20-5804

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Ian Resnick
Petitioner

v

United States of America
Respondent

ORIGINAL

ON PETITION FOR CERTIORARI TO THE SUPREME COURT

PETITION FOR CERTIORARI

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QUESTION(S) PRESENTED

1) Whether the Confrontation Clause of the Sixth Amendment permits, under the guise of "overview testimony", the admission against a criminal defendant a statement by an accuser on the grounds the Confrontation Clause framework established in Crawford V Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2nd 177 (2004) holds the Clause unequivocally prohibits the admission of out-of-court statements without the Right to Confrontation. Specifically when the statement is used to obtain an indictment that upon conviction opens the flood gates to millions of dollars in fraud loss at sentencing under Sentencing Guidelines 2B1.1 at a much lower standard of evidence that no trial jury will ever hear?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the 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 for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit affirmed my conviction was 5 May 2020.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

IN THE SUPREME COURT OF THE UNITED STATES

ISSUE TO REVIEW

PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals in the Third Circuit appears as Exhibit D to the Petition

On 23 January 2013, a grand jury sitting in the District of New Jersey returned a forty-four (44) count superseding indictment charging Petitioner and others with conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1343, 1349 (Count 1), mail fraud, in violation of 18 U.S.C. 1341 (Counts 2 through 20), wire fraud, in violation of 18 U.S.C. 1343 (Counts 21 through 34), conspiracy to commit money laundering, in violation of 18 U.S.C. 1957, 1956(h) (Count 35), money laundering, in violation of 18 U.S.C. 1957(a) (Counts 36 through 39), unemployment compensation benefit fraud, in violation of 18 U.S.C. 1341 (Counts 40 through 42), and wire fraud in relation to unemployment compensation benefit fraud, in violation of 18 U.S.C. 1343 (Counts 43 through 44). Petitioner was named in Counts 1, 18, 20, 32, through 34, and 42.

On 4 September 2013 after an eight week trial, the jury returned a verdict that convicted Petitioner on all Counts. On 22 April 2016 the District Court sentenced Petitioner to two-hundred-sixteen (216) months imprisonment. On 2 May 2016 Petition filed a timely notice of appeal. On 5 May 2020 in United States v Resnick, 2020 U.S. App. LEXIS 14278 (3rd Cir. 2020) the Court affirmed the judgments of conviction and sentences entered against Petitioner.

STATEMENT OF THE CASE

Federal Court are divided whether overview testimony is admissible against a criminal defendant on the basis Circuits addressing the use of overview witnesses have reached uniformly negative conclusions in view of serious dangers of prejudice to as fair trial as happened in this case to Petitioner. The Courts of Appeals for the First, Second and Fifth Circuits have held the use of overview testimony by the government is a troubling development for this very reason. As the First Circuit has explained in describing the practice as inherently problematic: Such testimony raises the very real specter the jury verdict could be influence by statements of fact or credibility assessments in the overview but not in evidence. There is also the possibility later testimony might be different that what the overview witness assumed; objections could be sustained or the witness could change his or her story. Overview testimony by government agents is especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government. This Court should review the Third Circuit's decision in this case - which hold that overview testimony permits law enforcement to present statements of an accuser, but denies defendant's the right to confront - to resolve this conflict because admissibility of such evidence is a critical issue in criminal trials across the Nation and the Third Circuit Court's rule is incorrect. The United State District Court of New Jersey in this matter stated overview testimony could be an issue. See T.T. Mesisca - Direct - Oswald at 75 (Exhibit A)

Another serious problem with overview testimony is it sometimes relies on anticipated witnesses, as in Petitioner's case. Thus, it may violate confrontation clause as in this case. Testimonial statements cannot be offered against a defendant without the opportunity for cross examinations, which is exactly what happened Petitioner's case, See T.T., Mesisca - Direct - Cerdone at 235-236 (Exhibit B).

If overview testimony previews the answers of an anticipated witness, such a violation is not easily cured if the expected witness, in this case Ms. Gerlach, fails to testify. The D.C. Circuit has explained: Because a witness presenting overview of the government's case-in-chief runs the serious risk of permitting the government to impermissibly paint a picture of guilt before the evidence has been introduced, and may never be introduced, it joins circuits that have addressed the issue in condemning the practice.

This Court has held a jury must base its verdict only evidence coming "from the witness stand in a public courtroom where a full judicial protection of the defendant's right of confrontation, cross examination, and of counsel." Turner v Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546 13 L. Ed. 2d 424 (1965). Prejudice is presumed if a defendant establishes extrinsic contact with the jury in fact occurred. McNair v Campbell, 416 F.3d 1291, 1307 (11th Cir. 2005). Once a

defendant makes a showing of prejudice, the burden shifts back to the state to rebut the presumption by "showing that jurors' consideration of extrinsic evidence was harmless to the defendant." Id. (quoting Remmer v United States, 347 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)).

The Sixth Amendment as made applicable to the states through the Fourteenth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him[.]" U.S. Const. amend. VI, XiV. In Crawford v Washington 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004), this Court thoroughly examined the historical meaning of the Sixth Amendment's Confrontation Clause and determined that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id., 541 U.S. at 59. This Court's holding, however, is limited to testimonial statements:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -- in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes casual remark to an acquaintance does not. This constitutional text, like the history underlying the common-law right of confrontation, this reflects an especially acute concern with a specific type of out-of-court statement. Id. 541 U.S. 51.

"The Confrontation Clause bars the introductions of testimonial hearsay against a criminal defendant, unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant." Smith v Simmons, 200 F. App'x 822, 825 (10th Cir. 2006)(citing Crawford 541 U.S. at 53-54). Testimonial hearsay includes "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use later at trial." Crawford, 541 U.S. at 51-52 (citations and internal quotation marks omitted). The admission of non-testimonial hearsay does not implicate the Confrontation Clause. Id. at 68. See also United States v Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006) ("[T]he Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted")

Indeed, the split of authority concerning overview testimony is endemic of the need to reexamine the Confrontation Clause in a more fundamental manner. This Court should undertake such an evaluation here and hold, Confrontation Clause erects per se rule that out-of-court statements that are contained in "testimonial" materials , such as emails, are inadmissible against criminal defendants. This modification would not require this Court to overrule any of its prior holdings, but it would greatly simplify applications of the Confrontation Clause, deconstitutuionalize hearsay law, and bring

the Confrontation Clause back in line with its textual and historical underpinnings.

The indictment names two accusers against Petitioner, See T.T. Resinick - Direct - Riley at 104, (Exhibit B), Mr. Baker and Ms. Gerlach. During trial Petitioner was afforded the right to confront Mr. Baker. Mr. Baker testified he was contacted by Petitioner in July 2010. Evidence at trial proved Petitioner was not employed by VO Group at that time. Being given the right to confront Mr. Baker gave Petitioner the opportunity to prove he had nothing to do with the transaction involving Mr. Baker. See T.T., Resnick - Direct - Riley at 89-91 (Exhibit B). The jury heard that and as a result could not find Petitioner culpable of any wrong doing against Mr. Baker, even though the jury did find Petitioner guilty of wrong doing against Mr. Baker. The jury found that because of the cumulative taint of the government's evidence regarding Ms. Gerlach that went unchallenged by having Petitioner's right to confrontation denied.

Regarding Petitioner's accuser Ms. Gerlach, Petitioner was denied the right to confrontation. During Special Agent Mesisca's (Mesisca) overview testimony he read from several emails purported to be authored by Ms. Gerlach. These emails were from Mesisca's investigative file T.T., Mesisca - Direct - Cerdone at 235 (Exhibit B), and were obtained during the interrogation of Ms. Gerlach. Testimonial hearsay is primary object of right to confrontation, such as prior testimony at preliminary hearing, before grand jury, or at a formal trial, and statements in response to interrogations by law enforcement officers falls squarely within that class. (3) Whatever else the term "testimonial" covered, it applied at a minimum to (a) prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and (b) police interrogations. There were modern practices with closest kinship to the abuses at which the confrontation clause was directed. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 17 FLa. L. Weekly Fed. S 181, 63 Fed. R. Evid. Serv. (CBC) 1077 (2004).

During Mesisca's overview testimony he painted the picture Petitioner had completed a "bank settlement deal" with Ms. Gerlach. At no point during the trial was Petitioner afforded the right to confront Ms. Gerlach his accuser. The government offered no defense as to why Ms. Gerlach was not produced at trial for Petitioner to confront. After trial Petitioner filed a Motion under Fed. R. Crim. P. 33 (Exhibit C) which contained documents demonstrating Ms. Gerlach has not been sold a "bank settlement deal". Had Petitioner been afforded the Constitutional right to confront Ms. Gerlach it would have been proven to the jury there was no criminal wrong doing. Because Petitioner was denied the Constitutional right to confront Ms. Gerlach all the jury heard was Mesisca's testimony which did not include the evidence demonstrating Petitioner did not use the "bank settlement deal" with Ms. Gerlach.

Since the jury heard Petitioner could not have been responsible for the transaction with Mr. Baker it is clear the jury concluded there was criminal wrong doing regarding Ms. Gerlach. Had Petitioner been able to confront Ms. Gerlach the jury would have been made aware there was no wrong doing and would have returned a verdict of not guilty regarding

both clients.

Ms. Gerlach was not told anything regarding the "bank settlement deal", at worst Ms. Gerlach would have revealed her only complaint was the location of her new property. The fact Ms. Gerlach knew there would be a new property, evidenced in her emails, concludes there was no "bank settlement deal", because the "bank settlement pitch" was about erroneously paying off an existing property. The "bank settlement pitch" was the sole focus of the government's case-in-chief. Because Ms. Gerlach was instructed by Petitioner prior to payment how the legal process worked and she was expecting, as evidenced in her emails, a new property, proves Ms. Gerlach's transaction could not have been the illegal "bank settlement pitch" as the government contends. There was a property replacement or switch with Ms. Gerlach as she was anticipating a completely different property in a different location proving it could not be a "bank settlement deal". This evidence proves Mesisca's testimony to the grand jury was false, making the entire indictment invalid.

The government, District Court and the Appellate Court erroneously concluded Petitioner admitted to using the "bank settlement pitch" when in fact testimony at trial proves otherwise. See T.T. Resnick - Direct - Riley at 105 to 108. Ms. Gerlach's emails demonstrates clearly she was completely informed of the legal "settlement pitch" which explains the entire process prior to payment being submitted and is still in use today with multiple other time share relief companies well known to the Federal Bureau of Investigations.

CONCLUSION

The Federal Bureau of Investigation's 302 of Ms. Gerlach's interrogation was read to the grand jury by Mesisca as an accuser of Petitioner. See Grand Jury Transcript at 60-62 (Exhibit C). Ms. Gerlach is referenced in the indictment against Petitioner as an accuser. During trial in Mesisca's overview testimony several of Ms. Gerlach's emails with VO Group were read. At no point during the trial was Petitioner given the Constitutional right afforded him under the Sixth Amendment to confront his accuser. The indictment alleged criminal conduct against Ms. Gerlach, but the evidence presented by the government in this case did not establish such. See Rule 33 Motion (Exhibit C).

For the foregoing reasons, this Petition for a writ of Certiorari should be granted.

Respectfully Submitted,

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REASONS FOR GRANTING THE PETITION

Under Rule 10 orf the Supreme Court, Considerations Governing Reviews on Certiorari it states, "A petition for a writ of certiorari will only be granted for compelling reason." In the United States of America v Ian Resnick the 3rd Circuit Court of Appeals has, (Rule 10c) decided an important question of federal law improperly that has not been, but should be settled by this court regarding the use of improper "overview testimony" that creates a constutional violation when a witness statement is relied on by the government to secure an indictment and the accused has no opportunity to cross examine them at any point before or during trial proceedings. The 3rd Circuit Court of Appeals has also decided an important federal question in a way that conflicts with the relevant decisions of this court regarding the constutional right to confront your accusers as established in Crawford v Washington.

Interestingly, by affirming the judgment and conviction of Ian Resnick the 3rd Circuit Court of Appeals contradicted their own findings as seen in their case summary (Exhibit D) that states the court held that overview testimony that opines on ultimate issues of guilt, ,makes assertions of facts outside the officers personal knowledge, or delves into aspects of the investigation in which he did not participate is inadmissible. It was clearly established in the 33 motion for newly discovered evidence (Exhibit C) that at no time did the lead case agent who testified both to the grand jury and then presented the problematic overview testimony at trial ever have any contact with the accuser in question. He opined on ultimate issues of guilt, made assertions of fact clearly outside his personal knowledge, and delved into aspects of the investigation in which he did not participate. By the 3rd Circuit Court of Appeals own definition, his testimony and evidence is inadmissible and in direct contradiction to their own findings.

It is for these reasons that this petition should be granted.

Respectfully,

Ian Resnick