No. _____

In the

Supreme Court of the United States

_____

Christopher Benjamin Blanton,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of *United States v. Haymond*, 139 S. Ct. 2369 (June 26, 2019)?

PARTIES TO THE PROCEEDING

Petitioner is Christopher Benjamin Blanton, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Benjamin Blanton seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Christopher Benjamin Blanton*, 783 Fed. Appx. 390 (5th Cir. August 28, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The Court of appeals denied Petitioner's petition for rehearing. That order is reprinted and attached as Appendix B. The district court's judgements and sentences in the two consolidated cases are attached as Appendix C and E. The district court's judgments revoking supervised release in the two cases are attached as Appendix D and F.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 28, 2019. The Court of Appeals issued its order denying the petition for rehearing on November 25, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves 18 U.S.C. § 3583(g) which provides the following:

> **(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).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in part:

> 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

LIST OF RELATED PROCEEDINGS

1. *United States v. Christopher Benjamin Blanton*, 4:14-CR-0225-Y. United States District Court, Northern District of Texas. Judgment after remand for re-sentencing entered September 11, 2017. Order revoking supervised release and imposing an 18-month term of imprisonment entered October 25, 2018. (Court of Appeals No. 18-11440).

2. *United States v. Christopher Benjamin Blanton*, 4:15-CR-053-Y-1, United States District Court, Northern District of Texas. Judgment after remand for re-sentencing entered September 11, 2017. Order revoking supervised release and imposing an 18-month term of imprisonment and no additional term of supervised release was entered on October 25, 2018. (Court of appeals number 18-11442).

3. *United States v. Christopher Benjamin Blanton*, CA Nos. 15-11196 and 15-11197, 684 Fed. Appx. 397 (5th Cir. 2017) (unpublished) (Direct consolidated appeal of sentences in 4:14-CR-0225-Y, and 4:15-CR-053-Y-1. Remanded for re-sentencing under the correct version of the Sentencing Guidelines).

4. *United States v. Christopher Benjamin Blanton*, CA Nos. 18-11440 and 18-11442, 783 Fed. Appx. Fed.390 (5th Cir. 2019) (unpublished) (current pending consolidated appeal of two orders revoking supervised release and imposing two 18-month terms of imprisonment to run consecutively for a total aggregate combined sentence of 36 months).

STATEMENT OF THE CASE

On October 25, 2018, Christopher Benjamin Blanton (Blanton) was sentenced to 18 months imprisonment for the supervised release revocation in cause number 4:14-CR-00225-Y-1 (CA No. 18-11440). (RAO.18-11440.153).[1] On that same day, in a consolidated hearing, the district court revoked Blanton's supervised release in cause number 4:15-CR-00053-Y-1 (CA No. 18-11442) and imposed an 18 month sentence, to run consecutively to the 18 months sentence in cause number 4:15-CR-00053-A-1. (ROA.18-11442.123), resulting in a total aggregate, combined sentence of 36 months. This is a consolidated direct appeal from the judgments revoking supervised release and imposing a revocation sentence of 18 months in district court cause number 4:14-CR-225-Y to run consecutively to the 18 month revocation sentence in 4:15-CR-053-Y.

The violation report for both cases stated that Blanton was subject to mandatory revocation of supervised release for possession of a controlled substance and more than 3 positive drug tests over the course of one year. (ROA.18-11440.139)(ROA.18-11442.111). Neither violation report recognized that the district court was required to consider alternatives to a term of imprisonment. *See id.*

On appeal, Blanton raised the issue that the district court imposed a procedurally unreasonable and substantively unreasonable sentence of imprisonment. The court of appeals, however, affirmed the sentence. *See* Appendix

[1] For the convenience of the Court and the parties, the Petitioner has included citations to the Court of Appeals number and the page number of the record on appeal below for both appeals.

A. Between the time of the initial briefing and the issuance of the opinion by the court of appeals, this Court issued its opinion in *United States v. Haymond*, 139 S. Ct. 2369 (June 26, 2019). Blanton petitioned the court of appeals for rehearing because Blanton's revocation procedures applied the mandatory revocation statute of 18 U.S.C. § 3583(g)(1), a statute that Blanton argued was unconstitutional in light of *Haymond*. The court of appeals denied rehearing. *See* Appendix B.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of, *United States v. Haymond*, 139 S.Ct. 2369 (June 26, 2019).

This Court's decision in *Haymond* makes clear that, even in the context of supervised release, "a jury must find any facts that trigger a *new* mandatory prison term." *Haymond*, 139 S.Ct. at 2380 (emphasis in original). Here, Blanton was sentenced under a statute that required mandatory imprisonment after failing to afford him the right to a jury trial to determine the truth of the allegations against him.

From the opening paragraph of the *Haymond* decision, the Supreme Court made clear that the mandatory revocation statute of 18 U.S.C. § 3583(k) violated the Constitution by failing provide the accused with the right to a jury and the reasonable doubt standard:

> Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison . . . without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.

Haymond, 139 S.Ct. at 2373.

In his initial trial, Haymond was convicted of possessing child pornography, in violation of 18 U.S.C. § 2252(b)(2). *Id.* Haymond was sentenced to 38 months' imprisonment and 10 years of supervised release. *Id.* After completing his prison sentence and beginning his term of supervised release, Haymond was found with

several "images that appeared to be child pornography" on his phone. *Id.* at 1374. The government moved to revoke Haymond's supervised release and imposed a new, additional prison sentence. *Id.*

After a hearing, the district judge found by a preponderance of the evidence that Haymond possessed some of the images. *Id.* The district judge felt "bound by [18 U.S.C. § 3583(k)] to impose an additional term of prison." *Id.* at 2375.

Section 3583(k) of United States Code Title 18 states in relevant part:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C.A. § 3583(k).

On appeal, Haymond challenged the constitutionality of the punishment, and the Tenth Circuit concluded that § 3583(k) violated the Fifth and Sixth Amendment. *Id.* The Tenth Circuit concluded that the last two sentences of § 3583(k) were "unconstitutional and unenforceable." *Id.* (citing 869 F.3d 1153, 1168 (10th Cir. 2017)).

On review the Court explained:

> [T]he Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added

> that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries."

Id. at 2376 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)).

Despite these rights, the Court noted that Haymond's revocation involved "a judge—acting without a jury and based only on a preponderance of the evidence—[who] found that Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release." *Id.* at 2378. Then, "[u]nder § 3583(k), that judicial fact-finding triggered a new punishment in the form of a prison term of at least five years and up to life. [Thus,] the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." *Id.* (citing *Alleyne v. United States*, 570 U.S. 99 (2013)).

> Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise.

Id. at 2379.

In a concurrence, Justice Breyer did not go so far. In his view supervised release may be likened to parole, violations of which may be ordinarily found without the aid of a jury. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring). But he vacated Haymond's sentence because of three features of 3583(k):

> 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."

Id. at 2386.

At least two of the three of these criteria are present in 3583(g). Subsection (g) names "a discrete set of federal criminal offenses," namely: unlawful possession of controlled substances, 3583(g)(1), possession of a firearm (necessarily a violation of 18 U.S.C. 922(g) when the underlying offense is a felony), 3583(g)(2), and repeated use of a controlled substance, as evidenced by positive drug tests, 3583(g)(4). The only other basis for mandatory revocation named in 3583(g)(3) – non-compliance with drug testing – is so closely associated with illegal drug use as to be essentially a means of proving a discrete federal offense. The statute thus creates the appearance of a legislative effort to provide punishment for criminal offenses while circumventing cumbersome constitutional guarantees. *See Haymond*, 139 S.Ct. at 2381 (Gorsuch, J., plurality op.) ("If the government were right, a jury's conviction on one crime would (again) permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment.")

Here, like Mr. Haymond, Blanton also had his supervised release revoked and was subjected to mandatory imprisonment without being afforded the right to a jury trial and the beyond a reasonable doubt standard. In petitioning the court for action

against Blanton, the probation officer reported that Blanton faced "[m]andatory revocation for possession of a controlled substance and refusal to comply with drug testing, and more than three positive drug tests over the course of 1 year," and was subject to a mandatory term of imprisonment under 18 U.S.C. § 3583(g)(1), and (g)(4). (ROA.18-11440.139,18-11442.111).

Section 3583(g) of Title 18 of the United States Code provides:

> **(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).

18 U.S.C. § 3583(g). This statute shares substantially similar language to the unconstitutional language of subsection (k): "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment." *Compare* 18 U.S.C. § 3583(g), *with* 18 U.S.C. § 3583(k).

The application of the mandatory revocation statute of § 3583(g) was illegal under the dictates of *Haymond*. "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or

not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Mr. Blanton's case remains on direct review, so *Haymond* is fully applicable to his case.

It is true that consideration of this sentencing issue would be ordinarily barred by the law of the case doctrine. *Tollett v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002). But there are three exceptions:

> (1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice.

United States v. Matthews, 312 F.3d 652, 657 (5th Cir. 2002). Here, *Haymond* represents an intervening change of law by a controlling authority. And because Mr. Blanton was denied his constitutional rights by the application of the mandatory revocation statute, refusal to entertain these issues would create a manifest injustice. Also, Blanton recognizes that this issue was not raised in the trial court nor initially before appellate court below. However, because the *Haymond* case was decided on June 26, 2019, between the time of briefing and the issuance of the opinion of the court of appeals, Blanton contends that a GVR is still appropriate remedy.

GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Any possible or arguable procedural obstacles to reversal – such as the consequences of non- preservation or harmless error analysis – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*) (GVR "has been our practice in analogous situations where, not certain that the case

was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983) (*per curiam*) (GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990) (Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

In the present case, the Petitioner did not raise this issue in the Court of Appeals. However, because neither the Petitioner nor the Fifth Circuit had the benefit of this Court's decision in *United States v. Haymond*, 139 S. Ct. at 2369, at the time of the initial briefing, this Court should vacate and remand for re-consideration in light of *Haymond*. *See Henderson v. United States*, 568 U.S. 1121, 1130 (2013) (For the purposes of determining whether error is plain, "it is enough that an error be plain at the time of appellate consideration.").

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.

Respectfully submitted this 24th day of February, 2020.

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