No. 20 - _____

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether due process requires the government to make an affirmative showing that a witness is afraid to testify before relying on testimonial hearsay at a revocation proceeding.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner, Clarence Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals affirmed the judgment of the United States District Court, revoking petitioner's supervised release based on a violation of California Penal Code section 245(a)(1) (assault) and failure to notify his probation officer regarding police contact related to the alleged assault.

OPINION BELOW

The memorandum opinion of the court of appeals is attached as Appendix A.

JURISDICTION

The court of appeals entered its memorandum opinion on May 8, 2020.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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.

STATEMENT OF THE CASE

A. Factual Background

On June 4, 2018, the alleged victim's mother called 9-1-1 to report that her daughter had been pepper sprayed. Appendix B at 34; Revocation Hearing Exhibit 5.

The alleged victim ("MJ")[1] later told Los Angeles Police Department (LAPD) Officer Patsenhann that petitioner was responsible: "Mr. Taylor approached her, argued with her again. He put pepper spray and sprayed her in the face and he took off." Appendix B at 33.

Officer Enriquez responded to the 9-1-1 call. Appendix B at 48. He saw that MJ was in pain, holding her eyes. She said she had been pepper sprayed. *Id.* at 49. MJ believed petitioner pepper sprayed her in retaliation for her spending time with another man ("JG"). *Id.* at 50. She told Officer Enriquez that petitioner threatened to beat her up and kill her. *Id.*

JG had witnessed the alleged assault. Appendix B at 52. Police were provided JG's telephone number. *Id.* The police did not attempt to interview JG. *Id.*

On June 17, 2018, MJ's mother called 9-1-1 again. Revocation Hearing Exhibit 4. MJ was in Los Angeles—near petitioner's residence and far from her own—visiting a friend. Appendix B at 39. MJ related the following story to Officer Earner:

> She exited her vehicle and began to walk towards her friend's house when Mr. Taylor approached her, and he began a verbal argument with her about why she was not talking to him. At that time, the argument continued at which time Mr. Taylor, with a closed fist, struck her two times in the face area. She began to defend herself, at which time Mr. Taylor grabbed her by the braids, her hair, drug her to his vehicle, entered the driver's side while still holding onto her hair, and put the vehicle in drive and began to drive.

Id. at 17. MJ told Officer Earner that "she had pain to her left knee" and showed him a

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[1] The alleged victim in this case is not a minor, and her full name was used at times by the district court in its orders. Nevertheless, petitioner refers to MJ by her initials, as she was referenced in the hearing transcript. Petitioner has also redacted her full name from the appendix.

"visible injury to the right side of the top of her head where a braid of her hair was missing." *Id.*

MJ did not have blood on her face or visible swelling. Appendix B at 22. The police reports did not describe any facial injuries. *Id.* at 37. The police did not take any photographs of MJ's alleged injuries. *Id.* at 21, 37.

MJ said that, at the time of the assault, she was with another man who witnessed it. Appendix B at 36. The man was not further identified. Police did not ask for his name. *Id.* It is not clear if he was JG or a different man.

MJ told Officer Earner that she waited in line to receive medical treatment. Appendix B at 23. She told Officer Patsenhann that "she waited for a while, and it was a long line so she had to work that night, so that's why she didn't stay and receive medical care, so she left." *Id.* at 35.

On August 1, 2018, more than a month after the alleged assault, Officer Patsenhann spoke to MJ. Appendix B at 27. Prior to their meeting, MJ had told Officer Patsenhann that she was afraid of petitioner and "fearful of retaliation" if she spoke to the police. *Id.* at 45.

MJ told Officer Patsenhann that, on June 17, 2018, petitioner had "punched her twice in the face." Appendix B at 27. She told him that "when Mr. Taylor [was] driving the car, her hair—braids fell from her scalp, and she received bruising in her knee when she fell to the pavement." *Id.* She said that petitioner told her that he was not going to let her go. *Id.* at 30.

Officer Patsenhann photographed MJ. Appendix B at 28. Her leg was bruised. *Id.*

at 28–29.

On August 2, 2018, MJ received a state restraining order against petitioner. Appendix B at 45. The restraining order was never served. *Id.*

B. Revocation Proceeding

On May 21, 2018, the district court sentenced petitioner to a term of three years of supervised release on a single count of conspiracy to manufacture, distribute, and possess with intent to distribute Phencyclidine (PCP) and illegally possess a listed chemical in violation of 21 U.S.C. §§846 and 841(b)(1)(C). United States v. Taylor, C.D. Cal. Case No. 2:13-cr-822-ODW, Docket ("DC-Doc") #1477. A condition of his supervised release was that he not commit a state crime. *Id.* at 3.

On August 30, 2018, a petition to revoke probation was filed alleging that petitioner violated his supervised release condition by committing an assault with a deadly weapon or force likely to cause great bodily injury, in violation of section 245(a)(1) of the California Penal Code.[2] Excerpts of Record ("ER") 6 at 95–96. The State of California ultimately declined to prosecute the matter due to "insufficient evidence." DC-Doc #1767 at 33.

On November 19, 2018, petitioner denied the allegation that he violated state law. DC-Doc #1765 at 3.

On January 29, 2019, a second revocation petition was filed alleging the same

[2] The petition also alleged, and petitioner admitted, that he violated the conditions of his supervised release by failing to notify his probation officer that he had been questioned by a police officer on July 19, 2018. ER 6 at 96; DC-Doc #1765 at 5 (noting that petition erroneously alleged that petitioner had been arrested when, in fact, he had only been questioned); Appendix B at 11 (petitioner admitting Allegation No. 2).

violations. ER 5 at 92–93.

At the February 4, 2019 hearing, the government presented Officer Earner, Detective Patsenhann, and Officer Enriquez. Appendix B at 14–24, 25–47, 48–54 (respectively). The government subpoenaed MJ, but she did not appear. Government's Excerpts of Record at 44. Over defense objection, the government introduced numerous statements of the alleged victim through the officers' testimony. Appendix B at 16–18, 27, 29, 31–32. The district court denied defense counsel's objections, considered the statements, and relied on them in ruling on the revocation petition. Appendix B at 54–55, 58–61.

The court found that Allegation No. 1 was "supported by a preponderance of the evidence." Appendix B at 60. Petitioner's criminal history category was found to be "V." DC-Doc #1767 at 55–56. The violation was found to be "Grade A." *Id.* The court revoked petitioner's supervised release and committed him to the custody of the Bureau of Prisons for a term of 24 months. ER 1 at 3.

On February 12, 2019, petitioner filed the notice of appeal. ER 3 at 63.

C. Appeal

On November 19, 2019, petitioner filed the opening brief on appeal. United States v. Taylor, 9th Cir. Case No. 19-50046, Docket ("Circuit-Doc") #14. The appeal raised the following issue: "Whether Mr. Taylor's due process right to confront adverse witnesses was violated by the admission of—and the district court's subsequent reliance on—numerous hearsay statements of the alleged victim through testifying police officers." *Id.* at 1.

On February 13, 2020, the government filed the answering brief. Circuit-Doc #33. On March 4, 2020, petitioner filed the reply brief. Circuit-Doc #39.

On May 8, 2020, the court of appeals affirmed the judgment. Appendix A.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Perpetuates the Inconsistent Application of This Court's Holding that Defendants Are Entitled to a Due Process Right to Confront Adverse Witnesses at Revocation Proceedings.

This Court has long held that due process requires that defendants at revocation hearings be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)[.]" *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).[3] Specifically, "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination." *Id.* at 487. However, the Court has never provided more clear guidance on how a hearing officer should determine whether an adverse witness would be subjected to a risk of harm so as to overcome the defendant's right to confrontation.

The district court allowed petitioner's due process right to confrontation to be overcome by perfunctory claims of witness fear. This practice allows the routine denial of confrontation whenever witness fear might be a factor, regardless of whether the government has made a particular showing that the witness at issue is actually afraid.

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[3] While *Morrissey* addressed revocation of parole, the same rule applies to revocation of supervised release. *United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner.").

By affirming the district court's decision, the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

The government failed to obtain any of the "conventional substitutes for live testimony," such as deposition testimony or sworn affidavits, once it decided that MJ was unlikely to testify. *United States v. Martin*, 984 F.2d 308, 313 (9th Cir. 1993). Instead, the government and district court relied on unsworn statements MJ provided to responding police and her mother's unsworn statements to a 9-1-1 operator. The statements describing the assault and identifying petitioner as the assailant were never corroborated.

Unsworn, uncorroborated hearsay statements are no substitute for live testimony. The government pointedly failed to obtain another potential substitute to MJ's live testimony—the testimony of other eyewitnesses. Neither the police nor the government attempted to locate, interview, or call JG to testify, although he witnessed the alleged pepper spray incident on June 4, 2018. Appendix B at 52. Similarly, the police never attempted to identify or interview the man who witnessed the alleged assault on June 18, 2018. Appendix B at 36. The government made no apparent efforts to locate the man, much less call him to testify at the hearing.

MJ's purported fear was not affirmatively established at the time of the hearing. There are no sworn statements from MJ asserting that she feared for her safety or feared testifying. Officer Patsenhann reported that MJ generally feared retaliation from petitioner prior to their August 1, 2018 meeting. Appendix B at 45. He insinuated that

this fear kept her from cooperating with his investigation prior to that date. *Id.* However, there was no evidence presented that MJ's fear persisted beyond her August 1, 2018 interview with Officer Patsenhann to the February 4, 2019 revocation hearing.

Although the government offered to "present additional evidence to show the victim's credible fear[,]" the district court declined, stating: "Given the fact she's not here, I think the point has been made." Appendix B at 54–55. A potential witness's mere absence cannot constitute sufficient evidence that she is too fearful to testify. More was required, particularly where petitioner's constitutional right to confrontation was at issue and prison time was at stake.

The Seventh Circuit has explained that bare bones allegations of witness fear are insufficient to overcome the releasee's right to confrontation:

> The prosecutor did suggest that Mrs. Pritchard may have been scared of Pritchard and intimidated by him, and that she did not want to testify. But there is no indication of when she was asked to testify or how firm her refusal was. *See* [*United States v. Carthen*, 681 F.3d 94, 101 (2d. Cir. 2012)] (affirming the district court's decision not to require the government to produce the alleged victim of domestic abuse in part because she repeatedly refused to testify, including "just prior to the hearing"). The government probably failed to delve into these questions because it was under the erroneous impression that producing the witness was not necessary as long as the hearsay evidence was reliable. The district court was under the same impression, and did not explicitly consider these proffered reasons in deciding not to require the government to produce Mrs. Pritchard.

United States v. Pritchard, 579 Fed.Appx. 513, 518 (7th Cir. 2014).

The admission of the hearsay was not harmless. The government did not attempt to contact or present testimony from known eyewitnesses. The evidence began and ended with MJ's statements to police and her mother's statements to 9-1-1 operators.

The Ninth Circuit has reached inconsistent results regarding the showing required to establish witness fear to overcome the right to confrontation. *See, e.g.*, *United States v. Comito*, 177 F.3d 1166, 1172 (9th Cir. 1999) (government's representation that a witness "was unwilling to testify because she was afraid of" the defendant did not constitute good cause because the government "offered no evidence of any such fear" and the witness was readily available); *United States v. Howard*, 576 Fed.Appx. 664, 665 (9th Cir. 2014) (district court erred in ruling that "it was unnecessary to compel these witnesses to face intimidation or relive fear in order for [the defendant] to have yet another opportunity of confrontation with his victims," because "[a] defendant is entitled to his confrontation rights in each individual case, and where, as here, witnesses are readily available to testify, their preference to avoid having to testify again is insufficient by itself to trump a defendant's confrontation right").

In a recent case involving similar facts, the court of appeals held that where "there is no record evidence that [the alleged victim] w[as] frightened *at the time of the revocation proceeding* and unwilling to testify[,]" and without a showing "that [the government] made some effort to procure the witnesses' testimony, the government fail[s] to meet its burden." *United States v. Cai*, 787 Fed.Appx. 916, 917 (9th Cir. 2019) (emphasis added). In *Cai*, as here, the government relied on hearsay from 911 calls and police reports involving the alleged victim and her mother to establish that the defendant had violated parole: "Specifically, the government relied on the recording of a 911 call by Monique Lai (Cai's wife), and victim statements by Lai and Li Ying Lo (Lai's mother) that were contained in police reports." *Id.* at 917 n.2. Despite the similarities to petitioner's

case, the court of appeals reached a different result. Tellingly, the court of appeals did not address *Cai* or attempt to distinguish it in denying petitioner's appeal. *See generally* Appendix A.

In the end, the district court ruled that speculative fear outweighed petitioner's constitutional right to confrontation. The court of appeals endorsed that decision. Comparisons between petitioner's case and cases like *Cai* show that, in the absence of clear guidance from this Court, the question of what showing of witness fear is required to overcome the defendant's right to confrontation has been answered in inconsistent fashion. This Court should grant certiorari to settle what showing of witness fear is required before a court may do away with the defendant's right to confrontation.

B. The Question Whether an Affirmative Showing of Witness Fear Is Necessary to Overcome the Defendant's Right to Confront Witnesses Is Important.

"About 19 percent of the 600,000 people entering the nation's prisons in 2016 were there for violating their parole, according to the Bureau of Justice Statistics." Beth Schwartzapfel, *Want to Shrink the Prison Population? Look at Parole*, The Marshall Project News (Feb. 11, 2019). Including individuals incarcerated for violating supervised release would make these numbers even higher.

This Court has repeatedly recognized the importance of establishing clear standards governing the application of the confrontation clause in criminal trials. From *Mattox v. United States*, 156 U.S. 237 (1895) to *Snyder v. Massachusetts*, 291 U.S. 97 (1934) to *Pointer v. Texas*, 380 U.S. 400 (1965); to *Ohio v. Roberts*, 448 U.S. 56 (1980); to *Crawford v. Washington*, 541 U.S. 36 (2004); to *Bullcoming v. New Mexico*, 564 U.S.

647 (2011) and *Williams v. Illinois*, 567 U.S. 50 (2012), this Court has invested heavily in ensuring that the right to confrontation is protected in criminal trials.

"The right to confront one's accusers is a concept that dates back to Roman times." *Crawford*, 541 U.S. at 43. Justice Scalia's opinion in *Crawford* traces the lengthy history of the right and underscores its unique importance to the American system of justice. *Id.* at 43–50. This Court has elsewhere highlighted the importance of cross-examination in assessing credibility:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. [Confrontation] does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as . . . the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." *Kentucky v. Stincer*, [482 U.S. 730, 736 (1987)].

Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

Given the importance of the confrontation clause, and given the high percentage of defendants who lose their liberty at revocation hearings, this Court should invest in protecting the right to confrontation at those hearings. The Court should establish clear standards for when the right to confrontation can be overcome by allegations of witness fear at revocation proceedings. To do otherwise would allow hundred of thousands of defendants to be locked away without the opportunity to confront their accusers in court.

CONCLUSION

Review of the decision below is necessary to settle important questions about what showing of witness fear is required by the government to overcome the defendant's right to confrontation at a revocation hearing. Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

DATED: August 5, 2020

Respectfully submitted,

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CLARENCE TAYLOR
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 20 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 12 pages long.

JAMES S. THOMSON