

No. _____

In the
Supreme Court of the United States

Alonte Deshavion Richey,
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. § 3583(g) comports with the Fifth and Sixth Amendments?

PARTIES TO THE PROCEEDING

Petitioner is Alonte Deshavion Richey, 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 Alonte Deshavion Richey 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opinion of the Court of Appeals is reported at *United States v. Richey*, 808 F. App'x 280 (5th Cir. June 10, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment of revocation and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 10, 2020. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days. 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.

LIST OF RELATED PROCEEDINGS

1. *United States v. Alonte Deshavion Richey*, 3:16-CR-00179-1-MO. United States District Court, District of Oregon. Judgment entered February 28, 2017.
2. *United States v. Alonte Deshavion Richey*, 4:19-CR-53-A-1. United States District Court, Northern District of Texas, motion to revoke term of supervised release filed on September 3, 2019. Judgment revoking supervised release and imposing an 18-month term of imprisonment and an 18-month term of supervised release was entered on September 5, 2019.
3. *United States v. Alonte Deshavion Richey*, CA No. 19-11019, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered June 10, 2020.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

In 2017, Petitioner Alonte Deshavion Richey received a sentence of 20 months for felon in possession of a firearm, together with a three-year term of supervised release, under 18 U.S.C § 922(g)(1). *See* (Record in the Court of Appeals, at 105–07).

Mr. Richey began serving his term of supervised release on August 29, 2018. (Record in the Court of Appeals, at 41). On August 9, 2019, the probation officer filed a Petition for Offender under Supervision alleging that Richey committed several violations of the terms of his supervised release. (Record in the Court of Appeals, at 26–30). Included with the alleged violations, the petition claimed that Richey (1) unlawfully possessed a controlled substances; (2) submitted four urine tests between December 10, 2018, and July 31, 2019, that tested positive for cocaine; (3) failed to attend substance abuse counseling; and (4) failing to submit urine specimens. (Record in the Court of Appeals, at 27).¹ The petition concluded that Mr. Richey's statutory maximum imprisonment was two years, with a maximum term of supervised release of three years, less any revocation sentence. (Record in the Court of Appeals, at 29). Mr. Richey's violation was calculated as Grade C, which combined with his Criminal History Category of IV to result in a guideline imprisonment range of six to 12 months. (Record in the Court of Appeals, at 29). Citing 18 U.S.C. § 3853(g)(1), (3) and (4), the petition

¹ A later addendum to the Petition alleged that, in August of 2019, Richey submitted another positive urine specimen and admitted to having used cocaine. (Record in the Court of Appeals, at 41–42).

concluded that the court must “[s]entence [Mr. Richey] to a term of imprisonment” because he faced “[m]andatory revocation for possession of a controlled substance, more than 3 positive drug tests over the course of 1 year, and refusal to comply with drug testing.” (Record in the Court of Appeals, at 29).

A warrant was issued for Mr. Richey’s arrest, and it was executed on August 19, 2019. (Record in the Court of Appeals, at 39). A revocation hearing was held on September 5, 2019. (Record in the Court of Appeals, at 64–79). At the beginning of the hearing, Mr. Richey’s attorney informed the court that Mr. Richey intended to plead true to the allegations. (Record in the Court of Appeals, at 65). The district court, before accepting that plea, discussed with Mr. Richey the implications of pleading true to the allegations. (Record in the Court of Appeals, at 67). The district court stated,

If you admit that everything in the motion to revoke says is true, then I’ll make a finding on the record here during the hearing that everything the motion says is true, and I’ll find that you violated your conditions of supervised release in each of the ways the motion says you did, and I’ll order that your terms and conditions of supervised release be revoked.

(Record in the Court of Appeals, at 67).

Mr. Richey admitted the truth of alleged violations. (Record in the Court of Appeals, at 69). The court revoked Mr. Richey’s supervision term, and imposed a sentence of 18 months’ imprisonment, with an additional 18-month term of supervised release. (Record in the Court of Appeals, at 76).

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), because those provisions violated the Fifth and Sixth Amendments under the rationale of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

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, Richey argues that § 3583(g) is unconstitutional in light of the Supreme Court’s decision in *United States v. Haymond*, 139 S. Ct. 2369 (2019), because it does not require a jury determination of guilt beyond a reasonable doubt. As he concedes, review of this unpreserved issue is for plain error, which requires him to show (1) an error that has not been affirmatively waived, (2) that is clear or obvious, and (3) that affected his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he can satisfy those three prongs, this court has the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

The Supreme Court’s decision in *Haymond* addressed the constitutionality of § 3583(k), and the plurality opinion specifically disclaimed expressing any view of the constitutionality of § 3583(g). *See Haymond*, 139 S. Ct. at 2382 n.7. In the absence of precedent from either the Supreme Court or this court extending *Haymond* to § 3583(g), we conclude that there is no clear or obvious error. *See Puckett*, 556 U.S. at 135; *United States v. Evans*, 587 F.3d 667, 671 (5th Cir. 2009). Accordingly, the judgment of the district court is AFFIRMED.

[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 atates*, 568 U.S. 266 (2013). Accordingly, Petitioner requests that the Court hold his 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 5th day of November, 2020.

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