

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**Ngoc Hong Nguyen,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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*Christopher A. Curtis*  
*Assistant Federal Public Defender*

Federal Public Defender's Office  
Northern District of Texas  
819 Taylor St. Room 9A10  
Fort Worth, TX 767102  
817-978-2753  
Chris\_curtis@fd.org

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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 Ngoc Hong Nguyen, 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 Ngoc Hong Nguyen, 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of the Court of Appeals is reported at *United States v. Ngoc Hong Nguyen*, 850 F. App'x 907 (5th Cir. June 22, 2021) (unpublished).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 C. The district court's judgment of revocation and sentence is attached as Appendix B.

### JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on Jun 22, 2021. 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

This is a direct appeal from a judgment revoking supervised release and imposing a revocation sentence. On April 13, 2009, Nguyen was sentenced to 151 months imprisonment, a three year term of supervised release, a mandatory special assessment of \$100, and forfeiture of \$12,450.00, as the result of a guilty plea to conspiracy to possess with intent to distribute a controlled substance, a violation of 21 U.S.C. §§ 846 and 841 (a)(1). (ROA.167). On October 6, 2015, Nguyen's sentence of imprisonment was reduced to 121 months. (ROA.216).

Nguyen began serving his term of supervised release on February 9, 2018. (ROA.227). On March 23, 2020, the probation officer filed a Petition for Person Under Supervision, alleging that Nguyen failed to submit urine specimens on December 30, 2019; January 15, 23, 26 and 31, 2020; and February 16, 2020; and by failing to report in February 2020. (ROA.227-228). The violation report established a statutory maximum term of imprisonment of two years plus an additional term of supervised release of 36 months less any term of imprisonment imposed. (ROA.229). the violation report also found that the mandatory revocation provisions of 18 U.S.C. § 3583(g)(3) applied. (ROA.229). The report found an advisory imprisonment range of 4-10 months. (ROA.229).

Prior to the revocation hearing, Nguyen's attorney filed a written objection to the mandatory revocation provisions of 18 U.S.C. § 3583(g), citing *United States v. Haymond*, 139 S. Ct. 2369 (2019), and arguing that the mandatory provisions of 3583

violated Nguyen's Fifth Amendment due process rights and his Sixth Amendment right to a jury trial. (ROA.257-259). Nguyen's attorney acknowledged that this argument is foreclosed in the Fifth Circuit by *United States v. Garner*, 969 F.3d 550 (5th Cir. 2020).

At the revocation hearing on October 27, 2020, Mr. Nguyen pleaded true to the allegations in the petition. (ROA.314). Mr. Nguyen's attorney asked for a sentence of time served, which was about two weeks less than the four-month bottom of the advisory imprisonment range. (ROA.315-317). The district court overruled Nguyen's constitutional objection to mandatory revocation (ROA.319). The district court revoked Mr. Nguyen's term of supervised release and imposed a sentence of imprisonment of 8 months and a new term of supervised release of 26 months. (ROA.266,320). The district court also noted that it would have revoked the term of supervised release and imposed the same term if Section 3583(g) were ruled unconstitutional. (ROA.320).

## **B. Appellate Proceedings**

On appeal, Petitioner argued that the district court committed plain error by 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, noting that the issue was foreclosed by an earlier panel decision of the court, granted a motion for summary affirmance. *See United States v. Nguyen*, 850 F. App'x 907 (5th Cir. June 22, 2021) (unpublished); [Appx. A]; citing

*United States v. Garner*, 969 F.3d 550, 551 (5th Cir. 2020). Accordingly, Nguyen has properly preserved this issue, both at the trial court level and on appeal, for plenary review in this court

## REASON FOR GRANTING THE PETITION

**I. The Fifth Circuit's holding in *United States v. Garner*, 969 F.3d 550 (5th Cir. 2020) conflicts with *United States v. Haymond*, \_\_U.S.\_\_, 139 S.Ct. 2369 (2019).**

**1. The Fifth Circuits controlling precedent 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 five 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 Fifth Circuit, 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 beyond 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).

As to the first factor, the Fifth Circuit has 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 in *Garner* 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 in *Garner* 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 in *Garner* 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 Fifth Circuit 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 possession of a firearm, or possession of drugs drug possessors or refusal to take a court ordered drug test are likely to prescribe a shorter mandatory minimum. But people accused of all of these offenses should enjoy equally 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](https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf), last visited April 30, 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 April 30, 2021, revealed 930 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, *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.<sup>1</sup> But this has not 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

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<sup>1</sup> 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 § 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))).

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 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*, \_\_ 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 (5<sup>th</sup> 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 of 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. Nguyen's case is a valid vehicle for review.**

The issue was preserved in district court and court of appeals. Although Mr. Nguyen only received an eight month sentence and was released on March 15, 2021, he received an additional 26 month term of supervised release. Mr. Nguyen had served over two years of his original term of supervised release at the time of this revocation. Therefore, not only has he endured and served an additional eight month sentence, his three year term of supervised release has been extended to approximately five years. And he faces the possibility of serving another 24 months imprisonment if revoked in the future. The mandatory revocation has increase not



only the amount of time he has had to serve in prison, it has extended his supervision. This Court should grant certiorari and end the widespread deprivation of the right to trial by jury suffered by federal supervised releases. In the alternative, the 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 19th day of November, 2021.

**JASON D. HAWKINS**  
**Federal Public Defender**  
**Northern District of Texas**

/s/ Christopher A. Curtis  
Christopher A. Curtis  
Assistant Federal Public Defender  
Federal Public Defender's Office  
819 Taylor Street, Room 9A10  
Fort Worth, TX 76102  
Telephone: 817-978-2753  
Fax: 817-978-2757  
E-mail: [chris\\_curtis@fd.org](mailto:chris_curtis@fd.org)

*Attorney for Petitioner*