IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

No._____

AIESHA JOHNSON,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the admission into evidence of a non-testifying co-defendant's plea agreement which includes a statement implicating the defendant on trial as a co-conspirator violate the Confrontation Clause of the United States Constitution?

II. If a criminal defendant argues at trial that a co-defendant was the perpetrator of the charged offense rather than herself, does that defense constitute invited error which allows the government to introduce the co-defendant's plea agreement implicating the defendant without a Confrontation Clause infringement?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

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Petitioner, Aesha Johnson, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 19-4000, filed October 8, 2020, appears at Appendix A-1 to the Petition.

The Order denying Petition to Rehear en Banc, filed November 10, 2020 appears at Appendix A-13 to the Petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on November 10, 2020.

RELEVANT CONSTITUTIONAL PROVISION

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

United States Constitution Amendment VI, provides, in pertinent part: 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 for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A grand jury for the Northern District of Ohio indicted the defendant-appellant Aesha Johnson for counts of Conspiracy to Commit Wire Fraud in violation of 18 U.S.C. §1349, 14 counts of wire fraud in violation of 18 U.S.C. §1343 and 14 counts of Aggravated Identity Theft, in violation of 18 U.S.C. §1028(a)(1) and (2) amongst other related offenses. The Government charged that Johnson was the lead of a scheme in which she and others stole the identities of others and used this personal information to file false tax returns. Johnson's main co-conspirator was allegedly her daughter, Brittany Williams. Williams worked outside to file false returns through an internet filing application, Tax Act. Johnson instructed her daughter how to effectuate the filings through phone calls and emails from Hazelton prison where she was incarcerated for a conviction of a similar nature.

In general, the defense did not question or challenge whether the victims had their identity stolen. Rather, the defense argued that Brittany was the actual perpetrator. Most of the victims had never heard of Aesha Johnson. The defense further argued that Johnson's participation with her daughter was minimal, if at all. The defense argued that the criminal activity was started by Brittany Williams and another, but not Johnson.

During the trial, the district court allowed the government to introduce the plea agreement that Johnson's co-defendant Brittany Johnson/Williams entered into with the Government. The problem is, the agreement constituted not only a confession by Brittany, but in addition implicated Johnson for the charged offenses. The jury heard evidence that Brittany pleaded guilty to being a co-conspirator with Johnson. Because Johnson had no ability to cross-examine Brittany about this plea agreement, the introduction of the plea agreement and the

testimony regarding the plea agreement violated Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed. 2d 476 (1968) and its progeny. The jury's ability to consider Brittany's admission to assisting Johnson without her actually testifying was a violation of Johnson's Confrontation Clause protections.

In Johnson's case, the prosecutor specifically requested the admission of the exact wording of the charge of her indictment because Brittany was "admitting to conspiring with the defendant, co-defendant, Aesha Johnson, to commit the crime." The district court found the information to be "perfectly permissible."

Thereafter, during the direct examination of an FBI agent, the prosecutor elicited specific information for the plea agreement that "Ms. Williams pled guilty to committing the crimes with the defendant, Ms. Johnson . ."

This Court has decided on numerous occasions that the admission into evidence of a statement of a non-testifying co-defendant violates the Confrontation Clause. This Court's holdings in Bruton, Lee v. Illinois, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056, 90 L.Ed. 2d 514 (1986), Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714, 95 L.Ed. 2d 162 (1987), Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998) and Lilly v. Virginia, 527 U.S. 116, 133, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999) were all premised, explicitly or implicitly, on the principle that accomplice confessions that inculpate a criminal defendant are not per se admissible (and thus necessarily fall outside a firmly rooted hearsay exception), no matter how much those statements also incriminate the accomplice.

The Sixth Circuit Court of Appeals agreed that the Confrontation Clause had been violated, citing United States v. McClain, 377 F.3d 216, 222 (2d Cir. 2004), but found invited

error rendered the admission harmless. United States v. Johnson, p. 2., No. 17-3602, filed 10/8/2020 (6th Cir. 2020) The opinion found that because Johnson's counsel argued that her co-defendant was the perpetrator, or minimally the major perpetrator, the plea agreement was admissible.

One of the problems with this holding is that it placed Johnson between a rock and a hard place; that is, if Johnson argued her defense she waived her Confrontation protections. This position is untenable. Without question, the government had the ability to rebut this claim very simply by calling the co-defendant as a witness. Because she had entered a guilty plea, she no longer had Fifth Amendment protections.

Johnson should not have been required to place her constitutional right to present a defense against her constitutional right to confront her witnesses. The invited error exception did not apply here and should not apply in similar situations.

REASONS FOR GRANTING THE WRIT

I. The admission into evidence of a non-testifying co-defendant's plea agreement which includes a statement implicating the defendant on trial as a co-conspirator violates the Confrontation Clause of the United States Constitution.

The district court allowed the government to introduce the plea agreement that Johnson's co-defendant Brittany Johnson/Williams entered into with the Government. The agreement included the co-defendant's confession which also implicated Johnson as a guilty co-conspirator. The co-defendant did not testify. Johnson had no opportunity to cross-examine her on the statement because she did not testify. Because Johnson had no ability to cross-examine Brittany about this plea agreement, the introduction of the plea agreement violated Bruton v. United

States, 391 U.S. 123, 88 S. Ct. 1620 (1968), and its progeny. The jury's ability to consider Brittany's admission to assisting Johnson without her actually testifying was a violation of Johnson's Confrontation Clause protections.

A particularly complicated area of confrontation law is the admission of a co-defendant's statement which not only inculpates the declarant, but also the defendant and the declarant does not testify. Congress basically carved out an exception to the Confrontation problem when, pursuant to Federal Rule of Evid. 801(D)(2)(e), a statement is made in furtherance of the conspiracy and the conspiracy has been established. Such a statement has been determined to be non-hearsay. However, if the statement by the co-defendant is made outside of the conspiracy, and therefore not in furtherance of the conspiracy, the admission of such an implicating statement is in violation of a defendant's right to confrontation.

The indicia of reliability of a declarant who inculpates herself in a statement would normally be that such a statement was against her penal interest. However, this circumstanced is outweighed by the Confrontation Clause when the statement also inculpates her co-defendant.

This Court at several times examined the hearsay exception for statements against penal interest. In Lilly v. Virginia, 527 U.S. 116, 133, 119 S. Ct. 1887 (1999), this Court identified three situations in which declarations against penal interest were offered into evidence: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. Id. at 127.

Lilly noted that statements in the first category, "voluntary admissions against the declarant," "carried a distinguished heritage confirming their admissibility." Id. at 127 (citations

omitted). But when the admission of such statements risked inculpating another person (such that they would border on the third category), they had been held inadmissible. Id. at 128 ("We have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."); see Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968) (ordering a new trial even after the jury had been instructed to consider one co-defendant's confession as evidence only against him, and not against the other co-defendant); Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702 (1987) ("Where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand."); Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151 (1998) (applying Bruton to bar the admission of a non-testifying co-defendant's confession even after the name of the other defendant had been redacted from it).

According to the court in Lilly, the logic of such decisions was that "because the use of an accomplice's confession 'creates a special, and vital, need for cross-examination,' a prosecutor desiring to offer such evidence must comply with Bruton, hold separate trials, use separate juries, or abandon the use of the confession." 527 U.S. at 128 (quoting Gray, 523 U.S. at 194-95 (1998)).

The third category included cases, like Johnson's (and Lilly's), where the government sought to introduce "a confession by an accomplice which incriminated a criminal defendant." Lee v. Illinois, 476 U.S. 530, 544 n.5, 106 S. Ct. 2056 (1986). The Court in Lilly first cited Lee 's holding that such statements were "presumptively unreliable." 527 U.S. at 131 ("Over the years . . . , the Court has 'spoken with one voice in declaring presumptively unreliable accomplices'

confessions that incriminate defendants.'") (quoting Lee, 476 U.S. at 541).

Present Case

In Johnson's case, the prosecutor specifically requested the admission of the exact wording of the charge of the indictment because Brittany was "admitting to conspiring with the defendant, co-defendant, Aesha Johnson, to commit the crime." The district court found the information to be "perfectly permissible."

Thereafter, during the direct examination of Special Agent Richard Kushan, the prosecutor elicited specific information for the plea agreement that "Ms. Williams pled guilty to committing the crimes with the defendant, Ms. Johnson . ."

Count One of the Conspiracy charged that 'Defendants Aesha Johnson and Brittany Williams did knowingly combine, conspire, confederate, and agree with others both known and unknown to the grand jury . . ." The prosecutor argued to the jury in closing argument that Brittany "pled guilty to conspiring with the defendant. . ."

As the result of the discussion and admission of Brittany's plea agreement, the jury was well aware of Brittany informing the government that her mother was involved in her offenses. Because Johnson had no ability to cross-examine her on the propriety of those statements, her right to Confrontation was denied.

II. Where a criminal defendant argues at trial that a co-defendant was the perpetrator of the charged offense rather than herself, the invited-error

doctrine does not permit the government to introduction the co-defendant's plea agreement into evidence without violating the Confrontation Clause of the United States Constitution.

The district court allowed the government to introduce the plea agreement that Johnson's co-defendant Brittany Williams entered into with the Government which implicated Johnson. Williams did not testify, thus the introduction violated Bruton v. United States, supra. Below, the Government argued invited error because the defense did not specifically address the error as a confrontation clause error at the district court.

In support of this contention, the Government pointed out that at various points in the trial defense counsel argued that Williams had pleaded guilty to the charges. Johnson's defense was, in summary, that Williams was responsible for the fraud, or at least a significant portion of it, and had made a deal to help herself by testifying against Johnson. The defense argument that Williams entered a guilty plea to the fraud charges does not open the door for the government to introduce the actual document which includes Williams' agreement that Johnson was her co-conspirator. The unfairly prejudicial section of her agreement could easily have been redacted to conform with Bruton and Lilly v. Virginia, 527 U.S. at 133, or, Williams could have testified as she no longer had Fifth Amendment protections.

Lilly prohibited the confession of a co-defendant because it shifted blame to the co-defendant and sought to minimize the responsibility of the declarant. Most importantly, the confession was used by the prosecutor to establish the guilt of the defendant on trial. The Court concluded that where normally the indicia of reliability of a declarant who inculpates herself in a statement would normally be that such a statement was against her penal interest, but violated the Confrontation Clause when the statement also inculpates her co-defendant. Id. 127.

Thus, ordinarily a co-defendant's plea agreement may not be introduced in support of the Government's case. United States v. Cobleigh, 75 F.3d 242, 247 (6th Cir. 1996). This was an unusual case where the defense brought up Williams' acknowledgment of guilt as part of the defense strategy. That fact that Brittany Williams admitted to engaging in tax fraud does not in and of itself implicate or establish Johnson's participation in the fraud. Williams' guilty plea established that Williams, unlike Johnson, acknowledged that she engaged in the charged conduct.

The question here is whether the defense attempt to introduce Williams' admission of guilt was allowed or opened the door to the Government to introduce the plea agreement for Williams, which included her implication of Johnson.

During the cross examination of Agent Perryman, Johnson's counsel asked the agent if he was aware that Brittany Williams had entered guilty pleas to the charges. Perryman had been unaware of the plea. There were no further questions by defense counsel on the subject at that time.

On re-cross of Agent Perryman, Johnson's counsel posited the following question to Perryman. "And once again, I just told you that Brittany Williams had pled guilty to 2012 and 2011 for filing fraudulent taxes in regards to your husband. Correct?"

The Government did not object to any of the plea related questions. It made no attempt to clarify the matter on redirect examination of the federal agent. Instead, the Government argued to the district court, successfully, that the defense questions relating to Williams' guilty plea opened the door for the actual plea document for the obvious reason that it included the information that is challenged here. The Government believed that a certified copy of the change

of plea was admissible because it mischaracterized the nature of Williams' guilty plea. This argument is erroneous. The fact that she entered a guilty plea was not a material mischaracterization. Defense counsel "strongly disagreed" with the introduction of the plea agreement.

Under the Sixth Circuit's ruling, a defendant in Johnson's situation would be forced to choose between her right to present a defense and her right to Confrontation. The right to present a defense has been firmly established by this Court. Ironically, had the defense questioning on co-defendant William's activities and guilty plea been precluded by the district court, it would have infringed on Johnson's right to present a defense. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). See also Crane v. Kentucky, 476 U.S. 683, 90 L.Ed. 2d 636 (1986); Holmes v. South Carolina 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (a defendant's federal rights cannot be limited by an evidentiary rule).

Thus, to perfect her defense, which was the co-defendant committed the offenses, the admission of that co-defendant is material to the defense. Johnson should have been permitted to argue Williams' admission without having to also risk admission of a plea agreement implicating Johnson.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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