

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHAMSUDDIN DOST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent. _____ /

On Petition for Writ of Certiorari to the
United States Court of Appeal
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it a violation of the Sixth Amendment to U.S. Constitution, which affords an accused the right to confront his or her accusers, for a court to allow undercover agents to testify anonymously during a criminal trial?

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

The petitioner, Shamsuddin Dost, respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in case number 18-10254, to which this petition relates, was filed on November 27, 2019 and is included in Appendix A. The opinion is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided this case was November 27, 2019. No petition for rehearing was filed. This petition for certiorari is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1).

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

The constitutional provision at issue in this petition is the Sixth Amendment to the United States Constitution, which provides that "In all criminal prosecutions,

the accused shall enjoy the right ...to be confronted with the witnesses against him....”

STATEMENT OF CASE

The indictment in this case was filed September 27, 2016, in the United States District Court for the Northern District of California. ER 773; Dkt 1.¹ The indictment charged petitioner Dost with one count of conspiracy to import more than one kilogram of heroin (21 U.S.C. § 963), and one count of distributing more than one kilogram of heroin (21 U.S.C. §§ 959, 960).

On November 21, 2017, the government filed a Motion for Miscellaneous Relief Regarding Testimony of Undercover Agent. ER 760; Dkt 68. The government’s factual support for this request was in a sealed filing. The government requested that an undercover agent (known to Dost as “Mustafa”) be allowed to testify pseudonymously, and that the public only be allowed to either view his testimony by video feed to another courtroom with his image not displayed, or to hear him testify while present in the courtroom but be prevented from seeing the witness by a screen. Petitioner objected to both of these proposed procedures

¹“ER” refers to the Excerpts of Record filed in the court of appeal, which include the pertinent reporter’s transcripts.

as an infringement on his Sixth Amendment right to confront and cross examine his accusers, as well as an infringement on the public's right of access to a public trial. ER 750; Dkt 70.

On December 18, 2017, the Court granted the government's request, finding that the government had shown "potential threats to national security and the safety of the UAs." ER 747; Dkt 96. The Court noted that the government had filed an under seal declaration from the Acting Assistant Director of the FBI Counterterrorism Division establishing grounds to protect the identity of the FBI undercover agent. ER 747-748. The court noted that the government's request for the Afghan undercover agent was not supported by a declaration but found the facts asserted in the government's motion "compelling." ER 748. The Court noted that the Afghan agent was involved in undercover work in Afghanistan and was the subject of a "bounty" for his work. The Court also noted the government's assertion that "threats" had been made in the areas where the agent worked.

During the Pretrial Conference on January 8, 2018, further discussions on this issue were held, and the defense requested that counsel be informed of the FBI undercover agent's true name so that an investigation into his background could be conducted. ER 717. Rather than ordering the government to provide the defense with the witness's true names, the Court ordered the government to produce any

disciplinary records, lawsuits, any information that “might be used to impeach the undercover agent,” or “anything else that might be useable for impeachment purposes.” ER 720.

Trial commenced January 16, 2018. Three witnesses were allowed to testify partly or wholly anonymously at trial. Following a four day trial, the jury returned guilty verdicts on all three charges. ER 782; Dkt 120.

In a judgment filed June 29, 2018, the district court imposed a sentence of 10 years imprisonment, the minimum required by statute, as well as a term of 5 years supervised release and a \$300 special assessment.

Petitioner filed notice of appeal on July 11, 2018. ER 1; Dkt 165.

Petitioner argued that his Sixth Amendment right to confront and cross examine his accusers had been violated.

On November 27, 2019, the United States Court of Appeals for the Ninth Circuit affirmed. Relying on cases addressing the scope of the informant privilege, the court of appeals found no abuse of discretion in the district court’s decision to allow FBI and Afghani undercover agents to testify anonymously at petitioner’s trial. The court of appeals also reasoned that any error was harmless.

This petition is timely filed within 90 days of that judgment.

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REASONS FOR GRANTING REVIEW

This Court has never allowed witnesses to testify anonymously at a criminal trial. When the issue was presented to this Court, the Court reversed a judgment of conviction because a court refused to allow a defendant to question an informant about his true name and address. *Smith v. Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968)

The Sixth Amendment's Confrontation Clause 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. This Court has identified "two broad categories" of Confrontation Clause cases. See *Delaware v. Fensterer*, 474 U.S. 15, 18, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (per curiam).

"The first category reflects the Court's longstanding recognition that the literal right to 'confront' the witness at the time of trial forms the core of the values furthered by the Confrontation Clause." *Id.* (quotations omitted). The "second category" arises when, "although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 19 (quotations omitted).

Put another way, confrontation problems arise in the second category of cases when cross-examination restrictions "effectively emasculate the right of cross-examination itself." *Id.* (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968)).

In *Smith v. Illinois*, this Court held that the right of confrontation necessarily includes the right to "ask the witness who he is and where he lives" because this is "the very starting point in exposing falsehood and bringing out the truth through cross-examination" when "the credibility of a witness is in issue." *Id.* at 131 (footnotes and quotations omitted). This Court reversed the judgment because the trial court refused to allow the defendant to question an informant about his true name and address. At the same time, the Court reiterated that lower courts have a "duty to protect [witnesses] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate [them]." *Id.* at 133 (quotations omitted). Justice White (joined by Justice Marshall) concurred, observing he "would place in the same category" as questions tending to harass, annoy, or humiliate "those inquiries which tend to endanger the personal safety of the witness." *Id.* at 133-34 (White, J., concurring).

Following Justice White's lead, the courts of appeal have interpreted this Court's language in *Smith* concerning harassment, annoyance or humiliation to include allowing anonymous testimony in order to avoid exposing a witness to potential danger.

One of the seminal cases on this issue in the courts of appeal is the Seventh Circuit's decision in *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969). In *Palermo*, the Seventh Circuit stated:

Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931), and *Smith v. Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968), require reversal where the district judge refuses to allow questions as to a witness' address and present employment since they are threshold questions of cross-examination. "The purpose of the inquiry is to make known to the jury the setting in which to judge the character, veracity or bias of the witness. Since there is no requirement of materiality, it is not necessary to show the possibility of the witness being in custody in order to make such inquiry." *United States v. Varelli*, 407 F.2d 735, p. 749 (7th Cir. 1969).

However, the decision to disclose a witness' address or place of employment cannot be made in a vacuum. This Court is not unaware of the problem that the government has in obtaining witnesses in cases where a witness' life may be in jeopardy if he testifies. As Justice White said in his concurrence in *Smith v. Illinois*, 390 U.S. 129, 133-134, 88 S. Ct. 748, 751, 19 L. Ed. 2d 956 (1968), "In *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 220, 75 L. Ed. 624 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness."

This Court agrees with Justice White that where there is a threat to the life of the witness, the right of the defendant to have the witness' true name, address and place of employment is not absolute. *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969). However, the threat to the witness must be actual and not a result of conjecture. *Shaw v. Illinois*, 394 U.S. 214, 89 S. Ct. 1016, 22 L. Ed. 2d 211 (1969). The government bears the burden of proving to the district judge the existence of such a threat.

An actual threat being shown, the government must also disclose to the district judge in camera the relevant information. *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969). Knowing of the existence of an actual threat and the witness' location, the district judge must determine whether the information must be disclosed in order not to deny effective cross-examination. "The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling." (White, J. concurring) *Smith v. Illinois*, 390 U.S. 129, 134, 88 S. Ct. 748, 751, 19 L. Ed. 2d 956 (1968). Such decision is reviewable on appeal. Under almost all circumstances, the true name of the witness must be disclosed. *Smith v. Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). If the witness is located in a penal institution, this, too, must be disclosed. *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931). A witness' prior address must also be disclosed if the witness does not intend to return to this location. *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969). If the trial judge concludes that the defendant does not have a right to the exact address of the witness and his place of employment, the defendant is entitled to ask any other relevant questions which may aid the jury in weighing the witness' credibility.

Palermo, 410 F.2d at 472.

Other courts of appeal have more fully articulated what they consider to be the relevant considerations in deciding whether allowing anonymous testimony violates an accused's right to confrontation. These courts evaluate Confrontation

Clause claims by asking (i) whether the government has demonstrated a threat and if so, (ii) whether anonymous testimony deprived the defendant of an opportunity for effective cross-examination. See, e.g., *United States v. Gutierrez de Lopez*, 761 F.3d 1123 (10th Cir. 2014); *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010); *United States v. Ramos-Cruz*, 667 F.3d 487 (4th Cir. 2011); *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011).

The opinions of the courts of appeal have thus strayed widely from this Court's original holding in *Smith*.

In the case at bar, two witnesses were allowed to testify anonymously against petitioner.

This Court should grant the petition to address the circumstances, if any, in which anonymous testimony can be allowed at a criminal trial without violating the Confrontation Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: 2-24-2020

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