No. _____

In the

Supreme Court of the United States

_____

Christopher Brent Garner,

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) unconstitutionally deprives federal supervised releasees of the right to trial by jury?

Whether courts of appeals reviewing sentences following the revocation of federal supervised release must ignore preserved legal errors so long as they are not clear or obvious?

PARTIES TO THE PROCEEDING

Petitioner is Christopher Brent Garner, 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 Christopher Brent Garner 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. Garner*, 969 F.3d 550, 552 (5th Cir. 2020), *as revised* (Aug. 14, 2020). 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 August 13, 2020 and revised the next day. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUIONAL PROVISION

Section 3583(e) of Title 18 reads:

> (e) **Modification of Conditions or Revocation**.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
>
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the

modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

Section 3583(g) of Title 18 reads:

(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 to the United States Constitution 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 Christopher Brent Garner sustained a conviction for drug trafficking and ultimately received a sentence of 100 months (reduced from 120 months following litigation under 18 U.S.C. §3582(c)). *See* (Record in the Court of Appeals, at 145-151). He began a term of supervised release, and briefly succeeded in "maintain[ing] full time employment as a salesperson since the onset of supervision, and … maintain[ing] a stable residence with his girl-friend in Fort Worth, Texas." (Record in the Court of Appeals, at 163). But he soon faltered due to substance abuse. Police arrested him for assault due to a fight outside a bar, and the court changed his conditions to require total alcohol abstinence. See (Record in the Court of Appeals, at 163). Then, he was arrested for possessing a very small amount of methamphetamine and associated needles. *See* (Record in the Court of Appeals, at 162). Further, he admitted to his Probation Officer that he consumed alcohol and tried to evade a positive drug test. *See* (Record in the Court of Appeals, at 163).

A Petition to revoke his term of release followed, which stated that he was subject to:

> [m]andatory revocation for possession of a controlled substance and refusal to comply with drug testing. Sentence to a term of imprisonment. 18 U.S.C. § 3583(g)(1) & (3).

(Record in the Court of Appeals, at 164). The Petition calculated an advisory range of imprisonment of 18-24 months imprisonment under Chapter 7 of the Federal Sentencing Guideline Manual. *See* (Record in the Court of Appeals, at 164).

The defense filed a written objection to the application of 18 U.S.C. §3583(g), arguing that it deprived him of the right to a jury trial and proof beyond a reasonable doubt under the reasoning of *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019), which found constitutional infirmity in 18 U.S.C. §3583(k). *See* (Record in the Court of Appeals, at 38-42). The Objection expressly requested that the court adjudicate the violation without the mandatory revocation provision. *See* (Record in the Court of Appeals, at 41). The government defended the statute's constitutionality, and after extensive colloquy on the issue the court agreed with the government. *See* (Record in the Court of Appeals, at 52-55, 80-87). The court did not say that it would have revoked the defendant's term of release in the absence of the mandatory provisions of §3583(g). *See* (Record in the Court of Appeals, at 87).

Mr. Garner's loved ones described him as hardworking and caring. *See* (Record in the Court of Appeals, at 88-90). His attorney emphasized the role that his early child abuse and sub-stance abuse played in the trajectory of his life. *See* (Record in the Court of Appeals, at 90-93). Speaking for him-self, Mr. Garner described a religious conversion to the judge, which gave him hope for a different kind of future. *See* (Record in the Court of Appeals, at 90-93).

After noting Mr. Garner's criminal history, the court imposed a sentence of 36 months, and an additional 24-month term of release. *See* (Record in the Court of Appeals, at 96). The court ex-plained its decision this way:

> Of course, a number of the charges – the description of your criminal history goes from paragraph 34 to paragraph 71 of the Presentence Re-port, and that includes some charges that were dismissed or where the outcome is unknown, but there are enough of the charges that you were

> convicted of, either at trial or on a plea of guilty, for me to understand **that you have not had much respect for the law.**

(Record in the Court of Appeals, at 95)(emphasis added). The defense objected to the sentence, after it was pronounced, as substantively and procedurally unreasonable. *See* (Record in the Court of Appeals, at 99).

B. Appellate Proceedings

Petitioner appealed, arguing first that the district court erred in applying the mandatory revocation provisions of 18 U.S.C. §3583(g). *See* Appellant's Initial Brief in *United States v. Garner*, No. 18-10884, 2020 WL 881768, at *7-18 (Filed 5th Cir. Feb. 18, 2020)("Initial Brief"). He contended that this provision offended the jury trial guarantee of the Sixth Amendment. *See* Initial Brief, at *7-18. To that effect, he referenced Justice Breyer's concurrence in *Haymond*, which names three factors to be considered in deciding whether facts named in a revocation statute should receive jury protections. *See id.* at *11-16. Specifically, in finding that 3583(k) offends the constitution, it noted that §3583(k) punished the violation of separate criminal statutes, that it imposed a mandatory minimum punishment, and that it did so by imposing a lengthy minimum term of ten years. *See Haymond*, 139 S.Ct. at 2368 (Breyer, J., concurring). Petitioner noted that §3583(g) accorded special significance to independently punishable criminal conduct, and set forth a mandatory minimum (at least one day's imprisonment). *See* Initial Brief, at *7-18. These two features of §3583(g), he argued, created a strong analogy to §3583(k) under Justice Breyer's concurring opinion in *Haymond*. *See id.*

Petitioner expressly requested that the court sever and excise this provision from 18 U.S.C. §3583(g), empowering the district court to continue the supervised release. *See id.* at *14-15. Alternatively, he argued that the district court's use of 18 U.S.C. §3583(g) harmed him by authorizing the district court to consider "the need for the sentence to respect for the law." *See id.* at *17-18. As discussed below, that sentencing factor is generally off-limits in revocation cases under Fifth Circuit precedent. *See United States v. Sanchez*, 900 F.3d 678, 684 (5th Cir. 2018). But district courts may arguably consider this factor in revocation cases arising under 18 U.S.C. §3583(g). *See United States v. Illies*, 805 F.3d 607, 609 (5th Cir. 2015). Because the court actually considered the need to promote respect for the law in the revocation sentence, *see* (Record in the Court of Appeals, at 95), he argued that the use of §3583(g) likely affected the sentence imposed by arguably allowing the district court to consider a factor that it thought to call for a higher sentence, *see* Initial Brief, at *17-18.

The court of appeals disagreed. It thought that Justice Breyer's opinion in *Haymond* stated the holding of that case. *See United States v. Garner*, 969 F.3d 550, 552 (5th Cir. 2020), *as revised August 14, 2020*. But it thought that the three factors discussed therein showed that 18 U.S.C. §3583(g) passed constitutional muster. *See Garner*, 969 F.3d at 552. It said:

> First, while Subsection (g) singles out certain conduct, only some of it is criminal. Indeed, Subsection (g) applies more generally to violations of common release conditions and non-criminal behavior the court expects prisoners to avoid during supervision…

***

> Second, although Subsection (g) takes away the judge's discretion to decide whether a violation should result in imprisonment, it doesn't dictate the length of the sentence.
>
> Third, Subsection (g) doesn't limit the judge's discretion in the same "particular manner" as Subsection (k). Instead of prescribing a mandatory minimum, Subsection (g) grants the judge discretion to impose any sentence up to the maximum authorized under § 3583(e) (which depends on the severity of the initial offense). Unlike Subsection (k), then, any sentence imposed under Subsection (g) is "limited by the severity of the original crime of conviction, not the conduct that results in revocation." That looks more like revocation as it is "typically understood"—as "part of the penalty for the initial offense," rather than punishment for a new crime.
>
> Because of these key differences, we hold that Subsection (g) is not unconstitutional under *Haymond*, and the district court did not err in its revocation decision.

Garner, 969 F.3d at 553 (internal footnotes omitted)(citing *Haymond*, *supra*).

Petitioner also argued that the district court reversibly erred in considering the need to promote respect for the law in fashioning its sentence. *See* Initial Brief, at *19-24. He conceded that the Fifth Circuit had held that consideration of this factor is not clear or obvious error in cases arising under §3583(g). *See id*. at *22 (citing *Illies*, *supra*). He further conceded that Fifth Circuit law required a releasee appealing a revocation sentence to show that any claim of legal error is free from doubt, even if it is properly preserved. *See id*. at *20 (citing *Sanchez*, *supra*).

Yet he maintained that this aspect of Fifth Circuit law – requiring a showing of clear or obvious error even when it is preserved -- was incorrect. *See id*. at *20, n.1 (citing the grant of certiorari in *Holguin-Hernandez v. United States*, 139 S.Ct. 2666 (June 3, 2019)). In the Reply Brief, he argued that *Holguin-Hernandez* overruled the

Fifth Circuit standard of review for revocation appeals, changing it from "plain unreasonableness" to "reasonableness." *See* Appellant's Reply Brief in *United States v. Garner*, No. 18-10884, 2020 WL 1976653, at *10-11 (Filed 5th Cir. April 9, 2020).

Further, he maintained that while consideration of "the need to promote respect for the law" is not clearly or obviously erroneous in cases arising under 3583(g), it is nonetheless error. *See* Initial Brief, at *21-24. After all, Congress compelled district courts revoking supervised release to consider every factor enumerated at 18 U.S.C. §3553, separately enumerating every single Subsection of that statute **except §3553(a)(2)(A)**, which includes "the need to promote respect for the law." Whatever Congress meant to accomplish by eliding this factor in revocation cases, it is difficult to see why the mandatory nature of the revocation would change its goal.

The court of appeals held that *Holguin-Hernandez* did not alter the standard of review for cases arising from the revocation of supervised release. Rather, it believed that releasees appealing a revocation sentence must show that all such sentences are "plainly unreasonable." It thus rejected the claim of error, on the grounds that there is no clear or obvious error in considering the need to promote respect for the law in cases arising under §3583(g):

> Garner also argues that the district court erred in increasing his revocation sentence in order to "promote respect for the law." This argument is foreclosed by *United States v. Illies*, 805 F.3d 607 (5th Cir. 2015), where we held that no plain, clear, or obvious error attends a district court's consideration of the retributive factors set forth in § 3553(a) when revocation is mandatory under § 3583(g). Contrary to Garner's argument, *Holguin-Hernandez v. United States*, —— U.S. ——, 140 S. Ct. 762, 206 L.Ed.2d 95 (2020), did not change this court's

> standard of review for revocation sentences. *See, e.g., United States v. Chappell*, 801 F. App'x 306, 307 (5th Cir. 2020). Although an unpublished opinion issued on or after January 1, 1996 is generally not controlling precedent, it may be considered as persuasive authority. *See Ballard v. Burton*, 444 F.3d 391, 401 (5th Cir. 2006).

Garner, 969 F.3d at 553, n.12.

REASONS FOR GRANTING THE PETITION

I. The opinion below conflicts with *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019).

1. The opinion below misapplies *Haymond*.

Other than the fact of a prior conviction, any fact that increases the defendant's maximum or minimum term of imprisonment must be proven to a jury beyond a reasonable doubt, and, in federal cases, placed in the indictment. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 102 (2013); *United States v. Cotton*, 535 U.S. 625, 627 (2002). There is some controversy, however, as to how this rule might apply to facts that give rise to a revocation of supervised release.

In *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019), five Justices held that supervised release revocations are exempt from a mechanical application of this rule. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring); *id.* at 2391 (Alito, J., dissenting). At the same time, however, five Justices held that 18 U.S.C. §3583(k), which mandates revocation and a ten year mandatory minimum upon a judge's finding that the defendant possessed child pornography, violates the Sixth Amendment guarantee of a jury trial. *See Haymond*, 139 S.Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring). This equivocal outcome resulted from a splintered opinion whose holding should be clarified by a majority of the Court. Further, even giving the decision a narrow reading, lower courts, including the court and opinion below, have not correctly recognized its implications for 18 U.S.C. §3583(g). They have accordingly continued to sanction the

widespread violation of the Sixth Amendment, a fundamental protection against oppressive governmental power to incarcerate.

Haymond addressed the constitutionality of 18 U.S.C. §3583(k), which requires revocation and a five year term of imprisonment when sex offenders on federal supervised release possess child pornography. *See Haymond*, 139 S.Ct. at 2375 (Gorsuch, J., plurality op.). Five Justices found that the provision violates the jury trial guarantee of the Sixth Amendment, though they did not join a common opinion. *See Haymond*, 139 S.Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring). Nonetheless, all five of these Justices concurred that imprisonment following a revocation constitutes punishment for the defendant's initial offense, not for subsequent conduct committed while on release. *See Haymond*, 139 S.Ct. at 2378 (Gorsuch, J., plurality op.) ("The defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime."); *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring)("Revocation of supervised release is typically understood as 'part of the penalty for the initial offense.'")(quoting *Johnson v. United States*, 529 U.S. 694, 700 (2000)).

A four Justice plurality of Gorsuch, Kagan, Sotomayor and Ginsburg treated facts found in a revocation proceeding just like facts found in a sentencing proceeding, labels and timing notwithstanding. *See Haymond*, 139 S.Ct. at 2379-2381 (Gorsuch, J. plurality op.). Because the finding that Haymond committed a new sex crime on supervised release produced a mandatory minimum and expanded maximum, it was,

in the plurality's view, subject to the jury trial and reasonable doubt guarantees. Justice Gorsuch explained:

> Our precedents, *Apprendi*, *Blakely*, *and Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof be-yond a reasonable doubt "no matter" what the government chooses to call the exercise.

Id. at 2379.

In a concurrence, Justice Breyer did not go so far. In his view, supervised release may be likened to parole, violations of which may be ordinarily found without the aid of a jury. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring). But he vacated Haymond's sentence because of three features of §3583(k):

> 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 "com-mit[ted] any" listed "criminal offense."

Id. at 2386.

The Gorsuch plurality reserved any conclusion about the constitutionality of 18 U.S.C. §3583(g), which compels revocation and imprisonment when the district court finds by a preponderance of the evidence that the defendant has used or possessed illegal drugs, failed or refused a drug test, or possessed a firearm. *See 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."). Nonetheless, the straightforward application of *Apprendi* and *Alleyne* championed in this opinion leaves little question about the appropriate treatment of this provision. Subsection (g) imposes a mandatory minimum upon a judge's finding about the defendant's conduct: the defendant must be imprisoned. However the proceeding is labeled, the rule of *Apprendi* and of *Alleyne* require this fact be made by a jury.

A straightforward application of Justice Breyer's concurrence likewise suggests that Subsection (g) offends the constitution. Two of the three factors named by Justice Breyer are present in §3583(g). First Subsection (g) names "a discrete set of federal criminal offenses," namely: unlawful possession of controlled substances, §3583(g)(1), possession of a firearm (necessarily a violation of 18 U.S.C. § 922(g) when the underlying offense is a felony), §3583(g)(2), and repeated use of a controlled substance, as evidenced by positive drug tests, §3583(g)(4). The only other basis for mandatory revocation named in §3583(g) – non-compliance with drug testing – is so closely associated with illegal drug use as to be essentially a means of proving a discrete federal offense. The statute thus creates the appearance of a legislative effort to punish criminal offenses while circumventing cumbersome constitutional guarantees.

Further, the findings in §3583(g) "take[] away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long." They demand imprisonment when found.

The §3583(g) findings do not, like §3583(k), compel a lengthy term of imprisonment. But that should not change the overall outcome. Even a day's prison sentence carries weighty constitutional significance in a free society. *See Glover v. United States*, 531 U.S. 198 (2001)("any amount of actual jail time has Sixth Amendment significance."). Because a short prison sentence is qualitatively different from a sentence that does not involve imprisonment at all, the length of the minimum is of less significance than the fact of the minimum. *See Gall v. United States*, 552 U.S. 38, 48 (2007)("We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.")(emphasis added).

The court below found that Justice Breyer's concurrence represented the holding of the Court in *Haymond*. *United States v. Garner*, 969 F.3d 550, 552 (5th Cir. 2020), as revised (Aug. 14, 2020)(holding, of Justice Breyer in *Haymond*, that "because he provided the 'narrowest grounds' in a case where 'no single rationale explaining the result enjoys the assent of five justices,' his concurrence represents 'the holding of the Court.'"). It further found that Subsection (g) survived scrutiny under the standards of the concurrence. *See Garner*, 969 F.3d at 552. But its analysis

overlooks the goals of the opinion, and unduly diminishes the protections of the Sixth Amendment.

As to the first factor, the court below held that "while Subsection (g) singles out certain conduct, only some of it is criminal." *Garner*, 969 F.3d at 553. True, one of the facts that may give rise to revocation – refusal to take a drug test – is not strictly criminal. A person not subject to supervised release may indeed decline drug testing.

But the remaining triggers to mandatory revocation named in §3583(g) do violate criminal prohibitions, at least where the defendant has been convicted of a felony. Further, the analysis of the court below misses the point of the first factor, which is to ensure that supervised release revocations do not circumvent the constitutional protections accompanying a new prosecution. And the close association of refusing a drug test with criminal activity (use of illegal drugs) makes this a real concern. If Subsection (k) had provided a lengthy mandatory minimum to anyone on release for a sex offense who refused Probation access to his computer, for example, there is little question that this would not have saved it in *Haymond*. That one of the acts triggering a mandatory minimum serves as a **proxy** for criminal activity, hence **lessening** the difficulties of proof, does not make the provision less problematic.

As to the second factor, the court below held that "although Subsection (g) takes away the judge's discretion to decide whether a violation should result in imprisonment, it doesn't dictate the length of the sentence." *Garner*, 969 F.3d at 553. But this merely collapses the second and third factors of Justice Breyer's concurrence,

which were separately enumerated in that opinion. Subsection (g) carries a mandatory minimum of one-day imprisonment. The second factor weighs in favor of the constitutional challenge.

Finally, as to the third factor, the court below correctly observed that Subsection (g) does not tell the judge how long to imprison the defendant. *See Garner*, 969 F.3d at 553. That is true, and weighs in favor of the statute's validity. But if this one factor were dispositive, we are left to wonder why the concurrence did not say as much. Instead, it named three factors that all have to be weighed.

Further, in assessing the significance of the third factor, the court below should have considered the severity of the conduct targeted by the legislature. The goal – or a goal, at least -- of *Apprendi* analysis is to ensure that the jury trial guarantee is not circumvented in the punishment of criminal acts. *See Blakely v. Washington*, 542 U.S. 296, 307, & n.10 (2004). As such, the absence of a lengthy mandatory minimum should not much reduce the Court's suspicions that such circumvention is afoot when the targeted criminal activity is relatively minor in nature. A legislature punishing child pornography is likely to prescribe a lengthy mandatory minimum. One punishing drug possessors is likely to prescribe a shorter mandatory minimum. But people accused of both offenses enjoy a fundamental right to trial by jury.

2. The issue merits this Court's attention.

There does not appear to be a division of authority in the courts of appeals as to the constitutionality of 18 U.S.C. §3583(g). *See United States v. Ewing*, 829 F. App'x

325, 330 (10th Cir. 2020)(unpublished)(collecting cases). This Court should nonetheless grant certiorari to resolve the question for three reasons.

First, if Subsection (g) in fact violates the constitution, it produces a remarkably widespread deprivation of constitutional rights. The number of federal supervised release defendants is vast and growing. In 2017, it reached 114,000, having nearly tripled in three decades of steady growth. *See* Pew Charitable Trusts, *Number of Offenders on Federal Supervised Release Hits All-Time High* (January 2017), *available at* https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf , *last visited January 9, 2021.* All of these individuals stand to lose their liberty on a judge's finding – by a preponderance of the evidence -- of non-compliance with drug testing, of drug possession, or of firearm possession. The mandatory revocation provisions of Subsection (g), moreover, are routinely used in revocation proceedings. A Westlaw search of the term "3583(g)" conducted on January 8, 2020 revealed 543 cases. And this is surely a tiny fraction of unreported district court cases involving this provision. Mandatory revocation under §3583(g) is no isolated transgression of a constitutional limit. It is the systematic denigration of a core protection against unjust incarceration. And it operates not in a single state or group of states exercising a general police power, but in the machinery of a federal government whose reach the Framers sought strictly to limit.

Second, historically, federal circuits have shown reluctance to apply *Apprendi* precedent to new circumstances. For example, they permitted judges to determine

drug quantities that changed the statutory maximum even after *Jones v. United States*, 526 U.S. 227 (1999), signaled the oncoming *Apprendi* rule. *See United States v. Miller*, 217 F.3d 842 (4th Cir. 2000), *on reh'g en banc in part sub nom. United States v. Promise*, 255 F.3d 150 (4th Cir. 2001)(" No circuit to address this question has extended *Jones* to § 841(b).")(collecting cases). And no court of appeals recognized the obvious implications of *Apprendi* for mandatory Guidelines before *Blakely v. United States*, 542 U.S. 296 (2004). *See* Petition for Certiorari for the United States in *United States v. Booker*, No. 04-104, at *10 (Filed July 21, 2004)("After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.")(collecting cases).

There is little reason to think that federal circuits will give serious consideration to the implications of *Haymond* in cases that do not arise from 18 U.S.C. §3583(k). Usually, this Court may assume that close constitutional questions will give rise to circuit splits if they are litigated with sufficient frequency.[1] But this has not

[1] The rule of the Fifth and Eleventh Circuits, however, tends to undermine this assumption. Those courts understand the binding force of their own precedent to prevail over intervening Supreme Court opinions, unless the intervening Supreme Court opinion is precisely on point. *See United States v. Patterson*, 829 F. App'x 917, 920–21 (11th Cir. 2020)(unpublished)("…while *Haymond* invalidated § 3583(k), it did not decide the constitutionality of § 3583(e). …As a result, we remain bound by this Court's opinion …which forecloses Patterson's challenge to the constitutionality of §

been the historic reality with *Apprendi* questions, perhaps because they stand to change very basic trial practices. Accordingly, if this Court waits for a circuit split, it is probably sanctioning the constitutional violation to continue indefinitely.

Third, a grant of certiorari would permit this Court to clarify the status of *Marks v. United States*, 430 F.3d 188 (1977). *Marks* holds that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 F.3d at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Recently questions about the application of *Marks* have generated serious controversy and confusion. In *Ramos v. Louisiana*, __U.S.__, 140 S.Ct. 1390 (2020)(itself a fragmented decision, ironically), the plurality and dissent could not agree as to the proper application of *Marks* when two opinions, both necessary to the outcome, were so different that it became difficult to say which was narrower. *See Ramos*, 140 S.Ct. at 1403 (Gorsuch, J., plurality); *id.* at 1430 (Alito, J., dissenting). Further, as the *Ramos* dissent acknowledged without contradiction, "[t]he *Marks* rule is controversial," and opportunities to clarify its application have recently slipped through the Court's fingers. *Id.* at 1430 (Alito, J., dissenting) ("…two

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3583(e)(3))(citing *Haymond, supra*, and *United States v. Brown*, 342 F.3d 1245 (11th Cir. 2003)); *United States v. Rose*, 587 F.3d 695, 706 (5th Cir. 2009)("We will overrule a prior panel opinion in response to an intervening decision of the Supreme Court only if such overruling is unequivocally directed.")(internal quotation marks omitted)(quoting *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 300 (5th Cir.2008) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir.1991))).

Terms ago, we granted review in a case that implicated its meaning…. But we ultimately decided the case on another ground and left the *Marks* rule intact.")(internal citation omitted)(citing *Hughes v. United States*, 584 U. S. __, 138 S.Ct. 1765 (2018)). *Ramos* was another missed opportunity on this score, as no opinion discussing *Marks* garnered five votes.

The uncertain status and application of *Marks* has generated confusion and conflict in lower courts, see *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431 (6th Cir. 2020)(application of Marks described as a "vexing task"); *id.* at 437 (disputing application of *Marks* in light of *Ramos*); *id.* at 455 (Clay, J., dissenting)(disputing application of *Marks* in light of *Ramos*); *Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020)(disputing application of *Marks*), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020); *id.* at 916 (Willett, J., dissenting)(disputing application of *Marks*), and even this Court, *see June Medical Services v. Russo*, __U.S.__, 140 S.Ct. 2103, 2148 (2020)(Thomas, J., dissenting)(asserting a disputed interpretation of *Marks*), on the most weighty matters before the federal judiciary. This Court should resolve the confusion quickly.

A grant certiorari in this case would present an excellent opportunity to address the validity and application of *Marks*. In order to decide whether 18 U.S.C. §3583(g) survives constitutional scrutiny under *Haymond*, it is first necessary to determine which opinion states the holding of that case. *See Garner*, 969 F.3d at 552 (addressing that question before applying *Haymond*); *United States v. Seighman*, 966 F.3d 237, 242 (3d Cir. 2020)(same); *United States v. Coston*, 964 F.3d 289, 295 (4th

Cir. 2020)(same); *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020)(same); *United States v. Watters*, 947 F.3d 493, 497 (8th Cir. 2020)(same); *Ewing*, 829 F. App'x at 329 (same). Because no opinion garnered five votes in *Haymond*, the validity and application of *Marks* will likely be a critical part of any merits resolution of the instant case.

3. Mr. Garner's case is the right vehicle.

This case is an excellent vehicle to decide the constitutionality of 18 U.S.C. §3583(g). The issue was preserved in district court. S*ee* (Record in the Court of Appeals, at 38-42, 80-87). This appears to be rare, judging by the relative volume of plain error and preserved litigation under 3583(g). *Compare, in the last six months, United States v. Ka*, 982 F.3d 219 (4th Cir. 2020)(plain error); *Ewing*, *supra* (same)*; United States v. Green*, 819 Fed.Appx. 265 (5th Cir. 2020)(unpublished)(same); *United States v. Dorman*, 818 Fed.Appx. 378 (5th Cir. 2020)(unpublished)(same); *United States v. Pandey*, 815 Fed.Appx. 800 (5th Cir. 2020)(unpublished); *United States v. Mankin*, 813 Fed.Appx. 162 (5th Cir. 2020)(unpublished)(same); *United States v. Seighman*, 966 F.3d 237 (3d Cir. 2020)(same); *United States v. Reavly*, 820 Fed.Appx. 211 (4th Cir. 2020); *United States v. Coston*, 964 F.3d 289 (4th Cir. 2020); *United States v. Shabazz*, 811 Fed.Appx. 919 (5th Cir. 2020)(unpublished), ***with*** *Garner*, *supra (*adjudicating a preserved challenge); *United States v. Onick*, 830 Fed.Appx. 442 (5th Cir. 2020)(unpublished)(same). It generated a published opinion below. The defendant received a stiff sentence by the standards of supervised release revocations – 36 months – and accordingly stands to obtain meaningful relief after a decision on

the merits. Because many revocation sentences are short, *see* USSG §7B1.4, this is not always the case.

Further, the defendant argued in both district court,[2] and the court of appeals,[3] that the court could rectify the constitutional error by severing the mandatory revocation provision of §3583(g), rather than convening a jury trial each time Probation accuses a releasee of failing a drug test. This means that the full range of remedies remains available in this case should the Court find a constitutional error.

This case well presents a serious constitutional question that merits this Court's review. This Court should grant certiorari and end the widespread deprivation of the right to trial by jury suffered by federal supervised releasees.

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[2] *See* (Record in the Court of Appeals, at 41)(("...in the event that the Court finds that Mr. Garner violated the terms of his supervised release, he respectfully requests that the Court set aside the mandatory revocation provision in§ 3583(g) as unconstitutional, and consider other remedies available to the Court.").

[3] *See* Appellant's Initial Brief in *United States v. Garner*, No. 18-10884, 2020 WL 881768 (Filed 5th Cir. Feb. 18, 2020),

II. There is a long-standing division of federal authority regarding the proper standard of review for terms of imprisonment following the revocation of supervised release.

1. The courts are divided.

Section 3742(e) of Title 18 provides a standard of review for the appeal of federal criminal sentences. Specifically, it provides that sentences should be reviewed to determine whether they were "imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. §3742(e)(2). But under the statute a sentence "for which there is no applicable sentencing guideline" is reviewed to determine whether it is "plainly unreasonable." 18 U.S.C. §3742(e)(4). Because revocation of supervised release is governed by policy statements rather than sentencing guidelines, revocation sentences were long thought to be reviewed only for "plain unreasonableness." *See e.g. United States v. Stiefel*, 207 F.3d 256, 259 (5th Cir.2000).

United States v. Booker, 543 U.S. 220 (2005), however, severed and excised this portion of the criminal code. *Booker* held that the facts determining the maximum of a defendant's mandatory guideline sentence must be determined by a jury and proven beyond a reasonable doubt. *See Booker*, 543 U.S. at 226-227. But it further concluded that Congress would have preferred advisory guidelines to mandatory guidelines whose factual components were decided by a jury beyond a reasonable doubt. *See id.* at 245. In order to effectuate what it perceived as Congress's second choice, it "severed and excised" those portions of the Code that enforced or contemplated mandatory Guidelines. *See id.* at 245. Section 3742(e) was among those provisions, and was

replaced by a single standard of review for "reasonableness." *See id*. at 259, 261. The Court did not distinguish between different portions of 18 U.S.C. §3742(e). *See id*. at 259, 261.

The result of the *Booker* opinion on this point has been a deep and persistent circuit split on the current standard of review for sentences of imprisonment following the revocation of supervised release. Some circuits understand the *Booker* opinion to mean what it says – that none of 18 U.S.C. §3742(e) is enforceable, including §3742(e)(4), and that all of it has been supplanted by review for reasonableness. *See United States v. Lewis*, 424 F.3d 239, 243 (2d Cir. 2005); *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir.2005); *United States v. Miqbel*, 444 F.3d 1173, 1176, n.5 (9th Cir. 2006); *United States v. Sweeting*, 437 F.3d 1105, 1106-1107 (11th Cir.2006). But other courts, like the one below, have concluded that the standard for revocation sentences remains "plain unreasonableness." *See United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006); *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011); *United States v. Sanchez*, 900 F.3d 678, 682 (5th 2018); *United States v. Kizeart*, 505 F.3d 672, 674–75 (7th Cir.2007).

In the court below, this means that some acknowledged errors in revocation cases will be affirmed because they are not clearly established under existing law, even if error has been impeccably preserved. *See Miller*, 634 F.3d at 844 ("…the court clearly considered § 3553(a)(2)(A) and in doing so, that court erred. Despite this mistake, the district court's error was not plainly unreasonable. When the district court sentenced Miller, our circuit's law on this question was unclear and therefore,

that court's consideration of § 3553(a)(2)(A) was not an obvious error.")(footnote omitted); *Sanchez*, 900 F.3d at 682 ("…the 'plainly unreasonable' standard, … has two steps… At the second step, however, we vacate the sentence only if the identified error is 'obvious under existing law,' such that the sentence is not just unreasonable but plainly unreasonable….Law from the 'obviousness' prong of Rule 52(b)'s plain error test informs this latter inquiry, …. notwithstanding that the error was in fact preserved.")(internal citations omitted).

And as this case shows, that view has persisted in the court below even after *Holguin-Hernandez v. United States*, __U.S. __, 140 S.Ct. 762 (2020), which mandated substantive reasonableness review for a sentence imposed following revocation. The court below has repeatedly held that *Holguin-Hernandez* is limited to the narrow question presented -- whether substantive reasonableness review must be preserved by an objection – and declared it irrelevant to closely related issues. *See United States v. Merritt*, 809 F. App'x 243, 244 (5th Cir. 2020)(unpublished)("The Supreme Court's decision in *United States v. Holguin-Hernandez* is inapplicable to this case of alleged procedural error…"); *United States v. Cuddington*, 812 F. App'x 241, 242 (5th Cir. 2020)(unpublished)("Our case law requiring a specific objection to preserve procedural error remains undisturbed, as we have previously held in at least one unpublished decision.")(citing *United States v. Gonzalez-Cortez*, 801 F. App'x 311, 312 n.1 (5th Cir. 2020)). And the published opinion below expressly rejects any suggestion that *Holguin-Hernandez* changed the standard of review in revocations from "plain unreasonableness" to "reasonableness." *See Garner*, 969 F.3d at 553, n.12.

2. The conflict merits this Court's attention.

As noted, the division of authority as to the standard of review for revocation cases has persisted for 15 years. It is balanced. And while there is good reason to think that *Holguin-Hernandez* has made this Court's position clear, the court below has passed on the opportunity to reevaluate its position in light of that guidance. Indeed, it has done so now in a published opinion. *See Garner*, 969 F.3d at 553, n.12. Finally, as noted above, there is a vast and growing population of federal supervised releases, each of whom may be subject to revocation. The standard of review is a basic and frequently litigated issue in the appeals of revocation sentences, and may affect the care with which revocation sentences are adjudicated in district court. It is an important issue that ought not depend on the accident of geography.

3. The position of the court below is wrong on the merits.

The court below holds that it must ignore errors in the revocation of supervised release so long as they are not clearly established. *See Miller*, 634 F.3d at 844; *Sanchez*, 900 F.3d at 682 .This is almost certainly wrong, for three reasons.

First, the court below grounds this conclusion in 18 U.S.C. §3742(e)(4), which stated that a court of appeals should determine whether a sentence "was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable." But the plain language of *Booker* severs and excises 18 U.S.C. §3742(e), replacing it with a general standard of reasonableness. *See Booker*, 543 U.S. at 245.

Second, any doubt ought to have been resolved by *Holguin-Hernandez*. That case plainly overruled the requirement of showing plain error in supervised release cases, at least when the defendant has objected to the sentence below. In *Holguin-Hernandez*, the defendant received a revocation sentence of 12 months, after requesting no additional prison time. *See Holguin-Hernandez*, 140 S.Ct. at 764. This Court held that this request, unreinforced by an objection to the reasonableness of the sentence, "preserved his claim on appeal that the 12-month sentence was unreasonably long." *Id*. In doing so, it held that "the question for an appellate court is simply, as here, whether the trial court's chosen sentence was 'reasonable' or whether the judge instead 'abused his discretion in determining that the § 3553(a) factors supported' the sentence imposed." *Id*. (quoting *Gall v. United States*, 552 U.S. 38, 56 (2007), and citing *Booker*, 543 U.S. at 261-262).

This Court thus directly stated the standard of review in cases arising from supervised release revocations like the one before it: "whether the trial court's chosen sentence was 'reasonable'..." Indeed, it repeatedly stated that the particular standard of review appropriate to the defendant's case was reasonableness review, not review for plain unreasonableness. *See id*. 766 ("Nothing more is needed to preserve the claim that a longer sentence is unreasonable."), *id*. ("Our decisions make plain that reasonableness is the label we have given to 'the familiar abuse-of-discretion standard' that 'applies to appellate review' of the trial court's sentencing decision.").

The very point of *Holguin-Hernandez* is that the defendant did not need to lodge a reasonableness objection to avoid plain error review of his reasonableness

claim. *See id.* 766. The decision would have been puzzling and pointless if the defendant, by mere virtue of his revocation status, were forced to show plain error anyway. As such, supervised release defendants need no longer show that the district court's error is free from doubt.

Third, even if the court below were correct in believing that the "plain unreasonableness" standard survived both *Booker* and *Holguin-Hernandez*, it would still be wrong to think that the standard compels the courts of appeals to ignore legal error. Supervised release revocations are governed by 18 U.S.C. §3583, by Federal Rule of Criminal Procedure 32.1, and by the protections of the Fifth and Sixth Amendments. The text of these provisions does not vary by judicial district. Accordingly, federal district courts ought not be permitted to apply widely different standards in supervised release proceedings, so long as they do not exceed some zone of reasonable disagreement.

There are some provisions that require courts to ignore legal error, so long as it does not represent a clear or obvious legal error. Federal Rule of Criminal Procedure 52(b) requires a showing of clear or obvious error when a party fails to object in district court. *See United States v. Olano*, 507 U.S. 725, 732 (1993). Section 2254 of Title 28 requires a state habeas petitioner seeking relief in federal court to show that his or her claim is based on "clearly established federal law." 28 U.S.C. §2254(d)(1).

But these provisions vindicate interests that are not at all implicated by the appeal of a supervised release revocation. The plain error rule seeks "to induce the

timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *See Puckett v. United States*, 556 U.S. 129, 134 (2009). By contrast, the court below will ignore legal error in supervised release revocations even if the defendant objects strenuously and with perfect clarity.

Section 2254 limits relief to state prisoners to vindicate the state's independent sovereign interest in the operation of its courts, and because state prisoners seeking federal review will have already received the benefit of at least one round of appellate review. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003). ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to further the principles of comity, finality, and federalism.")(internal quotation marks, quotation, and citations omitted)(citing and quoting *Williams v. Taylor*, 529 U.S. 362 (2000), and *id.* (opinion of STEVENS, J.)). A federal supervised releasee appealing to the circuit does not challenge the decision of another sovereign, and has received only one court's efforts to interpret the governing law.

Most importantly, the language of 18 U.S.C. §3742(e)(4) does not suggest an intent to disregard plain legal error. Rather, its reference to "plainly unreasonable" sentences – applicable where there is no applicable Guideline -- suggests only an intent to permit a wide zone of discretion as to the length of the sentence. It does not suggest an intent to immunize from review every antecedent legal error committed in the sentencing process.

The Fifth Circuit's decision in *United States v. Miller*, 634 F.d 841 (5th Cir. 2011), holds that preserved legal errors must be ignored in revocations unless they are clear or obvious. This holding is bizarre, and accomplishes no policy goal other than the abdication of meaningful review. Its continued application ignores multiple contrary Supreme Court decisions (*Booker* and *Holguin-Hernandez*), and it enjoys little support from the text of 18 U.S.C. §3742(e), a statute that has been excised in any case. This Court should overrule it.

4. This is the right vehicle.

Petitioner's case provides an excellent vehicle to address this conflict. Petitioner argued below that the district court erred in considering the "need to promote respect for the law" in his revocation. The court below expressly applied the "plainly unreasonable" standard of review to that claim. *See Garner*, 969 F.3d at553, n.12. It did not hold the defendant's claim of error forfeited, and would have been hard-pressed to do so under its law. The defendant objected to his sentence in district court on substantive reasonableness grounds. *See* (Record in the Court of Appeals, at 99). In the Fifth Circuit at the time of sentencing, this was the accepted means of preserving claims that sounded in substantive reasonableness terms. *See United States v. Peltier*, 505 F.3d 389 (5th Cir. 2006). A defendant's argument that the district court considered an improper factor in selecting the sentence is, under a Fifth Circuit law, a substantive reasonableness claim. *See United States v. Nikonova*, 480 F.3d 371, 376 (5th Cir. 2007), *abrogation on other grounds recognized by United States v. Delgado–Martinez*, 564 F.3d 750, 752 (5th Cir.2009). As such, the defendant's

substantive reasonableness objection was the approved way to preserve his claim that the district court erred in considering "the need to promote respect for the law" at sentencing.

Further, if a reviewing court were to discard the extreme deference inherent in the "plain unreasonableness standard," it would likely find that the district court. The district court referenced the defendant's lack of respect for the law when imposing sentence, making clear that it considered this factor when imposing sentence. *See* (Record in the Court of Appeals, at 95). The court below has held that a district court does not **plainly** err in considering this factor in cases arising under §3583(g). *See United States v. Illies*, 805 F.3d 607, 609 (5th Cir. 2015).

Likely, consideration of "the need to promote respect for the law" is not permitted in cases decided under §3583(g). "The need to promote respect for the law" is listed in 18 U.S.C. §3553(a)(2)(A) as among the factors that a court should consider when imposing a sentence for a new offense. Section 3583(e)(3) of Title 18 instructs a court adjudicating a violation of supervised release to consider all of the factors named in §3553(a) **except Subsection (a)(2)(A)**. Subsection (g) – compelling mandatory revocation when the defendant uses or possesses drugs – does not reference any factors named at §3553(a). The court below has thus reasoned that there is no clear or obvious error in considering the retributive factors named at §3553(a)(2)(A) if there is a mandatory revocation. *See Illies*, 805 F.3d at 60. 9Nonetheless, the deliberate elision of §3553(a)(2)(A) shows a clear Congressional concern about the propriety of retribution in a revocation. *See Sanchez*, 900 F.3d at

683; *United States v. Rivera*, 784 F.3d 1012, 1017 (5th Cir. 2015); *Miller*, 634 F.3d at 844. The fact that district courts need not consider any §3553(a) factors in a mandatory revocation case does not show any less distaste for the retributive factors in that setting.

In other words, the standard of review thus may well have decided the outcome of the case. This Court should grant certiorari to resolve the issue that has divided the courts of appeals and then either decide the merits of the case or remand to the Fifth Circuit.

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 11th day of January, 2021.

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