

No. _____

In the
Supreme Court of the United States

Anilou Beltran Del Rio,

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

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

QUESTIONS PRESENTED

Whether 18 U.S.C. § 3583(g) comports with the Fifth and Sixth Amendments?

PARTIES TO THE PROCEEDING

Petitioner is Anilou Beltran Del Rio, 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 Anilou Beltran Del Rio 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. Del Rio*, 805 Fed. Appx. 333 (5th Cir. July 7, 2020)(unpublished).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 July 7, 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

Petitioner Anilou Beltran Del Rio pleaded guilty to drug trafficking: conspiracy to possess more than a kilogram of heroin with intent to distribute it. *See* (Record in the Court of Appeals, at 36-38). She received 57 months imprisonment and a term of supervised release. *See* (Record in the Court of Appeals, at 67-69).

After her release from prison, she used and possessed marijuana, methamphetamine, and cocaine, missed urinalysis and counseling appointments, and associated with a felon. *See* (Record in the Court of Appeals, at 79-83). Probation filed a Petition to revoke supervision alleging these grounds. *See* (Record in the Court of Appeals, at 79-83). Petitioner would eventually plead true to these violations. *See* (Record in the Court of Appeals, at 110-111). The Petition also said that revocation would be mandatory under 18 U.S.C. §3583(g), due to the defendant's refusal to participate in drug testing. *See* (Record in the Court of Appeals, at 83).

After finding the uncontested allegations true at the sentencing hearing, the court revoked supervised release and imposed 24 months of imprisonment, to be followed by 24 more months of supervised release. *See* (Record in the Court of Appeals, at 119)(emphasis added).

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). She also presented a claim of procedural error related to the court’s misapplication the Sentencing Commission’s advisory policy statements related to supervised release.

After a limited remand regarding the policy statement issue, the court of appeals affirmed. *See* [Appx. A, at 2]. It rejected the constitutional argument with the following commentary:

Next, Del Rio argues 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 she concedes, review of this unpreserved issue is for plain error. *See Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). To prevail on plain error review, she must show a forfeited error that is clear or obvious and that affects her substantial rights. *See id.* If she makes such a showing, this court has the discretion to correct the error and should do so “only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks, citation, and alteration omitted).

The Supreme Court's decision in *Haymond* addressed the constitutionality of § 3583(k), and the plurality opinion specifically declined to “express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g).” *Haymond*, 139 S. Ct at 2382 n.7 (plurality opinion). The application of § 3583(g) was not plain error. *See United States v. Badgett*, 957 F.3d 536, 539-41 (5th Cir. 2020).

[Appx. A, at pp.2-3].

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 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) of Title 18 compels the district court to impose a term of imprisonment when a defendant on supervised release possesses illegal drugs, possesses a firearm, refuses to undergo drug testing, or tests positive three times. A straightforward application of *Alleyne*, therefore, would tend to show that the facts triggering mandatory revocation 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 proceeding 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).¹

¹ Petitioner is slated for release April 21, 2021. Even assuming that no decision can be reached on the applicability of *Haymond* in this time-frame, this does not mean that Petitioner can be helped. As this Court has recognized, district courts may respond to a finding of erroneous imprisonment by loosening conditions of release or reducing the term. *See Johnson v. United States*, 529 U.S. 53, 60 (2000).

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 3rd day of December, 2020.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner