

No. _____

**In The
Supreme Court of the United States**

PABLO ANTONIO PANTALEON-AVILES
Petitioner,

v.

UNITED STATES,
Respondent.

*On Petition for a 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

Whether a warrant of deportation admitted to prove an essential element of the offense of illegal reentry is subject to confrontation under the Sixth Amendment.

LIST OF PARTIES

There are no parties to this proceeding other than those listed in the caption.

RELATED CASES

- *United States v. Pantaleon-Aviles*, No. 18-cr-132, U.S. District Court for the Middle District of Alabama. Judgment entered February 20, 2019.
- *United States v. Pantaleon-Aviles*. No. 19-10845, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on December 6, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Pablo Antonio Pantaleon-Aviles respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

On December 6, 2019, the Eleventh Circuit issued an unpublished per curiam order affirming the conviction and sentence of Mr. Pantaleon-Aviles for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326(a). This order is reproduced as Appendix A.

JURISDICTION

The Court of Appeals panel issued its order rendering final judgment in this case on December 6, 2019. Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On February 17, 2018, the Auburn, Alabama Police Department arrested Mr. Pantaleon-Aviles for public intoxication and failure to appear. Following resolution of his state charges, Mr. Pantaleon-Aviles was taken into custody by Immigration and Customs Enforcement (“ICE”).

On April 30, 2018, a one-count criminal information was filed, alleging that Mr. Pantaleon-Aviles was a deported alien found in the United States, in violation of 8 U.S.C. § 1326. Following the District Court for the Middle District of Alabama’s rejection of a plea agreement between Mr. Pantaleon-Aviles and the United States, Mr. Pantaleon-Aviles was indicted for one count of reentry of a removed alien on February 17, 2018. The district court rejected a second plea agreement, and Mr. Pantaleon-Aviles’s case proceeded to trial on January 7, 2019.

- A. Over objection, the district court admitted a Form I-205 from Mr. Pantaleon-Aviles’s Alien File

At trial, the government produced a “Warrant of Removal / Deportation,” also known as a Form I-205, to prove that Mr. Pantaleon-Aviles had been previously removed from the United States, one of the elements of a § 1326(a) offense.¹ Mr. Pantaleon-Aviles objected to the admission of the I-205 on the basis that the Confrontation Clause of the Sixth Amendment required an opportunity to cross-examine the witness who claimed to have

¹ The I-205 is reproduced as Appendix B.

seen Mr. Pantaleon-Aviles leave the United States. The district court overruled the objection, admitted the I-205, and permitted a deportation officer with Immigration and Customs Enforcement who had not witnessed Mr. Pantaleon-Aviles's departure from the United States to testify that the I-205 confirmed that Mr. Pantaleon-Aviles had been removed from the United States in 2002. The I-205 was the only evidence offered to prove this essential element of the crime.

The jury found Mr. Pantaleon-Aviles guilty of being a deported alien found in the United States, and the district court sentenced him to 300 days of imprisonment. Mr. Pantaleon-Aviles timely appealed his conviction and sentence to the Eleventh Circuit Court of Appeals.

B. The Eleventh Circuit affirmed Mr. Pantaleon-Aviles's conviction and sentence

On appeal, Mr. Pantaleon-Aviles argued that admission of the I-205, without affording him an opportunity to cross-examine the deportation officer who signed the form as to witnessing or verifying Mr. Pantaleon-Aviles's departure from the United States, deprived him of his Sixth Amendment Right to Confrontation. The Eleventh Circuit held that this argument was foreclosed by its own binding precedent, citing *United States v. Cantellano*, 430 F.3d 1142, 1145–46 (11th Cir. 2005), in which the court “conclude[ed] that a warrant of deportation is non-testimonial and, thus, is not subject to confrontation under the Sixth Amendment.” *See App. A. at 3.*

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

“The Sixth Amendment’s Confrontation Clause confers upon the accused, ‘[i]n all criminal prosecutions, . . . the right . . . to be confronted with the witnesses against him.’” *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011) (quoting U.S. Const. amend VI). This Court has explained that “fidelity to the Confrontation Clause permit[s] 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.’” *Id.* at 658 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

A witness is not only those who testify at trial. *Crawford*, 541 U.S. at 42–43. Rather, a witness is one who bears testimony, where testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51. Thus, a witness could be one who made an out-of-court statement, but “not all hearsay implicates the Sixth Amendment’s core concerns.” *Id.* “It is the testimonial character of [a] statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the confrontation clause.” *Davis v. Washington*, 547 U.S. 813, 821 (2006).

In *Melendez-Diaz*, this Court examined whether certificates of forensic analysis—made by laboratory analysts hired by law enforcement to test suspected drugs—were testimonial and therefore subject to confrontation. *Id.*

In that case, the Court focused on what it had identified in *Crawford* as the “core class” of testimonial statements: (1) “material such as affidavits, custodial examinations, prior testimony . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at later trial.” *Id.* (quoting *Crawford*, 541 U.S. at 51–52) (internal punctuation and citations omitted).

The Eleventh Circuit failed to apply *Melendez-Diaz*. Instead, it held that Mr. Pantaleon-Aviles’s claim that the admission of the I-205 at trial violated his right to confrontation was foreclosed by its own pre-*Melendez-Diaz* precedent in *United States v. Cantellano*, 430 F.3d 1142 (2005). By relying upon this precedent to uphold conviction based on this evidence, the Eleventh Circuit is systematically violated the Confrontation Clause. This Court should grant certiorari to instruct courts that admission of an I-205 offends the Confrontation Clause under *Crawford* and *Melendez-Diaz*.

In *Melendez-Diaz*, the Court found that the documents at issue were “incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact” because they contained “the precise testimony the analysts would be expected to provide if called at trial.” *Id.*

The I-205 in Mr. Pantaleon-Aviles's A-File is similarly a solemn declaration by an ICE deportation officer made for the purpose of establishing or proving a fact, specifically that Mr. Pantaleon-Aviles had been removed from the United States prior to reentering, an essential element of a violation of § 1326.

The second page of the I-205 was completed by the ICE detention officers who executed the warrant of removal. It includes identifying information of Mr. Pantaleon-Aviles, such as his name, photograph, fingerprint, and signature. App. B at 2. Immediately following the identifying information, the form reads: "Departure witnessed by:", followed by a blank line for a signature by an ICE officer. *Id.* At the bottom of the form, another ICE detention officer signed the form to verify the departure. *Id.* Had the witnessing officer been called at trial, he would have testified that he had witnessed Mr. Pantaleon-Aviles's departure from the United States. The Form I-205, a solemn declaration or affirmation verified by another officer, was admitted to establish precisely what the witnessing officer's testimony would have, that Mr. Pantaleon-Aviles actually left the United States. Therefore, the I-205 falls directly within the core class of statements covered by the Sixth Amendment.

In *Melendez-Diaz*, the Court further found that the analysts certificates were testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial.” The same is true of an I-205.

The Department of Homeland Security (“DHS”) “primarily maintains information related to the adjudication of benefits, investigation of immigration violations, and enforcement actions in Alien Files (A-Files)” and has done so since 1944. Department of Homeland Security Notice of Modified Privacy Act System of Records, 82 Fed. Reg. 43556 (Sept. 18, 2017). These A-Files are derived from various sources and can include paper or electronic documents. *Id.* at 43557. One of the stated purposes of the A-File is to “assist DHS with detecting violations of immigration and nationality laws; supporting the referral of such violations for prosecution or other appropriate law enforcement actions.” *Id.* at 43559.

In fact, an A-File is often created specifically in anticipation of law enforcement action. The federal entity tasked with storing A-Files explains that the files may contain records of a not-yet naturalized alien as they work through the immigration process. National Archives, *Alien Files (A-Files)*, <https://www.archives.gov/research/immigration/aliens> (last visited Feb. 19, 2020). But “[a]n A-File might also be created without any action taken by the alien; for example, if the INS initiated a law enforcement action against or involving the alien.” *Id.*; *see also* United States Citizenship and Immigration Services, *A-Files Numbered Below 8 Million*, <https://www.uscis.gov/history-and-genealogy/genealogy/historical-record-series/a-files-numbered-below-8->

million (last visited Feb. 19, 2020) (“INS opened or consolidated A-Files for every immigrant who arrived after April 1, 1944 or naturalized after April 1, 1956, and for immigration law enforcement matters.”). Mr. Pantaleon-Aviles, who was the subject of possible removal on more than one occasion and was prosecuted for illegal reentry after deportation had not applied for legal entry and therefore his A-File was created for the purpose of enforcement of immigration laws.

The documents contained with Mr. Panataleon-Aviles’s A-File were created by ICE Immigration officers, law enforcement officers tasked with “combating illegal immigration.” Department of Homeland Security, *Criminal Alien Program / ICE*, <https://www.ice.gov/criminal-alien-program> (last visited Feb. 21, 2020). In particular, the I-205 was completed by a deportation officer with ICE Enforcement and Removal Operations (ERO). The application page to become a deportation officer, maintained by DHS, explains the role as follows:

As a deportation officer with ICE Enforcement and Removal Operations (ERO), you will uphold U.S. immigration law at, within, and beyond our borders. Your work is critical to the enforcement of immigration law against those who present a danger to our national security, are a threat to public safety, or who otherwise undermine the integrity of our immigration system.

You will use smart, efficient, strategies and tactics to manage all aspects of the immigration enforcement process, including the identification and arrest, transportation, detention, case management and removal of aliens.

You will conduct legal research to support decisions on removal cases and assist attorneys in representing the government in court actions. You may also work with other federal law enforcement officials to identify, locate and arrest aliens and you are responsible for ensuring the physical removal of aliens from the United States.

Department of Homeland Security, *Careers: Deportation Officer*, [ice.gov/careers/deportation-officer](https://ice.dhs.gov/careers/deportation-officer) (last visited Mar. 3, 2020).

In summary, Mr. Pantaleon-Aviles's A-File was created for the purpose of law enforcement by officers tasked with upholding immigration laws and assisting attorneys in court actions. These circumstances would lead an objective ICE detention officer to reasonably believe that an I-205 would be available for use at a later trial. I-205s are routinely produced in discovery in § 1326 cases.² Furthermore, a detention officer testified at Mr. Pantaleon-Aviles's trial that the I-205 demonstrated that he had been previously removed from United States. That officers who produce I-205s testify to the contents of that document reinforces the idea that an objective officer would reasonably believe the I-205 would be used in a future criminal prosecution.

CONCLUSION

For the forgoing reasons, the Court should grant this petition for writ of certiorari.

² In fiscal year 2019 alone, 25,426 defendants were charged with felony illegal reentry, in violation of § 1326. Department of Justice, Office of Public Affairs, *Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019* (Oct. 17, 2019), available at <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

DATED March 5, 2020

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