

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JOHN BRADHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

**WHETHER THE DISTRICT COURT'S ERRONEOUS
ADMISSION OF A VIDEO OF AN ALLEGED DRUG
AND FIREARM TRANSACTION BETWEEN THE CI
AND THE DEFENDANT VIOLATED THE
CONFRONTATION CLAUSE OF THE SIXTH
AMENDMENT?**

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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John Bradham respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-12346 in that court on June 6, 2019, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 6, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional provision:

U.S. Const. amend. VI.

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

STATEMENT OF THE CASE

On January 11, 2018, a federal grand jury in Broward County, Florida returned a two (2) count indictment against Mr. Bradham charging him with possession with intent to distribute a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) (Count 1); and possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count 2). The indictment also contained a forfeiture provision.

A jury trial began on March 13, 2018. During the trial, the government introduced an undercover video of an alleged firearm and drug transaction between a confidential informant and Mr. Bradham. The government first tried to introduce the video through Detective Carlton Smith who acknowledged that he did not see the actual exchange between the CI and the defendant but only saw the recording afterwards. Defense counsel objected based on a lack of foundation, *Crawford*, and hearsay, which the district court sustained. The government tried again to introduce the video through this same witness and defense counsel again objected and the district court once again sustained the objection. The government then tried to introduce the video through Detective Loges. Loges said he was looking at the meeting from a different vantage point from the video and was much further away but that the video was consistent with what he saw from his vantage point. Loges said he could not hear what was being said during the meeting. Defense counsel renewed his objections based on a lack of foundation, and that the introduction of the video constituted a *Crawford* violation and was hearsay.

Defense counsel also objected to the introduction of the audio portion of the video because the witness acknowledged that he could not hear what was being said. At this point, the district court allowed the video to be admitted into evidence. The confidential informant was not called as a witness. At the conclusion of trial, the jury returned verdicts of guilty against Mr. Bradham as to both counts. Mr. Bradham subsequently filed a motion for new trial arguing that the district court erroneously admitted GX24, which was an audio/video recording of the alleged firearm and drug transaction forming the basis of the charges against Mr. Bradham, for a lack of foundation. The district court denied the motion.

Before sentencing, Mr. Bradham filed written objections to the presentence investigation report in which he objected to the factual findings of paragraphs 3 through 33 of the presentence investigation report and all information provided in paragraphs 51 through 77 of the report. Mr. Bradham also filed a sentencing memorandum in which he asked for a sentence of fifteen (15) years based on "extremely old convictions," the necessity of mental health treatment and substance abuse treatment and the fact that the instant offense is a nonviolent offense and involved a minor amount of drugs.

Sentencing began on May 23, 2018. At that time, the district court overruled Mr. Bradham's objections to the presentence investigation report. The presentence investigation report set forth a criminal history category of VI and an offense level of 34, resulting in an advisory guideline range of 262-327 months imprisonment. At the conclusion of sentencing, the district court sentenced Mr. Bradham to 240

months imprisonment as to count 1 and 262 months imprisonment as to count 2, with all counts to be served concurrently, followed by three (3) years supervised release as to count 1 and five (5) years supervised release as to count 2, with both terms to run concurrently. Mr. Bradham timely filed a notice of appeal. The Eleventh Circuit Court of Appeals subsequently affirmed his convictions, finding that even if the Court assumed that admitting the recording into evidence violated the Confrontation Clause, "any error was harmless beyond a reasonable doubt because the contents of the recording were cumulative of the other 'overwhelming' circumstantial evidence that the government presented at trial."

Statement of Facts

On October 12, 2017, Detective Carlton Smith and Detective Steven Smith of the Fort Lauderdale Police Department met with a paid confidential informant and made recorded telephone conversations to Mr. Bradham in an attempt to set up a deal for a handgun. There was no evidence introduced at trial to show what number was being called. The deal was aborted when an attempt was made to complete the deal in a storage facility bathroom which law enforcement officers didn't believe was a safe situation for the confidential informant. On October 17, 2017, law enforcement and the confidential informant met again in order to resume the deal. Before progressing with the deal, Detective Carlton Smith and Detective Steven Smith searched the confidential informant, gave him a blue backpack containing \$460 which was money to purchase crack cocaine and the handgun. Four hundred dollars was for the gun and sixty dollars was for the cocaine.

Officers also gave the confidential informant "a covert video" which was an "audio and video recording device." He also had a phone with an open line. The confidential informant was instructed not to go inside the storage unit but to give the backpack at some point to the defendant so he could go and get the firearm. The confidential informant was instructed to activate the recording device once the defendant was walking back toward him from the storage unit. Before proceeding to the bus terminal where the meeting between the CI and the defendant was to take place, a recorded phone call was made between the CI and the defendant. After the phone call, detectives dropped the CI off in the vicinity of the bus terminal and the CI walked to the terminal. Detectives were on surveillance at the bus terminal.

Officer Herns Eugene with Fort Lauderdale Police Department was asked to go the bus terminal in an undercover capacity to perform surveillance and security. He was shown pictures of the defendant and the CI beforehand. He went to the central bus terminal on Broward Boulevard shortly after noon on October 17, 2017, and identified Mr. Bradham as the person he saw there that day. Eugene saw the CI join Mr. Bradham at the bus terminal. He saw them talk and then get on bus number 40. Mr. Bradham was carrying a backpack and the CI was carrying a blue backpack. Eugene waited a few minutes and then got on the bus behind them. He saw Bradham and the CI walk to the back of the bus and sit on the back row. Eugene sat a couple of rows ahead of them to their left. Periodically, Eugene was able to observe what was happening on the back seat. He heard them talk about different topics and no one else interacted with them. Eugene said that Bradham

and the CI exited right before 27th Avenue. At this particular bus stop there was a storage place right behind the bus stop. At this point Bradham was carrying both backpacks. Bradham and the CI went westbound and Eugene went eastbound after getting off the bus. At this point, other officers took up surveillance.

Detective Carlton Smith and Detective Steven Smith were on surveillance in the vicinity of the Storage Post on 6th Street in Broward County when the bus arrived at the bus stop around 12:30 p.m. Detective Carlton Smith saw the CI walk in the location of Sistrunk and 27th Avenue and head to a bus stop located right across the street from the storage facility. He also saw Bradham walk from the area of the storage unit to the same bus stop. At first, the CI was seated on a bench without a cover but then he and Bradham moved down a little more westbound to a totally covered bus bench. Smith could only see the silhouettes of their bodies at that time. He was in radio contact with other law enforcement officers also on surveillance. Smith also said he could hear "a gun being racked" through the open phone line during the meeting. Once the meeting between the CI and Bradham ended, the CI got back into Smith's vehicle and handed the officers the blue backpack which did not have any money in it. Inside the backpack was one piece of crack cocaine and a firearm with a magazine with live rounds. The CI was searched and nothing else was found on him. The cocaine was turned over to Detective Juan Rodriguez and Detective Darren Edwards and placed into FLPD evidence. Photographs of the firearm and ammunition were introduced at trial. The video recording was taken back to the office and downloaded. The information

from the video recording was placed onto a DVD and turned into police evidence. The video shows from the time the CI approached Bradham to the time the CI walked away. The device was clear before it was given to the CI.

Detectives John Loges and Darren Edwards were also on duty conducting surveillance in the vicinity of the Storage Post that day. Both detectives identified Mr. Bradham as the person they saw there that day. Detective Loges saw the CI on a bench across the street from where he was located and saw Bradham approach the CI. Bradham had a blue backpack in his possession which Loges said belonged to him at one time. He "saw the defendant go inside the backpack, retrieve something, and then he was showing it to the informant." He said the defendant stayed on the bench for a while and was later arrested. Detective Edwards was in radio communication with other law enforcement officers and received a communication that the bus had arrived with the CI and target at the bus stop by Storage Post. He saw Mr. Bradham walk toward the west side of the building where Edwards was located and enter the double doors that took him into the storage facility. Edwards said Bradham went to the very last row on the south side of the building and went to a locker. He saw him unlock the locker and lift up the storage unit door. He entered the locker and appeared to be looking for something. Edwards then went outside and radioed Detectives Smith and Smith what the locker number was and let them know he would stay there. Bradham walked back out of the storage facility 2-3 minutes later and started walking towards Northwest 6th Street and then there was a hedge that blocked Edwards's view. Bradham had both

backpacks with him at the time. At a later point in time that day he saw Bradham enter the storage facility again but he did not have the blue backpack with him this time, he only had the other backpack with him. Bradham came back out of the storage facility about 10-15 minutes later and had on a different shirt from the one he was wearing earlier. Edwards radioed to other law enforcement officers that the defendant was leaving the facility. After Bradham was taken into custody, detectives applied for a search warrant for the storage unit. Edwards assisted in the search of the unit. Keys to the unit were recovered from Bradham when he was taken into custody. The firearm and ammunition described in the indictment were found in the storage unit. A social security administration application for a social security card was found in the unit bearing the name of Mr. Bradham along with his date of birth and his social security number. The parties stipulated that Mr. Bradham had a felony conviction before October 2017. At some point, Edwards came in contact with Detectives Smith and Smith and they gave his partner, Detective Juan Rodriguez, the narcotics and the handgun that were sold to the CI. Edwards did not see the CI give the drugs to the other police officers. The narcotics was a small piece of crack cocaine and it field tested positive for crack cocaine. David Mix, a forensic chemist for the Broward Sheriff's Office crime lab tested the substance and determined that the mixture contained cocaine base with a net weight of .08 grams.

REASON FOR GRANTING THE WRIT

**THE DISTRICT COURT'S ERRONEOUS ADMISSION OF A
VIDEO OF AN ALLEGED DRUG AND FIREARM TRANSACTION
BETWEEN THE CI AND THE DEFENDANT VIOLATED THE
CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.**

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause serves to “ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

This Court held that the Sixth Amendment permits the admission of “[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine.” *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Federal Rules of Evidence define a “statement” as an (1) oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. Fed. R. Evid. 801(a). Hearsay is an out-of-court statement that a “party offers in evidence to prove the truth of the matter asserted in the statement,” and is generally inadmissible. Fed.R.Evid. 801(c); 802. The Confrontation Clause does not bar the “use of testimonial statements for purposes

other than establishing the truth of the matter asserted.” *Crawford*, 541 U.S. at 59 n.9, 124 S.Ct. 1354. The Confrontation Clause is concerned with a specific type of hearsay—testimonial statements, or “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51, 124 S.Ct. at 1364 (quotations omitted). Therefore, the Confrontation Clause does not bar statements that are not hearsay or statements that are nontestimonial in nature. See *Davis v. Washington*, 547 U.S. 813, 821–22, 126 S.Ct. 2266, 2273–74, 165 L.Ed.2d 224 (2006) (holding the Confrontation Clause is not concerned with nontestimonial hearsay); *United States v. Jiminez*, 564 F.3d 1280, 1287 (11th Cir. 2009) (determining statements offered “for a purpose *other* than the truth of the matter asserted” do not implicate the Confrontation Clause).

Over the objections of defense counsel, the district court admitted into evidence a video of an alleged drug and firearm transaction conducted between a confidential informant and Mr. Bradham. These two individuals were the only two people present at the meeting and the only two who knew what was being said during the encounter. The government chose not to call the confidential informant as a witness and made no representation that the informant was unavailable for trial. Defense counsel did not have the opportunity at any point to cross-examine or question the confidential informant. The statements made by the confidential informant were testimonial statements offered for the truth. Because defense counsel did not have the opportunity to cross-examine the confidential informant and because there was no evidence that the confidential informant was unavailable

as a witness, the admission of the video meeting violated Mr. Bradham's Sixth Amendment right to be confronted with the witnesses against him. Accordingly, the district court erred in admitted the video in violation of the Confrontation Clause of the Sixth Amendment as set forth in *Crawford* and the Eleventh Circuit Court of Appeals erred in deeming the admission harmless.


CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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August 30, 2019