

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

SHANE ROACH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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November 19, 2018

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

SHANE ROACH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Does a defendant preserve a confrontation issue for review by clearly articulating Confrontation Clause concerns as the basis for his objection without specifically mentioning the Confrontation Clause?

NO. _____

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Aric G. Elsenheimer, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for Petitioner Shane Roach and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately ____p.m. on the 19th day of November 2018.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT**

Petitioner Shane Roach respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming his conviction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Roach*, 10th Cir. No. 17-2085, affirming Mr. Roach's conviction, was filed July 24, 2018. That opinion is attached as Appendix A to this petition. The Amended Judgment in a Criminal Case, filed April 17, 2017, is attached as Appendix B.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction of the appeal of the district court's ruling pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Tenth Circuit entered its judgment affirming Mr. Roach's conviction on July 24, 2018. Mr. Roach filed a petition for rehearing, which the Tenth Circuit denied on August 20, 2018. Pursuant to Supreme Court Rule 13.1 and 13.3, this petition is timely if filed on or before November 19, 2018.

FEDERAL LAW AT ISSUE

The Confrontation Clause of the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Shane Roach and Co-Defendant Angela Santillanes were charged by indictment, filed in the United States District Court for the District of New Mexico, with violating 18 U.S.C. § 1591(a)(1) and aiding and abetting that violation. Section 1591 makes it a federal offense to “knowingly” “in or affecting interstate . . . commerce” “recruit[], entice[], harbor[], transport[], provide[], obtain[] [or] . . . maintain[] . . . by any means a person, . . . knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act.” 18 U.S.C. § 1591(a)(1). The indictment alleged that Mr. Roach and Ms. Santillanes had one victim, Dallas Grassbaugh.

Ms. Santillanes negotiated a deal with the government. She would cooperate with the government’s prosecution of Mr. Roach, including testifying against Mr. Roach, in exchange for the government not pursuing the charge against her. A conviction for a violation of the sex trafficking statute carried a mandatory minimum 15-year prison term. 18 U.S.C. § 1591(b)(1). Shortly before trial, the government moved to dismiss without prejudice the count in which Ms. Santillanes was charged. The district court granted the motion.

The Trial Testimony.

At trial, Ms. Grassbaugh testified about her lengthy history of drug addiction and prostitution. She testified that Mr. Roach initially contacted her through a number she listed in a Backpage ad she had maintained. He proposed that she make him her pimp. Ms. Grassbaugh did not immediately agree. Some days later, however, she contacted him and requested his help.

Ms. Grassbaugh testified about the arrangements Mr. Roach made for her to engage in commercial sex acts and the ways in which he controlled her. He kept the money she made and provided her with food, drugs, medical care, and personal items. Eventually, Ms. Grassbaugh contacted a victim advocate group and reported she was being trafficked, which led to the charges in this case.

Ms. Santillanes' testimony confirmed some of Ms. Grassbaugh's allegations against Mr. Roach. Ms. Santillanes also testified about how she taught Mr. Roach to run a prostitution organization. She had learned what she taught him during her years of working as a prostitute and stripper. She introduced Mr. Roach to Backpage to enable him to meet prostitutes. Ms. Santillanes posted ads for Ms. Grassbaugh with gift cards purchased by Mr. Roach.

Ms. Santillanes acknowledged she had struggled with addiction to Percocet, cocaine, and methamphetamine. During the months before she and Mr. Roach were arrested, she was using methamphetamine. After she obtained pretrial release, she tested

positive for illegal drugs at least twice. This resulted in law enforcement taking her into custody.

The Disallowed Cross-Examination of Ms. Santillanes.

On cross-examination of Ms. Santillanes, defense counsel¹ tried to make the point that she had considerable motivation to assist the prosecution in Mr. Roach's trial in order to avoid the very serious consequences of the conviction and sentence that she would otherwise have faced. She acknowledged that she was charged with the same crime as Mr. Roach. When asked whether she made a deal with the prosecution to have her charges completely dismissed, she responded that she decided to tell the truth and "the prosecution decided what they wanted to do with me at that point." "The deal," she said, "was that I was to come and tell the truth about what happened in the whole case." Defense counsel then inquired: "And that was quite a break, because before that happened, you were facing a pretty lengthy prison sentence, right?" The government objected before Ms. Santillanes answered.

At a bench conference, the government protested that the prospective punishment was irrelevant. The district court agreed. "That's correct. That's an incorrect form to inform the jury that there is a severe punishment," the court ruled. Consequently, the court ordered counsel to "avoid any questions about punishment." Counsel insisted he was not trying to show Mr. Roach's potential punishment. "[M]y question was aimed

¹ Undersigned counsel did not represent Mr. Roach at trial.

toward her understanding, her motivation to testify falsely,” counsel explained. Despite that explanation, the court instructed the jurors “you are to disregard the last question by [defense counsel] and answer by Ms. Santillanes.”

At another point in the cross-examination of Ms. Santillanes, the district court disallowed defense counsel from questioning her about what it characterized as her lying to her pretrial services officer. Ms. Santillanes’ attorney had filed a motion seeking authorization from the district court for Ms. Santillanes’ release from a halfway house to her grandparents, Joe and Jenny Chavez. In the motion, her counsel asserted: “Her grandparents . . . are willing to serve as third-party custodians for Ms. Santillanes.” The district court modified the release conditions as requested.

The probation office subsequently filed a petition for action stating that: the day before, a pretrial services officer visited the Chavezes’ home; the Chavezes indicated Ms. Santillanes had not been staying with them, nor did she have permission to do so; the probation office found Ms. Santillanes and instructed her to report to the office; and she failed to report. The Chavezes told the probation officer Ms. Santillanes had not asked them for permission to stay with them and that they would not have given her permission to stay if she had asked. Ms. Santillanes did not report to the probation office that she was living with someone else.

The government contended defense counsel’s proposed cross-examination was not proper impeachment because Ms. Santillanes did not lie. The government claimed her original plan was to stay with her grandparents, but when she arrived at their home,

they would not allow her to stay and so she stayed elsewhere. “At best, it was a misunderstanding between the probation officer and Ms. Santillanes,” the government argued.

The district court recognized that Mr. Roach wished to question Ms. Santillanes about an instance in which he contended she had lied. The court stated that it was familiar with the circumstances because it had received pretrial services reports. “I think there was some confusion there,” the court explained, “and if that testimony were allowed, she would probably try to explain, as [the government has], what happened, and it might result in the others having to be called as witnesses to testify.”² For that reason, the court concluded the proposed area of inquiry was not proper impeachment and consequently disallowed it.

At a later point of the cross-examination, the district court prohibited defense counsel from questioning Ms. Santillanes about the credit card fraud she was planning. Ms. Santillanes admitted she saved all the gift cards she used to pay for Backpage ads, even after the cards ran out of money, “[b]ecause there may have been something that myself and Shane were interested in doing after the prostitution.” She said Mr. Roach showed “a lot of interest” in this “something.” Defense counsel then asked: “And you were essentially instructing Shane on how to commit fraud, right?” The government objected.

² Federal Rule of Evidence 608(b) would have prohibited such testimony.

At a bench conference, defense counsel advised that, during the time period the indictment encompassed, Ms. Santillanes had proposed to Mr. Roach some kind of credit card fraud involving “skimmers” that he previously knew nothing about. The questioning went to her credibility because she was proposing a fraudulent scheme, he contended.

The government characterized the proffered cross-examination as unnoticed, irrelevant Federal Rule of Evidence 404(b) evidence. The district court confirmed with defense counsel that the inquiry was solely for impeachment. The government expressed concern that the jury would consider it as substantive evidence. Defense counsel pointed out the jury is presumed to follow its instructions to only consider it for impeachment. In answer to the court’s question about how the credit card fraud impeached Ms. Santillanes, counsel noted that Ms. Santillanes knew all about the fraudulent credit card activity and had communicated to Mr. Roach her intent to teach him about it. The court determined the evidence was inadmissible under Rule 404(b) and ordered counsel to avoid the subject.

The Closing Arguments.

In its closing, the government proffered Ms. Santillanes’ testimony as the reason why the jury should believe Ms. Grassbaugh. The prosecutor argued that Ms. Santillanes’ testimony “mirror[ed]” for the most part Ms. Grassbaugh’s testimony about what Mr. Roach did to her and showed that Ms. Grassbaugh was truthful about her version of events.

In his closing, defense counsel argued the government's case depended on the credibility of Ms. Grassbaugh and Ms. Santillanes who were "liars." Counsel contended Mr. Roach did not cause Ms. Grassbaugh to engage in prostitution. She already was doing that before Mr. Roach came along, he pointed out. Mr. Roach and Ms. Grassbaugh had a voluntary pimp-prostitute arrangement, he insisted. Mr. Roach coerced Ms. Grassbaugh to prevent her from setting up dates on the side, but not to cause prostitution, he maintained.

The prosecutor countered that Mr. Roach acted as he did solely to get Ms. Grassbaugh to perform commercial sex acts. If the jurors believed both Ms. Grassbaugh and Ms. Santillanes, or either of them, beyond a reasonable doubt, Mr. Roach is guilty, the prosecutor argued.

The Jury Verdict and Sentence.

The jury found Mr. Roach guilty. The district court imposed the mandatory minimum sentence of 180 months in prison.

The Court of Appeals' Ruling.

In his appeal, Mr. Roach argued that the district court's rulings restricting his cross-examination of Ms. Santillanes violated his Sixth Amendment right to confront the witnesses against him. He explained that the denial of impeachment unfairly prevented him from demonstrating to the jury the lack of credibility of Ms. Santillanes' testimony about his alleged misconduct and that her testimony was critically important to the government's case. He emphasized the long line of cases from this Court upholding the

vital nature of the right of cross-examination because it “is the principal means by which the believability of a witness and the truth of the testimony is tested.” *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

The court of appeals declined to consider Mr. Roach’s Confrontation Clause arguments because it decided that he had failed to preserve his objections to the district court’s rulings. Although Mr. Roach had timely objected to the limitations placed by the district court on his cross-examination of Ms. Santillanes, the court of appeals determined that he forfeited his Confrontation Clause challenges because “he failed to state a Confrontation Clause ground on which the court should permit the cross-examination.” Att. A at 10. The court of appeals did not review Mr. Roach’s claims under the plain error standard because it held he had waived plain error review.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court should grant certiorari in this case to address the important question of what constitutes adequate preservation of Confrontation Clause claims, an issue on which the lower courts have issued conflicting decisions.

A. Mr. Roach's Counsel Preserved his Confrontation Claims by Articulating his Intention to Cross-Examine Ms. Santillanes about Core Confrontation Clause Concerns involving Improper Motive and Bias.

By testifying against Mr. Roach, Ms. Santillanes likely escaped conviction on the charge on which she had been indicted and a lengthy prison sentence comparable to what Mr. Roach received. “The likelihood that a prosecution witness is shading or even contriving testimony adverse to the defendant reasonably can be viewed as directly correlated with the perceived value of such testimony to the witness.” *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir. 1983).

Mr. Roach's counsel made plain to the district court that he sought to cross-examine Ms. Santillanes about the improper motive and bias that prompted her testimony, as well as indications of her lack of credibility based on examples of her dishonest conduct and plans for future crimes. He clearly explained that the requested cross-examination of Ms. Santillanes concerned matters that fall squarely within the well-recognized purpose of the Confrontation Clause. Counsel's objection would have been reasonably understood to raise Mr. Roach's right to confront Ms. Santillanes.

The Sixth Amendment guarantees the right of a defendant to “be confronted with the witnesses against him.” *U.S. Const.*, Amend. VI. A primary interest secured by the Confrontation Clause is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308,

315 (1974). “Cross-examination is the principal means by which the believability of a witness and the truth of the testimony is tested.” *Id.* at 316. “[T]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 316-17. The “main and essential purpose” of the Confrontation Clause is to protect a defendant’s right to cross-examine and impeach an adverse witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986).

A criminal defendant has a right to reasonable cross-examination concerning bias for the prosecution, bias against the defendant, motive to fabricate, and matters indicating a lack of credibility. *Id.* at 678-79. *See also Olden v. Kentucky*, 488 U.S. 227, 231 (1988); *Davis v. Alaska*, 415 U.S. at 316-17. “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.’” *Delaware v. Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318).

B. *The First Circuit Has Repeatedly Held Objections Such as Those Raised by Mr. Roach Are Adequate to Preserve Confrontation Clause Claims for De Novo Review.*

In *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), the court concluded that the determination of whether a Confrontation Clause claim was preserved requires consideration of “the full context of counsel’s colloquy with the court.” *Id.* at 19. It relied on its prior decision in *United States v. Cabrera-Rivera*, 583 F.3d 26 (1st Cir.

2009). In that case, the court found that, despite counsel's failure to specifically cite the Confrontation Clause, it was "obvious" that counsel was objecting to the inability to confront the declarant. Counsel preserved the Confrontation Clause claim by pointing to the declarant's unavailability, explaining that the witness "is not here to--". *Id.* at 36. Courts should look at an objection in the context of the facts of the case to see whether counsel made "a short-hand reference to an objection on confrontation grounds." *Id.*

In *Meises*, the court reaffirmed both its analysis and conclusion in *Cabrera-Rivera* with respect to preservation of Confrontation Clause issues. The objections found adequate in *Meises* and *Cabrera-Rivera* were virtually the same. *Meises*, 645 F.3d at 20. While a mere hearsay objection is insufficient to preserve a Confrontation Clause claim, counsel may preserve the issue by articulating "Confrontation Clause concerns." *Id.* See also *United States v. Ramos-Gonzalez*, 664 F.3d 1, 4 (1st Cir. 2011) (de novo review was appropriate because in context, counsel clearly objected to the inability to confront the declarant and used language properly understood as a "short-hand reference" to a Sixth Amendment Confrontation Clause issue).

C. *The Tenth Circuit Held Mr. Roach Waived his Confrontation Clause Claim because He Did Not Specify below that He Was Objecting on Confrontation Grounds.*

The Tenth Circuit explained in its decision in this case that it will hold an objection to the exclusion of evidence adequate only where there has been an offer of proof at trial that, first, describes the evidence at issue and what it tends to show and, second, identifies the grounds for admitting the evidence. Att. A at 8. The court of

appeals held that Mr. Roach forfeited his Confrontation Clause claims because he “never mentioned . . . the Confrontation Clause at trial . . .” *Id.* at 10. The Tenth Circuit ruled consistently with its precedent that “[w]here a Confrontation Clause objection is not explicitly made below we will not address the constitutional issue in the absence of a conclusion that it was plain error for the district court to fail to raise the constitutional issue *sua sponte*.” *United States v. LaHue*, 261 F.3d 993, 1009 (10th Cir.2001) (quoting *United States v. Perez*, 989 F.2d 1574, 1582 (10th Cir.1993) (en banc)).

There can be little doubt that Mr. Roach’s counsel made a “short-hand reference to an objection on confrontation grounds.” Counsel raised repeated and obvious Confrontation Clause concerns, arguing that cross-examination of Ms. Santillanes—about the lengthy sentence she sought to avoid, her lies to the district court and the probation office about her living arrangements while on release, and her planned credit card fraud that would involve Mr. Roach—was crucial to expose Ms. Santillanes’ improper motive and bias and impeach her credibility. Counsel told the court that his questions about Ms. Santillanes’ cooperation with the prosecution concerned “her motivation to testify falsely.” He made clear to the district court his intention to cross-examine Ms. Santillanes in order to attack the credibility of her testimony. She was a crucial cooperating witness for the government who induced Mr. Roach’s participation in the crimes with which she helped to secure his conviction.

Without expressly using the word “confrontation,” counsel raised concerns that invoked the Confrontation Clause far more explicitly than the objections upheld as

adequate to preserve Confrontation Clause claims in *Meises* and *Cabrera-Rivera*.

Nonetheless, the court of appeals declined to review Mr. Roach's Confrontation Clause claims because he failed to specify below that he was relying on the Confrontation Clause. Att. A at 10.

D. *This Court Should Grant Certiorari to Address a Clear Circuit Conflict that Results in Disparate Protection of Sixth Amendment Rights.*

The ability to expose the lack of credibility of adverse witnesses' testimony is critical to a fair trial. Given the primary importance of Confrontation Clause rights, it is intolerable that the extent to which those rights are protected turns on the vagaries of geography. A defendant seeking vindication of his Sixth Amendment rights should not be required to demonstrate that he identified a Confrontation Clause claim by name in one circuit, but not another. Mr. Roach received far less protection of his rights than he would have received if he had sought redress in the First Circuit. This Court's grant of certiorari is warranted in this case in order to rectify this unfairness.

Constitutional rights are meaningful only if they are enforced. This Court should accept certiorari of this case and clarify the correct standard for preservation of Confrontation Clause claims.

CONCLUSION

For the reasons stated above, Petitioner Shane Roach requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I, Aric G. Elsenheimer, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Shane Roach, I caused to be mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5614, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 19th day of November 2018.

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