RECORD NO._____

In The
Supreme Court of The United States

DASHAWN D. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE SENTENCING COURT ERRED IN ADMITTING HEARSAY STATEMENTS AS EXCITED UTTERANCES.

2. WHETHER THE COURT ERRED IN ADMITTING HEARSAY STATEMENTS AS PRIOR IDENTIFICATION.

3. WHETHER THE COURT ERRED IN FINDING THAT THE RESIDUAL HEARSAY EXCEPTION WOULD BE APPLICABLE, EVEN IF THE EXCITED UTTERANCE AND PRIOR IDENTIFICATIN EXCEPTIONS WERE NOT APPLICABLE.

4. WHETHER THE EVIDENCE WAS SUFFICIENT TO FIND THAT THE DEFENDANT COMMITTED A CRIME IN VIOLATION OF HIS TERMS OF SUPERVISED RELEASE.

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STATEMENT OF THE OPINIONS BELOW

Dashawn D. Brown (hereinafter "Brown") was convicted of possession with intent to distribute a detectable amount of heroin in violation of 21 U.S.C. Section 841 and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 USC 924(c). The defendant received a sentence of 84 months with five years of supervised release. The original sentence was rendered on August 22, 2008. Brown completed his term of incarceration and began supervised release on July 10, 2014. On February 5, 2018, Brown's probation officer presented an official report on the conduct of Brown and requested that the sentencing court issue a warrant against Brown. The probation officer cited an alleged violation of a mandatory condition to-wit:

> On January 2, 2018, a warrant was issued by the Richmond Police Department for Mr. Brown's arrest, charging him with Malicious Wounding and Use of a Firearm in Commission of a Felony. According to the detective assigned to the case, Mr. Brown was involved in an argument, pulled out a firearm, and shot and wounded the victim. He was arrested on these charges by the Richmond Police Department on January 10, 2018. It is noted that this incident is not related to the previous shooting incident in June, 2017. (JA 12).

On May 15, 2018, the defendant pled not guilty and was found guilty as charged. The sentencing court sentenced the defendant to 60 months of incarceration with no supervised release to follow. On May 16, 2018, the defendant noted an appeal which was briefed by the defendant and the United States. On November 16, 2018, in an Unpublished Opinion, the United States Court of Appeals for the Fourth Circuit affirmed the trial court's decision. (App. A)

BASIS FOR APPELLATE JURISDICTION

This is a criminal matter initiated in the United States District Court with an automatic right of appeal to the United States Court of Appeals pursuant to 28 U.S.C. 1291. Petitioner has timely filed his Petition. This Petition is requested under Rule 10 of the Supreme Court Rules.

STATEMENT OF THE CASE

Dashawn D. Brown (hereinafter "Brown") was convicted of possession with intent to distribute a detectable amount of heroin in violation of 21 U.S.C. Section 841 and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 USC 924(c). The defendant received a sentence of 84 months with five years of supervised release. The original sentence was rendered on August 22, 2008. Brown completed his term of incarceration and began supervised release on July 10, 2014. On February 5, 2018, Brown's probation officer presented an official report on the conduct of Brown and requested that the sentencing court issue a warrant against Brown. The probation officer cited an alleged violation of a mandatory condition to-wit:

> On January 2, 2018, a warrant was issued by the Richmond Police Department for Mr. Brown's arrest, charging him with Malicious Wounding and Use of a Firearm in Commission of a Felony. According to the detective assigned to the case, Mr. Brown was involved in an argument, pulled out a firearm, and shot and wounded the victim. He was arrested on these charges by the Richmond Police Department on January 10, 2018. It is noted that this incident is not related to the previous shooting incident in June, 2017. (JA 12).
>
> The testimony regarding the probation violation was heard on May 15, 2018.

Manday Patten (hereinafter "Patten") was the government's first witness. Patten was shot on December 29, 2017. (JA18). The bullet entered his body, hit his liver, kidney and pancreas. (JA19, ll 2-4). Patten's girlfriend, Laquecia Phillips was with Patten at the time. (JA 20, ll 1-5). The time was around noon. (JA 20, ll 7-10). Brown had been smoking marijuana that morning. (JA 36, ll 8-11). When

Patten was shot, Patten could not see the shooter's face. (JA 20, ll 15-18). The shooter had on a big coat and was running up the alley. Patten took a few steps and then collapsed. (JA 20, ll 19-25). After Patten collapsed, he started "going in and out". (JA21, ll 1-6). Patten was taken to the hospital where he remained unconscious for four days. (JA22, ll 1-7).

After Patten regained consciousness, Detective McWhirter visited Patten in the hospital and showed Patten, according to Patten, a line-up of pictures. (JA 23 ll 6-16). Patten was asked whether Patten knew Brown as "Day Day". (JA 23, ll 23-25; JA 24, ll 1-7). The detective then asked Patten whether Patten recognized any of the images in the lineup as Dashawn Brown. (JA 26, ll 13-15). Patten agreed that only one of the images was a picture of Brown. Patten did not, however, identify Brown as the shooter. (JA 25, ll 7-10).

During this hearing, Patten emphatically denied that he identified Dashawn Brown as the person who shot him. (JA 27, ll 9-19).

On cross-examination, Patten agreed that he was drifting in and out of consciousness. (JA 32, ll 21-25 and JA 33, line 1). Patten also confirmed that Patten had never told any other person, including law enforcement officers outside of the State Grand Jury proceeding, that Brown was the shooter. (JA 32, ll 11-15).

Lastly, Patten could not really remember what he said when he was lying on the ground going in and out of consciousness. (JA 33, ll 2-19). Patten testified that he had no reason to testify falsely, or to prevent the disclosure of Brown as the shooter, insofar as Patten had no basis for any perceived motive on behalf of Brown to

shoot him. (JA 35, ll 18-25).

Laquecia Phillips, Patten's girlfriend, was walking with Patten, but not right beside him. (JA 43, ll 10-12). Phillips saw someone approaching Patten and started running before Patten was shot. (JA 43, ll 20-21). All Phillips knew was that she saw someone coming. (JA 44, ll 25; JA 45, ll 1-23). Phillips did not know the defendant and was unable to identify the defendant in the lineup. (JA 47, ll 21-25; JA 48, ll 1-9). The incident happened in a matter of seconds and the defendant had something covering his face. (JA 49, ll 2-14).

The United States then called law enforcement witnesses who testified about their observations at the scene and the hearsay statements of Patten. The first was Sergeant Gochenour. When Gochenour arrived on scene, other persons were attempting first aid on Patten (JA 54, ll 2-11). There was no evidence admitted establishing the time of the call reporting the shooting, or Gochenour's arrival at the scene. Sergeant Gochenour knew Patten. (JA 55, ll 14-17). Sergeant Gochenour attempted to talk to Patten. According to Gochenour, Patten appeared to indicate that he (Patten) knew Gochenouor. (JA 54, ll 8-9). Patten was in a great deal of pain. Patten could not feel his legs. (JA54, ll 18-23). Gochenour asked Patten if he knew who shot him. Patten did not immediately respond. (JA 55, ll 25; JA 56, ll 1-2). At some point Patten closed his eyes as Gochenour urged Patten to stay awake. Gochenour again asked Patten "who shot you?"(JA 43, ll 3-9). Per Gochenour, Patten said " Day Day". (JA 57, ll 3-9). The statement was admitted over objection. As a follow-up, Gochenour then asked Patten "which Day Day?:

(JA57, ll 2-13). Patten did not answer. (JA 57, ll 2-13) Gochenour then asked "Is it the same Day Day you've associated with in the past that hangs out around here?" Patten said "yes". (JA 44, ll -2-13). Gochenour said "Dashawn?" Id. Per Gochenour, Patten said yes and nodded. Id. Other than those statements, Patten could not tell Gochenour anything about the incident. Id.

On cross-examination, Gochenour admitted that Patten's medical condition appeared to be "shocky". (JA 58, ll 8-15). They were trying to keep Patten awake as he floated in and out of consciousness. (JA 45, ll 11-17). Gochenour agreed that Patten was in a great deal of pain. (JA 58, ll 18-19). Gochenour also agreed that Patten never provided a last name.

Detective McWhirter was then called as a government witness. McWhirter visited Patten in the hospital on January 2, 2018. (JA 60, ll 16-21). McWhirter testified over defense counsel's continuing objection that Patten expressed his concern about not testifying against the person that shot him. (JA 61, ll 10-16). According to McWhirter, Patten recalled telling officers at the scene of the shooting that Day Day shot him. (JA 61, ll 19-25; JA 62, ll 1-2).

According to McWhirter, and contrary to Patten's recollection, McWhirter displayed a single picture of Brown to Patten. (JA 62, ll 12-19). McWhirter asked Patten if the person in the picture was Day Day. Id. McWhirter then asked "Is this Day Day the person that shot you?" (JA 62, ll 15-18). Per McWhirter, Patten shook his head yes, but was reluctant. (JA 62, ll 15-21). McWhirter, on cross-examination, admitted that Patten was scheduled to appear in front of the

state Grand Jury investigating the shooting. While Patten sat in the room with Detective McWhirter, Patten advised McWhirter that he did not know or could not identify the shooter. (JA 63, ll 1-5). McWhirter further agreed that upon his initial visit in the hospital, Patten had just recently had his intubation tubes removed. (JA 67, ll 11-14). McWhirter was not aware of the pain medication that had been prescribed to Patten. (JA 67, ll 15-17), but agreed that Patten was still in significant pain. (JA 67, ll 18-19). McWhirter also did not inquire of any attending nurse regarding the degree or nature of the medicine that had been administered to Patten. (JA 67, ll 20-22).

At the conclusion of the evidence, the trial court concluded that the statements made by Patten at the scene, in which he identified Brown as the person who shot him, were admissible as an excited utterance through the hearsay exception under Rule 803(2). The court ruled that, even if not admissible under 803(2), the statement would have been admissible under the Rule 807 residual hearsay exception. The trial further ruled that the statements made by Patten to McWhirter at the hospital were admissible hearsay statements under 801(d)(1)(C) as a declarant witness' prior identification. The court then found Brown guilty by a preponderance of the evidence of committing the crime of malicious wounding under Virginia Code Section18.2-51, and using a firearm in connection with a felony under Virginia Code Section 18.2-53.1.

The guideline range yielded a range of 30-37 months with a maximum of 60 months. The court then sentenced the defendant to 60 months of incarceration.

SUMMARY OF ARGUMENTS

I. **The court erred in admitting hearsay statements as excited utterances under Rule 803 (2) because the statements were unreliable baed on the physical and mental state of the declarant.**

II. **The court erred in admitting hearsay statements as prior identification evidence under 801 (d)(1)(C) because the officer suggested the identify of the person identified by the declarant.**

III. **The court erred in finding that the residual hearsay exception under Rule 807 would be applicable, even if the excited utterance and prior identification exceptions were not applicable because the statements of the declarant were unreliable and contradicted by the declarant himself under oath.**

IV. **The evidence was insufficient to find that the defendant committed a crime in violation of the terms of his probation insofar as there was insufficient evidence to establish criminal intent.**

ARGUMENT

I. **The court erred in admitting hearsay statements as excited utterances under Rule 803(2).**

A. STANDARD OF REVIEW

The court reviews a district court's decisions on admission of hearsay evidence for abuse of discretion. United States v. Doswell, 670 F.3d 526, 529 (4th Cir. 2012).

B. DISCUSSION OF ISSUES

The Federal Rules of Evidence at 803(2) provide an exception to general rule precluding hearsay statements. Subparagraph (2) reads:

> 2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The excited utterance hearsay exception is "premised on the notion that the excitement caused by the event or condition temporarily stills the capacity for reflection thus producing statements free of conscious fabrication." United States v. James, 164 F.Supp 2d 718 (4th Cir. 2001). An excited utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or at least lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. Id.

In determining whether a declarant recounted an event while under the stress of excitement caused by the event, the court considers relevant factors such as (1) the lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and the mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. United States v. Jennings, 496 F.3d 344 (4th Cir. 2007).

In this case, at first glance, it would be easy to make a determination that

being shot is a startling event. It would also be easy to infer that person who has been shot, and is awaiting medical attention, would experience ongoing stress. At further glance, however, and based on the five relevant factors cited in Jennings, the court should look beyond the first glance.

Specifically, under the first factor, there is no evidence suggesting the time between the shooting and the time of the declaration. It is assumed that it is a fairly short amount of time, but, regardless, there is no direct evidence. When Sergeant Gochenour arrived on the scene, other persons were already attempting to administer first aid to Patten. (JA 54, ll 2-11).

Under the second factor, the age of the declarant does not appear to be a relevant factor. Under the third factor, the physical and mental state of the declarant should be thoroughly considered. Specifically, your defendant had been smoking marijuana that morning. (JA 36, ll 8-11). When the statements by Patten were made, Patten was "shocky". (JA 58, ll 8-15). People at the scene were trying to keep Patten awake as he kept floating in and out of consciousness. (JA 45, ll 11-17). Patten was in a great deal of pain. (JA 58, ll 18-19). Patten could not feel his legs. (JA 54, ll 18-23). Sometimes Patten would respond, and sometimes Patten would not respond. (JA 57, ll 2-13).

Under the fourth factor, the characteristics of the event in this event are essentially unknown. All that is known is that Patten was shot. There is no evidence of an altercation. There is no evidence of a robbery. There is no evidence of provocation. Lastly, under the fifth factor, the subject matter of the statement

was only that Patten identified Brown as the shooter without other explanation.

Under the analysis of Jennings factors, the evidence supports exclusion, not inclusion. Essentially, this was an unexplained shooting without apparent motive, and without corroboration. Patten's hearsay statements admitted during trial were essentially the only basis for conviction. The interests of justice are not advanced by imposing a five year term of incarceration on Brown when the only means of identifying Brown was, essentially, a single statement from a victim, under the influence of marijuana at the time, and drifting in and out of consciousness. Accordingly, the hearsay evidence should not have been admitted, and the court abused its discretion in permitting the hearsay statement under the relevant factor analysis set forth in Jennings.

II. **The court erred in admitting hearsay statements as prior identification under Rule 801(d)(1)(C).**

A. STANDARD OF REVIEW

The court reviews a district court's decisions on admission of hearsay evidence for abuse of discretion. United States v. Doswell, 670 F.3d 526, 529 (4th Cir. 2012). Any conclusion of the court which impacted the defendant's Due Process rights would be reviewed de novo. United States v. Saint Louis, 889 F.3d 145 (4th Cir. 2018).

B. DISCUSSION OF ISSUES.

Fed. R. Evid. 801(d)(1)(C) provides that an out-of-court statement which identifies a person as someone the declarant perceived earlier is not hearsay as long as the declarant testifies and is subject to cross-examination about the statement.

Due process principles prohibit the admission at trial of an out-of-court identification obtained through procedures so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. United States v. Saint Louis, 889 F.3d 145 (4th Cir. 2018). Put differently, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Even when unnecessarily suggestive procedures are used, due process does not require exclusion of the evidence if the identification was sufficiently reliable to preclude the substantial likelihood of misidentification. Thus, the court's analysis proceeds in two steps: (1) the defendant must show that the photo identification procedure was impermissibly suggestive, and (2) if the defendant meets this burden, a court considers whether the identification was nevertheless reliable in the context of all of the circumstances.

Under Saint Louis, courts evaluate the reliability of an out-of-court identification considering the totality of the circumstances, including factors such as (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. The court weights these factors against the corrupting effective of the suggestive identification itself, keeping in mind that the exclusion of such evidence is the exception to the rule that favors the admissibility of eyewitness identification for the jury's consideration. Id.

In this case, Patten's hearsay statements in the hospital during which he nodded affirmatively to McWhirter that Brown was the Shooter, also, at first glance, seem to meet the criteria under 801(d)(1)(c). A deeper dive, however, causes Brown to argue that this issue is not clear. From a due process consideration, according to McWhirter, McWhirter showed the defendant one picture. (JA 62, ll 12-19). With the one picture in hand, McWhirter then asked Patten if the picture was a picture of Brown. (JA 62, ll 12-19). McWhirter then asked Patten if Brown was the person that shot him. (JA 62, ll 15-18). Per McWhirter, Patten shook his head yes, but was reluctant. (JA 62, ll 15-21).

Essentially, McWhirter showed Patten one picture and asked Patten to confirm what McWhirter already suspected. There was no air of neutrality. According to McWhirter, there were no lineup arrays. McWhirter did not request Patten to physically describe the defendant prior to displaying the picture to Patten. McWhiter's method was suggestive. McWhirter's rationale for the single picture was that it was McWhirter's impression that Patten already knew the shooter, thereby eliminating the need for identification by a more extensive array. Regardless, McWhirter only showed Patten one picture, which was that of Brown and asked if the person in that one picture was the person who had shot him. Brown argues that this was an unnecessarily suggestive procedure sufficient to satisfy the first prong of the due process analysis.

Under the second prong, the court is then required to evaluate the reliability of the identification based on the totality of the circumstances. Under the first factor

in St. Louis, cited supra, it is not clear what opportunity Patten had to observe Brown at the time of the shooting. According to Patten, he could not see the shooter's face at all. (JA 20, ll 15-18). Additionally, per Gochenour, other than the statement made in which Patten identified Brown, Patten could not and did not tell Gochenour anything about the incident. (JA 57, ll 2-13). Under the second factor, insofar as Patten could not relate anything to Gochenour regarding what happened, Patten's degree of attention would weigh against attentiveness.

Under the third factor, Patten did not provide any description other than the shooter had a big coat and was running up the alley. (JA 20, ll 19-25).

Under the fourth factor, Patten had no reliable degree of certainty insofar as he was "shocky". (JA 58, ll 8-15). Patten was floating in and out of consciousness. (JA 45, ll 11-17). He was in pain and could not feel his legs. (JA 58, ll 18-19). Patten could not really remember what he said when he was lying on the ground going in and out of consciousness. (JA 33, ll 2-19). That being the case, Patten's statements were unreliable, especially in the absence of any additional corroborating evidence to confirm Patten's identification. That being the case, Brown's statements to Detective McWhirter at the hospital, should not have been admitted, and the court abused its discretion in doing so.

III. The court erred in finding that the residual hearsay exception under Rule 807 would be applicable, even if the excited utterance and prior identification exceptions were not applicable.

A. STANDARD OF REVIEW

The court reviews a district court's decisions on admission of hearsay evidence for abuse of discretion. United States v. Doswell, 670 F.3d 526, 529 (4th Cir. 2012). Any conclusion of the court which impacted the defendant's Due Process rights would be reviewed de novo. United States v. Saint Louis, 889 F.3d 145 (4th Cir. 2018).

B. DISCUSSION OF ISSUES

Rule 807 of the Federal Rules of Evidence, commonly known as the residual hearsay exception, states in relevant part:

> Under the following circumstances, a hearsay statement is not excluded by the rule under hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
> (1) The statement has equivalent circumstantial guarantees of trustworthiness;
> (2) It is offered as evidence of a material fact;
> (3) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) Admitting it will best serve the purposes of these rules and the interests of justice.

As noted by the Supreme Court, the residual hearsay rule applies "[w]hen a party seeks to introduce out-of-court statements that contain circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence available." Tome v. United States, 513 U.S. 150, 166, 115 S. Ct. 696, 130 L.Ed. 2d 574 (1995). The United States Court of Appeals for the

Fourth Circuit has cautioned that the residual hearsay exception "should not be construed broadly, "and that '[t]o construe it broadly would easily cause the exception to swallow the rule." United States v. Dunford, 148 E.3d 385, 394 (4th Cir. 1998) (citation omitted).

In evaluating the admissibility of evidence Under Rule 807, "[t]he most important element of [the Rule's] requirements is that the district court properly determine that 'equivalent circumstantial guarantees of trustworthiness' are present." Dunford, 148 F.3d at 3939 (quoting 2 MCCORMICK ON EVIDENCE Section 324, at 362 (4th ed. 1992)). To make this determination, this Court looks to the totality of the circumstances surrounding the out-of-court statements. See id. (citing United States v. Clarke, 2 F.3d 81, 84-85 (4th Cir. 1993).

The court relied primarily on 803(2) for its ruling on excited utterance and 801(d)(c) for its ruling on identification. The court noted, however, that such evidence may still have been admissible under Rule 807, and that the statements satisfied the criteria to establish a circumstantial guarantee of trustworthiness. To avoid duplication of arguments, the same arguments previously argued herein regarding reliability of Patten's statements and circumstances under which they were given, are adopted. They offered no guarantee of trustworthiness. In fact, without any other evidence to place the shooting in context, Patten could have given Brown's name out of spite, or a multitude of other reasons which would only have been known to Patten. The best evidence that was available to the United States was the victim himself who was, in fact, called by the government. The admission of

Patten's statements under the residual exception would have been an abuse of the court's discretion in that the statements were not reliable and not corroborated by any other evidence in the case.

IV. **The evidence was insufficient to find that the defendant committed a crime in violation of his terms of supervised release.**

A. STANDARD OF REVIEW

Legal questions are reviewed *de novo*. Factual findings are reviewed for clear error.

B. DISCUSSION OF ISSUES

Virginia Code Section 18.2-51 cites that, if any person should maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury with the intent to maim, disfigure, disable, or kill, she shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony. Virginia Code Section 18.2-51

Intent is a necessary element in the crime of shooting and wounding; intent must be proved either directly, or from facts from which an intentional shooting could be inferred. Where the evidence fails to show such intent, a conviction is not warranted. Hay v. Commonwealth, 139 Va. 578, 123 S.E. 333 (1924).

In this case, we have an unexplained shooting. The court found that the defendant committed the crime of malicious wounding and possession of a firearm in the furtherance of a felony. Malicious wounding under Virginia law requires intent

to be established. Without intent, one cannot be convicted of malicious wounding. Hay. While counsel concedes that intent can be inferred based on conduct, the conduct must be, at a minimum, established. In this case, the government offered no evidence of what happened other than the fact that Patten was shot and that Patten, while on the ground, identified the person that shot him as Brown. According to Gochenour, Patten could not tell Gochenour anything about the incident. (JA 57, ll 2-13).

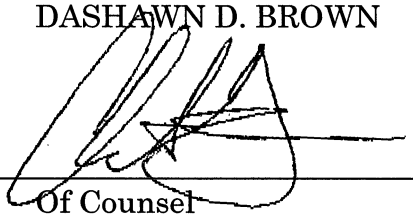
Patten knew of no motive that Brown could have had. (JA 35, ll 18-25). Accordingly, without more, there is no basis to differentiate this shooting from (1) an incident which may have been provoked by Patten himself requiring the shooter to exercise self-defense, (2) an accidental discharge of the firearm, (3) a scenario where the bullet could have been intended for someone else, like Phillips, (4) an unintended ricochet of a bullet not intended for anyone. That being the case, without more knowledge and/or introduction of the circumstances involving the shooting, there is insufficient evidence to determine the intent of the shooter. That being the case, the shooter could not have been found guilty under Virginia's malicious wounding statute. If Brown could not have been found guilty under Virginia's malicious wounding statute, the second charge of using a firearm in furtherance of a felony, would also fail.

CONCLUSION

The victim in the case denied under oath that Brown was the shooter. The conviction should not stand based purely on these hearsay statements obtained while

the Declarant was either in incredible pain, barely conscious, or sedated. The conviction should be reversed and the probation violation dismissed.

DASHAWN D. BROWN

By 
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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using Microsoft Word, Century, 12 point.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing status, rules, or regulations; and the certificate of service, this Brief of Appellant contains 18 pages and 4,929 words.

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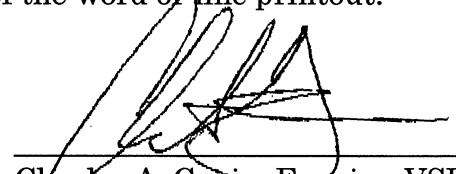

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In The
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DASHAWN D. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A - Unpublished Opinion of the U.S. Court of Appeals for The Fourth Circuit in *U.S. v. Dashawn D. Brown*, No. 18-4330 Decided November 16, 2018

Appendix B - Judgment of the U.S. Court of Appeals for the Fourth Circuit in *U.S. v. Dashawn D. Brown*, No. 18-4330 Filed November 16, 2018

Appendix A

In The U.S. Court of Appeals for the Fourth Circuit

No. 18-4330 *U.S. v. Dashawn D. Brown*

Unpublished Opinion

Decided November 16, 2018

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4330

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DASHAWN D. BROWN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:08-cr-00088-REP-2)

Submitted: October 30, 2018 Decided: November 16, 2018

Before DUNCAN and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Charles A. Gavin, CAWTHORN, DESKEVICH & GAVIN, P.C., Richmond, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Peter S. Duffey, Assistant United States Attorney, Richard D. Cooke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dashawn D. Brown appeals the district court's order revoking his supervised release and sentencing him to 60 months' imprisonment. The district court determined that Brown had violated his conditions of supervised release by committing the Virginia offenses of malicious wounding and use of a firearm in the commission of a felony. On appeal, Brown challenges the district court's admission of hearsay testimony at the revocation hearing and its revocation of his supervised release. We affirm.

Brown first argues that the district court improperly admitted a law enforcement officer's testimony relating the victim's statements at the scene of the shooting as excited utterances pursuant to Fed. R. Evid. 803(2) and, in the alternative, pursuant to the residual exception to hearsay in Fed. R. Evid. 807. He also contests the admission of another officer's testimony relating the victim's statements in the hospital as a declarant-witness' prior statement of identification pursuant to Fed. R. Evid. 801(d)(1)(C), and under the residual exception.

"We review a district court's evidentiary ruling in a revocation hearing for abuse of discretion." *United States v. Ferguson*, 752 F.3d 613, 616 (4th Cir. 2014). "Supervised release revocation hearings are informal proceedings in which the rules of evidence, including those pertaining to hearsay, need not be strictly applied." *United States v. Doswell*, 670 F.3d 526, 530 (4th Cir. 2012); *see* Fed. R. Evid. 1101(d)(3). "[P]rior to admitting hearsay evidence in a revocation hearing [in the absence of the declarant], the district court must balance the releasee's interest in confronting an adverse witness against any proffered good cause for denying such confrontation." *Doswell*, 670

F.3d at 530. "If hearsay evidence is reliable and the Government has offered a satisfactory explanation for not producing the adverse witness, the hearsay evidence will likely be admissible under Rule 32.1." *Id.* at 531.

The district court here did not abuse its discretion in admitting the contested statements. Brown's arguments regarding the Federal Rules of Evidence's exceptions and exclusions from hearsay are irrelevant because such rules are inapplicable to revocation hearings. *See id.* at 530; Fed. R. Evid. 1101(d)(3). The victim testified at the revocation hearing and Brown had full opportunity to, and did, cross-examine him, satisfying Fed. R. Crim. P. 32.1(b)(2)(C)'s confrontation requirement. *See Doswell*, 670 F.3d at 530. Accordingly, any issues with the contested testimony's reliability affect its weight and not its admissibility. *See id.*; Fed. R. Evid. 1101(d)(3). We thus decline to disturb the district court's admission of the statements. *See United States v. Riley*, 856 F.3d 326, 328 (4th Cir. 2017) ("[W]e may affirm on any grounds apparent from the record." (internal quotation marks omitted)).

Brown next challenges the district court's revocation of supervised release, contending that the evidence was insufficient to show that he committed malicious wounding because it did not demonstrate that Brown shot the victim with the requisite intent.* We review a district court's revocation decision for abuse of discretion and its

* Brown also contends in the conclusion section of his opening brief and in his reply brief that the district court clearly erred in its credibility determinations and in finding that Brown shot the victim. Brown has forfeited these arguments on appeal by failing to raise them in the argument section of his opening brief. *See United States v.* (Continued)

underlying factual findings for clear error. *United States v. Padgett*, 788 F.3d 370, 373 (4th Cir. 2015). A court may revoke supervised release if it "finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3) (2012).

Pursuant to Va. Code Ann. § 18.2-51 (2018), a person is guilty of malicious wounding if he "maliciously shoot[s] . . . any person or by any means cause[s] him bodily injury, with the intent to maim, disfigure, disable, or kill." "The mens rea of the crime is an intent to maim, disfigure, disable or kill . . . ." *Commonwealth v. Perkins*, 812 S.E.2d 212, 217 (Va. 2018) (internal quotation marks omitted). "Intent . . . may, *and often must*, be inferred from the facts and circumstances in a particular case." *Id.* at 217-18 (internal quotation marks omitted). "The state of mind of an alleged offender may be shown by his acts and conduct, and it is permissible for the fact finder to infer that every person intends the natural, probable consequences of his or her actions." *Id.* at 218 (citations, brackets, and internal quotation marks omitted).

The district court did not clearly err in finding the requisite intent for malicious wounding. The Government presented evidence that the shooting was unprovoked and that the shooter, whose face was covered, approached the victim from behind, pulled out a gun, shot him in the side, and fled. This evidence established by a preponderance of the evidence that the shooter shot the victim with the "intent to maim, disfigure, disable or

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White, 836 F.3d 437, 443 (4th Cir. 2016) ("[C]ontentions not raised in the argument section of the opening brief [are] abandoned." (internal quotation marks omitted)).

kill." *See* Va. Code Ann. § 18.2-51; *Perkins*, 812 S.E.2d at 219 ("Violently striking an unsuspecting, defenseless victim, without provocation, in the back of the head with a firearm . . . supports the reasonable inference that the attacker had the intent to maliciously wound the victim in cases where, as here, the attack actually injured the victim."). Thus, the district court did not abuse its discretion in revoking Brown's supervised release.

Accordingly, we affirm the district court's revocation order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

In The U.S. Court of Appeals for the Fourth Circuit

No. 18-4330 *U.S. v. Dashawn D. Brown*

Judgment

Filed November 16, 2018

FILED: November 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4330
(3:08-cr-00088-REP-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DASHAWN D. BROWN

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK