

No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTIAN DOMINIQUE SCOTT,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether supervised release revocation defendants enjoy a limited right of cross-examination as to facts that increase the sentence imposed following revocation, or only as to facts that make the defendant eligible for revocation?

PARTIES

Marquist Theobles Williams the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christian Dominique Scott 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. Scott*, 731 Fed. Appx 348 (5th Cir. July 16, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered written judgment on November 9, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an order denying a timely petition for rehearing, which was entered on July 16, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

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 offence 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.

Federal Rule of Criminal Procedure 32.1 provides in part:

(b)(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

- (A) written notice of the alleged violation;
- (B) disclosure of the evidence against the person;
- (C) an opportunity to appear, present evidence, and question any adverse witness

` unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Christian Dominique Scott began a federal term of supervised release began on November 7, 2016. (ROA.198)¹.

Pursuant to his conditions of release, Mr. Scott was not to commit any crimes or use drugs. (ROA.200). He was also required to undergo drug testing and make restitution payments. (ROA.199-201).

United States Probation Officer Ricardo Santiago filed a petition to revoke Mr. Scott's term of supervised release on October 4, 2017. (ROA.198-203). In the petition, Officer Santiago alleged two new crimes. (ROA.199). One of the alleged crimes was an assault by Mr. Scott against his girlfriend, Destinee Butler. (ROA.199). The other allegation involved the offense of driving without a valid license. (ROA.199). Officer Santiago also alleged a positive drug test, an admission to drug use, the failure to comply with drug testing, and the failure to make restitution payments. (ROA.200-01).

The revocation hearing centered on the alleged assault. Mr. Scott admitted to the drug- and restitution-related violations. (ROA.62, 88-89). Mr. Scott denied the license-related allegation but neither contested the issue nor objected to the government's use of the petition to prove the violation. (ROA.61, 88-89). In contrast, Mr. Scott denied the assault, (ROA.88-89, 199), and repeatedly invoked his right to confront the witness who identified Mr. Scott as the perpetrator of the offense, (ROA.61-62, 136, 171-74).

Both parties put on evidence concerning the alleged assault. First, Mr. Scott called Ms. Butler. (ROA.120). Ms. Butler testified that Mr. Scott had not assaulted her and claimed her injuries were caused by a fight that took place prior in the evening. (ROA.121-22). In response, the government called the officer who responded to the scene of the alleged assault, and he testified to

¹Citations to the Fifth Circuit record on appeal are included in hopes they are of use to the government or the Court in answering or evaluating the Petition.

an account provided by a witness. (ROA.146-47). Mr. Scott again invoked his right to confront the reporting party, (ROA.136-37), but the district court overruled the objection, (ROA.142-45). In particular, the district court found good cause to forgo confrontation for two reasons. First, the declarant was seemingly disinterested, and as a result, the district court considered his report to be “inherently reliable.” (ROA.144-45). Second, Officer Santiago had made some efforts to procure the witness’s presence at the hearing. (ROA.142).

At the conclusion of the hearing, the district court found the assault allegation proved by a preponderance of the evidence. (ROA.65, 178). The district court revoked Mr. Scott’s term of supervised release and imposed a ten-month term of imprisonment and a 50 month term of supervised release. (ROA.108-109). The government then directly asked whether the district court would have imposed the same sentence absent its finding on the reported assault: “Would you be willing to go on the record of saying whether or not you would have imposed the same sentence without finding the domestic violence?” (ROA.111-112).

The district court answered no. “I would like to say that it would be the same, but I don’t know that I could honestly, candidly say that.”

(ROA.111).

It elaborated:

“I think the domestic violence incident is the more serious of all the situations here . . . and so I don’t think I could candidly say it would be the same either way.”

(ROA.111).

B. Proceedings on Appeal

On appeal, Petitioner contended that the district court plainly erred in considering hearsay evidence of the domestic assault. He relied on his due process right of cross-examination in supervised release proceedings, which excludes hearsay unless the government can show good cause for it in a particular case. *See United States v. Jimison*, 825 F.3d 260, 262 (5th Cir. 2016)(citing *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972)). Good cause, he noted, is found by the court below in cases involving reliable, scientific evidence, but not in cases of ordinary hearsay. *Compare*

United States v. McCormick, 54 F.3d 214, 226 (5th Cir. 1995); *United States v. Grandlund*, 71 F.3d 507, 510 (5th Cir. 1995); *United States v. Kindred*, 918 F.2d 485, 486 (5th Cir. 1990) **with** *Jimison*, 825 F.3d at 262; *McCormick*, 54 F.3d at 226, n.49; *McBride v. Johnson*, 118 F.3d 432, 436 (5th Cir. 1997); *Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 978 (5th Cir. 1988). The present case involved classic eye-witness testimony, and nothing resembling a scientific finding. As such, he argued, the district court erred in admitting that testimony over a cross-examination objection. Further, he noted that the district court could not exclude the possibility that it would have imposed a lesser sentence but for its finding of domestic violence.

The Fifth Circuit affirmed on the sole ground that the district court would have revoked Mr. Scott's term of supervised release even if it had not admitted the evidence of domestic assault. *See* [Appx. A]. It did not address whether the evidence increased the sentence imposed, flatly holding that "the right of confrontation does not apply to the length of any resulting prison sentence." *See* [Appx. A].

REASONS FOR GRANTING THE WRIT

- I. The courts of appeals are divided as to whether supervised release revocation defendants enjoy a limited right of cross-examination as to facts that increase the sentence imposed following revocation, or only as to facts that trigger the defendant's revocation. The rule of the opinion below deprives thousands of revokees of due process, conflicts with the plain text of Federal Rule of Criminal Procedure 32.1, and will be difficult or impossible for district courts to apply.**

The revocation of supervised release implicates fundamental liberty interests and thus entitles the defendant to certain procedural due process protections. *Gagnon v. Scarpelli*, 411 U.S. 778, 782-86 (1973). The minimal requirements of due process for a revocation proceeding are explained in *Morrissey v. Brewer*, 408 U.S. 471 (1972). Among those requirements, a defendant must be afforded “the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” *Morrissey*, 408 U.S. at 488-89. The same right is found in Federal Rule of Criminal Procedure 32.1(b)(2)(C).

The court below held that these protections are categorically inapplicable as to facts that increase the length of the sentence. It said “the right of confrontation does not apply to the length of any resulting prison sentence.” [Appx. A]. It cited a published Fifth Circuit authority on this point, *United States v. Williams*, 847 F.3d 251, 254 (5th Cir. 2017). [Appx. A]. The defendant in *Williams* sought *en banc* review, and was refused. So while the opinion below is consistent with Fifth Circuit law, it is directly contrary to the law of the Third Circuit.

In *United States v. Lloyd*, 566 F.3d 341 (3rd Cir. 2009), the defendant suffered revocation of his supervised release upon findings that he failed to report his questioning by law enforcement, illegally possessed a firearm, and threatened his pregnant girlfriend with a gun (an aggravated battery under relevant state law). *See Lloyd*, 566 F.3d at 342-343. The firearm possession was established by a separate state conviction, which all parties agreed to be admissible. *See id.* at 344. But the aggravated battery conduct was unadjudicated, and established only by contested hearsay. *See id.* at 345-347. While the firearm possession was sufficient to justify the defendant's revocation, the

finding that he had also committed an aggravated battery increased the recommended range of imprisonment. *See id.* at 343. After applying a balancing test to determine whether the district court had good cause to admit hearsay supporting the battery allegation, the court of appeals vacated the sentence and remanded. *See id.* at 344-347. Plainly, the Third Circuit applies no categorical rule authorizing hearsay as to facts that increase the length of the revocation sentence. The Ninth Circuit appears to hold similarly. *See United States v. Comito*, 177 F.3d 1166, 2267 (9th Cir. 1999)(noting the effect of hearsay on the grade of violation, and recommended range of imprisonment).

The court of appeals “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup. Ct. R. 10(a). Further the rule announced by the opinion below deprives thousands of revokees of due process, conflicts with the plain text of Federal Rule of Criminal Procedure 32.1, and will be difficult or impossible for district courts to apply.

The categorical rule announced by the court below is wrong as a matter of constitutional law. To determine whether a given procedural protection is “due” a person facing lost liberty, it is necessary to consider three factors: the strength of the individual interest involved, the risk of erroneous deprivation of liberty without the protection, and the strength of the state’s interest *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). There is no reason supervised release sentencings should be exempt from this standard. To the contrary, *Mathews* compels a finding of good cause when cross-examination is denied as to facts that increase a revocation sentence.

The defendant has a substantial liberty interest in supervised release revocation proceedings: he or she faces a higher term in prison. That interest is magnified by the fact that he or she may be incarcerated for conduct that does not even constitute a crime. *See* 18 U.S.C. §3583(d)(specifying several conditions of release that proscribe non-criminal conduct).

The risk of error in the absence of a qualified right to cross-examination is serious, for two reasons. First, there are few other safeguards against erroneous fact-finding in revocation sentencing:

the standard of proof is just a preponderance of the evidence (*see* 18 U.S.C. §3583(e)(3)), and substantive reasonableness review is in many jurisdictions limited to review for plain unreasonableness (*see United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011); *United States v. Crudup*, 461 F.3d 433, 437-39 (4th Cir. 2006); *United States v. Kizeart*, 505 F.3d 672, 674-75 (7th Cir. 2007)). Second, the good cause finding will often turn on the reliability of evidence. Thus, if the government cannot establish good cause to deny cross-examination, the evidence will often be from an unreliable source. Cross-examination is of enormous importance in weeding out unreliable information – it is “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970).

Third, the burden on the government to bring a witness to court may be evaluated on a case-by-case basis in connection with the good cause finding. There is thus no reason to categorically withhold due process protection from facts that increase a revocation sentence.

The opinion below is also in quite direct conflict with Federal Rule of Criminal Procedure 32.1. That Rule gives revocation defendants the right to “question **any** adverse witness unless the court determines that the interest of justice does not require the witness to appear.” Fed. R. Crim. P. 32.1(b)(2)(C)(emphasis added). A witness whose testimony increases the defendant’s sentence is certainly “adverse,” and the Rule requires that **any** such witness be subjected to cross-examination absent good cause. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997)(“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”)(quoting Webster’s Third New International Dictionary 97 (1976)). The simple, plain language of the Rule requires that revokees be offered a right to cross-examine any witness against them, whether that witness gives evidence on the question of revocation, sentencing, or both.

Finally, the holding below— no right of confrontation as to facts that merely affect the length of the sentence – also burdens district courts with a nearly impossible standard. Revocation hearings are unitary, and the revocation and sentencing decisions often turn on the same information. *See Fed.*

R. Crim. P. 32.1. It would be cumbersome, and sometimes impossible, to parse out whether every fact affects the revocation decision, the sentencing, or both.

The present case is an outstanding vehicle to determine the scope of the due process right to cross-examination in revocation hearings. The error was fully preserved by contemporaneous objection. The court below made no suggestion that the district court had correctly found good cause to excuse cross-examination. And given the ordinary, eye-witness nature of the declarant's testimony, it would have been difficult for the government successfully to defend the decision. Further, the district court's response to the government at sentencing – expressly declining to say that the sentence would be the same – makes clear that there probably was an effect on the sentence. Finally, while the defendant has been released from his term of imprisonment, he remains subject to a lengthy term of supervised release. A finding of domestic assault likely convinced the court of the need for longer supervised release, so there remains a tangible impact on the defendant's sentence at stake in the case.

CONCLUSION

Petitioner respectfully requests that this Court grant *certiorari*, reverse the judgment below, and remand for resentencing. Alternatively, he requests such relief as to which he may be justly entitled.

Respectfully submitted this 15th day of October, 2018.

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