

No. _____

In the
Supreme Court of the United States

Christina Elizabeth Pandey,
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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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner is Christina Elizabeth Pandey, 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 Christina Elizabeth Pandey seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Pandey*, 815 F. App'x 800 (5th Cir. August 12, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and revocation of sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on August 12, 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 Christina Elizabeth Pandey served two concurrent 84 month sentences for drug trafficking. *See* (ROA.43). Although she maintained some periods of stable employment and extended sobriety on supervised release, she relapsed into addiction several times. *See* (ROA.50). This resulted in a government motion to revoke her terms of supervised release on the grounds that she repeatedly used and possessed illegal drugs, that she associated with felons, that she repeatedly failed and missed drug tests, and that she missed drug counseling sessions. *See* (ROA.59-64).

A Supervised Release Violation Report found that Appellant was subject to “[m]andatory revocation for possession of a controlled substance and refusal to comply with drug testing,” citing 18 U.S.C. §§3583(g)(1) & (g)(3). It noted an imprisonment range of 4-10 months imprisonment on each count, *see* (ROA.49), but stated that “the Court may not consider the factors listed in 18 U.S.C. § 3553(a)(2)(A),” (ROA.50).

Petitioner pleaded true to most of the allegations, and permitted the rest to be proven by police report. *See* (ROA.103-105). Taking the plea, the district court said flatly that it would revoke her term of release if she pleaded true, and it did so. *See* (ROA.102, 105).

Defense counsel emphasized Petitioner’s periods of sobriety and her willingness to seek help after her relapses. *See* (ROA.105-106). During allocution, the defendant discussed her journey through treatment and her commitment to fight her

addiction. *See* (ROA.111-115). The court commented that it had heard similar presentations in many supervised release cases, *see* (ROA.115), but also said it was “impressed” with it, (ROA.116).

Nonetheless, the court imposed two consecutive terms of 15 months imprisonment, followed by another 30 months of supervised release. *See* (ROA.117-118). It explained that it was “satisfied that the sentence I’ve indicated I’m going to impose is a reasonable sentence that adequately and appropriately addresses all the factors the Court should consider in sentencing under 18 United States Code Section 3553(a) as it applies in a revocation context...” (ROA.117). The judgment also said that the court “considered all relevant factors set forth in 18 U.S.C. § 3553(a) that are proper for consideration in a revocation context...” (ROA.78).

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 conceded that the claim was foreclosed on the plain error standard of review.

The court of appeals affirmed. *See* [Appx. A]; *United States v. Pandey*, 815 F. App’x 800 (5th Cir. 2020)(unpublished). It rejected the constitutional argument with the following commentary:

The Supreme Court held in *Haymond* that revocation of supervised release and imposition of a mandatory minimum sentence pursuant to 18 U.S.C. § 3583(k), based on judge-made findings by a preponderance of the evidence, violated due process and the right to a trial by jury.

Haymond, 139 S. Ct. at 2378-83. However, the *Haymond* plurality emphasized that its decision was limited to § 3583(k). *Haymond*, 139 S. Ct. at 2382-84 & n.7. In *Badgett*, we held that because *Haymond* had not been extended to § 3583(g) revocations, the district court did not plainly err in applying the statute. *See Badgett*, 957 F.3d at 540-41.

[Appx. A]; *Pandey, supra*.

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)(1) of Title 18 compels the district court to impose a term of imprisonment when a defendant on supervised release possesses illegal drugs. A straightforward application of *Alleyne*, therefore, would tend to show that the fact of such illegal possession must be proven to a jury beyond a reasonable doubt. Alternatively, a reviewing court might conclude that Congress would have preferred to sever and excise the mandatory revocation provision to compelling a full-blown jury trial for every allegation of drug possession. *See United States v. Booker*, 543 U.S. 220 (2005).

Nonetheless, at least five Justices in *United States v. Haymond*, __U.S.__, 139 S.Ct. 2369 (2019), concluded that some revocation proceedings fall outside the simple rules of *Apprendi* and *Alleyne*. *See Haymond*, 139 S.Ct. at 2385 (Breyer, J., concurring); *id.* at 2391 (Alito, J., dissenting). Under the view propounded by Justice Breyer's concurrence, facts determined in a revocation proceedings should instead be compared more globally to a "traditional element." *See id.* at 2385-2386 (Breyer, J., concurring). This analysis considers whether the fact in question sets forth an

independent criminal offense, whether it triggers a mandatory minimum, and the length of the mandatory minimum. *See id.* at 2385-2386 (Breyer, J., concurring).

A four Justice plurality expressly reserved the question at issue in this case: whether 18 U.S.C. 3583(g) violates the Fifth and Sixth Amendment, cautioning:

Just as we have no occasion to decide whether § 3583(k) implicates *Apprendi* by raising the ceiling of permissible punishments beyond those authorized by the jury's verdict, see n. 4, *supra*, we do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*. Nor do we express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g), which requires courts to impose “a term of imprisonment” of unspecified length.

Id. (Gorsuch, J.)(plurality op.), 139 S. Ct. at 2382. Such reservations have previously foreshadowed grants of certiorari on the reserved issue, often promptly. ***Compare*** *Blakely v. Washington*, 542 U.S. 296, 305, n.9 (2004)(“The Federal Guidelines are not before us, and we express no opinion on them.”) ***with*** *United States v. Booker*, 543 U.S. 220 (2005)(rendering a holding on this question); ***compare*** *Voisine v. United States*, 136 S. Ct. 2272, 2280, n.4 (2016)(Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior.”) ***with*** *Borden v. United States*, No. 19-5410, 140 S.Ct. 1262 (March 2, 2020)(granting certiorari to decide this question in the context of 18 U.S.C. 924(e), which contains a clause similarly worded to 18 U.S.C. 16); ***see also*** *Voisine*, 136 S. Ct. at 2277 (“...we expressly left open whether a reckless assault also qualifies as a “use” of force—so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)'s firearms ban. ...The two cases before us now raise that issue.”)(internal citations omitted)(citing *United States v. Castleman*, 572 U.S. 157 (2014)).

In the event that the Court chooses to address this issue while the instant case remains on direct appeal, the outcome may be affected. Although the error was not preserved in district court, which compels review for plain error only, *see* Fed. R. Crim. P. 52(b), the “plain-ness” of error may be established by change of precedent on before the judgment is final. *See Henderson v. United 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).

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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