No. __-_____

IN THE

Supreme Court of the United States

CALVIN TEKO COSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 3583(g) violates the Fifth and Sixth Amendments by mandating the revocation of supervised release and imposition of a term of imprisonment without affording a defendant the right to a jury trial and proof beyond a reasonable doubt, an issue expressly left open in *United States v. Haymond*, 139 S. Ct. 2369, 2382 n.7 (2019)?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Coston*, No. 19-4242, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 13, 2020.

(2) *United States v. Coston*, No. 2:05-cr-00084, U.S. District Court for the Eastern District of Virginia. Initial judgment entered February 8, 2006; order revoking supervised release entered March 27, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions, Statutes, and Rules

Legislative Materials

U.S. Sentencing Guidelines

Court Filings

PETITION FOR WRIT OF CERTIORARI

Petitioner Calvin Coston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at App. 1a–10a[1] and is reported at 964 F.3d 289 (4th Cir. 2020).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231 and 18 U.S.C. § 3583. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on July 13, 2020. This Court's order of March 19, 2020, extended the deadline for filing a petition for certiorari to 150 days after the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] "App. __" refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

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

The Sixth Amendment to the Constitution provides, in relevant 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.

18 U.S.C. § 3583(g) provides:

> Mandatory revocation for possession of controlled substance or firearm or 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 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).

STATEMENT OF THE CASE

Introduction

Petitioner Calvin Coston was sentenced to a three-year term of imprisonment under the mandatory revocation provision in 18 U.S.C. § 3583(g). C.A.J.A. 99, 120–24. That statute requires a court to "revoke the term of supervised release and require the defendant to serve a term of imprisonment" when the defendant, "as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year." 18 U.S.C. § 3583(g)(4) (2018).

In *United States v. Haymond*, a plurality of this Court recognized that the reasoning it applied to a nearby supervised-release provision, § 3583(k), might also apply to § 3583(g). *See* 139 S. Ct. 2369, 2382 n.7 (2019) (plurality opinion). But because § 3583(g) was not at issue in *Haymond*, the Court did not pass on its constitutionality. *Id.*

However, § 3583(g) implicates the same concerns as § 3583(k)—namely, that the statute triggers a new punishment based on judge-found facts supported by only a preponderance of the evidence. Further, the statute strips the sentencing judge of discretion by requiring revocation and the imposition of a mandatory minimum sentence in violation of *Alleyne v. United States*, 570 U.S. 99 (2013). As a result, § 3583(g) undermines the guarantees of the Fifth and Sixth Amendments, including those of due process and trial by jury. This Court should answer the question it left open in *Haymond* by applying *Haymond*'s holding to § 3583(g).

Proceedings in the District Court

In 2006, the U.S. District Court for the Eastern District of Virginia sentenced Mr. Coston to 235 months' imprisonment after he pleaded guilty to one count of possession with intent to distribute a cocaine base and one count of firearm possession in furtherance of a drug trafficking offense. App. 3a. After receiving two sentence reductions pursuant to 18 U.S.C. § 3582(c)(2), Mr. Coston ultimately served a 180-month sentence of imprisonment before beginning a five-year term of supervised release in late 2014. App. 3a; C.A.J.A. 6–8, 15, 21.

The district court revoked this term of supervised release in January 2017, after Mr. Coston stipulated to several violations. App. 3a; C.A.J.A. 23–24. The court imposed an 18-month prison sentence, to be followed by a 42-month term of supervised release. App. 3a–4a; C.A.J.A. 42. A few months into his second term of supervised release, Mr. Coston stipulated to additional violations. C.A.J.A. 45–48, 59–60. After Mr. Coston testified as to the attenuating circumstances leading to those violations, the court continued the disposition of the petition pending any further violations. App. 4a; C.A.J.A. 81–82, 87–88.

The district court ultimately revoked Mr. Coston's latest term of supervised release, and it is this revocation that is at issue here. In late 2018, the probation officer alleged new violations, including marijuana possession based on two positive drug tests and an additional instance of admitted use, two missed urine screens, and two missed monthly reports. C.A.J.A. 89–91. Mr. Coston told his probation officer he used the marijuana to cope with his wife suffering a massive heart attack, which required open-heart surgery, and his stepson being shot. App. 4a; C.A.J.A. 90.

Mr. Coston stipulated to the new violations at a revocation hearing. App. 4a; C.A.J.A. 99–100. At the hearing, the court noted that Mr. Coston was subject to mandatory revocation "for testing positive for a controlled substance more than three times over the course of a year," based on § 3583(g)(4). C.A.J.A. 99; *see* App. 4a–5a. Defense counsel asked the court not to impose the mandatory revocation given that Mr. Coston had qualified for a free inpatient drug treatment program that would serve his needs better than incarceration. C.A.J.A. 100–01 (citing U.S.S.G. § 7B1.4, comment n.6); *see* 18 U.S.C. § 3583(d) (providing an exception to § 3583(g) for the purpose of a defendant receiving "appropriate substance abuse treatment"). The court declined to do so, and it imposed an above-Guidelines three-year sentence with no subsequent supervised release. App. 6a; C.A.J.A. 123–24.

Proceedings in the Court of Appeals

This Court decided *Haymond* roughly three months after the district court revoked Mr. Coston's supervised release. Mr. Coston argued on appeal, in relevant part, that § 3583(g) violated his Fifth and Sixth Amendment rights in light of that decision.

The court of appeals reviewed Mr. Coston's claims under a plain-error standard. App. 6a. It followed Justice Breyer's concurring opinion in *Haymond*, reasoning that his opinion controlled under *Marks v. United States*, 430 U.S. 188 (1977). App. 7a. Applying the three considerations grounding Justice Breyer's reasoning in *Haymond*, the Fourth Circuit concluded that § 3583(g) was "an imperfect fit" under all three. App. 7a–8a. Additionally, the court stated that because a majority of Justices in *Haymond* did not "endorse[] the application of *Alleyne* in the

supervised release context," the court was bound by existing Fourth Circuit precedent holding that *Alleyne* did not apply. App. 8a (citing *United States v. Ward*, 770 F.3d 1090, 1099 (4th Cir. 2014)).[2]

REASONS FOR GRANTING THE PETITION

I. In *United States v. Haymond*, this Court left open the question presented here.

In *United States v. Haymond*, a majority of this Court held that 18 U.S.C. § 3583(k) violates the jury trial and due process rights guaranteed by the Fifth and Sixth Amendments. 139 S. Ct. 2369, 2373 (2019) (plurality opinion); *id.* at 2386 (Breyer, J., concurring in the judgment). Section 3583(k) required a sentencing court to impose an additional term of imprisonment of at least five years upon finding by a preponderance of the evidence that the defendant violated the conditions of his supervised release by committing one of the subsection's enumerated offenses. *See* 18 U.S.C. § 3583(k); *Haymond*, 139 S. Ct. at 2374 (plurality opinion).

Yet § 3583(k) is not the only provision of that statute requiring a court to revoke a defendant's supervised release and impose an additional prison sentence based on a a judicial finding of a particular violation. Section 3583(g) requires "[m]andatory revocation for possession of a controlled substance or firearm or for refusal to comply with drug testing." 18 U.S.C. § 3583(g). Upon finding by a preponderance of the evidence that a defendant violated the conditions of his supervised release in one of the ways enumerated in subsection (g), the court is

[2] The Fourth Circuit also rejected Mr. Coston's argument, not pursued here, that his above-Guidelines sentence was unreasonable. App. 8a–10a.

instructed to "require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3)." *Id.*

In *Haymond*, the plurality recognized that its reasoning—namely, that § 3583(k) impermissibly increased the sentencing floor based on judge-found facts in violation of *Alleyne*—might similarly apply to § 3583(g). *See Haymond*, 139 S. Ct. at 2378 (plurality opinion) (explaining its reasoning); *id.* at 2382 n.7 ("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.").[3] But that provision was not at issue in *Haymond*, so the Court declined to consider whether, based on its similarities to § 3583(k), subsection (g) violates the Fifth and Sixth Amendments.

Concurring in the judgment, Justice Breyer did not pass on subsection (g)'s constitutionality. Although he "would not transplant the *Apprendi* line of cases to the supervised-release context," Justice Breyer nonetheless relied on *Alleyne* for the proposition that "a jury must find facts that trigger a mandatory minimum prison term." *Haymond*, 139 S. Ct. at 2385–86 (Breyer, J., concurring in the judgment). He applied *Alleyne*'s holding to § 3583(k), pointing out that the statute limited the judge's discretion by imposing a mandatory minimum. *Id.* at 2386.

Thus, five Justices agreed that increasing a mandatory minimum based on judge-found facts in the supervised-release context could violate *Alleyne*, even if

[3] The government in *Haymond* seemed to understand that the Court's treatment of (k) could apply to (g). In its brief, it treated (g) and (k) as legally equivalent, and at no point did it hint at any meaningful difference between the two subsections. *See* Br. of United States at 10–11, 36, *United States v. Haymond*, 139 S. Ct. 2369 (2019) (No. 17-1672), 2018 WL 6618032.

Justice Breyer's hesistation regarding *Apprendi* and statutory maximums limits the full reach of the Court's decision. *See Marks*, 430 U.S. at 193 (explaining the narrowest concurring opinion controls when no opinion has the support of five Justices). Because the *Haymond* plurality and Justice Breyer left open the question of whether § 3583(g) is unconstitutional, the Court should grant certiorari in this case to now resolve it. *See, e.g.*, *Hall v. Hall*, 138 S. Ct. 1118, 1122 (2018) (explaining that *Hall* "present[ed] that question" the Court left open in *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015)).

II. 18 U.S.C. § 3583(g) is unconstitutional.

The Fourth Circuit erred by upholding § 3583(g)'s constitutionality. In light of the notion that a postrevocation sentence should not resemble a punishment for a new offense, the Fourth Circuit should have found § 3583(g) unconstitutional because it "take[s] a person's liberty" without a jury "acting on proof beyond a reasonable doubt." *Haymond*, 139 S. Ct. at 2373 (plurality opinion). This is true under both Justice Breyer's reasoning and the reasoning of the plurality in *Haymond*.

A. *Haymond*'s guiding principle was that sentencing for postrevocation imprisonment is unconstitutional if it resembles punishment for a new offense, especially when that punishment requires a mandatory minimum sentence.

In *Haymond*, the plurality opinion and Justice Breyer's concurring opinion shared a central theme that postrevocation imprisonment cannot resemble punishment for a new offense—especially when the sentence includes a mandatory minimum.

Congress created supervised release to replace parole in the Sentencing Reform Act of 1984. *See* Pub. L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1999

(codified as amended at 18 U.S.C. § 3583). In addition to "eliminat[ing] most forms of parole," Congress tasked sentencing courts with overseeing defendants during their terms of supervised release. *Johnson v. United States*, 529 U.S. 694, 696–97 (2000). If a defendant violates the conditions of his supervised release, the court may revoke it "and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." *Id.* at 697 (quoting what is now 18 U.S.C. § 3583(e)(3)).

Postrevocation imprisonment is "part of the penalty for the initial offense." *Id.* at 700. Violating a supervised-release condition constitutes a "breach of trust," the sanction for which a court may not impose "as if that conduct were being sentenced as new federal criminal conduct." *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment) (quoting U.S.S.G. ch. 7, pt. A, intro. cmt. 3(b) (Nov. 2018)). Indeed, to consider postrevocation imprisonment to be "punishment for the violation"—as opposed to the initial offense—would raise "serious constitutional questions." *Johnson*, 529 U.S. at 700.

One reason postrevocation imprisonment raises "serious constitutional questions" when it resembles punishment for a new offense is that the punishment is no longer authorized by the jury's original verdict. The vital connection between imprisonment and the jury's verdict means it is unconstitutional "to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quotation omitted). Instead, "such facts must be established by proof beyond a reasonable doubt," *id.*, to "ensur[e] that the judge's authority to sentence derives

wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (describing *Apprendi*). This is true both for facts that increase the statutory maximum penalty and those that raise the statutory minimum. *See Alleyne*, 570 U.S. at 108 (2013) (explaining *Apprendi*'s logic applies both to facts "that increase the ceiling" and "those that increase the floor").

Notably, altering the range of a prescribed punishment based on additional facts is not merely a shift in sentencing. Instead, it changes the nature of the punished offense. So, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of *a new offense* and must be submitted to a jury." *Id.* at 114–15 (emphasis added). Thus, *Apprendi* and *Alleyne* establish that sentencing which resembles punishment for a new offense is unconstitutional absent a jury trial and facts found beyond a reasonable doubt. In turn, ensuring that sentencing does not resemble punishment for a new offense avoids the serious constitutional questions to which *Johnson* alluded.

Even so, whether *Apprendi* or *Alleyne* could apply in the supervised-release context remained unclear until *Haymond*, where a majority of this Court relied on both *Johnson* and *Alleyne* to hold § 3583(k) unconstitutional. Consistent with *Johnson*, § 3583(k) was held to be unconstitutional because the provision required imprisonment based on "judicial factfinding that triggered a *new punishment*." *Haymond*, 139 S. Ct. at 2378 (plurality opinion) (emphasis added); *see id.* at 2386 (Breyer, J., concurring in the judgment) (holding "§ 3583(k) more closely resemble[s] the punishment of *new* criminal offenses" (emphasis added)). And consistent with

Alleyne, § 3583(k) was unconstitutional, in part, because the new punishment raised the mandatory minimum sentence that would otherwise apply. *See id.* at 2378 (plurality opinion) ("So just like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased the legally prescribed range of allowable sentences. . . ." (quotation marks omitted)); *id.* at 2385 (Breyer, J., concurring in the judgment) (finding § 3583(k) unconstitutional, in part, because it "impos[ed] a mandatory minimum term of imprisonment" upon a judge's factfinding and citing *Alleyne* for the rule that "a jury must find facts that trigger a mandatory minimum prison term").

In short, *Haymond* reflects the idea that a postrevocation sentence is unconstitutional when it appears to sanction as a new offense the conduct warranting revocation, and this is especially so when the sentence must be imposed according to a mandatory minimum.

Section 3583(g) is unconstitutional because it violates this same principle. Yet, the Fourth Circuit decided otherwise despite recognizing this core principle's paramount importance to the *Haymond* decision. *See* App. 7a (discussing how Justice Breyer found § 3583(k) unconstitutional because it "resemble[d] criminal punishment for a new offense"). The Fourth Circuit's conclusion, as discussed below, is contrary to both Justice Breyer's and the plurality's reasoning in *Haymond*.

B. The Fourth Circuit incorrectly applied the three considerations from Justice Breyer's concurring opinion in *Haymond*.

Justice Breyer found § 3583(k) unconstitutional based on three considerations that, when taken together, compelled that result:

> *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."

Haymond, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment). These considerations make "§ 3583(k) more closely resemble the punishment of new criminal offenses." *Id.* And all three map directly on to § 3583(g), contrary to the Fourth Circuit's conclusion that the provision is instead "an imperfect fit." App. 8a.

1. Section 3583(g) imposes mandatory imprisonment upon revocation of supervised release for some violations that do not necessarily reflect criminal conduct, as well as some that do.

Justice Breyer found § 3583(k) unconstitutional because it is triggered only when a defendant commits at least one of the federal criminal offenses enumerated in that provision. *Haymond*, 139 S. Ct. at 2386. Section 3583(g) implicates this same concern. It lists several discrete violations that prompt mandatory revocation and imprisonment, just like § 3583(k). Two enumerated violations mandate revocation for possession of a controlled substance and for possession of a firearm in violation of federal law, both of which are criminal offenses. *See* 18 U.S.C. § 3583(g)(1)–(2); *see also* App. 8a (noting the acts in these two provisions are criminal offenses); 18 U.S.C. § 922 (defining firearm possession offenses); 21 U.S.C. §§ 841–844 (defining various drug possession offenses, including simple possession).

The last two enumerated acts in § 3583(g) are refusal to comply with drug testing and testing positive for controlled substances more than three times in one year. *See* 18 U.S.C. § 3583(g)(3)–(4). The district court revoked Mr. Coston's

supervised release under the latter provision. App. 4a–5a. Though § 3583(g)(4) does not cross-reference another federal criminal statute, as § 3583(k) does, it nonetheless implicates Justice Breyer's first consideration.

For one, failing a drug test—which by common sense indicates recent drug use—is a proxy for drug possession. Many circuits in fact treat evidence of drug use as evidence of possession. For example, the Fourth Circuit has concluded that "[f]ederal courts uniformly have held that proof of intentional use of controlled substances is sufficient to establish possession for the purposes of applying § 3583(g)." *United States v. Battle*, 993 F.2d 49, 50 (4th Cir. 1993).[4] Some circuits have further held that failed drug tests in particular are evidence of drug possession. *See, e.g.*, *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991) (holding that "positive urine samples and [the defendant's] admission of drug use" are "circumstantial evidence of possession of a controlled substance for purposes of 18 U.S.C. § 3583(g)").[5]

Although the circuits have mainly applied this logic to § 3583(g)(1), the same logic applies here, too. Viewed through the lens that drug use is a proxy for

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[4] The Fourth Circuit continues to apply this rule. *See, e.g.*, *United States v. Hunnell*, 794 Fed. App'x 325, 326 (4th Cir. 2020). Other circuits have reached the same conclusion. *See, e.g.*, *United States v. Wirth*, 250 F.3d 165, 170 (2d Cir. 2001) ("We agree with [other circuits' decisions] and now hold that use of narcotics amounts to possession thereof for the purposes of § 3583(g)."); *United States v. Hancox*, 49 F.3d 223, 224–25 (6th Cir. 1995) ("[T]his circuit, as well as many others, has held that, for the purposes of 18 U.S.C. § 3583(g), 'use' of a controlled substance constitutes 'possession' of the substance."); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993) (same); *United States v. Rockwell*, 984 F.2d 1112, 1114–15 (10th Cir. 1993) (same); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991) (same); *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991) (same).

[5] Other circuits have held the same. *See, e.g.*, *Dow*, 990 F.2d at 24; *United States v. Ramos-Santiago*, 925 F.2d 15, 16, 18 (1st Cir. 1991); *United States v. Oliver*, 931 F.2d 463, 464–66 (8th Cir. 1991); *Baclaan*, 948 F.2d at 630.

possession, § 3583(g)(4) functionally mandates revocation and a term of imprisonment for drug use and thus for possession—which is a criminal offense—based on a finding that a defendant failed a drug test three times in one year. Because the prohibited conduct in subsection (g)(4) is effectively a proxy for a criminal offense, this provision mandates punishment for a new criminal offense, the elements of which the prosecution need not prove before a jury beyond a reasonable doubt. This contravenes the first factor in Justice Breyer's *Haymond* concurrence.

Moreover, even if this Court distinguishes use and possession for the purposes of § 3583(g)(4), the subsection still implicates Justice Breyer's first consideration by going beyond its implicit limits. Because failing a drug test three times in one year is not itself a criminal offense, § 3583(g)(4) mandates punishment for *noncriminal* conduct. *Cf. Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct.").

In short, § 3584(g) implicates Justice Breyer's first consideration because it triggers mandatory imprisonment when a defendant commits a criminal offense, commits an act that is a proxy for a criminal offense, or, perhaps most troubling, commits noncriminal acts.

2. Section 3583(g) strips the sentencing judge of discretion to decide whether to revoke supervised release and for how long.

Second, Justice Breyer found § 3583(k) unconstitutional because it limited the judge's discretion to decide whether a violation of supervised release warranted revocation, and if so, how long the resulting imprisonment should last. *Haymond*, 139 S. Ct. at 2386. The Fourth Circuit correctly held that § 3583(g)(4) strips the

judge's discretion to decide whether a violation warrants revocation. App. 8a. Indeed, § 3583(g)(4) requires revocation and imprisonment whenever a defendant commits any of the four enumerated violations. *See* 18 U.S.C. § 3583(g). The court has no say in the matter. And further, § 3583(g)(4) also restricts the judge's discretion to decide the length of the sentence by imposing on the judge a required sentencing range. Subsection (g)(4) requires a sentence of at least one day and a maximum, in this case, of five years. *See* 18 U.S.C. § 3583(e)(3) (specifying a five-year maximum sentence when the underlying conviction was a class A felony).

To be sure, § 3583(d) and U.S.S.G. § 7B1.4 provide one exception to the mandatory language in § 3583(g).[6] But that does not save subsection (g). After all, the possibility of a departure did not save mandatory sentencing guidelines from the holding in *United States v. Booker*. *See* 543 U.S. 220, 234 (2005) ("The availability of a departure in specified circumstances does not avoid the constitutional issue."). Nor did the existence of a "safety valve" save mandatory minimum sentences from the holding in *Alleyne*. *Cf.* 18 U.S.C. § 3553(e) (providing "[l]imited authority to impose a sentence below a statuory minimum"). So too here, the presence of one narrow escape from § 3583(g)'s otherwise mandatory rule does not suffice. The exception to § 3583(g) still requires judicial factfinding: the court must find the nonexistence of a suitable treatment program. And § 3583(g) still violates *Alleyne* because its

[6] Section 3583(d) provides, in relevant part, that "[t]he court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test." 18 U.S.C. § 3583(d).

mandatory language prevents the sentencing court from imposing a nonprison sanction even if the court believes one is called for under the § 3553(a) factors, despite the lack of an available substance abuse treatment program.

Thus, § 3583(g) impermissibly restricts the judge's sentencing discretion contrary to Justice Breyer's second consideration, and the Fourth Circuit erred concluding otherwise. App. 8a.

3. Section 3583(g) restricts a judge's discretion in a particular way by imposing a mandatory minimum.

Third, Justice Breyer found § 3583(k) unconstitutional because it took away the judge's discretion in violation of this Court's determination in *Alleyne* that "a jury must find," beyond a reasonable doubt, "facts that trigger a mandatory minimum prison term." *See Haymond*, 139 S. Ct. at 2347 (Breyer, J., concurring in the judgment). Section 3583(g) maps precisely onto this concern by requiring a judge to "impos[e] a mandatory minimum term of imprisonment" after the judge finds "that the defendant has 'commit[ted] any' listed [violation]." *Id.* That § 3583(k) calls for a specific sentence—at least five years—whereas § 3583(g) only requires at least one day of imprisonment and, here, not more than five years, is a distinction without a difference. After all, this Court has consistently held that "'any amount of actual jail time' is significant" for Sixth Amendment purposes. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)). Thus, even a single day of imprisonment violates *Alleyne* if it is imposed in mandatory fashion based only on a judge's findings by a preponderance of the evidence.

In sum, § 3583(g) fits each of Justice Breyer's considerations and thus more resembles the punishment of a new offense than revocation of supervised release. As a result, Mr. Coston's punishment here violated his Fifth and Sixth Amendment rights.

C. Finding § 3583(g) unconstitutional is consistent with the *Haymond* plurality's reasoning.

Section 3583(g) is unconstitutional under the *Haymond* plurality's reasoning as well. The Framers adopted the Fifth and Sixth Amendments, in part, to "ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt." *Haymond*, 139 S. Ct. at 2376 (plurality opinion). In today's modern supervised-release context, this means "a jury must find any facts that trigger a *new* mandatory minimum prison term" because "an accused's final sentence includes any supervised release sentence [the defendant] may receive." *Id.* at 2379–80. This ensures the defendant's ultimate sentence is within the jury-authorized range. *Id.* at 2380. Under this logic, *Apprendi* and *Alleyne* apply to supervised-release proceedings. In *Haymond*, the sentencing court engaged in new factfinding during the revocation hearing. *Id.* at 2378. Based on this factfinding, the statute required the court to impose a new punishment. *Id.* This violated *Alleyne* because the judge-found facts "increased 'the legally prescribed range of allowable sentences. . . .'" *Id.*

Further, the *Haymond* plurality explained that merely asserting that a defendant's original sentence contemplates a later revocation sentence is inapposite. The government in that case unsuccessfully argued "that Mr. Haymond's sentence for violating the terms of his supervised release was actually fully authorized by the jury's verdict" because it was only "on the strength of the jury's findings the judge

was entitled to impose as punishment a term of supervised release," which always includes the possibility of revocation and further imprisonment. *Id.* at 2380. The *Haymond* plurality rejected this argument, pointing out that the jury verdicts in *Apprendi* and *Alleyne* triggered statutes authorizing a judge to increase the defendant's sentence based on judge-found facts. *Id.* at 2381. In those cases, "[t]his Court had no difficulty rejecting that scheme as an impermissible evasion of the historic rule that a jury must find *all* of the facts necessary to authorize a judicial punishment." *Id.* This same logic, reasoned the *Haymond* plurality, invalidated § 3583(k). *See id.*

It is no different here. Section 3583(g)(4) specifies a set of facts—three positive drug tests in a one-year period—that triggers a new punishment of mandatory imprisonment. Thus, the district court's own factfinding required it to increase the defendant's sentence by imposing an additional term of imprisonment. That is, additional judicial factfinding, satisfied only by a preponderance of the evidence, increased the minimum legally prescribed range of allowable sentences. This violates the conclusion of the *Haymond* plurality.

Thus, under both the plurality's and Justice Breyer's reasoning in *Haymond*, § 3583(g) is unconstitutional. The statute contravenes the guarantees of the Fifth and Sixth Amendments, which "cannot mean less today than they did the day they were adopted." *Id.* at 2376.

III. This case is a good vehicle to decide these important questions.

This case is the right vehicle to decide that § 3583(g) is unconstitutional.

First, Mr. Coston's sentence makes this case the optimal vehicle for the Court to resolve this issue. Many supervised-release sentences are short—or are at least of insufficient time to fully appeal—and so challenges to those sentences quickly become moot when defendants are released. *See, e.g.*, *United States v. Fajri*, 285 Fed. App'x, 531, 533 (10th Cir. 2008) (imposing six months' imprisonment for violating § 3583(g)(4)); *United States v. Harvey*, 2011 U.S. Dist. LEXIS 8617, at *3–*4 (W.D. Wis., Jan. 13, 2011) (imposing a one-day sentence for violating § 3583(g)(4)). In contrast, Mr. Coston received an above-Guidelines, three-year sentence. App. 6a. His claim will not become moot before this Court's review.

Second, and relatedly, given the similarities between § 3583(g) and § 3583(k), appeals in the wake of *Haymond* will only become more frequent. In fact, multiple petitions raising the issue have already been filed with this Court.[7] But unlike the case presented here, the defendants in several of those cases would have served their sentence before this Court had a chance to rule on the issue. *See, e.g.*, Appendix C, *Weightman v. United States*, No. 20-5940 (*cert. denied* Nov. 9, 2020) (noting a 12-month revocation sentence); Petition for Writ of Certiorari, *Whichard v. United*

[7] *See, e.g.*, Petition for Writ of Certiorari, *Skidmore v. United States*, No. 20-6101 (*petition for cert. filed* Oct. 16, 2020); Petition for Writ of Certiorari, *Bailey v. United States*, No. 20-6042 (*cert. denied* Nov. 16, 2020); Petition for Writ of Certiorari, *Shabazz v. United States*, No. 20-6047 (*cert. denied* Nov. 16, 2020); Petition for Writ of Certiorari, *Weightman v. United States*, No. 20-5940 (*cert. denied* Nov. 9, 2020); Petition for Writ of Certiorari, *Badgett v. United States*, No. 20-5851 (*cert. denied* Nov. 9, 2020); Petition for Writ of Certiorari, *Nguyen v. United States*, No. 20-5219 (*cert. denied* Oct. 5, 2020); Petition for Writ of Certiorari, *Whichard v. United States*, No. 19-8790 (*cert. denied* Oct. 5, 2020); Petition for Writ of Certiorari, *Chandler v. United States*, No. 19-8675 (*cert. denied* Oct. 5, 2020).

States, No. 19-8790, at 4 (*cert. denied* Oct. 5, 2020) (same). The Court should instead grant certiorari in this case in order to settle the issue quickly.

Finally, this case's plain-error posture should not preclude review. The Fourth Circuit reviewed Mr. Coston's appeal for plain error after concluding that he did not properly "preserve a constitutional challenge to § 3583(g)." App. 6a; *see United States v. Olano*, 507 U.S. 725. 732–37 (1993) (defining the plain error standard as (1) an error; (2) that is plain; (3) that affects the defendant's substantial rights; and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

The Fourth Circuit should have concluded that *Haymond* rendered the district court's judgment plain error. First, for the reasons given above, § 3583(g) is unconstitutional under *Haymond*. By the time the Fourth Circuit considered Mr. Coston's appeal, it was clear his sentence was imposed in error. *See Henderson v. United States*, 568 U.S. 266, 279 ("Whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be "plain" at the time of appellate consideration.'" (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Second, the error was plain, meaning it was "clear" or "obvious." *See Olano*, 507 U.S. at 734 (defining "plain"). Given the guiding principles animating *Haymond*—which are not new but date back to *Johnson*, *Apprendi*, and *Alleyne*—and both the plurality's and Justice Breyer's specific reasoning, it is clear that § 3583(g) suffers the same defects as § 3583(k).

Third, the error substantially affected Mr. Coston's rights because it was "prejudicial" and "affected the outcome of the district court proceedings." *Id.* Had

the district court not considered itself bound by § 3583(g), it might have been more open to alternatives, such as the free inpatient drug treatment program for which Mr. Coston had qualified. App. 5a; C.A.J.A. 100–01. Finally, to impose a new punishment triggered by judge-found facts based only on a preponderance of the evidence affects the fairness and integrity of judicial proceedings. Allowing this new punishment signals that the government may use "quick-and-easy" revocation hearings to bypass normal trial protections to secure a new punishment against a defendant based on a lower standard of proof. *See Haymond*, 139 S. Ct. at. 2381 (plurality opinion) (describing revocation hearings).

But the Court need not go that far. Instead, the Court could grant certiorari in this case to decide the constitutionality of § 3583(g) and then remand the case for further consideration under the third and fourth plain-error prongs in light of the Court's decision. Indeed, the Court remanded *Haymond* for the circuit court to determine the proper remedy after holding § 3583(k) was unconstitutional. *Id.* at 2385. Deciding a legal question and remanding the case for the decision's application is common practice. "After identifying an unpreserved but plain legal error, this Court likewise routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings." *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring).

For example, in *Tapia v. United States*, this Court considered whether the Sentencing Reform Act prohibited courts from "imposing or lengthening a prison term in order to promote a defendant's rehabilitation." 564 U.S. 319, 321 (2011). After

answering that question in the affirmative, the Court remanded the case to the Ninth Circuit to consider the decision's impact on Tapia's case, citing Federal Rule of Criminal Procedure 52(b) and *Olano*. *Id.* at 335.

Similarly, in *United States v. Marcus*, this Court considered whether the Second Circuit correctly applied the plain-error standard to a defendant's *ex post facto* challenge to his conviction. 560 U.S. 258, 260 (2010). The Court decided the legal issue related to the plain-error rule but then remanded for the circuit court to apply the decision to the defendant's challenge. *Id.* at 266–67 (noting such a remand was "[c]onsistent with our practice").

The Court could do the same here. The Court should grant certiorari to decide that § 3583(g) is unconstitutional. The Court could then remand the case for the third and fourth prongs of the plain-error analysis.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted. In the alternative, Mr. Coston requests that the Court hold his case until the Court rules on similar cases presenting the issues raised here.

Respectfully submitted,

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