing marijuana. (J.A. 21).

At the revocation hearing, the government withdrew the charge that Petitioner had failed to follow his probation officer's instructions. (J.A. 25). Petitioner went on to admit the allegations that he possessed marijuana on two occasions. (J.A. 25). Those admissions, he conceded, amounted to his "admitting the conduct that [was] the basis of the charges" of criminal conduct, but he said he was pleading "no contest . . . to the actual charges." (J.A. 25).

The government called Raleigh, North Carolina, police officer Christian Danke to testify about two of the charged violations. (J.A. 25). Officer Danke told the court that on July 11, 2018, he and his partner saw Petitioner standing outside of the Staff Zone, a business that "provide[s] staffing for different construction companies . . . that . . . need people temporarily for the day." (J.A. 26-27). Officer Danke said he saw Petitioner again some 45 minutes later. (J.A. 27). The officers drove up to Petitioner to talk to him about trespassing. (J.A. 27). When Petitioner saw them, he began to walk away. (J.A. 27). He came back when the officers called out to him. (J.A. 27). Officer Danke testified he could smell marijuana on Petitioner. (J.A. 27). When they searched him, the officers found a total of 22 grams of marijuana contained within 14 bags. (J.A. 27). The bags were within a silk bag in Petitioner's pocket. (J.A. 28).

Following Officer Danke's testimony, the probation officer proffered to the court that on July 23, 2018, Petitioner was arrested on the amended revocation warrant. (J.A. 29). En route to the jail, Mr. Ray said he had marijuana in his possession. (J.A. 29). Upon arrival, authorities found "29 small, individually-wrapped baggies of marijuana and a large plastic bag of

marijuana." (J.A. 29). Petitioner said he had the marijuana for personal use; he denied dealing in the drug. (J.A. 29). After being told a warrant could be obtained to search his telephone, Petitioner said "there would be texts regarding transactions for drugs." (J.A. 29).

Following the presentation of evidence, the district court found Petitioner had violated his release conditions (J.A. 29). Petitioner then addressed the court, admitting that he used marijuana. (J.A. 29). He said he was involved with it only "for personal use." (J.A. 29). Defense counsel added that Petitioner was 43 years old and that he had finished more than two years of the three-year supervision period. (J.A. 30). Petitioner had "obviously had a relapse," but he was determined not to deny in court that he had possessed marijuana. (J.A. 30). He had worked throughout the supervision period, counsel said. (J.A. 30). Petitioner, she concluded, had "a good handle on where he went wrong," and he wanted to work to correct his errors. (J.A. 30).

The government, in turn, told the court that but for the two-year statutory maximum sentence, Petitioner's guideline imprisonment range would have been 33 to 41 months. (J.A. 31). It asked the court to impose the 24-month maximum sentence. (J.A. 31). The government said Petitioner had "amassed a pretty ugly criminal history" by the time he was convicted of drug distribution in federal court in 2012. (J.A. 31). One of his convictions, sustained in 1996, had been for second-degree murder. (J.A. 31). Another conviction, in 1997, had been for being a felon in possession of a firearm, and, in 2011, Petitioner was convicted of possession of cocaine and drug paraphernalia. (J.A. 31).

The government said the facts of the case "belied" Petitioner's assertion that he had possessed marijuana for personal use. (J.A. 31). The marijuana found on him on January 11 was

in separate baggies–packaged for sale, in other words. (J.A. 31). Just two weeks later, Petitioner was found with twice as much marijuana as before, and this time, as well, the drug was packaged for sale. "[T]his wasn't a user amount," the government told the court; rather Petitioner "was selling marijuana."

(J.A. 31).

When the government finished its argument, the district court said the following:

> All right. I'll impose the guideline sentence. I think it's appropriate and proportional to [Petitioner's] criminal behavior and impose a sentence of 24 months and give him credit for time served. (J.A. 32).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 34). In that forum, Petitioner argued the district court imposed a procedurally unreasonable sentence by considering the violation conduct in determining that sentence. In an opinion issued April 8, 2019, the Court of Appeals affirmed Petitioner's sentence.

On June 26, 2019, this Court decided *United States v. Haymond*, ___ U.S. ___, No. 17-1672, 2019 WL 2605552, 2019 U.S. LEXIS 4398 (Jun. 26, 2019). In *Haymond*, this Court held that another provision of 18 U.S.C. § 3583, subsection (k), "a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt," violated the Fifth and Sixth Amendments to the United States Constitution. 2019 U.S. LEXIS 4398 at *6 (plurality opinion).

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question whether the district court could sentence Petitioner to a term of

imprisonment on the basis of judge-found facts, under a preponderance of the evidence standard, was not presented to the Fourth Circuit, as this Court had not yet decided *Haymond*. Petitioner did challenge the basis of his sentence, arguing the district court determined that sentence on the basis of the charged violation conduct, conduct to which Petitioner had pled no contest. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Courts consideration. *See generally, Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASON FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS.

Haymond involved 18 U.S.C. § 3583(k). In relevant part, that statute mandated that "if a judge f[ound[by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction." *Haymond* 2019 U.S. LEXIS 4398 at *8 (emphasis in the original). Holding the provision unconstitutional, this Court said the following:

> Where parole and probation violations generally exposed a defendant only to the remaining prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard, supervised release violations subject to § 3583(k) can, at least as applied in cases like ours, expose a defendant to an additional mandatory minimum prison term well beyond that authorized by the jury's verdict—all based on facts found by a judge by a mere preponderance of the evidence. In fact, § 3583(k) differs in this critical respect not only from parole and probation; it also represents a break from the supervised release practices that Congress authorized in §3583(e)(3) and that govern most federal criminal proceedings today. Unlike all those procedures, § 3583(k) alone requires a

> substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard. And, as we explained in *Alleyn*e [*v. United States*, 570 U.S. 99 (2013)] and reaffirm today, that offends the Fifth and Sixth Amendments' ancient protections.

Id. at *28 and *29 (plurality opinion).

Concurring, Justice Breyer said that:

> Section 3583(k) is difficult to reconcile with this understanding of supervised release. In particular, three aspects of this provision, considered in combination, lead me to think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach. *First*, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. *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. *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."
>
> Taken 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.

Id. at *36 and *37 (Breyer, J., concurring).

Petitioner's case shares similarities to *Haymond*, similarities, he respectfully submits, implicate the Fifth and Sixth Amendments. Section 3583(e) permits the imposition of additional prison time based on judge-found facts under a preponderance-of-the-evidence standard. Revocations are triggered, moreover, based on new behavior. The prison sentence Petitioner is serving under § 3583(e) is every bit as real as imprisonment under subsection (k), and the constitutional deprivation is every bit as plain.

Petitioner respectfully asks that the writ issue so that this Court may determine whether § 3583(e) contravenes the Fifth and Sixth Amendments for the fundamentally same reasons

§ 3583(k) contravened them.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 8th day of July, 2019.

Respectfully submitted,

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