No. 18-1506

IN THE
Supreme Court of the United States

JULIAN MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Under *Lee v. Illinois*, "reliance by [a] judge upon [a non-testifying] codefendant's confession violate[s] [a defendant's] rights as secured by the Confrontation Clause of the Sixth Amendment." 476 U.S. 530, 531 (1986). Here, the District Court violated Julian Martin's Confrontation Clause rights when it relied upon the pretrial statement of a non-testifying co-defendant, Nathaniel Hoskins, in finding Martin guilty of being an accessory after the fact to murder. The Seventh Circuit then compounded the District Court's error by citing the portion of the District Court's verdict derived from Hoskins's pre-trial confession as support for its decision to affirm.

The Government's attempt to explain away the violation of Martin's rights is unconvincing. First, the Government's argument that the District Court did not rely on Hoskins's out-of-court statement disregards both the language and the substance of the District Court's findings. Second, the Government forfeited its contention that any error was harmless—and, in any event, the Government cannot satisfy the stringent standard for harmless error. Finally, the Government's claims that this case is a poor vehicle lack merit. The Government has identified no impediment to this Court's review.

The question here is exceptionally important. The right to confront one's accusers is "essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). This Court should grant the petition for a writ of certiorari.

ARGUMENT

I. The Seventh Circuit's Decision Subverts *Lee v. Illinois*

Under *Lee v. Illinois*, a trial court violates a defendant's Confrontation Clause rights when it expressly relies on a non-testifying co-defendant's pre-trial confession in finding the defendant guilty. *See* 476 U.S. at 539, 542–43. The "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is [used] against a criminal defendant without the benefit of cross-examination." *Id.* at 541. That is what happened here.

The District Court's own words show that it relied on the contents of Hoskins's confession in finding Martin guilty of being an accessory after the fact to murder. During trial, Investigator Marquez testified that Hoskins had told him that:

> "an hour after the murder of Marcus Hurley he [Hoskins] was in a car with Julian Martin, Andre Brown, and Gregory Hawthorne, and that he was informed by Andre Brown that he had just committed this murder."

App. 52a. The District Court, channeling that testimony when handing down its verdict, stated:

> "I'll also add that both of them were with Mr. Brown right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes. So all of this shows to me, beyond a reasonable doubt, that they knew why they were hiding Mr. Brown."

App. 68a-69a.

The District Court's language closely parallels Investigator Marquez's recitation of Hoskins's confession. And the substance of the District Court's finding directly mirrors Investigator Marquez's testimony regarding Hoskins's pre-trial confession. Hoskins's confession placed Martin, Hoskins, Brown, and Hawthorne together within an hour of the murder, and it provided the District Court with clear and unambiguous evidence that Martin "knew why they were hiding Mr. Brown." App. 69a. This express reliance by the District Court on a non-testifying co-defendant's confession violates Martin's Confrontation Clause rights under *Lee*.

The Government nonetheless contends that the District Court did not rely on Hoskins's pre-trial confession. Instead, the Government says, the court was relying on circumstantial evidence to conclude that Martin was together with Brown within an hour of the murder. In particular, the Government argues that "[t]he district court's reference to [Martin] being with Brown 'right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes' appears to have been drawn from" the testimony of Sergeant Xiques and Officer McHale. Opp'n Br. at 9. But that speculation does not withstand scrutiny.

Neither Sergeant Xiques's nor Officer McHale's testimony puts Martin, Hoskins, Brown, and Hawthorne together in the car at the same time. Instead, Sergeant Xiques testified that he observed Martin and Hoskins in a car together shortly after the murder, together with two unidentified individuals. Trial Tr. 529. And Officer McHale testified that he saw Hoskins, Brown, and Hawthorne together in the car while Martin was across the street, engaged in

conversation with someone else. *See id.* at 538-541. Only Investigator Marquez testified that Martin was in the car together with Brown. App. 52a. And, crucially, only Investigator Marquez testified that Brown told Martin about the crime. *Id.* In other words, only Investigator Marquez testified that Martin "knew why they were hiding Mr. Brown," App. 68a-69a, an essential element of the crime. *See United States v. Bell*, 819 F.3d 310, 323 (7th Cir. 2016) (the elements of being an accessory after the fact to murder include "that [the defendant] knew" the individual that he assisted had "committed the offense of murder").

Given this context, the Government is mistaken. The District Court's finding does not "appear[] to have been drawn from" Sergeant Xiques's and Officer McHale's testimony at all. The language, structure, and substance of the District Court's finding echoes Hoskins's post-arrest statement as recounted by Investigator Marquez. Thus, while the District Court had previously recognized that it would be improper to consider Hoskins's confession as evidence against Martin, when it came time to convict, the District Court did just that. And this might not have surprised the District Court. In instructing the Government to "leave out any statements that [Hoskins] made about Mr. Martin"—an instruction the Government promptly disregarded—the District Court explained: "I am only human." App. 43a-44a.

The District Court's "human[ity]" is all too understandable in this context. Investigator Marquez's testimony concisely put together all of the facts that the District Court needed. And "a confession that incriminates an accomplice is so . . .

devastating" that it is hard to disregard. *Lee*, 476 U.S. at 542 (internal quotation marks omitted). Here, the District Court failed to do so. And this failure struck at the core of Martin's Sixth Amendment rights.

II. The Government Is Mistaken About Harmless Error

The Government argues that if "the district court considered Hoskins's out-of-court statements in adjudicating [Martin]'s guilt, any error was harmless." Opp'n Br. at 11. To the contrary.

As an initial matter, the Government has forfeited its harmless-error argument. Martin argued in his Seventh Circuit Opening Brief that the District Court's error was not harmless. Brief for Appellant at 25 - 27, *United States v. Martin*, 910 F.3d 320 (7th Cir. 2018) (No. 16-4212), 2018 WL 1414299. The Government did not respond to the argument, and at no point contended that any error was harmless. Brief for Appellee, *United States v. Martin*, 910 F.3d 320 (7th Cir. 2018) (No. 16-4212), 2018 WL 3005763. Where a respondent "fail[s] to raise [an] argument in the courts below," this Court "normally decline[s] to entertain" it. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016); *see also OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015) ("That argument was never presented to any lower court and is therefore forfeited.").[1]

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[1] The Government states in a footnote that Martin "assert[ed] . . . that the government 'forfeited' a harmless-error argument below by focusing on the fact that the district court did not rely on Hoskins's post-arrest statements in adjudicating petitioner's guilt." Opp'n Br. at 12, n.*. But Martin's forfeiture argument is not based on the Government's "focus"; rather,

In any event, the District Court's error was not harmless. The Government faces a daunting standard here, for it must prove "beyond a reasonable doubt that the error…did not contribute to the verdict." *Chapman v. United States*, 386 U.S. 18, 24 (1967). In other words, the admission of a co-defendant's statement is harmless only if there is no "reasonable possibility" that the statement might have contributed to the defendant's conviction. *Id.* at 23-24. But here there is a more-than-reasonable possibility that the statement contributed to Martin's conviction: Hoskins's confession provided the *only direct proof* that Martin knew that Brown committed murder. As noted, knowledge that the individual the defendant assisted had committed murder is an essential element of the crime of being an accessory after the fact to murder. *Bell*, 819 F.3d at 323. And circumstantial evidence that at most indicates that Martin thought that Brown had committed *some* crime does not provide a basis for "declar[ing] a belief that [the District Court's reliance on the confession] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24.

III. Martin's Case Is Well-Suited For This Court's Review

This case is well-suited for this Court's review. The Government forfeited its harmless-error argument, which in any event lacks merit. The Court thus can address Martin's Confrontation Clause argument without considering any interposing

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Martin's argument is based on the Government's failure to address harmless error at all.

subsidiary issues. Indeed, for the same reason, this case is particularly well-suited for summary reversal.

Further, this Court not only can but should address Martin's Confrontation Clause argument. The Government suggests that "this case would be a poor vehicle for addressing the question presented because"—due to concurrent sentencing—Martin "would receive little practical benefit from a decision in his favor." Opp'n Br. 13. But the Government presents no evidence, much less any statement made by the District Court, that Martin's sentence for his other conviction would have been identical even if he were not convicted of the felony of being an accessory after the fact to murder. *Cf. Dean v. United States*, 137 S. Ct. 1170, 1176 (2017) ("As a general matter . . . a court imposing a sentence on one count of conviction [may] consider sentences imposed on other counts."); *United States v. Hines-Flagg*, 789 F.3d 751, 757 (7th Cir. 2015) (when reviewing a sentencing error, courts "look[] for an unequivocal statement by the sentencing court that it would have imposed the same sentence" regardless of the error). Nor does the Government explain why, as a practical matter, having an additional conviction of this significance on his record will not affect Martin when he is eventually released from incarceration and attempts to build a new life.

Finally, Martin's sentence has no bearing on whether this Court can reach the question presented. And the question is extraordinarily important. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, 380 U.S. at 405. The importance of correcting the Seventh Circuit's error thus transcends the

importance of vindicating Martin's Sixth Amendment rights: "[T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee*, 476 U.S. at 540. To protect that system, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons and those stated in Martin's opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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