

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

GLENVERT GREEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF *CERTIORARI*

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Question Presented

- A. Do the Sixth and Fifth Amendments provide a criminal defendant with a right to cross-examine a government witness who testifies during a sentencing proceeding or can a district court forbid such questioning because hearsay is admissible in the form of victim impact statements and because cross-examination may be unpleasant for the victim?

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Petitioner, Glenvert Green, by his attorney Frederick W. Ulrich, Assistant Federal Public Defender in the Office of the Federal Public Defender for the Middle District of Pennsylvania, respectfully petitions for a writ of *certiorari* to review the order entered here by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit filed its opinion at 17-1943, and it's in the appendix. *See* (App. 1a-5a). The District Court filed its opinion, denominated as a “certified supplement to the record” at 1:08-CR-00073, and it's in the appendix. *See* (App. 6a-11a).

JURISDICTION

On April 10, 2018, the Court of Appeals affirmed the judgment of the District Court. *See* (App. at 5a). The jurisdiction of the United States Supreme Court is invoked under Section 1254(1) of Title 28 of the United States Code, 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

RELEVANT CONSTITUTIONAL PROVISIONS

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 offense 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.

U.S. CONST. amend. V.

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.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

a. Relevant facts

Petitioner, Glenvert Green, was an inmate at the United States Penitentiary in Allenwood. *See* (App. 2a). During a designated open move of inmates in the Allenwood compound, Mr. Green exited his housing unit, but remained in the sally port area connected to it. *See id.* While Mr. Green waited in the sally port, a female correctional officer (“CO”), Jacqueline Showers, entered to observe the inmates as they passed through a metal detector. *See id.*

CO Showers encountered Mr. Green and instantly noticed that he was facing her with his genitals exposed, and he was stroking his penis. *See id.* This occurred within a few feet of CO Showers. CO Showers ordered Mr. Green to stop, but he did not immediately comply. *See id.* Instead, Mr. Green approached, stating, “come get on this Ms. Showers.” CO Showers radioed for assistance, at which point Mr. Green stopped. *See id.* A closed-circuit camera recorded portions of the incident.

b. Procedural history

i. The charges and guilty plea

The institution administratively sanctioned Mr. Green with, among other things, a loss of “good time.” On September 8, 2016, a grand jury returned a one-count indictment, charging Mr. Green under the Assimilated Crimes Act, 18

U.S.C. § 13, with indecent exposure, in violation of Section 3127 of the Pennsylvania Consolidated Statutes, 18 Pa. C.S. § 3127. *See* (App. 2a). Mr. Green pleaded guilty to the indictment without a plea agreement. *See id.*

ii. The sentencing

The Probation Office prepared a presentence report, finding that there was no applicable or analogous guideline and, as a result, the factors in Section 3553(a) of the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a), guided the Court's sentencing discretion. The maximum penalty for the offense is two years and a \$5,000 fine.

The presentence report included a memorandum by CO Showers, which outlined the offense and detailed the affect the offense had upon her and her family. *See* (App. 2a). Among other things, CO Showers noted that, although the behavior at issue was something that she had seen many times, on this occasion it was worse because of Mr. Green's proximity. As for Mr. Green, the presentence report detailed his history of abuse at the hands of his mother, father, and uncle. The report also discussed Mr. Green's mental health, including hospitalization and diagnoses of bipolar disorder and depression.

At the sentencing proceeding, the Government strenuously advocated for the imposition of the statutory maximum, asserting that Mr. Green's conduct was premeditated, commonplace within the Bureau of Prisons ("BOP"), and that it

affected the safety of the staff globally. The Government also presented testimony from CO Showers, who recounted the events surrounding the offenses and the affect it had on her and her family. *See* (App. 2a). On behalf of Mr. Green, counsel emphasized his abusive childhood, his need for treatment, and the fact that the institution had sanctioned him as part of the administrative process.

The District Court declined the Government's request for the 24-month statutory maximum, imposing a sentence of 21 months consecutive to the sentence Mr. Green is serving. *See id.*

iii. The District Court's ruling

After the Government presented testimony from CO Showers, counsel for Mr. Green sought to cross-examine her. *See* (App. 70). The Government objected, asserting that the testimony was for sentencing and cross-examination would be irrelevant. Counsel responded that her questioning would address the following: the context of CO Showers resuming her duties; the indication by CO Showers that this type of incident commonly occurs; whether there were protocols in place that may have allowed CO Showers to protect herself; whether there has been a change of such protocols; whether there was surveillance; her post-incident suffering and how long it took for her to recover; and that CO Showers is not the average victim as she has been trained to handle a specific population.

The District Court denied cross-examination, stating that the proffer respecting remedial measures was not relevant. *See* (App. 2a). Following the appeal, the District Court filed a “Supplement to the Record,” which was, in the end, an opinion addressing the reasons for its ruling. *See* (App. 6a). In the supplement, the Court expressed concern that allowing a victim to be cross-examined would “mark the first step down a troubling path,” and observing that a rule that “strictly cabins adversarial examination during victim impact testimony thus prioritizes truth and courage over intimidation.” (App. 9a).

c. The ruling by the Court of Appeals

The Third Circuit reasoned that, because the Confrontation Clause does not apply to a sentencing and the Due Process Clause includes no right to cross-examine at a sentencing, Mr. Green was unable to show a violation of his rights. *See* (App. 5a).

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

- A. When the Government elects to present testimony from a victim at a sentencing, it should not be permitted to insulate this testimony from cross-examination because it could have introduced a victim impact statement and because cross-examination may be unpleasant.**

This Court has consistently emphasized the “necessity for cross-examination as a protection for defendants in criminal cases.” *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Indeed, this Court has described cross-examination as “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE EVIDENCE § 1367 (3d ed. 1940)). Cross-examination is, thus, the prescribed method for measuring the reliability of evidence. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004).

The right to cross-examination has two constitutional bases. First, under the Fifth and Fourteenth Amendments, “[t]he rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); see also *Pointer*, 380 U.S. at 405. In addition, the Sixth Amendment’s “Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 18–19 (1985) (*per curiam*)). Despite the constitutional underpinnings, a district court retains significant latitude to impose reasonable

limits on cross-examination. *See United States v. John-Baptiste*, 747 F.3d 186, 211 (3d Cir. 2014). Here, however, the District Court did not simply impose some limitations, but denied cross-examination altogether.

Mr. Green acknowledges, even so, that this Court has declined to extend the constitutional protections in the Confrontation Clause to non-capital sentencing proceedings. *See Williams v. United States*, 358 U.S. 576, 584 (1959)). Similarly, the Federal Rules of Evidence do not apply at sentencing proceedings, allowing a court to consider hearsay. *See* FED. R. EVID. 1101(d)(3). There are valid reasons, however, upon which to distinguish Mr. Green's case.

First, this is not an instance when the Court merely considered a victim impact statement that was a part of a presentence report. *See, e.g., United States v. Clark*, 335 F. App'x 181, 184 (3d Cir. 2009) (non-precedential). Nor is this an instance in which the investigating law enforcement officer testified, recounting how some victims had discovered fraudulent activity in their bank accounts. *See, e.g., United States v. Smith*, 751 F.3d 107, 112 (3d Cir. 2014). There is no indication in either the *Smith* or *Robinson* opinions that counsel for the defendants were precluded from cross-examining the Government's law enforcement witness.

No one disputes the Government's prerogative to introduce victim impact statements as part of the sentencing proceeding. *See United States v. Donzo*, 335 F. App'x 191, 196 (3d Cir. 2009) (non-precedential). Here, however, the

Government sought to bolster a victim impact statement by presenting testimony surrounding the commission of the offense and its impact upon the victim and her family. Neither the District Court nor the Government offered a credible reason why the extent, nature, and veracity of the alleged impact is off limits and not subject to adversarial testing. Indeed, the Government sought the statutory maximum, citing as one of the bases the affect the offense had upon the victim.

In this circumstance, the Confrontation Clause's right to cross-examination should apply. While courts have cited *Williams* for the proposition that the Confrontation Clause does not apply at a sentencing, in that case, this Court framed the issue as relating "to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant." *Williams*, 337 U.S. at 244. Ultimately, the *Williams* Court held that the statutory scheme at issue did not violate due process. *See id.* at 252. Given the basis for the holding in *Williams*, the Confrontation Clause may have some application at sentencing. *See generally Vankirk v. State*, 385 S.W.3d 144, 149-50 (Ark. 2011) (concluding that *Williams* did not address whether the Confrontation Clause applied at sentencing).

In any event, due process considerations impose a constitutional floor on the admission of evidence at sentencing. *See United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007). And as noted, due process includes a right to cross-examine.

Indeed, even in the context of a revocation of supervised release, due process provides a limited right to confront and cross-examine adverse witnesses. *See United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009) (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). Once the Government has elected to present testimony, it should not, consistent with due process, be able to preclude this evidence from adversarial testing.

CONCLUSION

For these reasons, the Petitioner, Glenvert Green, requests that this Honorable Court grant his petition for a writ of *certiorari*.

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CERTIFICATE OF BAR MEMBERSHIP

I, Frederick W. Ulrich, Esquire, Assistant Federal Public Defender, hereby
certify that I am a member of the Bar of this Court.

Respectfully submitted,

/s/ Frederick W. Ulrich

FREDERICK W. ULRICH

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Date: July 5, 2018