

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE CORTEZ, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Order Denying Petition for Rehearing

Appendix C Judgment and Sentence of the United States District Court for the Northern District of Texas

Appendix D Judgment of Revocation and Sentence of the United States District Court for the Northern District of Texas

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 23, 2019

Lyle W. Cayce
Clerk

No. 18-11300
Summary Calendar

Plaintiff-Appellee

UNITED STATES OF AMERICA,

v.

GEORGE CORTEZ, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CR-122-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant George Cortez, Jr., challenges the 36-month sentence of imprisonment imposed following the revocation of supervised release for his 2008 conviction for conspiracy to possess with intent to manufacture and distribute methamphetamine. Cortez contends that his sentence, which exceeded the range provided in the policy statements of the Sentencing Guidelines, is procedurally and substantively unreasonable.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-11300

Revocation sentences generally are reviewed under 18 U.S.C. § 3742(a)'s "plainly unreasonable" standard. *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011). Because Cortez failed to object on the procedural reasonableness grounds he asserts on appeal, we review those arguments for plain error. *See United States v. Dunigan*, 555 F.3d 501, 506 (5th Cir. 2009). Under a plain error standard, Cortez must show a forfeited error that is clear or obvious and that affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). We have discretion to correct such an error, but will do so only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

The record shows that the district court was aware of the advisory range, that it implicitly considered that range, and that it stated that it had considered all relevant § 3553 factors. *See United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The record also shows that the district court heard Cortez's mitigation arguments and even discussed some of them with the parties, but it found those arguments insufficient to excuse Cortez's continued violation of the conditions of supervised release. *See United States v. Fraga*, 704 F.3d 432, 438-39 (5th Cir. 2013). Finally, the district court sufficiently explained the chosen sentence because its statements, in the context of the entire hearing, show that it evaluated the various sentencing arguments and based the sentence on Cortez's repeated failure to comply with the conditions of his supervised release. *See United States v. Diaz Sanchez*, 714 F.3d 289, 294 (5th Cir. 2013). Cortez has not shown that the district court plainly erred or that his sentence is procedurally unreasonable.

We review the substantive reasonableness of the sentence for "an abuse of discretion, examining the totality of the circumstances." *United States v. Warren*, 720 F.3d 321, 332 (5th Cir. 2013). Although Cortez's 36-month

No. 18-11300

sentence exceeds the policy statement range of 7 to 13 months, it is within the statutory maximum of 60 months. “We have routinely affirmed revocation sentences exceeding the advisory range, even where the sentence equals the statutory maximum.” *Id.* (internal quotation marks and citation omitted). Cortez has not shown that the district court failed to account for a factor that should have received significant weight, gave significant weight to any irrelevant or improper factors, or clearly erred in balancing the sentencing factors. *See id.* Accordingly, Cortez has not established that the district court abused its discretion or that his sentence is substantively unreasonable.

The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11300

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GEORGE CORTEZ, JR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:

Defendant-Appellant George Cortez, Jr., seeks rehearing. He contends that the recently-decided *United States v. Haymond*, 139 S. Ct. 2369 (2019), renders unconstitutional the mandatory term of imprisonment imposed on him at the revocation of his supervised release because the underlying facts were not decided by a jury. Justice Breyer's concurrence in *Haymond* sets forth the controlling language, holding that, while the "[r]evocation of supervised release is typically understood as 'part of the penalty for the initial offense'" and is therefore within the purview of a judge, three features of 18 U.S.C. § 3583(k) make it more like punishment for a new offense and thus subject to

No. 18-11300

the right to a trial by jury. *Id.* at 2386 (Breyer, J., concurring in judgement) (quoting *Johnson v. United States*, 529 U.S. 694, 700 (2000)).

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.

But the provision under which Cortez was sentenced, section 3583(g), does not share those characteristics. First, it is not triggered only by separate, specific criminal offenses, but rather by conduct closely tied to the conditions of supervised release. Second, while § 3583(g) requires imprisonment, it sets no minimum term and therefore does not disrupt the connection between the consequence for revocation and the severity of the original crime as embodied in 3583(e)(3). See *Haymond*, 139 S. Ct. at 2386. *Haymond*, therefore, does not control this case. See also *United States v. Wilson*, 939 F.3d 929, 933 (8th Cir. 2019) (holding that imposition of punishment under § 3583(g) is a sanction, not punishment for a separate offense).

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX C

United States District Court

EASTERN DISTRICT OF TEXAS

Sherman

UNITED STATES OF AMERICA

V.

GEORGE CORTEZ, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:07CR00091-002

USM Number: 14315-078

John W. Key, III

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 of a Superseding Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 USC § 846	Conspiracy to Possess with Intent to Manufacture and Distribute Methamphetamine	05/10/2007	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/7/2008

Date of Imposition of Judgment


Signature of Judge

Michael H. Schneider

United States District Judge

Name and Title of Judge

10/8/08

Date

18-11300.11

DEFENDANT: GEORGE CORTEZ, JR.
CASE NUMBER: 4:07CR00091-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **240 months**

The court makes the following recommendations to the Bureau of Prisons:

The defendant participate in an appropriate substance abuse treatment program, if eligible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GEORGE CORTEZ, JR.
CASE NUMBER: 4:07CR00091-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant 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.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GEORGE CORTEZ, JR.

CASE NUMBER: 4:07CR00091-002

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release.

The defendant shall provide the probation officer with access to any requested financial information for purposes of monitoring efforts to obtain and maintain lawful employment.

The defendant shall participate in a program of testing and treatment for drug abuse, under the guidance and direction of the U.S. Probation Office, until such time as the defendant is released from the program by the probation officer.

DEFENDANT: GEORGE CORTEZ, JR.
CASE NUMBER: 4:07CR00091-002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 100.00	\$ 0.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ _____	\$ _____	\$ 0.00

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GEORGE CORTEZ, JR.
CASE NUMBER: 4:07CR00091-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to:

the U.S. District Court, Fine & Restitution Section, P.O. Box 570, Tyler, TX 75710.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILEDIN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SEP 20 2018

CLERK, U.S. DISTRICT COURT
By _____ Deputy

UNITED STATES OF AMERICA

§
§
§
§

VS.

§ NO. 4:18-CR-122-A

GEORGE CORTEZ

JUDGMENT OF REVOCATION AND SENTENCE

Came on to be heard, as contemplated by Fed. R. Crim. P. 32.1, the motion of United States of America to revoke the term of supervised release imposed on defendant, GEORGE CORTEZ.

After having considered the grounds of the government's motion, defendant's admissions, statements on behalf of defendant, and argument of counsel, the court has determined that the term of supervised release imposed on defendant should be revoked and that defendant should be sentenced to a term of imprisonment of 36 months and to serve a 36-month term of supervised release upon discharge from prison.

The court finds and concludes that:

(a) Defendant was given, in a timely manner, written notice of his alleged violations of the term of supervised release upon which the motion to revoke is based;

(b) The motion to revoke the term of supervised release was served on defendant in a timely manner prior to the hearing;

(c) There was a disclosure to defendant, and his attorney, of the evidence against defendant; and

(d) The hearing was held within a reasonable time.

Other findings and conclusions of the court were stated by the court into the record at the hearing. The court adopts all such findings and conclusions as part of this judgment.

In reaching the conclusions and making the determinations and rulings announced at the hearing, and as stated in this judgment, the court considered all relevant factors set forth in 18 U.S.C. § 3553(a) that are proper for consideration in a revocation context.

The court ORDERS, ADJUDGES, and DECREES that the term of supervised release, as provided by the Judgment in a Criminal Case signed October 8, 2008 by a judge of the United States District Court for the Eastern District of Texas in Case No. 4:07-CR-091-002 of that court, imposed on defendant on October 7, 2008, be, and is hereby, revoked; and

The court further ORDERS, ADJUDGES, and DECREES that defendant, GEORGE CORTEZ, be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months, to be followed by a term of supervised release of 36 months.

The court further ORDERS, ADJUDGES, and DECREES that, while on supervised release, defendant shall comply with the following Standard and Special Conditions of Supervision:

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, ammunition, destructive device, or other dangerous weapon.
3. The defendant shall provide to his U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district in which he is being supervised without the permission of the U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his or her dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Special Conditions of Supervision

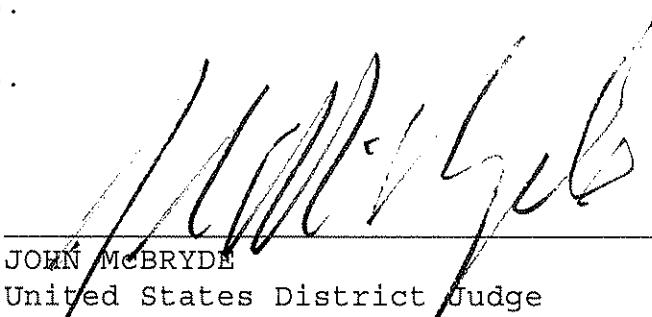
1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as directed by the U.S. Probation Office.
3. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by Title 18 United States Code section 3583(f).

The defendant remanded to the custody of the U.S. Marshal.

The date of imposition of the sentence provided by this judgment is September 20, 2018.

SIGNED September 20, 2018.


JOHN MCBRYDE
United States District Judge

Personal information about the defendant is set forth on the attachment to this Judgment of Revocation and Sentence.