No._____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICIO LEMUS, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether at a supervised-release revocation hearing the government must prove by a preponderance of the evidence its contention that a defendant's conduct alleged in a revocation petition is a crime-of-violence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

U.S. Sentencing Guidelines

Rules

No._____

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Mauricio Lemus asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 11, 2020.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the court below

OPINION BELOW

The unpublished opinion of the court of appeals, *United States v. Lemus*, is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on May 11, 2020. This petition is filed within 150 days after entry of judgment. Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the U.S. Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property without due process of law[.]"

FEDERAL STAUTORY PROVISION INVOLVED

Title 18 U.S.C. § 3583(e)(3) provides in pertinent part that a district court may "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a

preponderance of the evidence that the defendant violated a condition of supervised release[.]

STATEMENT

Petitioner Mauricio Lemus pleaded guilty in 2010 to possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841. EROA.91-96.[1] He was sentenced to a term of imprisonment to be followed by a five-year term of supervised release. EROA.91-96.

In early August 2018, Lemus' probation officer filed a report with the district court explaining that Lemus had admitted that marital and financial stressors had led him to relapse into drug use. EROA.124-25. The officer recommend that the supervised-release term be continued as Lemus was receptive to getting help for his problem. EROA.124-25.

A month later, the probation officer filed a petition alleging that Lemus had continued to use drugs. The officer asked that a warrant issue and recommended that Lemus' supervised-release term be revoked. EROA.126-30. The district court issued an arrest warrant. EROA.130.

A month later, the probation officer filed an amended petition, restating the drug-use allegations and alleging that, after the revocation warrant had been served, Lemus had been accused of domestic-violence offenses in Texas state court.

[1] EROA refers to the electronic record on appeal in the court of appeals.

EROA.142-47. The government moved to revoke Lemus's supervised-release term. Its motion tracked the probation officer's amended revocation petition and asserted that the state charges Lemus supposedly faced meant that he had committed a Class A violation under U.S. sentence guidelines §7B1.1(a)(1) because he had engaged in conduct constituting a state crime that was a crime of violence. EROA.148-51.

At a revocation hearing, the government put on witnesses, but it did not show that any domestic-violence charges had been filed against Lemus and it did not have any evidence of the strangulation element of the Texas offense that it argued raised the conduct to a crime of violence and thus made the violation a Grade A violation. Deputy U.S. marshal Yadira Mejia was one of the officers who executed the revocation warrant for Lemus. EROA.217-18. In serving the warrant, the officers had breached the door of Lemus' apartment. EROA.218-19. The officers had some trouble entering the apartment because there was a plastic bin full of tools and other objects in front of the door. EROA.219; EROA.278. Lemus was in the apartment. He was fully compliant with the officers as they arrested him. EROA.219; EROA.229.

According to deputy marshal Mejia, Lemus' wife, Taylor, and son were also in the apartment, and Taylor Lemus thanked the officers for coming to the apartment. EROA.219-20. At the revocation hearing, Mejia testified that Taylor Lemus said that the bin had been placed by the door to keep her from leaving the apartment; Mejia acknowledged that Taylor Lemus had also told her the couple was moving and that was why the items were in the bin. EROA.220-21; EROA.230-31. Taylor Lemus told the deputy marshal that Mauricio monitored her and had not allowed her to leave

the apartment for four days. EROA.224-25. Taylor Lemus had also claimed that Lemus had threatened to kill all of them if she left him. EROA.220-21. She also claimed that Lemus had struck her on August 29. EROA.221.

Mejia testified that Taylor Lemus affirmed her stories in a follow-up interview. EROA.228. San Antonio police detective Manuel Anguiano interviewed Taylor Lemus on September 19, 2018. Anguiano had not at the apartment when the marshals served the revocation warrant. EROA.247. Anguiano testified that, during the September 19, 2018, interview, Taylor Lemus claimed that Mauricio Lemus had choked her on August 29. EROA.238.

Detective Anguiano acknowledged that, although Lemus had been arrested months earlier, the state had not done anything and the case was still awaiting evaluation and the possible prosecution of charges. The state had not assigned a prosecutor to the matter or taken it before a grand jury. EROA.244-45; EROA.248-49. The government did not introduce any medical records at the revocation hearing. EROA.214-60. Lemus adamantly stated that the claims his wife made about him were false. EROA.271.

At the end of the hearing, the district court revoked Lemus' supervised release. EROA.260-61. It made no findings on what happened, but it determined that sentencing range was the Grade A violation range set out by the policy statements in Chapter Seven of the U.S. Sentencing Commission's *Guidelines Manual* was 24 to 30 months' imprisonment. EROA.261. Defense counsel urged the court to order Lemus

to a residential drug treatment center. EROA.265. The district court sentenced Lemus to 30 months' imprisonment and imposed a new five-year term of supervised release. EROA.271-72. .

Lemus appealed, challenging the sufficiency of the evidence supporting the revocation order and the length of the sentence imposed upon revocation. He argued that the government had failed to prove a Class A violation because it had not shown an offense that was a crime of violence. He also challenged the length of the sentence imposed on him. The Fifth Circuit rejected those arguments.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF, UNDER 18 U.S.C. § 3583 AND THE SENTENCING GUIDELINES, THE GOVERNMENT MUST PROVE AN ELEMENT OF VIOLENCE WHEN IT ALLEGES THE VIOLATION CONDUCT CONSTITUTES A CRIME OF VIOLENCE.

It is well-established that due process rights apply at revocation hearings. *Morrisey v. Brewer,* 408 U.S. 471, 487-88 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973). In enacting the federal sentencing scheme providing for supervised-release, Congress required proof by a preponderance of the evidence before a district court may revoke a person's supervised-release term. 18 U.S.C. § 3583(e)(3); *see also Johnson v. United States,* 529 U.S. 694, 700 (2000). This case presents the Court with an opportunity to provide guidance about what the government must show at supervised-release hearings when it alleges that a Class A crime-of-violence violation has occurred that warrants revocation of the supervised-release term.

In this case, the probation officer and the government alleged that Lemus had committed a Class A violation under guidelines §7B1.1(a) by engaging in conduct that was a third-degree felony under Texas state law. *See* EROA.142-43; EROA.148-51; EROA.169-70. Section 7B1.1(a) defines a Class A violation in two ways. It first states that a supervisee commits a Class A violation if he engages in conduct constituting a state offense that carries a sentence of more than one year and is a controlled substance offense, a crime of violence, or a firearms offense. It then states that a supervisee commits a Class A violation if the conduct he engaged in is punishable as

a federal, state, or local crime carrying a penalty of more than 20 years' imprisonment. U.S.S.G. §7B1.1(a)(1)(A)-(B).

The allegations against Lemus in the petition did not meet the 20-year penalty test of §7B1.1(a)(1)(B). The probation officer correctly stated that the charges the police officer had written Lemus up on following his arrest were third-degree felonies under Texas law and carried a maximum sentence of 10 years' imprisonment. *See* EROA.169-70; Tex. Penal Code § 12.34; Tex. Penal Code § 22.01(b). The allegations might have fulfilled the test under subsection (A), if the government could have proven that the conduct constituted a state offense that was a crime of violence. But the government did not put on evidence or argument that Lemus's alleged conduct would be considered a crime of violence under the relevant definition in §7B1.1(a)(1)(A) and §4B1.2. *See* U.S.S.G. §7B1.1 (comment. (n.2)) (incorporating §4B1.2 meaning).

The government relied instead on hearsay in this case, and that hearsay was insufficient to prove that Lemus's conduct was a crime of violence, even under the preponderance standard. The government relayed through a police officer that Taylor Lemus had said that Mauricio Lemus had choked her. This, the government claimed, was sufficient to prove a Class A violation because under Texas law strangulation is a crime of violence. It is true that strangulation may be a crime of violence, but only if there is proof of specific elements required by the Texas statute. No evidence of conduct supporting those elements was introduced at the revocation hearing. Though the officer repeated Taylor Lemus's claim that Mauricio Lemus had "choked" her, the

probation officer reported that, despite that claim no marks were visible when police responded. And the police officer's testimony did not state that Taylor Lemus had said that her breathing was impaired, a requirement for conviction under Texas Penal Code § 22.01(b)(2)(B). *See* EROA.217-50. Under Texas law, a strangulation assault occurs only if "the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." Tex. Penal Code § 22.01(b)(2)(B)

Because no evidence of strangulation was offered, the government did not prove the conduct constituted a state law crime of violence by a preponderance of the evidence, as due process and § 3583(e) require. The district court simply relied on the hearsay testimony of "choking" and the court of appeals approved that reliance. Such reliance appears at odds with due process, with § 3583(e)(3), with the requirements of §7B1.1, and with this Court's precedent. This Court has repeatedly taught in the sentencing context that alleged crimes of violence must be proved up by specific evidence and with particular attention to the statutory sections alleged to be relevant. *See, e.g., Mathis v. United States,* 136 S. Ct. 2243 (2016); *Taylor v. United States,* 495 U.S. 575 (1990). Those principles would seem to apply equally to revocation hearings. The Court should grant certiorari to determine if they do.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

/s/ PHILIP J. LYNCH
Counsel for Petitioner

DATED: July 28, 2020.