No. _____

In the

Supreme Court of the United States

_____

Michael Adair Mankin,

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 Michael Adair Mankin, 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 Michael Adair Mankin seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Mankin*, 813 F. App'x 162 (5th Cir. July 24, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence for the underlying criminal case is attached as Appendix B. The district court's judgment of revocation and sentence is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on July 24, 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 2006, Petitioner Michael Adair Mankin received a sentence of 188 months for bank robbery, together with a three-year term of supervised release, under 18 U.S.C § 2113(a). *See* (Record in the Court of Appeals, at 43–46).

Mr. Mankin began serving his term of supervised release on July 19, 2019. (Record in the Court of Appeals, at 54). On October 18, 2019, the probation officer filed a Petition for Offender under Supervision alleging that Mankin committed several violations of the terms of his supervised release. (Record in the Court of Appeals, at 54–58). Included among the alleged violations, the Petition claimed that Mankin submitted more than three positive drug tests over the course of one year. (Record in the Court of Appeals, at 55, 57). The Petition concluded that Mr. Mankin'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 57). Mr. Mankin's violations were calculated as Grade C, which combined with his Criminal History Category of VI to result in a guideline imprisonment range of 8 to 14 months. (Record in the Court of Appeals, at 58). Citing 18 U.S.C. § 3583(g)(4), the petition concluded that the court must "[s]entence [Mr. Mankin] to a term of imprisonment" because he faced "[m]andatory revocation for more than 3 positive drug tests over the course of 1 year." (Record in the Court of Appeals, at 57).

A warrant was issued for Mr. Mankin's arrest, and he was arrested on October 24, 2019. (Record in the Court of Appeals, at 58). A revocation hearing was held on November 7, 2019. (Record in the Court of Appeals, at 88–116). After Mr. Mankin signaled his intent to admit the truth of the allegations against him, (Record in the Court of Appeals, at.91), but before hearing arguments about the propriety of revoking Mr. Mankin's supervised release, *see* (Record in the Court of Appeals, at 101–05), the district court advised him:

> If you admit that everything in this Motion to Revoke Term of Supervised Release says is true, then I'll make a finding on the record that everything that motion says is true. I'll find on the record that you violated your conditions of supervised release in each of the respects alleged in the motion, and I'll express the conclusion and then find on the record that your term and condition of supervised release should be revoked.

(Record in the Court of Appeals, at 94).

Nonetheless, Mr. Mankin admitted the truth of the allegations against him in the petition. (Record in the Court of Appeals, at 95). The court then found that Mr. Mankin had violated the conditions of his supervised release and concluded "that his term and conditions of supervised release should be and . . . are hereby revoked." (Record in the Court of Appeals, at 95).

Despite the court's assertion that Mr. Mankin would be revoked if it found the allegations against him true, Mr. Mankin's attorney advocated for inpatient rehabilitation in lieu of incarceration. (Record in the Court of Appeals, at 102).

Nonetheless, the district court imposed a sentence of ten months' imprisonment and 22 months of supervised release. (Record in the Court of Appeals, at 106).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court erred in applying the mandatory revocation provision of 18 U.S.C. §3583(g), because that provision 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:

> On appeal, Mankin argues for the first time 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. 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.*
>
> *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).
>
> 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)(3) of Title 18 compels the district court to impose a term of imprisonment when a defendant on supervised release refuses to comply with drug testing imposed as a condition of supervised release. A straightforward application of *Alleyne*, therefore, would tend to show that the fact of such refusal 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 refusal to comply with required drug testing. *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 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 21st day of December, 2020.

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