

No. 17-8390

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IN THE SUPREME COURT OF THE UNITED STATES

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SCOTT ALLEN SPERLING, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals, applying plain error review, correctly denied relief on petitioner's claim that 18 U.S.C. 3583(k) violates the Sixth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 636.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2017. A petition for rehearing was denied on December 28, 2017 (Pet. App. 4a). The petition for a writ of certiorari was filed on March 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted on one count of possession of child pornography in violation of 18 U.S.C. 2252A(a)(5)(B).<sup>\*</sup> D. Ct. Doc. 40, at 1 (Aug. 9, 2007). He was sentenced to 39 months of imprisonment, to be followed by ten years of supervised release. Ibid. After his discharge from prison, and following an evidentiary hearing, the court revoked petitioner's supervised release and ordered him to serve five years in prison. Pet. App. 1a-2a. The court of appeals affirmed. Id. at 1a-3a.

1. In 2007, petitioner pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). D. Ct. Doc. 40, at 1. The statutory range of imprisonment for that offense is zero to ten years. 18 U.S.C. 2252A(b)(2). The statutory range of supervised release is five years to life. 18 U.S.C. 3583(k).

The district court sentenced petitioner to 39 months of imprisonment, to be followed by ten years of supervised release. D. Ct. Doc. 40, at 1. The court ordered a number of conditions of supervised release, including that petitioner install monitoring

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<sup>\*</sup> Unless otherwise indicated, all statutory citations are to the 2012 edition of the United States Code, with amendments contained in the 2016 Supplement IV. The current versions of the statutes are identical in all relevant respects to the versions in force at the time of petitioner's sentencing.

software on his computer and refrain from possessing child pornography. Id. at 2, 4. The court also ordered that petitioner not commit another federal, state, or local crime during the term of supervision, id. at 5, as required by 18 U.S.C. 3583(d).

2. a. Petitioner began serving his term of supervised release in September 2009. 7/14/16 Hr'g Tr. 8. In February 2016, after discovering that petitioner had disabled the monitoring software on his computer, probation officers seized the computer. Gov't C.A. Br. 11-13. A forensic examination revealed 27 images of child pornography. Id. at 13, 18-19.

After conducting an evidentiary hearing, the district court found, by a preponderance of the evidence (and, it added, by "clear and convincing" evidence), that petitioner had violated several conditions of his supervised release. 9/7/16 Tr. (Tr.) 26-27; see D. Ct. Doc. 131, at 2 (June 13, 2016); D. Ct. Doc. 133 (June 14, 2016). As relevant here, the court found that petitioner had violated the condition that he not commit another federal, state, or local crime by possessing child pornography in violation of 18 U.S.C. 2252A(a)(5)(B). Tr. 26-27; see D. Ct. Doc. 131, at 2.

b. The consequences for a violation of supervised release are generally outlined by 18 U.S.C. 3583(e)(3). Under 18 U.S.C. 3583(k), however, if "a defendant required to register under the Sex Offender Registration and Notification Act [SORNA]," 34 U.S.C. 20901 et seq. (formerly codified at 42 U.S.C. 16901 et seq.), commits "any criminal offense under chapter \* \* \* 110 [of Title

18] \* \* \* for which imprisonment for a term longer than 1 year can be imposed," the "court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment" of "not less than 5 years." 18 U.S.C. 3583(k).

Because petitioner was required to register under SORNA, see D. Ct. Doc. 40, at 2, and violated his supervised release by committing "a criminal offense under" Chapter 110 of Title 18, see 18 U.S.C. 2252A(b)(2), the district court applied Section 3583(k) to revoke petitioner's ten-year term of supervised release and order him to serve five years in prison and a subsequent five-year term of supervised release. 9/7/16 Tr. 31-32; D. Ct. Doc. 166, at 2 (Sept. 7, 2016); see 18 U.S.C. 3583(h) (allowing for a term of supervised release to follow reimprisonment).

3. On appeal, petitioner challenged the sufficiency of the evidence that he had possessed or accessed with intent to view child pornography, and he argued, for the first time, that his five-year mandatory term of reimprisonment under Section 3583(k) violated his Sixth Amendment right to a jury trial under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013). Pet. C.A. Br. 19-29.

The court of appeals rejected both challenges in an unpublished memorandum opinion. Pet. App. 1a-3a. The court first found that the government met its burden to prove petitioner's violation of his supervised release by a preponderance of the evidence. Id. at 2a. The court then explained that "[p]lain error

review applies to” petitioner’s “claim that his sentence violated his Sixth Amendment rights, because he failed to raise the issue below,” and found that Section 3583(k) “is not obviously unconstitutional” under that standard of review. Ibid. The court observed that “Supreme Court precedent and [circuit] precedent hold that the Sixth Amendment does not apply to revocation proceedings.” Id. at 2a-3a.

#### DISCUSSION

Petitioner contends (Pet. 7-14) that the provisions of 18 U.S.C. 3583(k) requiring the district court to revoke his supervised release and return him to prison for at least five years violate his Fifth and Sixth Amendment rights. The court of appeals correctly rejected his constitutional claim under a plain-error standard. Petitioner observes (Pet. 7-9), however, that a divided panel of the Tenth Circuit held Section 3583(k) unconstitutional as applied to the defendant in United States v. Haymond, 869 F.3d 1153 (2017). The government has filed a petition for a writ of certiorari in that case. See United States v. Haymond, No. 17-672 (filed June 15, 2018). Haymond provides a better vehicle for deciding the question presented than does this case, which arises in a plain-error posture. The Court should therefore grant the petition in Haymond and hold this case pending the disposition of Haymond.

1. The court of appeals correctly rejected petitioner’s constitutional challenge to the provisions of 18 U.S.C. 3583(k)

requiring the district court to revoke his supervised release and return him to prison for at least five years. Pet. App. 2a-3a. For the reasons explained in the government's petition in Haymond, application of Section 3583(k) to petitioner did not violate the Sixth Amendment. Pet. at 12-27, Haymond, supra, (No. 17-1672).

The Sixth Amendment, by its terms, applies only in a "criminal prosecution[]." U.S. Const. Amend. VI. A supervised-release revocation proceeding, however, is not part of a criminal prosecution; it occurs long after the prosecution has ended, and involves only administering the sentence, not imposing it. See Oregon v. Ice, 555 U.S. 160, 168 (2009); see also Apprendi v. New Jersey, 530 U.S. 466, 478 & n.4 (2000) (linking the end of "criminal proceedings" with "the imposition of sentence"). This Court has long recognized that "the revocation of parole is not part of a criminal prosecution" to which the Sixth Amendment applies, Morrissey v. Brewer, 408 U.S. 471, 480 (1972), and supervised release is equivalent to parole in all relevant respects, see Johnson v. United States, 529 U.S. 694, 709-711 (2000). Petitioner's challenge accordingly would fail under a de novo standard of review, and a fortiori fails under a plain-error standard. Pet. App. 2a-3a.

2. As petitioner observes (Pet. 7-9), however, a divided panel of the Tenth Circuit addressed a circumstance similar to this case and held Section 3583(k) unconstitutional. The government has filed a petition for a writ of certiorari in Haymond



asking this Court to review that decision. Haymond provides a superior vehicle than this case for addressing the constitutionality of Section 3583(k). In Haymond, the court of appeals considered the question in a published opinion and analyzed both Fifth and Sixth Amendment claims. See Haymond, 869 F.3d at 1160-1167. By contrast, in this case, the court considered the question in an unpublished opinion, analyzed only a Sixth Amendment claim, and did so under the plain-error standard. This Court accordingly should hold the petition in this case pending the disposition of the petition in Haymond, and then dispose of the petition in this case as appropriate.

#### CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in United States v. Haymond, No. 17-1672 (filed June 15, 2018), and then disposed of as appropriate.

Respectfully submitted.

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