

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT KEITH KINSEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals for the Fifth Circuit

No. 22-10418
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 6, 2022

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

ROBERT KEITH KINSEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:13-CR-251-1

Before WIENER, ELROD, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Defendant-Appellant Robert Keith Kinsey directly appeals from a judgment revoking his supervised release and sentencing him to 24 months in prison. He challenges the constitutionality of 18 U.S.C. § 3583(g), which mandates revocation of supervised release and imposition of a term of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

No. 22-10418

imprisonment for any offender who violates named conditions of supervised release, including—as applicable here—possession of a controlled substance.

Examining the plurality in *United States v. Haymond*, 139 S. Ct. 2369 (2019), Kinsey challenges the constitutionality of § 3583(g) because it *requires* the revocation of supervised release and imposition of imprisonment without affording the defendant a jury trial.

Kinsey concedes, however, that his argument was rejected in *United States v. Garner*, when this court held that § 3583(g) is not unconstitutional under *Haymond*. 969 F.3d 550, 551–553 (5th Cir. 2020). Kinsey’s sole argument on appeal is thus foreclosed. He only raises this issue to preserve it for further review if case law should develop in his favor. In turn, the Government has filed an unopposed motion for summary affirmance and, alternatively, for an extension of time to file its brief.

The Government’s motion for summary affirmance is GRANTED, its alternative motion for extension of time is DENIED, as unnecessary, and the judgment of the district court is AFFIRMED. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For Revocation of Probation or Supervised Release)

v.

ROBERT KEITH KINSEYCase Number: **3:13-CR-00251-B(1)**USM Number: **32856-077****John M Nicholson**

Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	admitted guilt to violation of condition(s)	One (1) Mandatory Condition, Standard Conditions Nos. 1 and 7, and three (3) Special Conditions of the term of supervision.
<input type="checkbox"/>	was found in violation of condition(s)	after denial of guilt.

The defendant is adjudicated guilty of these violations:

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
Roman Numeral I	Defendant failed to abstain from the use of alcohol during and after completion of treatment and used and possessed illegal controlled substances. <i>See</i> Petition for Person Under Supervision and the first through fourth addenda for substances and dates.	3/4/2022
Roman Numeral II	Defendant left the judicial district without permission of the court or probation officer.	8/27/2021
Roman Numeral III	Defendant failed to attend individual mental health treatment sessions in July 2020, December 2020, July 2021, and August 2021.	8/12/2021
Roman Numeral IV	Defendant failed to submit a urine specimen as instructed on August 25, 2021.	8/25/2021
Roman Numeral V	Defendant failed to abstain from the use of alcohol during and after completion of treatment on December 6, 2021.	12/6/2021

The defendant is sentenced as provided on page 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has not violated condition(s) and is discharged as to such violation(s) condition.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 21, 2022

Date of Imposition of Judgment

Signature of Judge

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

April 22, 2022

Date

DEFENDANT: ROBERT KEITH KINSEY
CASE NUMBER: 3:13-CR-00251-B(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 MONTHS. No term of supervised release imposed.

The court makes the following recommendations to the Bureau of Prisons:
that the defendant be allowed to serve his sentence BOP medical facility due to his current medical condition.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

969 F.3d 550

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,

v.

Christopher Brent GARNER, Defendant—Appellant.

No. 19-10884

|

FILED August 13, 2020

|

REVISED August 14, 2020

Synopsis

Background: The United States District Court for the Northern District of Texas, John H. McBryde, Senior District Judge, revoked defendant's supervised release, and defendant appealed.

The Court of Appeals, Davis, Circuit Judge, held that statutory provision mandating revocation of defendant's supervised release did not violate Due Process Clause or Sixth Amendment right to jury trial.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 3583(k)

***551** Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:19-CR-147-1, John H. McBryde, U.S. District Judge

Attorneys and Law Firms

Stephen S. Gilstrap, Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff-Appellee.

Kevin Joel Page, Federal Public Defender's Office, Northern District of Texas, Dallas, TX, Michael Arthur Lehmann, Federal Public Defender's Office, Northern District of Texas, Fort Worth, TX, for Defendant-Appellant.

Before Davis, Jones, and Willett, Circuit Judges.

Opinion

W. Eugene Davis, Circuit Judge:

Appellant Christopher Garner argues that 18 U.S.C. § 3583(g), which requires revocation of supervised release and a term of imprisonment for certain drug and gun violations, is unconstitutional under *United States v. Haymond*, — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019), where the Supreme Court held that a different mandatory revocation provision, § 3583(k), violates the Fifth and Sixth Amendments. Because § 3583(g) lacks the three features which led the Court to hold § 3583(k) unconstitutional, we AFFIRM the judgment of the district court.

I. BACKGROUND

Christopher Garner pled guilty to aiding and abetting possession with intent to distribute methamphetamine. He was sentenced to 120 months imprisonment, to be followed by a five-year term of supervised release. Soon after his term of supervised release began, the United States Probation Office filed a petition alleging that Garner had violated the conditions of his release by possessing methamphetamine and attempting to falsify a drug test.

Garner was subject to mandatory revocation under 18 U.S.C. § 3583(g), which requires revocation and a term of imprisonment for defendants found to have committed certain gun or drug violations. At his revocation hearing, Garner argued that the mandatory revocation feature of § 3583(g) was unconstitutional under *United States v. Haymond*.¹ The district court rejected his argument, and sentenced Garner to 36 months imprisonment to be followed by a 24-month term of supervised release.

On appeal, Garner again argues that mandatory revocation under § 3583(g) is unconstitutional. Because Garner preserved his challenge, our review is *de novo*.²

II. DISCUSSION

Under the general revocation provision, 18 U.S.C. § 3583(e), a district judge *may* revoke a defendant's term of supervised

release if it finds, by a preponderance of the evidence, that the defendant violated a condition of supervised release. And upon revocation, the district judge *may* impose a new prison term, subject to a maximum of one to five years depending on the severity of the original crime.

Sometimes, though, revocation is mandatory. For example, 18 U.S.C. § 3583(g) *requires* revocation if a defendant (1) possesses a controlled substance in violation *552 of a supervised release condition; (2) possesses a firearm in violation of federal law or a condition of supervised release; (3) refuses to comply with drug testing imposed as a condition of supervised release; or (4) tests positive for illegal controlled substances more than three times in one year. And when Subsection (g) applies, the district judge *must* impose a new prison term up to the maximum authorized by the general revocation provision.

In *United States v. Haymond*, a divided Supreme Court held that a different provision of the supervised release statute, § 3583(k), is unconstitutional.³ Subsection (k) required a district judge to impose a new prison term of at least five years and up to life if it found, by a preponderance of the evidence, that the defendant committed an enumerated federal sex crime while on supervised release.

A four-justice plurality concluded that Subsection (k) is unconstitutional under *Alleyne v. United States*, where the Court held that any fact that increases the mandatory minimum sentence for a crime must be submitted to a jury and found beyond a reasonable doubt.⁴ Haymond's original conviction of possession of child pornography carried a prison term of zero to ten years. But after the district judge found, by a preponderance of the evidence, that Haymond engaged in additional conduct enumerated in Subsection (k) while on supervised release, that triggered a new prison term with a mandatory minimum of at least five years. The plurality reasoned that Subsection (k) violates the Fifth and Sixth Amendments by increasing a defendant's statutory sentencing range based on facts found by a judge, and only by a preponderance of the evidence. The plurality declined to "express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g),"⁵ the provision Garner challenges here.

Justice Breyer, concurring in the judgment, took a narrower approach. And 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."⁶ Justice Breyer concluded that Subsection (k) violates the Fifth and Sixth Amendments due to three features that, "considered in combination," make it "less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach."⁷

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 "commit[ted] any" listed "criminal offense."⁸

Garner argues that Subsection (g) is unconstitutional under *Haymond* because it shares at least two of those features: it applies to a discrete set of specified violations, and it requires the district judge to *553 impose at least some term of imprisonment. We disagree.

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:

(g) Mandatory revocation for possession of controlled substance or firearm or refusal to comply with drug testing.—If the defendant—

- (1) possesses a controlled substance in violation of the conditions [of supervised release];
- (2) possesses a firearm ... 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).⁹

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."¹⁰ 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.¹¹

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.¹²

III. CONCLUSION

For these reasons, the judgment of the district court is **AFFIRMED**.

All Citations

969 F.3d 550

Footnotes

1 — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019).

2 *United States v. Minnitt*, 617 F.3d 327, 332 (5th Cir. 2010).

3 — U.S. —, 139 S. Ct. 2369, 204 L.Ed.2d 897 (2019).

4 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

5 *Haymond*, 139 S. Ct. at 2382 n.7.

6 *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

7 *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment).

8 *Id.*

9 18 U.S.C. § 3583(g).

10 *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring in the judgment).

11 *Id.* (quotations omitted).

12 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).

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