No. --

IN THE

SUPREME COURT OF THE UNITED STATES

WILBERTH MEDINA GARCIA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an immigration officer's formalized statements relating the fact of an alien's removal constitute testimonial hearsay for the purposes of analyzing the confrontation clause?

PARTIES

Wilberth Medina Garcia is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wilberth Medina Garcia, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Garcia,* 887 F.3d 20 (5th Cir. April 6, 2018), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered August 30, 2018, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on April 6, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. District Court Proceedings

On August 29, 2016, Petitioner Wilberth Medina Garcia was arrested by state authorities and booked into the Dallas County Jail. *See* (ROA.868).[1] There, an ICE officer interviewed him and transferred to immigration custody pursuant to a federal detainer. *See* (ROA.873, 880).

ICE Deportation Officer Sims, whose "job is to investigate, arrest and remove individuals that we believe -- that's in the United States illegally," (ROA.879), then interviewed Mr. Garcia on October 11, 2016, *see* (ROA.1104). This interview resulted in Mr. Garcia's admission "[t]hat he entered the United States illegally on or about May 2016 at or near El Paso, Texas." (ROA.885). Officer Sims ran Mr. Garcia's identifying information through several ICE databases and could find no evidence that he was entitled to be in the country. *See* (ROA.886).

The government indicted Mr. Garcia on one count of illegally re-entering the country following a deportation. *See* (ROA.13). He pleaded not guilty and proceeded to jury trial.

At trial, the government sought to prove the defendant's prior removal by introducing four documents: a Notice of Intent to Issue a Final Administrative Removal Order (Govt's Exh. 2), (ROA.912, 1090), a Warning to Alien Removed and Deported, (Govt's Exh. 3), (ROA.912-913, 1097), a Warrant of Removal, (Govt's Exh. 3), (ROA.912-913, 1099), and a Final Administrative Removal Order, (Govt's Exh. 4), (ROA.913, 1104).

The Warrant of Removal included what might be termed a "Return": a signature line attesting that the "Departure [was] witnessed by" a particular officer, and another line attesting "Departure [was] Verified by" another officer. (ROA.930, 1100). According to the government's witness, these signatures constitute a statement that the named alien actually departed. *See* (ROA.935). But the government was not able to identify or locate the officer who signed the second line (Departure Verified By) on this document. *See* (ROA.935). In fact, a line was actually drawn through his or her

[1] Record citations are included in hopes they are of use to the government in answering the Petition or the Court in evaluating it.

signature. *See* (ROA.1100).

Mr. Garcia's trial counsel objected, invoking the confrontation clause, among other authorities. *See* (ROA.915-916). In support of their admission, the government elicited testimony that the documents did not result from a prior criminal proceeding, and were administrative nature:

> Q. Now, these documents aren't necessarily related at all to a prosecution; they're an administrative removal proceeding?
>
> A. That is correct. In this particular case, the documents that you -- you just referred to, none of them are due to criminal -- they were not criminal in nature; they're all administrative removal documents.

(ROA.915). The sponsoring witness also testified that these and other documents in an alien's "A-File" exist "to document what the various employees at the Immigration and Customs Enforcement do with regard to the individual..." (ROA.915). The district court overruled the defense objections.

The jury convicted, but not before sending the trial court a series of notes about the evidence. *See* (ROA.1038). The third of these notes asked why someone had drawn a line through the "Departure Verified By" line on page four of the Return. *See* (ROA.1038). The parties agreed that the court could not provide a substantive answer. *See* (ROA.1040).

The district court imposed a sentence of 22 months imprisonment, *see* (ROA.711), from which the defendant has now been released.

B. Appeal

On appeal, Petitioner argued, *inter alia*, that the district court erred in admitting the Return on the Warrant of Removal, because it constituted testimonial hearsay under the confrontation clause of the Sixth Amendment. Petitioner acknowledged prior Fifth Circuit opinions to the contrary in *United States v. Becerra-Valadez*, 448 Fed. Appx. 457 (5th Cir. 2011)(unpublished), and *United States v. Valdez-Maltos*, 443 F.3d 910 (5th Cir. 2006). He contended, however, that these had been abrogated by *Melendez-Diaz v. Massachussetts*, 557 U.S. 305, 309 (2009).

The court of appeals rejected that contention in a published opinion. Specifically, it reasoned that the Return is used "to memorialize an alien's departure" and not specifically for criminal prosecution:

> warrants of removal are nontestimonial because they are not "prepared specifically for use at . . . trial." They must be issued for cases resulting in a final order of removal, *see* 8 C.F.R. § 241.2, to memorialize an alien's departure—not specifically or primarily to prove facts in a hypothetical future criminal prosecution. Accordingly, *Melendez-Diaz* does not require that warrants of removal be subject to confrontation.

[Appx. A].

REASON FOR GRANTING THE PETITION

I. The decision of the court below conflicts with this Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

The Sixth Amendment entitles every accused "to be confronted with the witnesses against them." U.S. Const. Amend. VI. The confrontation clause prohibits the use of testimonial hearsay from an absent declarant, unless the declarant is unavailable and the defendant had a prior opportunity to cross examine him. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004); *Melendez-Diaz v. Massachussetts*, 557 U.S. 305, 309 (2009).

The Return on the Warrant of Deportation was plainly used as hearsay to show Petitioner's actual removal, and the defendant lacked any opportunity to cross-examine the unidentified declarant. The court below, however, held it non-testimonial. *See* [Appx. A]. In this respect, its decision conflicts with the precedent of this Court.

The "core class" of testimonial statements includes, at a minimum:

> material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ... extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] ... statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51; *accord Melendez-Diaz*, 557 U.S. at 310. This Court has explained that "[t]estimonial" statements are those that do "what a witness does on direct examination." *Melendez-Diaz*, 557 U.S. at 311 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). They thus include a "solemn declaration or affirmation made for the purpose of establishing as proving some fact" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 557 U.S. at 310.

The Return falls directly within the class of materials. It is part of a warrant, and the portion

that asserts the defendant's departure attests to an officer's compliance with a judicial order. It could thus hardly be more formalized. Indeed, knowing falsification would subject the author to felony liability, *see* 18 U.S.C. §1001, so it is effectively under oath. *See Davis*, 547 U.S. at 826-827 (holding that statements made to police officers are "formal" because modern statutes impose criminal liability for the provision of false information). It is not a spontaneous declaration, but rather invites the particular testimony given by the author: the officer fills in the blank to attest to the alien's removal. *See* (ROA.935). It narrates a past event (the alien's departure) for future use; it does not discuss an on-going event. *See Michigan v. Bryant*, 562 U.S. 344, 356-359 (2011)(discussing the significance of this distinction).

Further, the officer who signed the document offered "the precise testimony [he or she] would be expected to provide if called at trial," namely that the defendant left the country. *Melendez-Diaz*, 557 U.S. at 310. Finally, the document's use in future proceedings against the accused – criminal, civil, or administrative – is obvious and routine. The Return is, in plain terms, "a solemn declaration or affirmation made for the purpose of establishing as proving some fact."

The court below held the Return non-testimonial because it was drafted "to memorialize an alien's departure—not specifically or primarily to prove facts in a hypothetical future criminal prosecution." [Appx. A]. Yet its non-prosecutorial purpose was of a special kind: to determine an alien's rights to be present in the United States.

Immigration proceedings are a legal process brought by the sovereign to exercise power over the body of a particular, targeted individual. They result in incarceration and the separation of a person from family, home, and work. *See Woodby v. INS*, 385 U.S. 276, 285 (1966)("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."). "[M]emorializ[ing] an alien's departure," is thus a special kind of non-prosecutorial purpose, unusually close to the core concerns of the confrontation clause. Unlike non-testimonial hearsay, it involves the government production of evidence for the

purpose of targeting someone – a particular someone – for legal proceedings that may restrict his or her freedom. Notably, this Court has suggested that a document prepared for civil litigation would be testimonial hearsay. *See Melendez-Diaz*, 557 U.S. at 321-322 (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943), a civil case, to demonstrate the limits on any presumed exemption of business records from the definition of testimonial hearsay).

Further, the Return should qualify as testimonial hearsay even if documents drafted exclusively for civil or administrative proceedings do not trigger the confrontation clause. It is true, of course, that not all removals result in a criminal prosecution. As the government's witness testified, "there are numerous more administrative proceedings than there would be criminal." (ROA.919). But certainty of a future criminal prosecution is not required. Rather, a statement is testimonial if made for the primary purpose of establishing "past events ***potentially*** relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. And the drafter of the document certainly knows that some predictable subset of removals will result in re-entry prosecution, just not that it will happen in any particular case.

The decision of the court below thus cannot be squared with this Court's precedent. The conflict merits this Court's attention. The issue is a recurring one, critical to defendants in one of the most frequently prosecuted federal offenses. *See United States v. Lorenzo-Lucas*, 775 F.3d 1008, 1010 (8th Cir. 2014); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163 (9th Cir. 2010) ; *United States v. Arias-Rodriguez*, 636 F. App'x 930, 933 (7th Cir. 2016).

Further, the present case is an apt vehicle. Admission of the Return was clearly harmful to the defendant. The government relied on the document heavily at closing to prove the prior removal element. *See* (ROA.1017-1018). And the jury inquired directly about the Return in a note, showing that it used the exhibit to establish the removal element. *See* (ROA.1038). As this Court has observed, a jury's note may provide important insight into the issues that determined the verdict. *See Bollenbach v. United States*, 326 U.S. 607, 613 (1946). Most importantly, the government had no

live evidence of the defendant's actual departure – that is why the challenged exhibit was introduced. The constitutional issue, in short, is dispositive of the case.

Other factors support using the instant case to address the application of the confrontation clause to this recurring evidentiary issue in re-entry prosecutions. The issue was preserved in district court and passed on by the court of appeals. And this case well-illustrates the reason that cross-examination must be afforded to the author of the Return. While the Warrant of Removal in ordinary cases contemplates that the departure be "verified by" another officer, here that signature is scratched out. *See* (ROA.1100). The declarant could not be located, *see* (ROA.935), and there is absolutely no explanation for the signature being scratched out. This notation may represent the declarant's admission that he or she had not verified departure. Or it might represent another official's expression of doubt about the signatory's claim to have verified the departure. Or it might mean none of these. The only way to determine reliably what the Return meant to express was to call its author, not to speculate on the basis of a cold document.

Finally, it is true that Mr. Garcia – having been sentenced only to 22 months imprisonment – is no longer in the custody of the Bureau of Prisons. But this is an endemic problem in re-entry cases, which tend not to generate lengthy sentences. And it is well-settled that a defendant's challenge to his or her conviction is rarely mooted by his or her release. *See Spencer v. Kemna*, 523 U.S. 1, 1 (1998); *Sibron v. New York*, 392 U.S. 40, 55–56 (1968). An important, recurring, constitutional issue has been resolved at variance with this Court's precedent, and it is squarely presented here.

CONCLUSION

Petitioner respectfully submits that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 5th day of July, 2018.

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