No.

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY MCLAIN MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

Sixth Circuit Case No. 19-5371

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals failed to decide an important Federal Question regarding the right of a Defendant to confront witnesses against him, by refusing to consider and decide whether having a co-defendant make a phone call at the request of, and in the custody of law enforcement violates the right of confrontation stated in this Court's case of Crawford v. Washington?

2. Whether the Sixth Circuit Court of Appeals left open an important Federal Question regarding the scope of the expectation of privacy a Defendant has in a United States Postal Service package that hasn't reached its intended recipient?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14(1)(b), your Petitioner states that parties to this petition are:

Petitioner: Jimmy McLain Moore

Respondent: United States of America

The opinion of the United States Court of Appeals that is the subject of this Petition was only to Jimmy McLain Moore as the only defendant. Moore is not aware of any separate Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit also seeking review of the Sixth Circuit opinion that is the subject of this appeal.

LIST OF PROCEEDINGS IN STATE AND FEDERAL COURT THAT ARE RELATED TO THIS CASE

There are no cases in either State of Federal Court that are directly related to this case.

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TABLE OF AUTHORITIES

CASES CITED:

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER 2020 TERM

JIMMY MCLAIN MOORE,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

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

The Petitioner Jimmy McLain Moore respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on April 16, 2020, and an Order denying Petition for Rehearing with Suggestion of Rehearing En Banc entered on May 15, 2020.

OPINIONS BELOW

(1) Judgment in a Criminal Case, United States of America v. Jimmy McLain Moore, Case No. 17-CR-00086, United States District Court for the Eastern District of Tennessee on April 8, 2019. (Appendix 1).

(2) Opinion, United States of America v. Jimmy McLain Moore, No. 19-5371, United States Court of Appeals for the Sixth Circuit, April 16, 2020. (Appendix 2).

(3) Order Denying Petition for Rehearing with Suggestion of Rehearing En Banc, United States Court of Appeals for the Sixth Circuit, May 15, 2020. (Appendix 3).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth (6th) Circuit was entered on April 16, 2020 affirming Moore's conviction and sentence following a trial in the United States District Court for the Eastern District of Tennessee. Moore was sentenced to 292 months after a conviction on a charge of Conspiracy to Distribute Fifty (50) grams or more of Methamphetamine in violation of 21 U.S.C. §§846, 841(a)(1) and 841(b)(1)(A).

A Final Judgment was entered by the United States District Court for the Eastern District of Tennessee on April 8, 2019. A Petition for Rehearing with Suggestion of Rehearing En Banc was denied by an Order entered by the Sixth Circuit Court of Appeals on May 15, 2020.

The United States Court of Appeals for the Sixth Circuit had jurisdiction over Moore's appeal pursuant to 28 U.S.C. §1291, which confers on the United States Court of Appeals jurisdiction from all final decisions from District Courts of the United States (28 U.S.C. §1291 (West 2020)).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), which provides that cases in the Court of Appeals may be reviewed by the Supreme Court on a Writ of Certiorari granted upon the petition of any party. (28 U.S.C. §1254(1) (West 2020)). Jurisdiction is also invoked by United States Supreme Court Rules 10 and 13. (U.S. Sup. Ct. R. 10,13).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth (4th) Amendment to the United States Constitution provides that: "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (U.S. CONST., amend IV).

The Sixth (6th) Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" (U.S. CONST., amend VI).

STATUTORY PROVISIONS INVOLVED

None are at issue in this case.

STATEMENT OF THE CASE

A.

1. On August 15, 2017, Moore was indicted – along with two (2) co-defendants – on charges of conspiracy to distribute fifty (50) grams or more of methamphetamine in violation of 21 U.S.C. §§846, 841(a)(1), and 841(b)(1)(A).

2. On June 15, 2018, Moore – through counsel – filed a Motion to Suppress the contents of a United States Postal Service package seized by the Monroe County, Tennessee Sheriff's Department from the car of co-defendant Gary Holder. The motion sought to suppress both the contents of the package and any evidence obtained as a result as "fruit of the poisonous tree."

3. In his pre-trial Motion to Suppress the contents of a United States Postal Service box seized on January 5, 2018, Moore asserted that his Fourth Amendment rights were violated, as he did not lose his expectation of privacy in the box. The box never reached its intended recipient co-defendant Cook.

4. The search of the postal service box was initiated as the result of events on January 3, 2018. That's when Monroe County Sheriff's Department Officer Dennis Graham made contact with co-defendant Jamie Cook.

5. Graham had been receiving Complaints of Cook selling methamphetamine in Monroe County that he had been receiving by mail. Graham asked Cook for and received permission from Cook to search his vehicle and his person.

6. During his search Graham recovered a priority mail receipt from Cook's jacket. The receipt was to an address in California and sent through the Sweetwater Post Office.

7. Graham then took Cook to the Monroe County Sheriff's Office where he advised him of his Miranda Rights. Cook admitted sending Two Thousand Four Dollars ($2,400.00) to California as payment for methamphetamine.

8. Cook told Graham that he had been receiving methamphetamine for approximately eight (8) months; that Moore sent the methamphetamine through the mail to Holder; and Cook picked up the packages from Holder, paying him $200.00-$300.00.

9. Cook then told Graham that Moore was going to mail a package that was scheduled to arrive on either January 4th or 5th, 2018. Holder was going to pick up the package.

10. On January 5, 2018, Graham with the help of United States Postal Inspector Wendy Boles arranged a controlled pickup of the package.

11. Boles delivered the package to Holder at the Sweetwater post office.

12. Once Holder left the post office, Graham observed him commit a traffic violation and pulled him over.

13. Holder gave consent to search his vehicle and the Postal Service box where officers discovered methamphetamine packaged in baggies surrounded by grease.

B.

1. The District Court held an evidentiary hearing on Moore's Motion on August 24, 2018. On September 11, 2018, the Magistrate Judge issued a Report and Recommendation recommending the denial of Moore's Motion to Suppress.

2. The Magistrate Judge found that Moore did not have a legitimate expectation of privacy in the postal service box, and thus did not have a standing to assert a Fourth Amendment violation.

3. The Magistrate Judge also found that the warrantless search of the package was supported both by consent and probable cause.

4. Moore objected to the Magistrate Judge's Report and Recommendation, but on October 1, 2018 the District Judge overruled Moore's objections and adopted the Magistrate Judge's Report and Recommendation as the Order of the District Court.

C.

1. Prior to trial Moore filed several Motions in Limine. Of relevance to this Petition is the Motion in Limine in which Moore moved pursuant to Federal Rules of Evidence 803, and 804, as well as this Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004) to exclude any statements made by co-defendant Cook while in the custody of and working on behalf of the Monroe County Sheriff's Department. Moore also moved to exclude any evidence obtained as the by-product of Cook's statements.

2. In his Motion, Moore asserted that Cook had made numerous statements to officers implicating Moore in the charged methamphetamine conspiracy. Cook had initially been cooperating with the Sheriff's Office but had changed his mind and was attempting to withdraw his guilty plea.

3. Moore asserted that as the result of Cook's change of heart, Cook was not going to testify and thus would not be subject to cross-examination.

4. On November 8, 2018, the District Court entered a Memorandum Opinion denying Moore's Motion in Limine to exclude Cook's statements and phone calls.

5. In denying Moore's Motion in Limine, the District Court stated:

> "It is the Court's understanding that Cook will not be testifying at trial. As such, the defendant argues that Cook's recorded statements are inadmissible hearsay. The Court disagrees.
>
> The transcript prepared by the government is seven pages in length. The defense does not specify which of Cook's statements are allegedly inadmissible. Instead, it is simply argued that Cook's every recorded utterance should be excluded as hearsay.
>
> Following the November 7 hearing, the Court again carefully reviewed the audio recordings and transcript. Because the defendant has not objected to specific statements, the Court finds that Cook's recorded utterances can be grouped into three categories:
> 1. Questions, such as whether a package had been mailed or whether the defendant had communicated with another person.
> 2. Statements about being out of, and needing more of, "it."
> 3. Miscellany, such as complaints about the United States Postal Service.
>
> Questions—which are the bulk of what is heard from Cook on these recordings are not hearsay.
>
> ***
> Turning to the other categories of Cook's statements, no credible argument has been presented that those out-of-court utterances are being offered for the truth of the matters asserted therein. See Fed. R. Evid. 801(c)(2). For example, the truth of whether Cook's packages were in fact dispatched by the Postal Service with disappointing efficiency, or whether Cook was in fact "out of" something, do not appear to be contested issues in this trial. Such statements therefore are not hearsay and are admissible to provide context for the defendant's own admissible opposing party statements. See *United States v. Henderson,* 626 F.3d 326, 337 (6th Cir. 2010); Fed. R. Evid. 801(d)(2)(A). The statements are also admissible because they are offered to demonstrate their effect on the listener, and to show the listener's knowledge. *United States v. Churn,* 800 F.3d 768, 775-76 (6th Cir. 2015)."

D.

1. Moore proceeded to trial on November 13th and 14th 2018. The Government presented four (4) witnesses and introduced the contents of Cook's recordings made while in the custody of the Monroe County Sheriff's Office.

2. Importantly, in conjunction with the introduction of the recordings made of Cook calling Moore where they discussed the shipment of something, the Government used Officer Dennis Graham, formerly a drug investigator with the Monroe County Sheriff's Department as Cook's surrogate mouth piece.

3. Graham not only recorded Cook's conversations with Moore, he readily provided his own interpretation of their contents in lieu of Cook's appearance at trial:

> "Q: Okay. So you said that Jamie Cook was cooperative when you first arrested him?
> A: Correct.
> Q: And did you ask him to make a controlled call for you?
> A: I did.
> Q: What is a controlled call?
> A: For law enforcement to listen in to use for collaboration of what's going on.
> Q: Okay. And so who was Jamie Moore (sic in original) going to call?
> A: Jimmy Moore
> Q: And why was he going to call him?
> A: In reference to a package that was supposed to have been sent and also give him the tracking number for the currency package.
> Q: And why was it important for you to place this controlled call to Jimmy Moore?
> A: To collaborate what Jamie Cook had said during the interview.
> Q: Okay. And did you learn that Jimmy Moore was supposed to be Jamie Cook's supplier?
> A: I did."

4. "Q: Okay. So tell me what's going on we start the call at 2:09. So where are you recording this call?
A: We are at the Monroe County Sheriff's Department.
Q: And the - - are you interviewing Jamie Cook?
A: I am
Q: And you asked him to place this phone call?
A: Yes.
Q: And you checked to see that he called the number that was on the label?
A: I did.

Q: And whose phone number was that supposed to be based on your interview from Jamie Cook?
A: Jimmy Moore."

5. First phone call between Cook and Moore:

"Q: Okay. So what are they talking about there?
A: At the start of the call, Jamie Cook is saying that he's out of methamphetamine. Then he says 'I sent yours'. He's referring to currency that he sent the $2400 payment for the meth and that he was going to keep a little bit of the currency. The next part of the call was where they are negotiating the price of an ounce of methamphetamine in California.
Q: When he says, You can't even touch that for - - touch it for that here, what is the speaker talking about?
A: An ounce of methamphetamine.
Q: Okay.
A: The next part of the call when he's talking about Did you send ours separate, through the investigation, I learned that another subject, Lonnie Graves, was also getting methamphetamine from California, supposedly shipped by Jimmy Moore, and that they were getting packages together. There was a problem that one got lost, so Jamie Cook insisted that he got his separate from Lonnie Graves from then on."

6. Second call between Cook and Moore:

"Q: So what are they talking about in that clip?
A: The start was finishing the conversation about Gary - - going to get methamphetamine from Gary. Then Jimmy Moore, he told him that - - he let him know that he had a big package coming soon, which was the package of methamphetamine that was intercepted. Then Cook asked him if he give him the tracking numbers, which through the investigation, I learned that Jimmy Moore, he tracked the packages of the currency and Gary Holder tracked the packages of the methamphetamine that was sent. So, that's what they are talking about, the tracking numbers."

7. The Jury convicted Moore, determining that the conspiracy included over fifty (50) grams of methamphetamine.

E.

1. On his appeal to the Sixth Circuit, Moore argued that the District Court erred in denying his Motion in Limine to keep out the audio recordings. Moore asserted that the calls were classic hearsay and were inadmissible under Crawford v. Washington, as Moore was deprived of his right to confront Cook at trial.

2. Moreover, Moore argued that the audio was inadmissible, and more significantly, that it was not made in the course of, and in furtherance of a conspiracy. At the time it was made, Cook was working as an agent of the Monroe County Sheriff's Department.

3. Moore also argued that the District Court erred in denying his Motion to Suppress as he retained an expectation of privacy in the postal service package until it reached its intended recipient.

4. The Sixth Circuit rejected Moore's arguments and affirmed his conviction and sentence.

F.

1. The Petitioner now seeks review by the United States Supreme Court for the following reasons:

(1) The Sixth Circuit has ignored an important federal question regarding the right of a defendant to confront the witnesses against him, by refusing to consider whether having someone make a phone call at the request of, and in the custody of law enforcement takes those calls outside of the context of non-hearsay and complies with this Court's decision in Crawford v. Washington.

(2) The Sixth Circuit's decision left open an important Federal question regarding the scope of the expectation of privacy in a United States Postal Service package when the package never reached its intended recipient.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT MISAPPLIED THE LAW OF CRAWFORD V. WASHINGTON, DENIED DEFENDANT JIMMY MOORE HIS RIGHT UNDER THE CONFRONTATION CLAUSE, AND THE RIGHT TO A FAIR TRIAL

In its opinion, the Sixth Circuit panel stated:

> "Moore argues that the admission of the phone recordings violated the Sixth Amendment's Confrontation Clause because Cook's statements on the calls were hearsay. To answer that argument on its terms: as the district court correctly found, most of Cook's statements on the call took the form of questions, which are not hearsay, see *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314-15 (6th Cir. 2009); and otherwise the recordings were admitted not to show the truth of the matters asserted, but to provide context for Moore's admissions during the calls, see *United States v. Henderson*, 626 F.3d 326, 337 (6th Cir. 2010). Moore's argument is meritless."

(Opinion, p. 4).

The district court relied on Federal Rule of Evidence 801(d)(2)(E), which provides that a statement offered against an opposing party is non-hearsay if it was made by the party's co-conspirator during and in furtherance of the conspiracy. Fed. R. Evid 801(d)(2)(E)(West 2020).

At the time Cook made his statements and the recordings were made, the record in the district court is clear that Cook was no longer part of a conspiracy. He was in the custody of the Monroe County Sheriff's Department and was working on behalf of the Sheriff's Department. Cook wasn't a co-conspirator; he was an agent of law enforcement. "It is settled that proof of an agreement between a defendant and a government agent or informer is not sufficient to support a conspiracy conviction." United States v. Hayden, 68 Fed. Appx. 530, 532 (6th Cir. 2003)(citing, United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984)). See also, United States v. Williams, 274 F.3d 1079, 1084 (6th Cir. 2001) (a government agent cannot be a conspirator); and United States v. Barger, 931 F.2d 359, 369 (6th Cir. 1991) (a conspiracy cannot be proven between a defendant and a government agent or informer). Analogously, if a government agent cannot be a

co-conspirator, statements made outside of the scope and not in furtherance of the conspiracy are hearsay.

"Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the rule." Bourjaily v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). "There must be evidence that there was a conspiracy involving the declarant and the non-offering party, and that statement was made during the course of, and in furtherance of conspiracy." Id.

The question that remains open, and the one Moore is requesting this Court to consider is whether permitting the introduction of hearsay statements made by a co-defendant who is in the custody of and working at the direction of law enforcement denies a defendant his Sixth Amendment right to confront his accusers and goes contrary to this Court's decision in Crawford v. Washington?

This Court established clearly in Crawford, that the Sixth Amendment right to confrontation does not yield to the Rules of Evidence. Likewise this Court rejected the view that Crawford applies only to in-court testimony: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." Id. at 51. "This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under the hearsay rules, but it bears little resemblance to the civil law abuses the Confrontation Clause targeted." Id. "On the other hand, ex parte communications might sometimes be admissible under modern hearsay rules, but the Framers certainly would not condone them." Id.

It is clear from this Court's precedent that statements made to and in the present of police officers are prime areas for Confrontation Clause violations. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. "Statements taken by police officers in the course of interrogations are also testimonial under a *de novo* standard." Id.

"Even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id. at 53. "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability." Id. at 61.

The statements made by Cook in this case were inherently unreliable. They were made while Cook was in police custody. See, United States v. McCleskey, 228 F.3d 640, 644 (6th Cir. 2000):

> "…[w]here as here, it is the government which seeks to introduce a statement, otherwise hearsay, which inculpates its declarant, but which in its detail also inculpates the defendant by spreading or shifting onto him some, much, or all of the blame, the out-of-court statement entirely lacks such indicia of reliability. It is a garden variety hearsay as to the defendant and it does not lose that character merely because it in addition reliably inculpates the defendant. Indeed, an alleged co-conspirator in the custody of law enforcement officials will generally have a salient and compelling interest in incriminating other persons, both to reduce the degree of his own apparent responsibility and to obtain lenience at sentencing."
>
> ***
>
> "[The] truth finding function of the Confrontation Clause is uniquely threatened when an accomplice's confessions is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally…More than this, however, the arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

Id. (citing, Lee v. Illinois, 476 U.S. 530, 541, 106 S. Ct. 2056, 70 L.Ed. 2d 514 (1986).

See also, United States v. Gomez-Lemos, 939 F.3d 326, 330 (6th Cir. 1991) ("A long line of Supreme Court cases interpreting the confrontation clause has created a strong presumption against the trustworthiness of co-conspirators' statements that are made after a conspiracy has terminated in arrest").

"Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the clause's ultimate goal is to ensure reliability of evidence, but it's a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner by testing in the crucible of cross examination." Id. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because co-defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Id.

This Court later addressed the "testimonial" nature of a statement in Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L.Ed.2d 93 (2011). This Court also clarified testimonial statements in the context of law enforcement.

In Crawford, "[w]e defined testimony as [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 353-354. "We noted that [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. "[I]n order for testimonial evidence to be admissible, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id.

While this Court stopped short of a definition of testimonial, "Crawford noted that at a minimum it includes prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations." Id.

In this case, there is no question that Cook was in the custody of officers and working on their behalf by placing phone calls to Moore that officers recorded for the purpose of soliciting information to be used at trial. There was not, and indeed there could not be, any other purpose than to use the phone calls as part of the government's case-in-chief to prove that Moore was shipping drugs across the United States via the postal service. Cook was initially cooperating, but he later chose not to cooperate. To this day, he's still flooding the District Court with frivolous arguments on why he should be permitted to withdraw his guilty plea. When the government couldn't secure his appearance at trial, they got the same evidence before the jury both with the recordings and the testimony of Officer Graham, but in doing so deprived Moore of his right to cross-examination and ultimately a fair trial.

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to prove past events potentially relevant to later criminal prosecution." Id.

"The most important instances in which the [confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal out-of-court interrogation of a witness and the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can

evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." Id.

Here it is clear that the primary purpose of making the recordings was for use at trial. Had Cook testified, Moore's right to cross-examine Cook on his motivation for making such statements, among other things, would have been protected. Instead, the district court allowed the recordings to be played, and left Moore without a fundamental right guaranteed by the Sixth Amendment and consequently a fair trial. "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provide the most accurate assessment of the primary purpose of the interrogation." Id. at 360. "The circumstances in which an encounter occurs – e.g., at or near the scene of crime versus at a police station, during an ongoing emergency of afterwards-are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Id. at 360.

See also, Ohio v. Clark, 576 U.S. 237, 249, 135 S.Ct. 2173, 192 L.3d. 2d 306 (2015) ("Courts must evaluate challenged statements, in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers").

Moore was deprived of his constitutional right to confront co-defendant Cook as to why he assisted police and his motives for doing so. Moore respectfully submits this Court must undertake

review to determine if Moore's right to a fair trial was violated and this Court's decision in Crawford v. Washington rendered meaningless.

II. THE SIXTH CIRCUIT DECISION LEFT OPEN AN IMPORTANT FEDERAL QUESTION REGARDING THE SCOPE OF THE EXPECTATION OF PRIVACY IN A UNITED STATES POSTAL SERVICE PACKAGE WHEN IT NEVER REACHED ITS INTENDED RECIPIENT

In its opinion the Sixth Circuit held:

> "Moore contends specifically (if implausibly) that he retained a privacy interest in the contents of the package he mailed to Holder even after Holder picked it up, and that the deputy's warrantless search of the package violated the Fourth Amendment. We dispose of that argument simply by observing that the search of Holder's car and its contents was lawful if the officer had probable cause to conduct the search, which he did once the dog alerted. See *United States v. Winters*, 782 F.3d 289, 304 (6th Cir. 2015). Hence the court properly denied Moore's motion to suppress."

(Opinion, p. 3).

The Sixth Circuit skipped over the true issue, that being the continuation of a person's expectation of privacy in a mailed item. That's the open question that Moore respectfully submits this Court must decide.

As this Court has stated: "[i]t has long been held that first-class mail such as letter and sealed packages subject to letter postage – as distinguished from newspapers, magazines, pamphlets and other printed matter – is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment." United States v. Van Leeuwen, 397 U.S. 249, 251, 90 S. Ct. 1029, 25 L.Ed. 2d 282 (1970). "As stated in Ex Parte Jackson, 96 U.S. 727, 733, 24 L.Ed 877 (1878) letters and sealed packages of this kind in the mail are fully guarded from examination and inspection, except as to their outward form and weight, as if they were returned by the parties forwarding them in their own domiciles." Id. (citing Ex Parte Jackson, 96 U.S. at 727). "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may

be." Id. "Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." Id. "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to the mail matter of the kind must be in subordination to the great principle embodied in the fourth amendment of the constitution." Id.

"We have emphasized over and over again that while Congress may classify the mail and fix the charges for its carriage, it may not set up a regime of censorship over it nor encumber its flow by setting administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail to him." Id. at 251-52. See also, United States v. Alexander, 540 F.3d 494, 500 (6th Cir. 2008) ("Sealed packages…[are] free from inspection by postal authorities except in the manner provided by the Fourth Amendment"); United States v. Williams, No. 10-20357-STA-tmp, 2013 U.S. Dist. Lexis 10051 at *16 (W.D. Tenn. 2013); United States v. Williams, No. 10-20357, STA-tmp, 2012 U.S. Dist. Lexis 18577 at *8 (W.D. Tenn. 2012).

"Whether a legitimate expectation of privacy exists in a particular place or thing is determined on a case-by-case basis and involves a two-part inquiry by the Court. First, we ask whether the individual by [his] conduct, has exhibited an actual expectation of privacy; that is whether he has shown that he sought to preserve something as private…Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Id. "It is well-settled in the Sixth Circuit that a sender of a sealed package generally has a legitimate expectation of privacy while it is in route to its destination." Id. "Under normal

circumstances, the sender of a package has standing to assert violations of his Fourth Amendment rights if a law enforcement official intercepts the package and searches its contents before delivery." Id.

The record in this case was clear that the intended recipient of the package sent by Moore was co-defendant Cook. Co-defendant Holder was nothing more than a "middle-man" trying to mitigate his time in Federal prison. The package never made it to Cook, which is why the Monroe County Sheriff's Department set up a controlled pickup, and then fabricated a traffic violation for the purpose of coercing Holder's consent.

Despite that record, however, the Sixth Circuit completely ignored the applicable law regarding an expectation of privacy in a Postal Service box and punted the issue to probable cause. That leaves open the question of expectation of privacy for this Court and requires this Court to grant cert to review that question.

Moreover, there is a second related question that this case presents: What is the scope of the "common authority" doctrine? As this Court stated in United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L.3d 2d 242 (1974) "[under] the common authority doctrine, the consent of one person with common authority over premises or effects is valid against absent non-consenting person when that authority is shared."

The open question is whether a person who simply picks up a package for another and is not the intended recipient has common authority to consent to a search of its contents? The Sixth Circuit ignored this question as well, despite the record clearly showing co-defendant Holder first denied that he had any interest in the box, and then gave permission for law enforcement to search the box.

These are significant questions not just for this case, but for all cases of this type. Moore thus respectfully requests this Court undertake review and provide much needed clarity on these matters.

CONCLUSION

For reasons set forth herein, the Petitioner Jimmy McLain Moore respectfully requests this Court grant a Writ of Certiorari and undertake review of his case as it presents important Federal Questions.

Respectfully submitted this 30th day of July 2020

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Attorney for the Petitioner Jimmy McLain Moore as appointed under the provisions of the Criminal Justice Act, 18 U.S.C. §3006A

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2020 a true and exact copy of this document has been filed via this Court's Electronic Filing System, along with an Original and ten (10) copies to the Honorable Scott Harris, Clerk – United States Supreme Court, One First Street, N.E., Washington, D.C. 20543 – via Federal Express overnight delivery. This document has also been served on the OFFICE OF THE SOLICITOR GENERAL, DEPARTMENT OF JUSTICE, Room 5614, 950 Pennsylvania Avenue, Washington, D. C. 20530-0001 by placing the same in the United States Mail, first class postage pre-paid.

/s/ Mark E. Brown
Mark E. Brown

APPENDECIES