

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

GEORGE MAURICE STEELE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 19-60288

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Abby Webber Brumley (MS Bar #101929)
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the district court erred by allowing testimony at the revocation hearing that violated Mr. Steele's Fifth Amendment due process right to confront witnesses.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT.....	3
III. CONSTITUTIONAL PROVISION INVOLVED.....	4
IV. STATEMENT OF THE CASE	5
A. Basis for federal jurisdiction in the court of first instance.....	5
B. Statement of material facts.....	5
1. Introduction.....	5
2. The alleged supervised release violations.....	6
3. Evidence and issues at the revocation hearing.....	6
4. Sentencing	9
V. ARGUMENT: The district court erred by allowing testimony at the revocation hearing that violated Mr. Steele’s Fifth Amendment due process right to confront witnesses	11
A. Review of certiorari should be granted in this case	11

B. Argument.....	12
1. Controlling law	12
2. Application of the law to the facts of Mr. Steele’s case	14
3. Conclusion: The district court violated Mr. Steele’s constitutional right to confront witnesses	16
VI. CONCLUSION.....	18
CERTIFICATE OF SERVICE	19
(Appendices 1, 2 and 3)	

TABLE OF AUTHORITIES

Page(s)

Cases:

<i>United States v. Jimison</i> , 825 F.3d 260 (5th Cir. 2016)	4, 12, 13, 14, 15, 16
<i>United States v. Owens</i> , 484 U.S. 554 (1988)	14
<i>United States v. Quinones</i> , 136 F.3d 1293 (11th Cir. 1998)	9

Statutes:

18 U.S.C. § 3231	5
18 U.S.C. § 3583	9
18 U.S.C. § 3584	9
28 U.S.C. § 1254	3

Rules:

Rule 10, Supreme Court Rules	11
Rule 13.1, Supreme Court Rules	3
Rule 29.5, Supreme Court Rules	19

Provisions of the United States Constitution:

Fifth Amendment, United States Constitution	ii, 4, 5, 11, 12, 13, 16
Sixth Amendment, United States Constitution	4, 12

I. OPINIONS BELOW

On March 26, 2003, the United States District Court for the Southern District of Mississippi entered a Judgment convicting Mr. Steele of four counts – three drug related counts and one count of possessing a firearm during a drug distribution crime. The district court case number is 3:02cr120-TSL.

At sentencing, the court ordered a 181-month prison term followed by ten years of supervised release. Later, the court reduced the sentence to 180 months under retroactive amendments to the Sentencing Guidelines. The subject supervised release revocation proceeding arises out of that criminal conviction.

In this revocation proceeding, the probation officer alleged that Mr. Steele committed two violations. First, he allegedly committed another crime, in violation of a mandatory condition of supervised release. Second, he allegedly possessed a firearm, in violation of a mandatory condition of supervised release. The district court found Mr. Steele guilty of both allegations at a revocation hearing on April 18, 2019. It sentenced Mr. Steele to serve a total of 108 months in prison. The court entered a Revocation Judgment on April 26, 2019. The Revocation Judgment is attached hereto as Appendix 1.

Mr. Steele appealed his revocation to the United States Court of Appeals for the Fifth Circuit on April 26, 2019. The Fifth Circuit case number is 19-60288.

The Fifth Circuit affirmed the district court's rulings via an Opinion filed on October 31, 2019. It filed a Judgment on the same day. The Fifth Circuit's Opinion and its Judgment are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion is not designated for publication, but it appears in the Federal Appendix at 783 Fed. App'x 423. The Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on October 31, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

This case involves Mr. Steele’s constitutional right to confront witnesses against him. “Defendants in supervised release revocation proceedings have a qualified right to confront witnesses. Unlike a defendant’s Sixth Amendment right ‘to be confronted with the witnesses’ testifying at trial, the confrontation right at revocation hearings that flows from the Due Process Clause” of the Fifth Amendment. *United States v. Jimison*, 825 F.3d 260, 261-62 (5th Cir. 2016). The Due Process Clause of the Fifth Amendment states: “No person shall be ... deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V, Due Process Clause.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Revocation Judgment entered in federal court because Mr. Steele purportedly violated conditions of supervised release. Regarding the underlying criminal conviction that this revocation proceeding is based upon, the court of first instance was the United States District Court for the Southern District of Mississippi. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the underlying criminal charges levied against Mr. Steele arose from the laws of the United States of America.

B. Statement of material facts.

1. Introduction.

As stated above, this case involves a revocation of supervised release proceeding. The district court found Mr. Steele guilty of two supervised release violations alleged by the probation officer. Then, it sentenced him to the maximum possible sentence – 108 months in prison.

Facts relevant to the issue on appeal focus on the district court allowing testimony at the revocation hearing that violated Mr. Steele's Fifth Amendment due process right to confront witnesses. The only testimony at the revocation hearing that directly connected Mr. Steele to the alleged supervised release

violations was presented through hearsay testimony. The defense objected and the court overruled the objections, without any explanations for its rulings.

2. The alleged supervised release violations.

As described by the district court at the revocation hearing, the probation officer alleged that Mr. Steele committed the following two supervised release violations:

1. “[Y]ou violated a mandatory condition of supervision in that you should not commit another federal, state, or local crime. And specifically, on December 12, 2018, it’s charged that the Jackson Police Department arrested you for domestic aggravated assault and shooting into an occupied dwelling.”
2. “[T]he second charge is a violation of mandatory condition that you not possess a firearm or any other dangerous weapon, and it’s alleged specifically that on December 12, 2018, you were in possession of a firearm prior to your arrest for domestic aggravated assault and shooting into an occupied dwelling.”

3. Evidence and issues at the revocation hearing.

It is undisputed that someone fired a gun at the Vintage Apartments in Jackson, Mississippi on December 12, 2018. Shots were fired at about 3:00 a.m. when it was dark outside. The shots were fired in apartment F10. Two of the bullets traveled from apartment F10 through the window of apartment F11, and lodged in bedroom furniture in that apartment. Also, one bullet struck a lady in

apartment F10. It is important to note that no witness that testified at the revocation hearing saw who fired the shots.

Mr. Steele lived in apartment F10, along with the shooting victim and at least one grade school age boy.¹ Eddie Hunter and Emily Hunter lived in apartment F11. Apartments F10 and F11 are next to each other.

The victim was shot in the chest while she was in apartment F10, but she survived. She did not testify at the revocation hearing. After all of the testimony, the court asked about the victim's status. The prosecutor responded, "I don't know her exact status, but it is my understanding that she is in either California or Arizona."

Mr. Hunter testified at the revocation hearing. Five or six minutes before the shooting, he purportedly saw Mr. Steele outside of his apartment with something that appeared to be a gun barrel in his hand. However, he stated, "I couldn't make out what kind of gun it was or nothing like that." His difficulty making out the object in Mr. Steele's hand is understandable because it was 3:00 a.m. and it was dark outside. Also, Mr. Hunter's porch light was out.

Five or six minutes after he saw Mr. Steele, Mr. Hunter heard two gunshots. Two bullets came through Ms. Hunter's window, but she was unharmed.

¹ Neither the victim's name nor the boy's name were stated at the revocation hearing.

Of particular importance to the issue on appeal is Mr. Hunter's testimony about what the grade school age boy stated when the boy walked out of apartment F10. The prosecutor asked Mr. Hunter what the boy said to him. Defense counsel objected to the question, and the court overruled the objection. After the court's ruling, Mr. Hunter testified that the boy said Mr. Steele shot his mom.

Ms. Hunter also testified at the revocation hearing. She never saw Mr. Steele with a gun on the night in question. She was asleep when the shooting happened.

Ms. Hunter's testimony is important to the issue on appeal for the same reason that Mr. Hunter's testimony is important – she provided testimony about what the boy stated when he walked out of apartment F10. Again, defense counsel objected to this line of questioning and the court overruled the objection. Then Ms. Hunter testified that the boy said Mr. Steele shot his mom.

The only two people that possibly could have witnessed the shooting were the victim and her son. There is no indication in the revocation hearing transcript that the prosecution made diligent efforts to locate and subpoena these two witnesses for the hearing. Rather, after the court inquired as to the whereabouts of the alleged victim, the prosecutor simply stated, "the government stands on the evidence presented."

Another evidentiary shortcoming in the prosecution's case centers on the handgun at issue. Jackson Police Officer Mammie Barrett recovered a revolver outside of apartment building F. However, even though Officer Barrett sent the gun, the spent bullet casings and the bullet fragments to the crime laboratory, she did not know if the bullet fragments were forensically connected to either the handgun or the bullet casings found in the handgun. Also, she did not provide testimony about whether forensics found Mr. Steele's fingerprints on the gun or the bullet casings. Finally, the prosecution did not call any witness from the crime laboratory to testify about these issues.

4. Sentencing.

The court found that Mr. Steele violated two conditions of supervised release. The underlying Judgment that his supervised release stemmed from contained four counts of conviction. Since there were four underlying counts of conviction, the district court could impose four separate supervised release sentences, to run either concurrently or consecutively.²

The court calculated the revocation sentence range for each of the four underlying counts of conviction, as follows: 24 to 30 months in prison on each of

² Under the combined provisions of 18 U.S.C. §§ 3583(e)(3) and 3584(a), a court can impose separate revocation sentences for each underlying count of conviction, and the revocation sentences can run either concurrently or consecutively. *United States v. Quinones*, 136 F.3d 1293, 1295 (11th Cir. 1998).

counts 1, 3 and 4, and 12-18 months in prison on count 2. If we total the top-end of each of these four sentence ranges, the sum is 108 months in prison.

The court ordered the most severe sentence possible – 108 months in prison. That is, the court adopted the top-end of the sentence range for each of the four underlying counts of conviction, and ordered each of the four prison terms to run consecutive to one another. The length of the sentence is not at issue in this Petition, but such a long term of incarceration amplifies the importance of the due process violation that is at issue.

V. ARGUMENT:

The district court erred by allowing testimony at the revocation hearing that violated Mr. Steele's Fifth Amendment due process right to confront witnesses.

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” One scenario that warrants Supreme Court review is when “a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this court’s supervisory power.” Supreme Court Rule 10(a).

In Mr. Steele’s case, the lower courts effectively eviscerated his right to confront the witnesses against him. The right to confront witnesses at a revocation hearing, which is guaranteed by the Fifth Amendment to the United States Constitution, is part of the strong foundation that our criminal justice system is based on. This Court should exercise its supervisory power to correct the constitutional violation committed by the district court and sanctioned by the Fifth Circuit.

B. Argument.

1. Controlling law.

About three years ago, the Fifth Circuit decided *United States v. Jimison*, 825 F.3d 260 (5th Cir. 2015). *Jimison* originated from the exact same district court as Mr. Steele’s case. In *Jimison*, the defendant argued that the district court violated his “right to confrontation at his revocation hearing when it allowed a law enforcement officer to testify about an informant’s statements and identification of the defendant.” *Id.* at 262. The Fifth Circuit agreed. *Id.* The *Jimison* court vacated the revocation judgment and sentence and remanded the case to district court for a new revocation hearing. *Id.* at 266.

The *Jimison* court set forth a good roadmap for analyzing confrontation issues at revocation hearings. “Unlike a defendant’s Sixth Amendment right ‘to be confronted with the witnesses’ testifying at trial, the confrontation right at revocation hearings that flows from the Due Process Clause can be overcome by a showing of ‘good cause.’” 825 F.3d at 261-62. “Determining whether good cause exists requires ‘weigh[ing] the defendant’s interest in confrontation of a particular witness against the Government’s proffered reasons for pretermitt[ing] the confrontation.’” *Id.* at 263 (emphasis added; citation omitted). “[A] district court is required to make ‘an explicit, specific finding of good cause’ for not allowing confrontation of a particular witness.” *Id.* (emphasis added; citation omitted).

From the above holding, we know that a district court must articulate a good cause reason for allowing testimony that violates a defendant's confrontation right at a revocation hearing. However, "failure to articulate the reasons may be found to be harmless error where good cause exists, its basis is found in the record, and its finding is implicit in the court's rulings." *Jimison*, 825 F.3d at 264 (citation omitted).

The above holdings are summarized as follows:

- A defendant at a revocation hearing has a qualified right to confront witnesses under the Due Process Clause of the Fifth Amendment.
- This confrontation right can be overcome by a showing of good cause.
- To determine if good cause exists, a court must balance a defendant's interest in confronting the witness on the one hand, and the prosecution's reason for not allowing confrontation on the other.
- A district court must make an on the record finding of good cause if it denies the right to confrontation.
- If the district court fails to make a good cause ruling, that error may be harmless if: (1) good cause actually exists; (2) the basis for good cause can be found in the record; and (3) the good cause finding is implicit in the court's rulings.

2. Application of the law to the facts of Mr. Steele's case.

The only eyewitness evidence presented by the prosecution came from testimony offered by two of the prosecution's witnesses that testified at the revocation hearing. First, Mr. Hunter provided testimony that the victim's son told him that Mr. Steele shot his mother. Second, Ms. Hunter provided the same testimony – that the victim's son told her that Mr. Steele shot his mom. This out of court identification testimony is clearly evidence to which the right to confrontation applies. *Jimison*, 825 F.3d at 263 (citing *United States v. Owens*, 484 U.S. 554, 560 (1988)).

Since Mr. Steele had a right to confront the purported eyewitness, we must consider the court's reason for denying him that right. During both Mr. Hunter's and Ms. Hunter's testimony, defense counsel objected to admission of the subject testimony. On both occasions, the district court simply stated "overruled," and provided no explanations for its ruling. That is, the court did not make its required on the record finding of good cause for denying Mr. Steele's right to confront the witness.

Since the district court erred by failing to make a good cause finding, we must consider whether the error was harmless. *Jimison*, 825 F.3d at 264 (citation omitted). This entails looking at three factors – (1) whether good cause actually exists; (2) whether the basis for good cause can be found in the record; and (3)

whether the good cause finding is implicit in the court's rulings. *Id.* (citation omitted).

The first harmless error factor entails determining if good cause existed to deny Mr. Steele his constitutional right to confrontation. To determine if good causes existed, we must balance Mr. Steele's interest in confronting the witness on the one hand, and the prosecution's reason for not allowing confrontation on the other. *See Jimison*, 825 F.3d at 264. This balancing test is simplified by the fact that the prosecution provided no reason whatsoever for failing to call the victim's son as a witness at the revocation hearing.

The victim's son's statement was the only eyewitness evidence of the shooting that the prosecution presented at the hearing. Without the need for a lengthy explanation, this evidence was obviously very important to the prosecution's case. The defense had an important confrontation right to cross-examine the boy to test his memory and credibility, and to explore any motives that he may have had to lie about Mr. Steele.

Now we come to the balancing process. On one side of the scale, we have the prosecution's total lack of explanation for denying Mr. Steele's right to confrontation. So the prosecution has no weight at all pressing down on its side of the scale. On Mr. Steele's side of the scale, we have the heavy weight of his right

to confront an eyewitness. Under this weighing process, Mr. Steele prevails on the first harmless error factor.

The second and third harmless error factors ask whether the basis for good cause can be found in the record whether the good cause finding is implicit in the court's rulings. Both the record and the district court's rulings are silent on the good cause issue. Therefore, these two factors bode in Mr. Steele's favor.

Since all three of the harmless error factors support Mr. Steele's argument, this Court should find that the district court legally erred by allowing the prosecution to violate his right to confrontation of witnesses.

3. Conclusion: The district court violated Mr. Steele's constitutional right to confront witnesses.

Mr. Steele had a Fifth Amendment due process right to confront the alleged eyewitness in this case. *Jimison*, 825 F.3d at 261-63. He was denied that right. Neither the court nor the prosecutor attempted to make a good cause showing why Mr. Steele should be denied the right to confrontation. Finally, analysis of the factors to determine whether the error was harmless weigh heavily in favor of ruling that the error was not harmless. This requires the court to vacate the Revocation Judgment.

Sadly, the error could have been cured if the prosecution had called not only the victim's son, but also the victim herself. Neither was called. Also, there is no

indication in the revocation hearing transcript that the prosecution made diligent efforts to locate and subpoena these two witnesses for the hearing. Instead, after the court inquired as to the whereabouts of the alleged victim, the prosecutor simply stated, “the government stands on the evidence presented.”

We must also recognize that the prosecution could have proved its case by admitting forensic evidence connecting the bullet fragments recovered at the scene to the handgun, then connection the handgun to Mr. Steele. This could have been done through forensic analysis of the bullet fragments and lifting fingerprints from either the gun or the spent shell casings found in the gun. Even though the prosecution sent the gun, the shell casings and the bullet fragments to the crime laboratory, it did not present any of this evidence at the revocation hearing.

To summarize, the prosecution chose to rely on hearsay testimony, rather than to call the witness or witnesses that could have proven its case, or to present forensic evidence. This district court erred by allowing the evidence, and now Mr. Steele must spend 108 months (nine years) in prison. Requiring a man to spend nine years in prison based on inadmissible evidence is patently unjust. This Court should grant certiorari and ultimately find that Mr. Steele suffered an inexcusable constitutional violation.

VI. CONCLUSION

Based on the arguments presented above, Mr. Steele asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted January 27, 2020 by:

/s/Abby Webber Brumley

Abby Webber Brumley

Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner