

No. _____

In the
Supreme Court of the United States

Rachel Mae Skidmore,

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

Whether 18 U.S.C. 3§583(g)(1) comports with the Fifth and Sixth Amendments?

PARTIES TO THE PROCEEDING

Petitioner is Rachel Mae Skidmore, 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 Rachel Mae Skidmore seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Skidmore*, 805 Fed. Appx. 333 (5th Cir. May 21, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 21, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

18 U.S.C. §3583(g) states:

(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).

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

In 2011, Petitioner Rachel Mae Skidmore received a sentence of 60 months for traveling in aid of a drug smuggling conspiracy, together with a three-year term of supervised release, under 18 U.S.C §1952(a)(3). *See* (Record in the Court of Appeals, at 64-68). She has since suffered three revocations, the last of which forms the basis of the instant appeal: a term of 11 months imprisonment, followed by a 25 months term of release, (Record in the Court of Appeals, at 123-128); a term of 18 months imprisonment, followed by a 7 month term of release, (Record in the Court of Appeals, at 149-151), and a term of 24 months imprisonment, (Record in the Court of Appeals, at 189-190).

Most recently, the district court found that Ms. Skidmore possessed marijuana, committed a felony offense by attempting to destroy her marijuana, committed the felony offense of evading arrest, failed to report an arrest, failed to report to her Probation Officer, moved without notice, failed to attend mental health treatment, and failed to submit drug tests. *See* (Record in the Court of Appeals, at 259, 262, 264).

A Supervised Release Violation Report issued in November of 2018 found a Grade B Violation, and an advisory range of 8-14 months imprisonment. *See* (Record in the Court of Appeals, at 160). It also found revocation mandatory under 18 U.S.C. §3583(g) due to Ms. Skidmore’s “possession of a controlled substance and fail[ure] to comply with drug testing.” (Record in the Court of Appeals, at 160).

Ten months later, the district court convened a revocation hearing, during which the defendant pleaded true to all allegations save the possession of marijuana and the two felonies. *See* (Record in the Court of Appeals, at 259). The government proved the remaining allegations to the district court. *See* (Record in the Court of Appeals, at 262, 264). Before hearing from the defendant or her counsel, the court expressly found revocation mandatory. *See* (Record in the Court of Appeals, at 264). With-out discussing the advisory ranges in USSG §7B1.4, the court imposed the statutory maximum term: 24 months imprisonment. *See* (Record in the Court of Appeals, at 269-270). It said:

When I consider your history and all of the factors the Court should consider in sentencing under 18, United States Code, Section 3553(a), as it applies in a revocation context, I'm satisfied that a sentence of imprisonment of 24 months is absolutely necessary to address all of the factors in a proper way.

(Record in the Court of Appeals, at 269).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court erred in applying the mandatory revocation provisions of 18 U.S.C. §3583(g)(1), because those provisions violated the Fifth and Sixth Amendments under the rationale of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019). She also presented a claim of procedural error related to the court's failure to consider the Sentencing Commission's advisory policy statements related to supervised release.

The court of appeals affirmed. *See* [Appx. A, at 2]. It rejected the constitutional argument with the following commentary:

For the first time on appeal, Skidmore maintains that § 3583(g) is unconstitutional in light of *United States v. Haymond*, — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019), because it does not require a jury determination of guilt beyond a reasonable doubt. As Skidmore concedes, review of this unpreserved issue is for plain error, which requires her to show, *inter alia*, (1) an error that has not been affirmatively waived and (2) that is clear or obvious. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). *Haymond* addressed the constitutionality of § 3583(k), and the plurality opinion, 139 S. Ct. at 2382 n.7, explicitly disclaimed any view on the constitutionality of § 3583(g). In the absence of precedent from the Supreme Court or this court extending *Haymond* to § 3583(g), there is no clear or obvious error. *See Puckett*, 556 U.S. at 135, 129 S.Ct. 1423; *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009).

[Appx. A, at p.2].

REASONS FOR GRANTING THE PETITION

This Court should hold the instant Petition pending any plenary grant of certiorari addressing the question presented, which was reserved by the plurality in *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

The Fifth and Sixth Amendments to the United States Constitution require that any fact that increases the defendant's maximum or minimum range of punishment must be proven to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013). Section 3583(g)(1) of Title 18 compels the district court to impose a term of imprisonment when a defendant on supervised release possesses illegal drugs. A straightforward application of *Alleyne*, therefore, would tend to show that the fact of such illegal possession must be proven to a jury beyond a reasonable doubt. Alternatively, a reviewing court might conclude that Congress would have preferred to sever and excise the mandatory revocation provision to compelling a full-blown jury trial for every allegation of drug possession. *See United States v. Booker*, 543 U.S. 220 (2005).

Nonetheless, at least five Justices in *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019), concluded that some revocation proceedings fall outside the simple rules of *Apprendi* and *Alleyne*. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring); *id.* at 2391 (Alito, J., dissenting). Under the view propounded by Justice Breyer's concurrence, facts determined in a revocation proceedings should instead be compared more globally to a "traditional element." *See id.* at 2385-2386 (Breyer, J., concurring). This analysis considers whether the fact in question sets forth an

independent criminal offense, whether it triggers a mandatory minimum, and the length of the mandatory minimum. *See id.* at 2385-2386 (Breyer, J., concurring).

A four Justice plurality expressly reserved the question at issue in this case: whether 18 U.S.C. 3583(g) violates the Fifth and Sixth Amendment, cautioning:

Just as we have no occasion to decide whether § 3583(k) implicates *Apprendi* by raising the ceiling of permissible punishments beyond those authorized by the jury's verdict, see n. 4, *supra*, we do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*. Nor do we express 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. (Gorsuch, J.)(plurality op.), 139 S. Ct. at 2382. Such reservations have previously foreshadowed grants of certiorari on the reserved issue, often promptly. *Compare Blakely v. Washington*, 542 U.S. 296, 305, n.9 (2004)(“The Federal Guidelines are not before us, and we express no opinion on them.”) *with United States v. Booker*, 543 U.S. 220 (2005)(rendering a holding on this question); *compare Voisine v. United States*, 136 S. Ct. 2272, 2280, n.4 (2016)(Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior.”) *with Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020)(granting certiorari to decide this question in the context of 18 U.S.C. 924(e), which contains a clause similarly worded to 18 U.S.C. 16); *see also Voisine*, 136 S. Ct. at 2277 (“...we expressly left open whether a reckless assault also qualifies as a “use” of force—so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)'s firearms ban. ...The two cases before us now raise that issue.”)(internal citations omitted)(citing *United States v. Castleman*, 572 U.S. 157 (2014)).

In the event that the Court chooses to address this issue while the instant case remains on direct appeal, the outcome may be affected. Although the error was not preserved in district court, which compels review for plain error only, *see Fed. R. Crim. P. 52(b)*, the “plain-ness” of error may be established by change of precedent on before the judgment is final. *See Henderson v. United States*, 568 U.S. 266 (2013). Accordingly, Petitioner requests that the Court hold her petition pending any case that presents the issue reserved in *Haymond*, and then grant the petition, vacate the judgment below, and remand for reconsideration. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163 (1996).

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 16th day of October, 2020.

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