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NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018

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Donavan Cross - Petitioner,

vs.

United States of America - Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- (1) Whether a statute that criminalizes a constructive delivery of drugs without *bona fide* intent to transfer possession is a felony “controlled substance offense” for purposes of a sentencing guidelines enhancement; and
- (2) Whether the Confrontation Clause prohibits an enhanced sentence based on testimonial out-of-court statements offered to prove prior bad conduct.

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The petitioner, Donavan Cross, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 17-1982, entered on April 30, 2018. The Eighth Circuit issued an order denying Mr. Cross's petition for rehearing *en banc* and petition for rehearing by the panel on June 12, 2018.

**OPINION BELOW**

On April 30, 2018, a panel of the Eighth Circuit entered its ruling affirming Mr. Cross's conviction and sentence. The Eighth Circuit's decision is published at 888 F.3d 985. Mr. Cross's criminal prosecution occurred in the United States District Court for the Northern District of Iowa, which did not issue any published decisions related to his sentence.

## **JURISDICTION**

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Const. amend. VI

USSG § 4B1.2(b)

Iowa Code §§ 124.101, 124.401

## **STATEMENT OF THE CASE**

A jury found Mr. Cross guilty of being a prohibited person in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and (3) and 924(a)(2). The district court sentenced Mr. Cross to 120 months' imprisonment (the statutory maximum), and the Eighth Circuit affirmed. This petition raises issues related to Mr. Cross's sentencing.

The Eighth Circuit affirmed the district court's ruling that Mr. Cross's prior Iowa conviction for possession with intent to deliver marijuana is a felony "controlled substance offense" under the sentencing guidelines, USSG § 4B1.2(b), which increased his base offense level and guideline sentencing range. *See id.* § 2K2.1(a)(4)(A). Mr. Cross incurred that prior conviction under Iowa Code § 124.401(1), which allows a conviction for the "constructive" delivery of narcotics. *See id.* § 124.101(7). The Eighth Circuit summarily held that Iowa Code § 124.401 categorically defines a "controlled substance offense" based on its prior ruling in

*United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 702 (2018). App. at 10 & n.3.

In addition, the Eighth Circuit affirmed the district court's upward variance from a 77-to-96-month guideline range to 120 months' imprisonment based on the conclusion that Mr. Cross was a habitual domestic abuser who possessed firearms on several occasions. In reaching its conclusion that Mr. Cross repeatedly abused women, the district court relied, in part, on a grand jury transcript reflecting that Reyna Anderson (the mother of one of Mr. Cross's children) had testified that he physically abused her and Saydie Grier (the mother of another of Mr. Cross's children). The district court admitted the grand jury transcript into evidence over Mr. Cross's objection. Mr. Cross had no convictions for assaulting either Ms. Anderson or Ms. Grier. *See id.* at 11-14.

Moreover, the court found that Mr. Cross repeatedly brandished firearms based, in part, on allegations that he had pointed a gun at a security guard at a dance club in one incident and fired gunshots into the ceiling at a garage party in another incident. *See id.*

Regarding the dance-club incident, Mr. Cross had a previous conviction for misdemeanor harassment. A complaint filed in the case alleged that Mr. Cross had pointed a pistol at a security guard – an allegation that Mr. Cross denied and objected to the district court using against him at sentencing. The district court

overruled Mr. Cross's objection and concluded that he had pointed the gun at the security guard based on the complaint and affidavit. *See id.*

Regarding the garage-party incident, Mr. Cross had a previous conviction for felony terroristic threats. A police report from that case alleged that Mr. Cross had brandished a handgun and fired multiple shots into the ceiling of the garage; Mr. Cross also denied and objected to this allegation. The district court overruled Mr. Cross's objection based on the police report. *See id.*

No one testified at Mr. Cross's sentencing. In particular, neither Reyna Anderson, nor Saydie Grier, nor anyone involved with the dance-club and garage-party incidents testified to establish the relevant allegations against Mr. Cross.

After the Eighth Circuit affirmed the district court's judgment, Mr. Cross filed an unsuccessful petition for rehearing by the panel or by the *en banc* court. *Id.* at 17.

This petition follows.

#### REASONS FOR GRANTING THE WRIT

This Court should grant Mr. Cross's petition for two reasons.

**I. The Eighth Circuit's Conclusion that a Constructive Delivery of Drugs is a "Controlled Substance Offense" Conflicts with Rulings from the Second and Fifth Circuits.**

In Iowa, a "constructive" delivery is sufficient for a conviction for drug trafficking. *See* Iowa Code §§ 124.101(7), 124.401(1). The Iowa statute fails to define "constructive." The dictionary definition of the term "constructive" is "existing by virtue of legal fiction though not existing in fact." *Black's Law*

*Dictionary* 380 (10th ed. 2014); *see also Merriam-Webster's Collegiate Dictionary* 248 (10th ed. 2002) (defining “constructive” as something “declared such by judicial construction or interpretation”); *see generally* Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases*, 58 Va. L. Rev. 751, 761-62 (1972) (“Constructive possession is a legal fiction used by courts to find possession in situations where it does not in fact exist, but where they nevertheless want an individual to acquire the legal status of a possessor.”).

The sentencing guidelines applicable to Mr. Cross provide for enhanced sentences for defendants previously convicted of a felony “controlled substance offense.” USSG § 2K2.1(a). The guidelines define a “controlled substance offense” as “an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” USSG § 4B1.2(b). The commentary to § 4B1.2 contains no suggestion that the guidelines encompass a constructive delivery. *See* USSG § 4B1.2 comment. n.1.

The Second and Fifth Circuits have held that a mere offer to sell drugs is not covered by § 4B1.2(b)’s definition of a “controlled substance offense.” *United States v. Hinkle*, 832 F.3d 569, 571 (5th Cir. 2016); *United States v. Savage*, 542 F.3d 959, 965 (2d Cir. 2008). As *Savage* explained, “[a]n offer to sell can be fraudulent, such

as when one offers to sell the Brooklyn Bridge. In such a circumstance, the offer to sell is fraudulent in the sense that the person offering the bridge or the drug does not have the intent to distribute or sell the item.” 542 F.3d at 965 (citation omitted).

The expansive meaning of the term “constructive” in the Iowa statute suggests that a defendant could face conviction even if he lacked a *bona fide* intent to transfer possession of drugs. For instance, a defendant could face conviction for the same Iowa offense as Mr. Cross if he made an offer to sell drugs to another individual with intent to rob that individual and not actually transfer possession of the drugs. If that is so, then the Eighth Circuit’s decision conflicts with the reasoning of the Second and Fifth Circuits. *See Hinkle*, 832 F.3d at 571; *Savage*, 542 F.3d at 965.

In sum, the statutes underlying Mr. Cross’s previous Iowa drug conviction encompass a constructive delivery. A constructive delivery does not require a *bona fide* intent to transfer drugs. Thus, contrary to the Eighth Circuit’s conclusion, the Iowa drug offense is not categorically a “controlled substance offense.” This Court should grant Mr. Cross’s petition to resolve the conflict between the Eighth Circuit (as illustrated by his case and *Maldonado*) and the Second and Fifth Circuits (as illustrated by *Savage* and *Hinkle*, respectively).

## **II. This Court Should Re-examine the Confrontation Clause's Applicability at Sentencing.**

As explained, the district court concluded that Mr. Cross repeatedly abused women and brandished firearms based, in part, on police records and court documents. Mr. Cross denied those allegations. No witnesses testified at his sentencing regarding such allegations. There was no showing that any of Mr. Cross's accusers were unavailable to appear for testimony.

The Confrontation Clause of the Sixth Amendment guarantees “[i]n all criminal prosecutions” the right of the accused “to be confronted with the witnesses against him.” U.S. Const. amend. VI. Every court of appeals to consider the issue has concluded that the Confrontation Clause does not apply at sentencing, *United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) (collecting cases), and this Court long ago held the same. *See Williams v. Oklahoma*, 358 U.S. 576, 584 (1959).

Nevertheless, this Court’s more recent ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), provides cause for reexamination. In *Crawford*, the Court held that the Confrontation Clause imposes at trial a *per se* bar on the admission of out-of-court testimonial statements made by unavailable declarants where there was no prior opportunity for cross-examination. *See id.* at 53-54. *Crawford* made clear that the constitutional requirement is “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 61. The same reasoning applies to evidence at sentencing, which could (as here) have a dramatic impact on the defendant’s punishment.

Moreover, the text of the Sixth Amendment makes clear that the right of confrontation applies at sentencing. The Sixth Amendment provides that the right to confrontation – like the right to counsel – applies “[i]n all criminal prosecutions.” U.S. Const. amend VI. Because sentencing is part of a criminal prosecution, this Court has held that “the right to counsel applies at sentencing.” *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). There is simply no textual basis for treating the right to confrontation any differently from the right to counsel.

Mr. Cross had no opportunity at sentencing to cross-examine the individuals who accused him of previously assaulting women and brandishing firearms. This Court should use his case as a vehicle to reexamine the Confrontation Clause’s applicability at sentencing.

## CONCLUSION

For the foregoing reasons, Mr. Cross respectfully asks this Court to grant his petition.

RESPECTFULLY SUBMITTED,



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