

No. _____

In the Supreme Court of the United States

TIMOTHY IVEY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Timothy Ivey was serving a term of federal supervised release when he was accused of committing an aggravated assault outside of a bar at 2:00 a.m. The victim, Rufus Parrott, was intoxicated at the time of the attack and suffered head trauma. That night, he told the responding officer that he had an argument with Mr. Ivey inside of the bar about Mr. Parrott's niece, with whom Mr. Ivey was in a relationship, and that Mr. Ivey followed him outside and hit him with a gun that then "broke into several pieces."

At Mr. Ivey's revocation hearing, Mr. Parrott testified that his initial report was unreliable—explaining that he had been drinking heavily, that he did not know who attacked him outside, that he was unsure whether it was with a gun, and that he did not even know whether the man he confronted in the bar was actually Mr. Ivey. The district court declared that Mr. Parrott was "a liar" and that his testimony was "not to be believed," but nevertheless relied exclusively on his initial accusation to find that Mr. Ivey committed the assault and thus violated his terms of supervision.

The questions presented are:

- (1) Does a district court violate a defendant's due process rights by relying solely on an uncorroborated, recanted, out-of-court identification to revoke his supervised release when the court has no basis for finding the initial accusation credible or reliable?
- (2) Did the revocation of Mr. Ivey's supervised release violate his due process rights under the Fifth Amendment?

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Petitioner Timothy Ivey respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

In 2007, Timothy Ivey pleaded guilty to a drug conspiracy charge and was sentenced to 180 months of imprisonment followed by 8 years of supervised release. He began his term of supervision on February 1, 2019.

On January 8, 2020, the district court revoked Mr. Ivey's supervised release and sentenced him to 60 months of imprisonment. Mr. Ivey timely appealed, and the Fifth Circuit affirmed the district court's judgment on August 20, 2020. *See Opinion, United States v. Ivey, No. 20-30016 (5th Cir. Aug. 20, 2020).* A copy of the panel decision is attached hereto as the Appendix.

JURISDICTION

The final judgment of the Fifth Circuit Court of Appeals was entered on August 20, 2020. No petition for rehearing was filed. Mr. Ivey's petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13.1, as modified by this Court's Order dated March 19, 2020, which extended the deadline for petitions for writs of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

18 U.S.C. § 3583(e)(3) provides:

The court may . . . revoke a term of supervised release . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . .

STATEMENT OF THE CASE

On February 1, 2019, Timothy Ivey began serving a term of federal supervised release, which was imposed as part of his sentence for a 2007 drug conviction. Several months later, the U.S. Probation Office petitioned the district court for an arrest warrant for Mr. Ivey based on its belief that he violated a mandatory condition of supervision. Specifically, the petition stated that “a warrant was issued by the Jefferson Parish Sheriff’s Office for Ivey’s arrest for committing 2nd degree battery and aggravated assault with a deadly weapon.” The petition attached the Jefferson Parish warrant and supporting affidavit, which described a report by Rufus Parrott that he had an argument with Mr. Ivey inside of a bar regarding Mr. Parrott’s niece; that Mr. Parrott left the bar to end it; that Mr. Ivey followed him outside; that an unknown person gave Mr. Ivey a firearm; that Mr. Ivey began pointing the gun at Mr. Parrott and threatening to shoot him; that Mr. Parrott hid behind vehicles in the parking lot; and that Mr. Ivey “quickly approached him and struck him two to three times in the head.”

The district court issued an arrest warrant pursuant to U.S. Probation’s petition, and Mr. Ivey was arrested and taken into federal custody. However, he was later released on bond—with no opposition from the government or U.S. Probation—after the parties learned that the Jefferson Parish District Attorney’s Office refused all charges. Apparently, Mr. Parrott had notified the office that he no longer believed in the accuracy of his previous identification and therefore did not want to pursue charges against Mr. Ivey.

Despite the state's refusal to charge Mr. Ivey with a crime, the government filed a Rule to Revoke his federal supervised release. In the Rule to Revoke, the government alleged that he violated the terms and conditions of his supervision "in the manner set forth in the Petition for Warrant"—*i.e.*, based solely on the allegations in the Jefferson Parish warrant application. U.S. Probation prepared a dispositional report similarly asserting that Mr. Ivey violated the terms of his supervision by committing a "crime of violence"—presenting the allegations from the warrant application as fact and stating that "Ivey's conduct on October 12, 2019, when he pointed a gun at the victim, threatening to shoot him and striking him in the head with the handgun constitutes a crime of violence."

Mr. Ivey denied the allegation, and a revocation hearing was held. At the hearing, the government presented two witnesses: (1) Deputy Michael Naccari, who responded to the assault, and (2) Mr. Parrott.

Deputy Naccari testified that he responded to a reported assault at the bar in which the complainant had "stated that he was attacked by another person . . . wearing a green shirt or something of the like." When Deputy Naccari arrived, he found Mr. Parrott standing in the street with blood on his head and hands. According to Deputy Naccari, Mr. Parrott described being assaulted as recounted in the warrant affidavit, identifying Mr. Ivey as his assailant. Deputy Naccari also testified that Mr. Parrott claimed he was struck with a gun that "broke into several pieces." He further testified, however, that officers looked for the "pieces" of the gun that allegedly broke but could not find anything. With respect to Mr. Parrott's written

statement, Deputy Naccari testified that he had to personally write it because Mr. Parrott “was not in the physical condition to actually write legibly at the time”—specifically, he was distraught, had just suffered a head trauma, “appeared intoxicated,” smelled of alcohol, and was “slurring his words.”

Mr. Parrott confirmed in his testimony that he was intoxicated on the night of his assault, that Mr. Ivey was in a relationship with his niece, and that the written statement recorded by Deputy Naccari accurately reflected what he initially reported. However, he recanted his previous identification of Mr. Ivey as his assailant. According to Mr. Parrott, he was drinking in the bar when he “approached someone who [he] thought was Timothy Ivey” and told the man that he did not want to be involved in his relationship issues. Mr. Parrott testified that the man responded, “I don’t know what you’re talking about,” and “words were exchanged.” He testified that he then decided to leave the bar and walk home, but he was attacked in the parking lot. Describing the night as “very blurry,” Mr. Parrott testified that he did not know who assaulted him because “it was dark and [he] had been drinking,” and he stated that he was not even sure whether it was actually Mr. Ivey who he confronted in the bar due to his intoxication that night. He also did not know whether the person who attacked him outside was the same person with whom he argued in the bar, nor was he sure whether his attacker hit him with a gun or some other object.

At the conclusion of the testimony, the district court asked whether there was “[a]ny argument that [the] government would like to make other than the fact that Mr. Parrott is not to be believed, which the Court is absolutely in agreement with[.]”

The court then stated: “Mr. Parrott lied on the witness stand. I heard the way he answered the questions. I noticed his demeanor. Mr. Parrott is a liar.” The government declined to offer any argument, and defense counsel argued that the government had not met its burden of proving by a preponderance of the evidence that Mr. Ivey violated his supervised release in the manner alleged in the rule.

Despite its determination that Mr. Parrott was a “liar,” the court relied solely on his initial report of the assault to find that Mr. Ivey violated his supervised release. Reiterating that it was “absolutely certain that Mr. Parrott is a liar” and “lied on the witness stand for whatever reason,” the court nevertheless determined that he was truthful “when he told the deputy exactly what happened” and “[t]hat it was a gun, not a blunt object.” In other words, the district court made a credibility finding against Mr. Parrott but still relied on his prior, out-of-court accusation to revoke Mr. Ivey’s supervised release.

In response to defense counsel’s objections, the court stated that it had “made a credibility finding understanding that [Mr. Parrott] was intoxicated,” and further stated that “there is no reason for the Court to think that he didn’t say exactly what he said and mean it right after this happened.” The court did not explain, however, why it determined that the initial accusation was reliable, even assuming Mr. Parrott believed it at the time. Nor did the court provide any reason to believe that Mr. Parrott’s out-of-court identification was credible, especially in light of its determination that he was “a liar” and “not to be believed.” Instead, it simply assumed the initial accusation to be truthful and reliable.

Mr. Ivey timely appealed the judgment, arguing that the district court abused its discretion by revoking his supervised release based solely on a prior, uncorroborated, out-of-court identification by a witness who recanted it under oath, without any basis for crediting the prior statement. He argued that the evidence could not satisfy the government's burden to prove by a preponderance of reliable evidence that it was "more likely than not" that Mr. Ivey assaulted Mr. Parrott, especially given Mr. Parrott's undisputed intoxication and subsequent recantation. He further argued that the court's reliance on the victim's out-of-court accusation over his in-court testimony "rendered meaningless" Mr. Ivey's Sixth Amendment confrontation right and violated the spirit of due process, because his revocation was not based on verified facts.

The Fifth Circuit affirmed, finding that the evidence "was sufficient for a reasonable trier of fact to conclude that Ivey violated the conditions of his release." App'x at 2. Specifically, the court determined that Deputy Naccari's testimony, the photographic evidence of Mr. Parrott's injuries, and Mr. Parrott's written statement support the district court's finding that Mr. Ivey "argued with the victim at the bar, followed him to the parking lot with a gun, threatened to shoot him, then struck him repeatedly in the head with the butt of the gun." *Id.*

With respect to Mr. Parrott's recantation of his initial identification, the Fifth Circuit stated that the district court was "free to choose among reasonable constructions of the evidence." App'x at 2–3 (quoting *United States v. Alaniz-Alaniz*, 38 F.3d 788, 792 (5th Cir. 1994)). According to the Fifth Circuit:

The record shows that the court specifically accounted for the victim's intoxication and injuries when making the finding that his statements to Deputy Naccari identifying Ivey as his assailant were true and that his later testimony to the contrary was not credible.

Id. at 3. The court also found no Sixth Amendment confrontation issue in the district court's admission of and reliance on Mr. Parrott's out-of-court identification in light of the fact that he "was also called as a witness and questioned extensively by defense counsel[.]" *Id.* Accordingly, the Fifth Circuit concluded that "[a] preponderance of sufficiently reliable evidence satisfied the district court that Ivey violated the terms of his supervised release by committing an aggravated assault," and therefore it "did not abuse its discretion in revoking [his] supervised release." *Id.*

REASONS FOR GRANTING THE PETITION

“Freedom from imprisonment . . . lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Here, the district court deprived Mr. Ivey of that freedom based solely on an uncorroborated, out-of-court accusation by an intoxicated assault victim who later explained under oath why his own prior identification was unreliable. While expressing confidence that the victim was a “liar,” the district court nevertheless credited his prior accusation, relying on it to find that Mr. Ivey committed the assault.

In affirming the district court’s ruling, the Fifth Circuit sanctioned a significant departure from the usual and accepted course of judicial proceedings and basic principles of due process. It also split from decisions of other Courts of Appeals, which have sanctioned reliance on recanted, out-of-court accusations only when there is good cause to admit the hearsay in place of live testimony and a reasonable, articulable basis for crediting the initial accusations. In this case, the district court provided no such basis, stating only that it had “no reason . . . to think [the declarant] didn’t say exactly what he said and mean it right after this happened.” Accordingly, this unique case raises serious constitutional concerns and calls for the exercise of this Court’s supervisory power.

I. The district court’s significant departure from the accepted course of judicial proceedings necessitates this Court’s intervention.

As this Court has long recognized, “[t]he hearsay rule . . . is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.” *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). “Out-of-court

statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant’s word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.” *Id.*; *see also, e.g., United States v. Parry*, 649 F.2d 292, 294 (5th Cir. 1981) (explaining that the factfinder has “no basis for evaluating the declarant’s trustworthiness” with respect to an out-of-court statement, “and thus his statement is considered unreliable”); *United States v. Console*, 13 F.3d 641, 656 (3d Cir. 1993) (explaining that Federal Rule of Evidence 801 “prohibits the admission of an out-of-court statement offered to prove the truth of the matter asserted because the statement is inherently untrustworthy”).

In revocation proceedings, “[d]ue process requires that a defendant be given a fair and meaningful opportunity to refute and challenge adverse evidence to assure that the court’s relevant findings are based on verified facts.” *United States v. Grandlund*, 71 F.3d 507, 510 (5th Cir. 1995). Although there is no blanket prohibition against hearsay, courts have recognized that its use is problematic—not only due to confrontation concerns, but because “unreliable hearsay undermines the accuracy of the fact-finding process.” *Farrish v. Miss. State Parole Bd.*, 836 F.2d 969, 978 (5th Cir. 1988). Indeed, as the First Circuit has recognized, “[r]eflexive reliance on hearsay accusations can hollow out” a defendant’s right to due process in revocations. *See United States v. Colón-Maldonado*, 953 F.3d 1, 10 (1st Cir. 2020). Thus, “when a court extends a defendant’s sentence based on hearsay, there must be other signs (other

‘indicia of trustworthiness’) to permit a reasoned conclusion that the statements are still reliable,” such as corroborating evidence or the application of a recognized hearsay exception. *Id.*; see also *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (“Challenged information is deemed false or unreliable if it lacks some minimal indicium of reliability beyond mere allegation.” (internal quotation marks and citations omitted)).

In determining whether to permit hearsay in lieu of witness testimony at a revocation hearing, district courts must weigh competing interests between the government and defendant. As the Fifth Circuit has explained, “the government may introduce—and a court may revoke probation or supervised release on—hearsay evidence without live testimony” only when there is “a showing of good cause” to deny confrontation. *United States v. Ferguson*, 760 F. App’x 328, 330–31 (5th Cir. 2019) (citation omitted). The determination of good cause requires weighing the interests for and against confrontation, and the “reliability of the hearsay is an important consideration” in that assessment. *United States v. McCormick*, 54 F.3d 214, 223 (5th Cir. 1995).

In this case, Mr. Ivey did have an opportunity to confront his accuser, but the district court still relied on the accuser’s hearsay to revoke supervised release. Considering the nature of Mr. Parrott’s out-of-court identification, and the circumstances under which it was made, it is a near certainty that the district court would not have been able to find “good cause” to excuse confrontation and rely on the hearsay alone. However, by selectively discrediting Mr. Parrott’s in-court

testimony—including his corroborated explanation for why his prior identification was unreliable—the court rendered meaningless Mr. Ivey’s due process and confrontation rights. Indeed, the district court credited an allegation by Mr. Parrott that not only was recanted and lacked indicia of reliability, but which the court did not observe and thus could not assess for credibility and reliability. And the court’s finding that Mr. Parrott was a “liar” only further diminished the reliability of any statements he previously made.

The district court’s ruling in this case circumvented Mr. Ivey’s constitutional due process rights, relying on impermissible hearsay by simply discrediting contradictory testimony from the declarant. The Fifth Circuit’s affirmance sanctioned this departure by the district court from the accepted and usual courts of judicial proceedings as well as long-established evidentiary tenets and constitutional principles. This Court should thus exercise its supervisory power to review this uniquely problematic case.

II. The Fifth Circuit’s affirmance conflicts with precedent from other federal Courts of Appeals.

The specific circumstances of this case do not appear to have arisen in other Courts of Appeals. However, the Fifth Circuit’s ruling represents a significant departure from the approaches of other courts in analogous situations. Specifically, other courts have affirmed revocation rulings based on recanted, out-of-court identifications, but only when good cause exists to preclude confrontation. Moreover, those courts require additional indicia of reliability (not present here) to credit the prior accusations.

For example, courts have found good cause to allow hearsay accusations in revocation cases involving domestic violence or similar allegations, recognizing that it is not uncommon for victims to later recant truthful reports. *See, e.g., United States v. Farmer*, 567 F.3d 343, 347–48 (8th Cir. 2009) (permitting the reliance on the police report because the witness, who recanted her allegations to police after the initial report, was unavailable); *United States v. Jackson*, 347 F. App’x 701, 703 (2d Cir. 2009) (finding good cause to deny confrontation for assault victims who were not cooperating with authorities); *United States v. Hall*, 419 F.3d 980, 988, 988 n.6 (9th Cir. 2005) (finding good cause for not producing the victim, who was homeless and could not be located, and noting that “[t]he difficulty of securing the testimony of domestic violence victims . . . against their batterers is well recognized”).

In those cases, unlike here, the courts found that the initial reports contained strong indicia of reliability—consistency of multiple reports, corroborating statements from other witnesses, and even corroborating statements by the defendant himself. *See Farmer*, 567 F.3d at 347 (finding a domestic violence victim’s hearsay allegations sufficiently reliable when the police investigation corroborated her account, and noting the frequency with which victims of domestic abuse recant initial accusations); *Jackson*, 347 F. App’x at 703 (finding that the reliability of recanted assault allegations was “convincingly demonstrated” based on the number and consistency of multiple accounts, the sworn and recorded nature of an out-of-court allegation, the defendant’s admission to altercations with his accusers, and hospital records that “strongly established the alleged assault” when combined

with those admissions); *Hall*, 419 F.3d at 988 (finding that a false imprisonment victim’s hearsay bore “some indicia of reliability” when her statements to the police were consistent and corroborated by extrinsic evidence, independent investigation, and statements made by the defendant himself). And, notably, in those types of cases, the credibility and reliability challenges generally relate to the circumstances of the assault, not the identity of the assailant.

Here, there was no good cause finding, and Mr. Ivey’s accuser testified to the circumstances that made his previous identification unreliable, which were corroborated by Deputy Naccari’s testimony. Moreover, his initial identification bore no independent indicia of reliability—it was a mere allegation by an intoxicated assault victim who was attacked in the dark, did not initially identify his assailant by name, and had no corroborating evidence or witnesses. Other aspects of his initial account similarly were uncorroborated and implausible, such as his claim that he was hit with a gun that “broke into several pieces,” which were never located. Also absent from this case was any reason for the district court to believe that Mr. Parrott would lie about the unreliability of his prior identification—indeed, it could articulate none.

The district court’s ruling in this case effectively endorses the view that a crime victim’s initial accusation will always be sufficiently reliable to support revocation, regardless of the conditions under which it was made and regardless of any correction or recantation provided later. Even if the district court found Mr. Parrott’s in-court testimony incredible, that did not render his out-of-court identification inherently credible or reliable. The district court’s contrary approach undermines long-standing

evidentiary principles and procedures, and the Fifth Circuit's affirmation sanctioned that approach, setting the evidentiary bar for revocation hearings lower than other Courts of Appeals have set it. This Court's review is thus warranted to ensure proper and uniform application of due process.

CONCLUSION

For the foregoing reasons, Timothy Ivey respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted January 15, 2021,

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