

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARLENE HERNANDEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

Respectfully submitted,

Steve Hershberger, Attorney at Law
Texas State Bar # 09543950
600 No. Marienfeld St., Ste 1035
432-570-4014

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Government's failure to prove a suspected substance is actually a dangerous drug or controlled substance in a probation revocation case premised on a Texas state narcotics violation implicates and violates fundamental fairness as articulated in Black v. Romano, 471 U.S. 606 (1985).

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IN THE SUPREME COURT OF THE UNITED STATES

ARLENE HERNANDEZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, ARLENE HERNANDEZ, Appellant in the United States Court of Appeals for the Fifth Circuit and the Defendant in Case No. P-18-CR-770, submits this Petition for Writ of Certiorari and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 21 2020.

OPINION BELOW

On July 21, 2020, the United States Court of Appeals for the Fifth Circuit entered its Opinion affirming the revocation of probation by the United States District Court. A copy of the Opinion is attached as Appendix A.

The District Court's Criminal Judgment is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code sec. 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part to the case *sub judice*:

No person...shall be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner had been serving a term of probation arising from a conviction in the United States District Court, Western District of Texas. in P-18-CR-770. On September 10, 2019, the United States Probation Department in the Western District of Texas, Midland Division filed a Petition for Warrant or Summons for Offender Under Supervision (ROA.53-54). An amended petition was filed on September 12, 2019 (ROA.56-58).

Petitioner had been placed on five years probation on or about May 03, 2019, for the offense of Aiding and Abetting Transport of Illegal Aliens for Financial Gain (ROA.42-46).

The grounds for the initiation of revocation proceedings stem from a September 08, 2019, arrest by Midland, Texas police officers responding to a family/domestic disturbance in Midland, Texas. Petitioner had been arrested and charged with violating five (05) Texas State narcotics statutes. The Amended Petition alleged, in part, the following:

“The defendant shall not commit another federal, state or local crime...On September 08, 2019, the defendant was arrested by the Midland Sheriffs’ Department for the\ Following offenses: Man/Del CS PG1>4G<200G F/1, Poss. CS. PG1>1G, 4G F/3, Man/Del CS PG3/4<28. These charges remain pending in Midland County, Texas.””

(ROA.56-57).

On or about October 28, 2019, Petitioner’s Counsel filed a Motion for Discovery (ROA.65-67). Petitioner’s Counsel requested the results of any laboratory or forensic testing of items seized during the incident in issue. The Motion for Discovery was denied.

(ROA.69).

On November 07, 2019, the United States District Court, Western District of Texas, Midland Division held a final hearing on the Amended Petition for Warrant for Offender Under Supervision (ROA.79). Prior to the hearing, in the courtroom, an Assistant United States Attorney advised the Court that communications had been had between Petitioner's Counsel and him, regarding the results of chemical or forensic testing of the alleged contraband. The Assistant U.S. Attorney advised the Court that there were no reports of results from testing. The Government's counsel did advise the Court that the parties had discussed a proposal for resolution whereby Petitioner would plead "true" to the marijuana possession allegation. The Government backed away from that proposal due to the marijuana allegation being a "C" violation under the United States Sentencing Guidelines, rather than the more serious "A" violation.

The Government did not enter expert opinion testimony, whether from chemical or forensic testing, regarding the contraband seized from Petitioner. The Government only called the arresting officer who gave opinion testimony.

The United States District Court sustained the revocation petition and entered an Order Revoking Probation and Resentencing of Defendant (ROA.79). Among other things, Petitioner was sentenced to 18 months incarceration in the United States Bureau of Prisons and a term of supervised release, post incarceration.

On or about November 18, 2019, Petitioner filed a Notice of Appeal, complaining of the revocation (ROA.80).

On July 21, 2020, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision.

REASON FOR GRANTING THE WRIT

The District Court erred by granting the Amended Petition for Warrant for Offender Under Supervision and imposing punishment involving a greater deprivation of liberty than the probation previously entered. United States v. Goodwin, 717 F.3d 511, 522 (7th Cir. 2013), cert. denied -U.S-, 134 S.Ct. 334 (2013).

Simply put, the District Court's decision was not fundamentally fair until the Due Process\ Clause on the ground that the Government did not prove the contraband seized was illegal.

The parameters for the imposition of probation are set by 18 U.S.C. sec. 3561-3566. The decision to revoke is governed by 18 U.S.C. sec. 3565. Johnson v. United States, 529 U.S. 53, 59-60 (2000).

The United States Court of Appeals for the Fifth Circuit holds that revocation is proper if the District Court finds by a preponderance of the evidence that the defendant violated a condition of release. United States v. Spraglin, 418 f.3d 479, 480 (5th Cir. 2005). The evidence and the reasonable inferences from it are reviewed in the light most favorable to the Government. United States v. Alaniz-Alaniz, 38 F.3d 788 (5th Cir. 1994). Thus, under that circuit's standard, the revoking court must base a finding of a probation violation on a preponderance of the evidence. United States v. Grandlund, 71 F.3d 507, 509, n. 2 (5th Cir. 1995).

The review of the revocation of probation is governed by an abuse of discretion standard. United States v. Fryar, 920 F.2d 252, 258 (5th Cir. 1990). To obtain a reversal of a revocation order on the basis of evidentiary insufficiency, an appellant must show clearly that the revoking court abused its discretion. United States v. King, 990 F.2d 190, 193 (5th Cir. 1993), cert. denied 510 U.S. 881 (1993).

Probation may not be revoked in the absence of a threshold determination that there has been a violation of an express or clearly implied condition of probation. As the United States Supreme Court concluded in Douglas v. Buder, 412 U.S. 430 (1973), this is a requirement of due process. At issue in Buder was a revocation of state probation purported to be prompted by violation of a condition that all arrests for any reason must be reported without delay to the probation officer. Because the only evidence at the revocation hearing was that defendant had received but not reported a traffic citation, not an arrest under state law, the Court concluded the finding he had violated his probation was devoid of evidentiary support as to be invalid under the due process clause. In Buder, the Court found the petitioner was deprived of due process.

In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court held that a probationer is entitled to a preliminary and final revocation hearing, under the conditions specified in Morrissey v. Brewer, 408 U.S. 471 (1972).

In Black v. Romano, 471 U.S. 606 (1985), the United States Supreme Court declared that a due process requirement could not be found in Gagnon or Morrissey but indicated that case involved only discretionary revocation, did not require the Court decide whether concerns for fundamental fairness would preclude the automatic revocation of probation in circumstances other than those involved in Bearden (Bearden v. Georgia, 461 U.S. 660 (1983)).

Here, the Government alleged that Petitioner violated the probation condition of not "committing another federal, state or local crime". The Government alleged Petitioner violated the Texas Health & Safety Code by (1) manufacturing or delivering a controlled

substance n penalty groups 1 and 3; (2) possessing a controlled substance in penalty group 1 and (3) possessing a controlled substance or marijuana in a drug free zone.

The Government failed to provide as a threshold a controlled substance. Texas state law mandates that the prosecution has the burden of proving that the substance was actually a dangerous drug or controlled substance. Lay testimony is not permitted. Bright v. Texas, 556 S.W.2d 317, 321-322 (Tex.Crim.App. 1977); Manning v. Texas, 637 S.W.2d 941, 943 (Tex. Crim.App. 1982).

This case clearly violates the concept of fundamental fairness within the Due Process Clause as set forth in Buder and then addressed in Black. The parameter set by the Amended Petition was a narcotics violation by a probationer. Fundamental fairness under the Due Process Clause warrants the Government proving the substance was actually a narcotic.

The District Court clearly erred by failing to require the substances seized were actually dangerous drug or illegal narcotics. The Government's case was premised solely on allegations of Texas state narcotics violation.

Texas state law mandates that in a narcotics case, the narcotics be proven. The Government failed here, and the decision to revoke Petitioner's probation denied her Due Process and denied her liberty greater than the deprivation of the probation.

Petitioner prays for reversal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted and prays that the Order Revoking Probation be reversed, the sentence of incarceration be vacated and the Petitioner be released from custody.

PRAYER FOR RELIEF

Petitioner, ARLENE HERNANDEZ, requests that the Petition for Writ of Certiorari be granted for the reasons stated and that the conviction entered against him be vacated and this case remanded for consideration of the motion to set aside jury verdict, and such other relief to which Petitioner would be entitled to receive in law or in equity.

Respectfully submitted,

Steve Hershberger, Attorney at Law
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Midland, TX 79701
432-570-4014

By: /s/ Steve Hershberger
Steve Hershberger
Texas State Bar # 09543950

Attorney for Petitioner

APPENDIX A
(Opinion of the United States Court of Appeals, for the Fifth Circuit)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51070
Summary Calendar

D.C. Docket No. 4:18-CR-770-3

United States Court of Appeals
Fifth Circuit
FILED
July 21, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

v.

ARLENE HERNANDEZ,

Defendant-Appellant

Appeal from the United States District Court for the
Western District of Texas

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.



Certified as a true copy and issued
as the mandate on Jul 21, 2020

Attest:

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

July 21, 2020

Lyle W. Cayce
Clerk

No. 19-51070
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ARLENE HERNANDEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:18-CR-770-3

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

PER CURIAM:*

Arlene Hernandez appeals the revocation of her term of probation, which was based on her having committed another federal, state, or local crime. We review the district court's decision for an abuse of discretion. *See United States v. Teran*, 98 F.3d 831, 836 (5th Cir. 1996).

Contrary to Hernandez's assertions, the Government was not required to prove the elements of the Texas offenses with which she was charged; rather

* Pursuant to 5TH CIR. R. 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 CIR. R. 47.5.4.

No. 19-51070

the district court could revoke Hernandez's probation if it found by a preponderance of the evidence that she violated a condition of her probation. *See Teran*, 98 F.3d at 836; *see also United States v. Spraglin*, 418 F.3d 479, 481 (5th Cir. 2005). The simple possession of a controlled substance is both a federal and Texas crime. *See* 21 U.S.C. § 844; TEX. HEALTH & SAFETY CODE ANN. §§ 481.115-481.118. Hernandez concedes that the Government proved possession. The evidence and reasonable inferences from it, reviewed in the light most favorable to the Government, *see United States v. Alaniz-Alaniz*, 38 F.3d 788, 792 (5th Cir. 1994), established that she more likely than not possessed controlled substances. Specifically, the arresting officer smelled a strong marijuana odor emanating from the vehicle in which Hernandez sat; inside the vehicle he found what he suspected to be cocaine, marijuana, Ecstasy, Xanax, and an acid tab; and the suspected Ecstasy and cocaine field-tested positive.

We review Hernandez's claim that the revocation violated her due process rights for plain error only. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764 (2020). As detailed above, there was evidentiary support for a finding that she violated the conditions of her probation. Hernandez therefore fails to make the requisite showing that a due process error occurred or that the error was clear or obvious. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Whitelaw*, 580 F.3d 256, 259 (5th Cir. 2009).

AFFIRMED. The mandate shall issue immediately.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 21, 2020

Ms. Jeannette Clack
Western District of Texas, Pecos
United States District Court
410 S. Cedar Street
U. S. Post Office & Courthouse
Room 203
Pecos, TX 79772-0000

No. 19-51070 USA v. Arlene Hernandez
USDC No. 4:18-CR-770-3

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

cc: Ms. Elizabeth Berenguer
Mr. Joseph H. Gay Jr.
Mr. James Steven Hershberger
Ms. Diane D. Kirstein

APPENDIX B

(Criminal Judgment, United States District Court for the Western District
of Texas, Midland Division)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

Plaintiff

VS

(3) ARLENE HERNANDEZ

Defendant

§
§
§
§
§
§
§
§

Case No. P-18-CR-00770-DC

ORDER REVOKING PROBATION and
RESENTENCING OF DEFENDANT

On this the November 7, 2019, came on to be heard the Government's Motion for Revocation of Supervised Release granted by virtue of Judgment entered on April 23, 2019, in the above numbered and styled cause.

Defendant appeared in person and was represented by attorney of record, Steve Hershberger. The United States was represented by Assistant United States Attorney, Austin Berry.

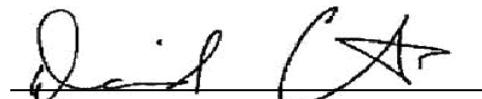
After reviewing the motion and the records in this case as well as hearing testimony and arguments of counsel, the Court is of the opinion that said Defendant has violated the provisions of her Probation and that the ends of justice and the best interests of the public and of the Defendant will not be subserved by continuing said Defendant on Probation. Further, the Court is of the opinion that the Motion for Revocation of Supervised Release should be, and it is hereby **GRANTED**.

IT IS THEREFORE ORDERED that the term of Probation of Defendant named above granted by the Judgment entered on April 23, 2019, and it is hereby **REVOKE**D and **SET ASIDE** and the Defendant is resented as follows:

The Defendant, ARLENE HERNANDEZ, is hereby committed to the custody of the United States Bureau of Prisons for a term of Eighteen (18) months. The Court recommends a facility as close to Midland as possible. A term of Three (3) years Supervised Release is imposed with all Mandatory and Standard Conditions approved for the Western District of Texas and all conditions previously imposed.

The Clerk will provide the United States Marshal Service with a copy of this Order and a copy of the Judgment entered on April 23, 2019, to serve as the commitment of the Defendant.

SIGNED this 12th day of November, 2019.



David Counts
United States District Judge