

No. _____

In the
Supreme Court of the United States

Alfred Brown,

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

Christopher Curtis
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
819 Taylor Street, Room 9A10
Fort Worth, TX 76102
(817) 978-2753
Chris_Curtis@fd.org

QUESTION 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 (2019)?

PARTIES TO THE PROCEEDING

Petitioner is Lucas Moss, 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 Lucas Moss 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of Appeals is located within the Federal Appendix at *United States v. Lucas Moss*, 787 F. App'x 225 (5th Cir. 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment is attached as Appendix B. The district court's judgment of revocation and sentence is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 5, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Federal Rule of Criminal Procedure 51 provides:

(a) Exceptions Unnecessary.

Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error.

A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

This Petition also 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. Lucas Moss*, 4:15-CR-239-A-7. United States District Court, Northern District of Texas. Judgment entered April 1, 2016.
2. *United States v. Lucas Moss*, 4:15-CR-239-A-7, United States District Court, Northern District of Texas, petition for offender under supervision. Motion to revoke filed April 10, 2019. Judgment revoking supervised release and imposing a 12-month term of imprisonment and an 18-month term of supervised release was entered on April 11, 2019.
3. *United States v. Lucas Moss*, CA No. 19-10301, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered December 6, 2019.

STATEMENT OF THE CASE

Lucas Moss (“Moss”) was originally sentenced on April 1, 2016, to 12 months in prison and three years of supervised release for conspiracy to make, possess, and utter forged and counterfeit securities. (ROA.50–52).¹ He began his term of supervised release on July 11, 2017. (ROA.58). Moss’s term of supervision was revoked on February 28, 2019, and he was sentenced to 11 months in prison with a 24-month term of supervised release. (ROA.86–88).

In petitioning the court for action against Moss, the probation officer reported that Moss faced “[m]andatory revocation for possession of a controlled substance” and was subject to a mandatory term of imprisonment under 18 U.S.C. § 3583(g)(1). (ROA.62).

On appeal, Moss argued that the district court’s application of the mandatory revocation statute was unconstitutional in light of this Court’s decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019). The court of appeals, however, determined that Moss did not prove plain error. *See* Appendix A.

¹ For the convenience of the Court and the parties, the Petitioner has included citations to the page number of the record on appeal below.

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 (2019).

This Court’s plurality 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. 2369, 2380 (2019) (emphasis in original). Here, Moss 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 *Haymond*, the plurality made clear that the mandatory revocation statute of 18 U.S.C. § 3583(k) violated the Constitution by failing to 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 2374. 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 this 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 Id.* 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.

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 Id.* 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, Moss 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 Moss, the probation officer reported that Moss faced “[m]andatory revocation for possession of a controlled substance” and was subject to a mandatory term of imprisonment under 18 U.S.C. § 3583(g)(1). (ROA.62).

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*.

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 5th day of March, 2020.

**JASON D. HAWKINS
Federal Public Defender
Northern District of Texas**

/s/ Christopher A. Curtis
Christopher Curtis
Assistant Federal Public Defender
Federal Public Defender's Office
819 Taylor Street, Room 9A10
Fort Worth, Texas 76102
Telephone: (978) 767-2746
E-mail: Chris_Curtis@fd.org

Attorney for Petitioner