

No. _____

In the
Supreme Court of the United States

Bruce Kintrell Green,

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 Bruce Kintrell Green, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

LIST OF DIRECTLY RELATED PROCEEDINGS BELOW

1. *United States v. Bruce Kintrell Green*, 6:10-CR-00010-WSS, United States District Court for the Western District of Texas. Judgment and Sentence entered on June 8, 2010. (Appendix B)
2. *United States v. Bruce Kintrell Green*, 6:10-CR-00010-WSS, United States District Court for the Northern District of Texas. Judgment of Revocation and Sentence entered on January 23, 2020. (Appendix C)
3. *United States v. Bruce Kintrell Green*, CA No. 20-10091, United States District Court for the Northern District of Texas. Judgment entered on September 2, 2020. (Appendix A).

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- Appendix B Judgment and Sentence of the United States District Court for the Western District of Texas, entered May 30, 2006.
- Appendix C Judgment of Revocation and Sentence of the United States District Court for the Northern District of Texas, entered November 7, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce Kintrell Green 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The opinion of the Court of Appeals is reported at *United States v. Green*, 819 F. App'x 265 (5th Cir. Sept. 2, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The judgment and sentence of the District Court for the Western District of Texas on the underlying criminal case is attached as Appendix B. The judgment of revocation and sentence of the District Court for the Northern District of Texas 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

On June 8, 2010, Bruce Kintrell Green (“Green”) was sentenced to 84 months’ imprisonment and a five-year term of supervised release for the offense of possession with intent to distribute at least five grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii). (Record in the Court of Appeals, at 247–49).

Mr. Green began his term of supervised release on July 31, 2015. Sealed Pet. for Offender Under Supervision, at 1, *United States v. Green*, No. 3:17-CR-00150-L (N.D. Tex. Nov. 26, 2019), ECF No. 35 (“Sealed Pet.”). On November 26, 2019, Mr. Green’s probation officer filed a Petition for Offender under Supervision that alleged Mr. Green violated his conditions of supervised release in several ways, including by unlawfully possessing a controlled substance and refusing to comply with drug testing requirements of his mandatory substance abuse treatment program on four occasions between February and September of 2019. (Sealed Pet. at 3) (allegation group II).

The petition concluded that Mr. Green’s statutory maximum imprisonment term was three years. (Sealed Pet. at 5). His violation was calculated as Grade B, which combined with his Criminal History Category of VI to result in a policy statement range of 21 to 31 months. (Sealed Pt. at 5). Citing 18 U.S.C. § 3583(g)(1) and (g)(3), the petition concluded that the court must “[s]entence [Mr. Green] to a term of imprisonment” because he faced “[m]andatory revocation for possession of a

controlled substance and refusal to comply with drug testing.” (Record in the Court of Appeals, at 90).

A revocation hearing was held on January 21, 2020. (Record in the Court of Appeals, at 135–211). Mr. Green pled true to the some of the allegations against him, including the allegations in group II that triggered probation’s invocation of the mandatory release statute. *See* (Record in the Court of Appeals, at 136–37). The government presented evidence to prove up the contested allegations. (Record in the Court of Appeals, at 138–83). After the district court concluded that a preponderance of the evidence existed to establish that Mr. Green had committed all the alleged violations, (Record in the Court of Appeals, at 137–38, 191), Mr. Green’s attorney advocated for a sentence of “as little time as possible.” (Record in the Court of Appeals, at 195–99). The government, however, asked the court to revoke and incarcerate Mr. Green for a period at the high end of the policy statement range. (Record in the Court of Appeals, at 207). The district court revoked Mr. Green’s supervised release, sentencing him to 24 months’ incarceration. (Record in the Court of Appeals, at 99, 208–09).

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:

[Green] challenges the constitutionality of 18 U.S.C. § 3583(g), which mandates a term of imprisonment for any offender who violates certain conditions of supervised release such as possessing a controlled substance or refusing to comply with the drug-testing requirement. Relying on *United States v. Haymond*, — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019), Green contends that § 3583(g) is unconstitutional because it requires revocation of a term of supervised release and imposition of a term of imprisonment without affording the defendant the constitutionally guaranteed right to a jury trial, which requires proof beyond a reasonable doubt. He concedes that his plain error challenge is foreclosed under *United States v. Badgett*, 957 F.3d 536 (5th Cir. 2020), but he raises the issue to preserve it for further review. . . .

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. *See Haymond*, 139 S. Ct. at 2378-83. Unlike § 3583(k), which mandated a mandatory minimum of five years for certain offenses such as possession of child pornography, § 3583(g) does not provide for a mandatory minimum sentence based on judge-found facts. *See* § 3583(g), (k). Further, the *Haymond* plurality limited its decision to § 3583(k) and its mandatory minimum provision. *See 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 commit clear or obvious error in applying the statute. *See Badgett*, 957 F.3d at 540-41. In view of *Badgett*, Green's sole argument on appeal is foreclosed..

[Appx. A, at p.1].

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 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 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 29th day of January, 2021.

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