

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CURTIS DENTON,
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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QUESTION PRESENTED

- I. Whether the introduction of unfronted affidavits establishing the foundation for admission of business records violates the Confrontation Clause of the Sixth Amendment.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is James Curtis Denton.

Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by published opinion issued 25 November 2019, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Denton's convictions, following a jury trial, of one count of conspiracy to manufacture, distribute, dispense and possess with the intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a) (Count 5); one count of receipt and possession of a firearm, specifically, a destructive device, not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871 (Count 7); one count of transporting and receiving an explosive in and affecting interstate commerce while being an unlawful user of and addicted to a controlled substance, in violation of 18 U.S.C. §§ 842(i)(3) and 844(a)(1); and one count of receiving and transporting an explosive in interstate commerce with knowledge and intent that it would be used to kill, injure, and intimidate an individual person and unlawfully to damage and destroy a vehicle, in violation of 18 U.S.C. § 844(d) (Count 9). The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

The 28 May 2015 explosion

On 28 May 2015, Chase Farmer, a resident of Cary, North Carolina, was driving his Ford Explorer through his neighborhood, near the home he shared with his then-girlfriend Kristi Hicks, when he heard a loud “boom” and felt his car lift off the ground. J.A. 154, 158. Outside the Explorer, Farmer found remnants of what appeared to be a makeshift bomb: PVC pipe, gunpowder residue, and buckshot shotgun shell pieces on the ground. J.A. 158-59. Local police and ATF agents responded to the scene of the explosion and collected evidence. J.A. 230-31, 245.

Farmer told police that Hicks’s estranged husband, Appellant James Curtis Denton (known as Curtis), had previously threatened to kill Farmer. J.A. 299. The day after the explosion, Mr. Denton was arrested for violating a domestic violence protective order entered in favor of Hicks. J.A. 317. Hicks told police that Mr. Denton had showed up at her friend’s house the night before the explosion, agitated and angry, and asking about Hicks. J.A. 300. Agents began to focus on Mr. Denton as a suspect. J.A. 300. However, agents were unable to identify any DNA or fingerprints on the remnants of the bomb, J.A. 245-46, and initially did not make any arrests in connection with the explosion. J.A. 129.

Investigation of Marcus Lee Williams

In February 2015, law enforcement officers received information that Marcus Lee Williams was cooking and distributing methamphetamine from his home in Garner, North Carolina. J.A. 862.

As a result of Mr. Denton's arrest on 29 May 2015 for violation of a domestic violence protective order, investigators searched his phone and found Facebook messages suggesting that Mr. Denton was involved in drug trafficking activity. J.A. 317-18. Using phone records, investigators connected Mr. Denton to Marcus Williams. J.A. 301. On 16 November 2015, agents executed a search warrant at Mr. Williams's home. J.A. 302. Agents found evidence of methamphetamine manufacturing, including bottles and tubing commonly used to cook methamphetamine, plastic baggies with methamphetamine residue, coffee filters, and boxes of pseudoephedrine. J.A. 302-10.

Indictment of Mr. Denton and co-defendants

In February 2016, Marcus Williams was charged by indictment with several methamphetamine-related crimes. J.A. 10-11; *see* J.A. 56-58. In May 2016, Marcus Williams and four co-defendants, including his brother Craig Williams, Curtis Denton, Melissa Goodwin, and Angela Trogon, were charged in a superseding indictment with conspiracy to manufacture, distribute, dispense, and possess with the intent to distribute methamphetamine. J.A. 14; *see* J.A. 58-59.

Finally, on 2 August 2016, the Government filed a second superseding indictment with additional charges against Mr. Denton arising from the pipe bomb

planted on Farmer's car. *See* J.A. 60-61. In total, Mr. Denton was charged with four counts: one count of conspiracy to manufacture, distribute, dispense and possess with the intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a) (Count 5), J.A. 58-59; one count of receipt and possession of a firearm, specifically, a destructive device, not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871 (Count 7), J.A. 60; one count of transporting and receiving an explosive in and affecting interstate commerce while being an unlawful user of and addicted to a controlled substance, in violation of 18 U.S.C. §§ 842(i)(3) and 844(a)(1) (Count 8), J.A. 60; and one count of receiving and transporting an explosive in interstate commerce with knowledge and intent that it would be used to kill, injure, and intimidate an individual person and unlawfully to damage and destroy a vehicle, in violation of 18 U.S.C. § 844(d) (Count 9), J.A. 61.

Pre-trial proceedings

Each of Mr. Denton's four co-defendants pleaded guilty pursuant to a written plea agreement, and agreed to cooperate with the Government. J.A. 24-25, 26-29, 85. Mr. Denton pleaded not guilty to all four counts charged against him, and his case was set for jury trial. J.A. 41, 81.

Mr. Denton's trial

Mr. Denton's case was tried to a jury in the Eastern District of North Carolina beginning on 23 October 2017, before United States District Judge Louise

W. Flanagan. See J.A. 45-46. The Government called twenty-three witnesses over the course of the three-day trial. See J.A. 102-729.¹

Curtis Farmer and Kristi Hicks

Curtis Farmer testified that on 28 May 2015, he left his home in Cary, North Carolina in his Ford Explorer. J.A. 154-58. Before he made it out of the subdivision, he heard an explosion and felt his car lift off the ground. J.A. 158. He got out of the car and saw fragments of what he concluded was a pipe bomb. J.A. 158-59.

Farmer recounted meeting Kristi Hicks in the fall of 2014. J.A. 148. At the time, Hicks was not yet divorced from Mr. Denton. J.A. 149. Farmer testified that when he and Hicks started dating, he received anonymous threatening text messages telling him to stay away from Hicks or he would be harmed. J.A. 149-50. Farmer said he called Mr. Denton, whom he had known for many years, and asked why he was getting the messages; Mr. Denton denied sending them. J.A. 151. Nevertheless, before Farmer left the house on the day of the explosion, he checked his car for broken windows or slashed tires, because he suspected Mr. Denton might have done something. J.A. 156-57.

Mr. Denton's ex-wife Kristi Hicks testified about her relationship with Mr. Denton. J.A. 168-75. She said that she and Mr. Denton got married in 2008, and

¹ Mr. Denton has summarized the testimony of a subset of these witnesses, as relevant to provide background about the case and context for the issue presented in the petition.

were “on-and-off again” starting in 2010 until she left for good in 2014. J.A. 169. The couple divorced in 2015. J.A. 169.

While they were separated, Hicks explained, Mr. Denton was “never happy” that Hicks was dating other people. J.A. 170. Hicks testified that Mr. Denton “basically stalked her and the person—anybody he even believed [she] may be dating.” J.A. 170. She testified that Mr. Denton “would threaten everybody that I talked to.” J.A. 170.

The Government introduced a series of text messages from unidentified telephone numbers. See J.A. 176, 180-81. Hicks testified that despite the unfamiliar numbers, she believed the messages were from Mr. Denton based on the wording and spelling, and the content of the messages. *See, e.g.*, J.A. 179, 183, 197, 201-03, 207-08, 213, 226. Hicks also testified that Mr. Denton used a variety of numbers to contact her, and that he also used fake Facebook accounts and email addresses. J.A. 184, 200-01. Hicks read aloud from a variety of messages in which the author called her a “trashy whore,” said she was “the reason why good men are so sour these days,” and said the author wished “all trashy bitches like you and sorry ass mom’s [sic] would drop off the face of the earth.” J.A. 181.

Hicks testified that having domestic violence protective order did not help, because Mr. Denton tried to break into her house the day after she obtained it. J.A. 191-92. She testified that she called 911, and had a police car at her house overnight for protection. J.A. 193-94. She said she received threatening messages that night, again from an unfamiliar number, that she believed were from Mr.

Denton. J.A. 194-96. She believed the messages reflected that Mr. Denton was watching the house; the author wrote, among other things, “Tell that pig to get the fuck out of in front of my house bitch.” J.A. 196; see J.A. 197-98.

Law enforcement witnesses

Mathew Simon, a forensic chemist with ATF specializing in explosives analysis and fire debris analysis, J.A. 248, testified that he analyzed the remnants of the pipe bomb placed on Farmer’s truck and found Pyrodex powder residue. J.A. 254-55. He testified that Pyrodex powder could be bought at a hunting store like Bass Pro Shop or Cabela’s, and was manufactured in Kansas. J.A. 255-57. He also testified that he found that the pipe was 1.25-inch PVC pipe manufactured by LASCO, which could be bought from any hardware store, such as Lowe’s or Home Depot. J.A. 256. Simon testified that the pipe bomb contained steel slingshot shots and lead pellets use for airsoft guns, both items available at hunting stores like Bass Pro Shop or Cabela’s. J.A. 257.

Phillip Whitley, explosive enforcement officer with ATF, testified as an expert about his analysis of the remnants of the pipe bomb, including his opinion that the pipe bomb was a destructive device. J.A. 272-86. Whitley also testified that it would not require expertise to build the pipe bomb. J.A. 286-87.

ATF special agent Stephen Babits testified that he was the agent on duty on 28 May 2015, when he received word of the pipe bomb explosion in Cary. J.A. 295, 297-98. Babits testified that he responded to the scene, interviewed Farmer, got updates from “the guys who were processing the scene,” and that there was a

canvass of the neighborhood to see if anyone knew anything. J.A. 299. Asked whether the interviews assisted him, Babits responded that they did, and he described his interviews with Chase Farmer and Kristi Hicks. J.A. 299-300. Babits testified that Farmer told him that Mr. Denton previously threatened to kill Farmer. J.A. 299. Babits also testified that his investigation was going “right to Mr. Denton at this time.” J.A. 300.

Babits testified that, the day after the explosion, Mr. Denton was arrested for violating the domestic violence protective order that Hicks took out “for the abuse.” J.A. 301. Agents obtained a search warrant for Mr. Denton’s phone, which Babits testified contained evidence of “drug trafficking activity between him and other individuals.” J.A. 301. Mr. Denton’s phone led investigators to connect him to Marcus Williams, and prompted further investigation of Williams’s drug activity, culminating in the execution of the search warrant at Williams’s home in November 2015. J.A. 302-03. The Government offered the search warrant affidavit, and evidence obtained from the search of Marcus Williams’s home, through Babits. J.A. 304-10.

Next, Babits testified that investigators turned to NPLeX logs to identify other people involved in methamphetamine-related activity. J.A. 311. Based on the records, Babits concluded that there were multiple people buying pseudoephedrine and being blocked. J.A. 311-12. When asked how the NPLeX records helped the investigation, Babits responded, “Once you see an individual purchase pseudoephedrine with another person, it indicates that they are part of the

conspiracy to produce methamphetamine.” J.A. 312. Babits testified that he then sought out those people involved in the conspiracy for interviews and further investigation. J.A. 312. Babits opined that the NPLEx records showed that Mr. Denton and then-girlfriend Angela Trogdon were “conspiring to purchase the Sudafed in order to manufacture methamphetamine.” J.A. 315; *see* J.A. 316-17. He further opined, “But it’s kind of very odd for it to have two people who are dating to buy pseudoephedrine on two separate dates—or on one date with two minutes apart.” J.A. 315.

Later in the examination, the Assistant United States Attorney asked Babits again what the circumstances were that allowed Mr. Denton’s phone to be taken, and Babits reminded the jury that Mr. Denton was arrested on 29 May 2015 for violating the domestic violence protective order. J.A. 317. Babits testified that he used information from Mr. Denton’s phone to send a grand jury subpoena to Facebook, and later a search warrant for records from Mr. Denton’s Facebook account. J.A. 318-19. Babits also said he received a “business record affidavit back from Facebook.” J.A. 318. Babits testified that he spoke with individuals who communicated with Mr. Denton through the Facebook account to confirm that it was Mr. Denton’s account. J.A. 319-20. The Government then offered the affidavit of a records custodian from Facebook, who did not testify at trial. J.A. 320-21; *Supp.* J.A. 948. Babits described the information he received from Facebook, explaining his interpretation of what the records meant. J.A. 320-21. Babits testified regarding when Mr. Denton registered the Facebook account, what the

registered email address was, and whether the account was active. J.A. 322.

Regarding the street address associated with the Facebook account, the Assistant United States Attorney asked whether the address “appear[ed] to be consistent with what [he] knew to be the truth,” and Babits responded that it was. J.A. 323.

Babits testified that the records he received from Facebook were of value to his investigation, because the records “assisted us to show that the Defendant was involved in the drug trafficking trade.” J.A. 324. Babits identified and interpreted a series of messages between Denton and Kristen Lynn Laabs, who was not a witness a trial. J.A. 325. Babits testified about Laabs’s messages to Mr. Denton, and Mr. Denton’s responses. *See* J.A. 325-31. As Babits testified, he read aloud portions of the messages, and in the same breath, offered his interpretations:

The Defendant sent a message to Kristen Laabs again on December 19, 2014 where Mr. Denton wrote, “I have some Opana 20s,” which is, in the drug slang, that means 20 milligrams of Opana, which we heard is a controlled substance.

* * *

Ms. Laabs then sent a reply to Mr. Denton. In the body you can see, “How much are they . . . if I can’t find anything, I might.”

* * *

Seconds later Mr. Denton wrote “25,” which indicated to us it was \$25 per pill.

* * *

Ms. Laabs is the author, and she’s sending a message to the Defendant where she writes in the body, “Any luck on percs?” which is Percocet. The Defendant then replies to Ms. Laabs, “9 roxy 15.” Roxies are street for Percocet, Roxicodone.

J.A. 327-28; *see* J.A. 328-36. In addition to purporting to interpret drug slang, *see*, *e.g.*, J.A. 335-36, Babits offered his opinions about words he thought were spelling errors, and what Mr. Denton probably meant by his messages. *See* J.A. 332-33.

Babits then read aloud what he said was a message from Mr. Denton to Laabs asking how she knew Chase Farmer. J.A. 334. According to Babits, Mr. Denton wrote, “U comment on a pic with that mother fucker and my wife last night.” J.A. 334. Babits testified that the message was of assistance to his investigation, “because Mr. Denton had referred to Chase Farmer in that term as a mother fucker on previous text messages.” J.A. 334.

Reading another message between Laabs and Mr. Denton, Babits testified that when Mr. Denton wrote, “I pay her 8,410 a month,” Mr. Denton was talking about his wife, Kristi Hicks. J.A. 335. Further, Babits testified that when Mr. Denton wrote, “She out spending it on him,” the pronoun “it” was a reference to the \$8,410. J.A. 335.

Next, Babits interpreted a series of messages between Jenny Smith, who did not testify at trial, and Mr. Denton. J.A. 337. Babits reviewed a message where Mr. Denton wrote, “Wrong smith sorry,” and testified that he was able to determine that Mr. Denton meant to send the message to a different person, Amy Smith. J.A. 337-38. The Government next introduced a series of messages between Mr. Denton and Peter Laabs, and Babits continued to read parts of the messages while offering his opinions about their meaning. *See, e.g.*, J.A. 340 (“Mr. Denton sent to Mr. Laabs was, ‘U have a box.’ The word ‘box’ in the methamphetamine business

is—means a box of pseudoephedrine.”). Babits also offered his interpretations of messages he said Mr. Denton exchanged with seven other individuals who did not testify at trial, Jeffrey Smith, Tracy Benson, Angela Thornton, Greg Cornell, Ashley Poole, Lauren Morgan, and Justina Moore. J.A. 339-49. Babits said the messages were valuable evidence of illicit drug activity. J.A. 339-49.

The Assistant United States Attorney then turned Babits’s attention to his interview of Hicks, and offered into evidence an email Babits received from Detective Jim Young, which in turn included an email Young received from Hicks. J.A. 349. Babits testified that Hicks was forwarding a threatening email that purported to be from Curtis Farmer, but Farmer was sitting next to her on the couch when she received it, so she knew it was not from him. J.A. 350. Babits testified that a subpoena was sent to Google for records associated with the originating email account. J.A. 351. The Government offered into evidence a certificate from a Google records custodian and what Babits said were the records accompanying the certificate. J.A. 351-53; *see* Supp. J.A. 949. Babits then interpreted what he said were Google’s records for the jury. *See* J.A. 353-54.

Finally, the Government offered into evidence through Babits the declaration of a records custodian from Time Warner Cable, and what Babits said were records accompanying the declaration. J.A. 354-57; *see* Supp. J.A. 953. Based on his interpretation of the Time Warner records, Babits testified that he was able to determine that the threatening email to Hicks that purported to be from Farmer actually originated from Mr. Denton’s residence. J.A. 357.

Jim Young, a detective with the Cary Police Department, testified that he responded to the scene of the explosion on Chase Farmer's car. J.A. 607-08. He also testified that he interviewed Trogon and others, and then worked to corroborate the information that Trogon provided by going to Cabela's and Wal-Mart. J.A. 609-10. He testified that receipts from Cabela's and Wal-Mart helped him corroborate Trogon's statements. J.A. 611-12.

Records custodians

Krista McCormick, an employee of Appriss, Inc., testified about her company's management of the National Precursor Log Exchange (NPLEx), a national pseudoephedrine tracking database. J.A. 287-88. McCormick explained the daily and monthly purchase limits on pseudoephedrine, designed to inhibit purchasing pseudoephedrine for the production of methamphetamine, and the use of NPLEx to track and deny attempted purchases beyond those limits. J.A. 290-91. McCormick authenticated NPLEx records showing that Mr. Denton made twenty-six successful purchases of pseudoephedrine, and attempted five blocked purchases. J.A. 292-93.

William Bridgers, senior operations manager for Cabela's in Garner, authenticated a receipt for a cash purchase of blackhorn powder on 6 May 2015. J.A. 598-602.

Jefferson Lomick, assistant manager at Wal-Mart in Fuquay Varina, authenticated a receipt for a cash purchase of matches at 12:28 a.m. on 28 May 2015. J.A. 603-07.

Cooperating witnesses and co-defendants

The Government then called several cooperating witnesses who were not co-defendants, but claimed to have been involved in illegal drug activity with Mr. Denton, and to have heard Mr. Denton make threatening statements about his ex-wife. *See* J.A. 368-75, 376-79, 383-92, 398-410, 420-31, 432-40.

Co-defendant Melissa Goodwin testified pursuant to a plea agreement. J.A. 442-47. Goodwin was Marcus Williams's roommate and later his girlfriend. J.A. 447-48. She testified that Mr. Denton and others came to Williams's house and exchanged pseudoephedrine for methamphetamine. J.A. 449-50. According to Goodwin, Mr. Denton used cocaine and methamphetamine at the house. J.A. 450-51. Goodwin testified that she overheard a conversation where Mr. Denton said Angela Trogon had thrown away a telephone in a dumpster. J.A. 451.

Next, the Government called Craig Williams, also pursuant to a plea agreement. J.A. 461-67. Williams said he met Mr. Denton through Williams's brother, Marcus Williams, and testified that Mr. Denton came by Marcus Williams's house to exchange pseudoephedrine for methamphetamine. J.A. 467. Craig Williams also testified that he saw Mr. Denton use methamphetamine, cocaine, and "maybe some pills and stuff." J.A. 468. According to Craig Williams, Mr. Denton did not like Kristi Hicks. J.A. 469. Williams recalled being at his brother's house when Mr. Denton showed up and said there had been an explosion, and it was Hicks's boyfriend. J.A. 470. Williams testified he did not think Mr. Denton had a lot to do with the explosion. J.A. 470. Williams also testified that Mr. Denton

talked about the investigation, and said he was not worried about investigators finding his phone because Angela Trogdon had gotten rid of it. J.A. 471.

Marcus Williams followed, and like his brother and Goodwin, testified pursuant to a plea agreement. J.A. 481-87, 491-92. Williams admitted to selling methamphetamine to Mr. Denton. J.A. 488.

Mr. Denton's girlfriend and co-defendant Angela Trogdon also testified pursuant to a plea agreement. J.A. 511-18. Trogdon said she dated Mr. Denton from late 2014 to early January 2016. J.A. 519. Trogdon's former boyfriend, Billy Chapman, had previously introduced her to the Williams brothers. J.A. 520. Trogdon testified that Mr. Denton bought pseudoephedrine for Marcus Williams, in exchange for methamphetamine. J.A. 521. She also testified that Mr. Denton occasionally sold pills, such as oxycodone or Opana, and he used methamphetamine. J.A. 522-23. Trogdon said she used methamphetamine from 2013 until September 2015, when she became pregnant. J.A. 523. Trogdon testified she had been using methamphetamine with Mr. Denton, "probably every day, maybe a half a gram to a gram a week." J.A. 523.

Trogdon testified that Mr. Denton spied on Kristi Hicks, and was angry that Hicks had left him. J.A. 523-24. Trogdon recalled Mr. Denton being upset when he saw pictures of his daughters with Chase Farmer, and said Mr. Denton did not like having to pay Hicks every month. J.A. 523-24. According to Trogdon, Mr. Denton told her he was going to put a bomb in Farmer's car. J.A. 526. Trogdon recounted going to Cabela's in Garner with Mr. Denton in the beginning or middle of May

2015, and Mr. Denton telling her he was there to buy gunpowder, and that he was going to put a bomb in Farmer's car. J.A. 526-27. Mr. Denton then went into Cabela's and bought gunpowder, paying in cash, according to Trogdon. J.A. 527.

Trogdon said she asked Mr. Denton what he would do if his daughters were in the car with Farmer, but Mr. Denton reassured her that Kristi Hicks was the one who would transport the children. J.A. 528.

On 27 May 2015, according to Trogdon, she and Mr. Denton went out to dinner, and then Mr. Denton went to speak to Kristina Will Keith. J.A. 531-32. When Mr. Denton returned, he and Trogdon went to a bar. J.A. 532-33. Later that night, they went to Wal-Mart in Fuquay Varina, where Mr. Denton bought matches. J.A. 533. Trogdon testified that she and Mr. Denton then drove to the subdivision where Kristi Hicks and Chase Farmer lived, arriving around 1:00 a.m. on May 28. J.A. 534. She saw Mr. Denton put on work gloves, and then he got something out of the bed of the truck and disappeared around a curve. J.A. 534-35. Trogdon testified that she waited for about twenty or thirty minutes for Mr. Denton to return. J.A. 535, 537. Mr. Denton and Trogdon then stayed the night at Trogdon's mother's house. J.A. 537-38.

Trogdon testified that the next day, Chase Farmer's sister called Mr. Denton and asked why he tried to kill her brother. J.A. 539. Mr. Denton hung up the phone and vacuumed his office. J.A. 539-40. Trogdon said Mr. Denton then asked her to throw away a piece of PVC pipe from a storage room at his office, which she did. J.A. 540-41.

On 29 May 2015, the day after the explosion, Mr. Denton was arrested for violation of the domestic violence protective order. J.A. 542. Trogon testified that she was questioned when Mr. Denton was arrested, that she denied using drugs, and that she lied to investigators by saying they had been at Mr. Denton's mother's house all night before the explosion. J.A. 542-43. She also testified that in July or August 2015, when Mr. Denton was serving sixty days in jail for violation of the protective order, she disposed of his phone at his request. J.A. 543-53.

On cross-examination, Trogon admitted that she never saw Mr. Denton construct a pipe bomb or possess a pipe bomb. J.A. 581-82. She also admitted she never saw him place a pipe bomb on Chase Farmer's car. J.A. 582.

At the close of the Government's evidence, the district court denied Mr. Denton's motion for judgment of acquittal. J.A. 622. Mr. Denton elected not to put on evidence in his defense. J.A. 622.

Closing arguments

In closing, the Government asked the jury to focus on three items: (1) Mr. Denton's marriage to Kristi Hicks was a "rocky road" that was "heading to the cliff"; (2) Mr. Denton's drinking had escalated into drug use; and (3) Mr. Denton was a "controlling and temperamental individual," which had "caused problems in his marriage; it's causing problems in his life." J.A. 635. The Assistant United States Attorney talked at length about Mr. Denton's jealousy, violations of the protective order, and again called Mr. Denton "controlling" and "temperamental." J.A. 636; see J.A. 637-47.

Mr. Denton's counsel argued in closing that the Government failed to meet its burden to prove Mr. Denton guilty beyond a reasonable doubt. J.A. 647-68.

After deliberations, the jury returned a guilty verdict on all counts against Mr. Denton. J.A. 724, 774-75. On the drug conspiracy in Count 5, the jury found the drug weight alleged in the indictment: fifty grams or more of a mixture or substance containing a detectable amount of methamphetamine. J.A. 774.

Sentencing and judgment

At a sentencing hearing held on 8 June 2018, the district court overruled Mr. Denton's objections to the drug quantity and the sentencing enhancements in the presentence report, and concluded that the Guidelines imprisonment range was 360 months to life. J.A. 796, 804-05. The district court also denied Mr. Denton's motion for a downward variance. J.A. 835, 837. The district court imposed a total sentence of 360 months' imprisonment, and entered judgment accordingly. J.A. 835, 891.

Mr. Denton timely filed a notice of appeal on 8 June 2018. J.A. 54, 849-50.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below because Mr. Denton argued on appeal, subject to a plain error standard, that the district court erred by admitting unfronted affidavits of absent witnesses in violation of the Confrontation Clause of the Sixth Amendment. The Fourth Circuit concluded that there was no error, reasoning that the Confrontation Clause does not apply to business record certifications. App. 19-22.

REASONS FOR GRANTING THE WRIT

Mr. Denton contends that there is a compelling reason for granting his petition for writ of certiorari, because a “United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). This Court has held that the confrontation right applies to testimonial statements, and that affidavits are within the “core class of ‘testimonial’ statements” that are inadmissible unless the defendant is afforded the right to confront the witness. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (identifying “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits” as testimonial statements). Citing this Court’s decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Fourth Circuit distinguished between “an affidavit created to provide evidence”—which it considered testimonial—and “an affidavit created to

authenticate an otherwise admissible record”—which the Fourth Circuit held was not testimonial. App. 22. The Fourth Circuit relied on its own prior unpublished decision in *United States v. Mallory*, 461 F. App’x 352 (4th Cir. 2012) (per curiam), in which the panel cited a footnote in *Melendez-Diaz* to conclude that the affidavit of a business records custodian is not subject to the Confrontation Clause. App. 22 (citing *Mallory*, 461 F. App’x at 356-57). As shown below, and contrary to the reasoning in *Mallory*, adopted by the Fourth Circuit below, the *Melendez-Diaz* Court did not create an exception to the Confrontation Clause for authenticating affidavits. The conflict between the Fourth Circuit’s decision and decisions of this Court, including *Melendez-Diaz*, warrants granting the petition for writ of certiorari. See S. Ct. R. 10(c).

DISCUSSION

INTRODUCTION OF UNCONFRONTED AFFIDAVITS ESTABLISHING THE FOUNDATION FOR ADMISSION OF BUSINESS RECORDS VIOLATES THE CONFRONTATION CLAUSE.

The Sixth Amendment guarantees every criminal defendant the right to confront witnesses. U.S. Const. amend. VI. This Court holds that the confrontation right applies to testimonial statements, and that affidavits are within the “core class of ‘testimonial’ statements” that are inadmissible unless the defendant is afforded the right to confront the witness. *Crawford*, 541 U.S. at 51. Contrary to the reasoning of the Fourth Circuit below, App. 22, this Court has never excluded statements in affidavits offered to lay the foundation for admission of business records from the core class of testimonial statements. The district court’s admission

of such affidavits without confrontation denied Mr. Denton his right to confront the witnesses against him.

The Government offered affidavits or declarations² from records custodians at Facebook, Google, and Time Warner, and the business records that ATF special agent Babits claimed accompanied each affidavit. *See* J.A. 320-21, 351-57. These affidavits were uncontroverted—there was no showing that Mr. Denton had a prior opportunity to cross-examine the affiants. *See* J.A. 320-21, 351-57. The affidavits were apparently intended to show that the underlying records received from Facebook, Google, and Time Warner were authentic and reflected regularly conducted activity of each business. *See* J.A. 320-21, 351-57. The affidavits were therefore used to establish the foundation for admission of the records from Facebook, Google, and Time Warner, pursuant to the hearsay exception set forth in Rule 803(6) of the Federal Rules of Evidence. *See* Fed. R. Evid. 902(11) (allowing custodian certification to authenticate record and establish criteria for admission under Rule 803(6)).

The Fourth Circuit acknowledged that “affidavits generally fall within the ‘core class’ of testimonial statements.” App. 21 (quoting *Crawford*, 541 U.S. at 51). Affidavits are “functionally identical” to in-court testimony. *See Melendez-Diaz*, 557 U.S. at 310. Affidavits do “precisely what a witness does on direct examination.” *Id.* at 311 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

² All three documents are hereafter referred to as “affidavits” for brevity.

Indeed, at Mr. Denton's trial, three other records custodians testified live and, during direct examination by the Government, authenticated records from their respective organizations. *See* J.A. 287-93, 598-602, 603-07. The affidavits of the absent records custodians were created as substitutes for this in-person testimony, solely for the purpose of offering evidence against Mr. Denton, in response to inquiries from law enforcement. *See Melendez-Diaz*, 557 U.S. at 322-23. They fall squarely within the core class of testimonial statements this Court identified in *Crawford*.

The fact that the affidavits were used to authenticate and admit business records does not take them outside the Sixth Amendment's confrontation guarantee. The Fourth Circuit and other Courts of Appeals employed faulty reasoning to conclude otherwise. *See Mallory*, 461 F. App'x at 356-57 (cited in App. 21-22); *United States v. Yeley-Davis*, 632 F.3d 673, 680 (10th Cir. 2011); *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006); *see also United States v. Farrad*, 895 F.3d 859, 876 n.11 (6th Cir. 2018). The Fourth Circuit and the Tenth Circuit erroneously relied on a footnote in *Melendez-Diaz* to conclude that the affidavit of a business records custodian is not subject to the Confrontation Clause. *Mallory*, 461 F. App'x at 356-57 (cited in App. 22); *Yeley-Davis*, 632 F.3d at 680-81. In the cited footnote, the Court responded to the dissenting opinion by explaining that the majority's decision will not necessarily require every person who is a link in the chain of custody of evidence to testify at trial; rather, the prosecutor will have to decide what steps in the chain of custody are important enough to prove at trial. *Melendez-*

Diaz, 557 U.S. at 311 n.1. The Court did not bless the use of written, out-of-court statements to prove those steps—instead, it reinforced that whatever testimony the prosecutor does introduce must be offered through a live witness. *Id.*

The Seventh Circuit found it “compelling” that “*Crawford* expressly identified business records as nontestimonial evidence.” *Ellis*, 460 F.3d at 927. Because the underlying business records “themselves do not fall within the constitutional guarantee provided by the Confrontation Clause,” the Seventh Circuit observed that “it would be odd to hold that the foundational evidence authenticating the records do.” *Id.* In doing so, the Seventh Circuit failed to distinguish two categories of evidence later elucidated by this Court in *Melendez-Diaz*—records maintained in the course of a regularly conducted activity, and records created solely for the purpose of furnishing evidence against a criminal defendant at trial. The latter category of evidence is testimonial. *Melendez-Diaz*, 557 U.S. at 322-24.

An affidavit of a records custodian affirming that she searched and found evidence in whatever repository her organization regularly maintains is no different than the statement of a law enforcement officer saying that she searched and found evidence in the defendant’s home. *See* Supp. J.A. 948, 949-50, 953-54 (reflecting that records custodians each searched their organization’s records and selected results to produce in response to subpoenas). If the evidence resulting from the search is incriminating, the custodian’s or officer’s statement that she found the evidence in a location associated with the defendant is substantive evidence of the defendant’s guilt. *See Melendez-Diaz*, 557 U.S. at 322-23. The veracity of the

statement is critical—the evidence only incriminates the defendant if the custodian’s statement that the evidence was maintained in a location associated with the defendant (e.g., a defendant’s online account) is true.

Saying that the affidavits “did nothing more than authenticate the business records to which they pertain,” App. 22, also ignores the broader context in which the affidavits were used. The effect of the affidavits was to allow ATF special agent Stephen Babits to provide commentary on the meaning and content of the business records, despite his lack of personal knowledge. *See supra* pp. 9-12. Babits purported to apply his training and experience as a law enforcement officer to interpret the records for the jury and to incriminate Mr. Denton. *See supra* pp. 9-12. Because Mr. Denton had no opportunity to confront the witnesses who gave the affidavits, he was left to take Babits—who had no personal knowledge of the Facebook, Google, or Time Warner records he testified about, or how those records were purportedly maintained or collected by the respective companies—at his word. *See* J.A. 320-57. The Fourth Circuit’s holding thus leaves a significant gap in the protection of the Confrontation Clause—the Government may use unfronted affidavits to admit potentially incriminating business records, insulating the affiants with personal knowledge of the source and meaning of the records from cross-examination, while instead allowing the defendant to cross-examine a Government witness who has no knowledge of how the records were purportedly obtained or what they mean.

Moreover, there is no bright-line rule for deciding when an affidavit merely

authenticates records, and when it interprets them. The Constitution does not specify what words an affiant may or may not use in such an affidavit. Allowing courts to analyze the content and purpose of affidavits before determining whether they are testimonial threatens to deny criminal defendants the “bedrock procedural guarantee” of confrontation. *Crawford*, 541 U.S. at 42. Trial courts should not be given license to evaluate, on a case-by-case basis, whether confrontation is necessary to provide the defendant with a fair trial. *See, e.g., Bullcoming v. New Mexico*, 564 U.S. 647, 662 (2011) (“[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”). “[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider ‘fair.’” *Giles v. California*, 554 U.S. 353, 375 (2008). This Court has made clear that “[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts’ views) those underlying values.” *Id.* Rather, “the Constitution guarantees one way [to test evidence]: confrontation.” *Melendez-Diaz*, 557 U.S. at 318.

Mr. Denton does not question that excluding records custodian affidavits from the Confrontation Clause would make criminal cases easier to prosecute. But the trial rights afforded by the Sixth Amendment are not designed to facilitate convictions; they are designed to protect criminal defendants. This Court has

rejected previous attempts to create exceptions to the Confrontation Clause in service of prosecutorial expediency. *See Melendez-Diaz*, 557 U.S. at 325 (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”); *accord Bullcoming*, 564 U.S. at 665-68. This case is no different. The Sixth Amendment guarantee of confrontation extends to all affidavits, regardless of the prosecutor’s judgment about how substantial, or how reliable, any particular affidavit may be.

CONCLUSION

For the foregoing reasons, Petitioner James Curtis Denton respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, vacate his convictions on all counts, and remand for a new trial without the introduction of unfronted testimonial affidavits.

This the 24th day of February, 2020.

/s/ Kelly Margolis Dagger

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

Jennifer P. May Parker, Esq.
Assistant United States Attorney
150 Fayetteville Street, Suite 2100
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This the 24th day of February, 2020.

/s/ Kelly Margolis Dagger
Kelly Margolis Dagger