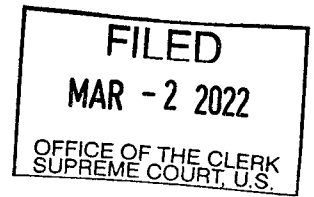


21-7316
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Richard Duerson — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard Duerson 22773-032
(Your Name)

P.O. Box 4000
(Address)

Manchester, Kentucky, 40962
(City, State, Zip Code)

(606)-598-1900
(Phone Number)

QUESTION(S) PRESENTED

UNDER CIRCUMSTANCES IN WHICH THE COURT BECOMES A CONTRIBUTING FACTOR, OVER COUNSEL'S OBJECTION TO THE SOLICITATION OF HEARSAY, WHAT OBLIGATION DOES THE COURT HAVE IN BEING VIGILANT IN ALLOWING AN OFFICER TO REPEAT AN ABSENT WITNESS'S EXACT STATEMENTS WHICH INCULPATES A DEFENDANT IN ASSURING A JUST CONCLUSION TO THE JUDICIAL PROCEEDINGS AS IT RELATES TO FORFEITURE OF THE CONFRONTATION CLAUSE?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Richard Duerson # 22723-032, FCI Manchester, P.O. Box 4000, Manchester, KY 40962
Jason Rapp 1001 Monarch St., Ste. 120, Lexington, KY 40513

FRANCISCO Villalobos, Charles Wisdom, OFFice of the U.S.
Attorney, 260 W. Vine Street, Ste 300, Lexington, KY 40507

RELATED CASES

N/A

TABLE OF AUTHORITIES CITED

CASES

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U.S. v. Davis, 577 F.3d 660, 670 (6 th Cir 2009)	* 10
U.S. v. Jones, 924 F.3d 219 (5 th Cir 2019)	* 6, 7, 10
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STATUTES AND RULES

U.S. Const. amend. VI
Federal Rule of evidence Rule 801(c)

OTHER

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Petition for rehearing en-banc 10/21/2021

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 5:19-cr-00130-DCR-MAS, Doc# 135; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at Petitioner Unaware; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Oct 4, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Dec 10, 2021, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI
Federal Rule of Evidence, Rule 801(c)

STATEMENT OF THE CASE

On July 18, 2019, a Lexington, Kentucky federal grand jury returned a four count indictment, accusing the Defendant/Appellant, Richard C. Duerson ('Richard'), with conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine and 500 grams or more of a mixture or substance containing a detectable amount of cocaine beginning on or about March 2, 2019 and continuing through on or about March 8, 2019, possession with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, possession with the intent to distribute a mixture or substance containing a detectable amount of cocaine and possession with the intent to distribute a mixture or substance containing a detectable amount of fentanyl. (Indictment, R. 1, Page ID# 1-6). Richard pled not guilty to all charges at his initial appearance and arraignment on September 4, 2019. (Minute Entry for Initial Appearance and Arraignment, R. 28, Page ID# 71).

On September 13, 2019, the United States filed a Notice that, due to a prior conviction for Assault in the Second Degree in violation of KRS §508.020, Richard was subject to increased punishment pursuant to 21 U.S.C. §851 as outlined in 21 U.S.C. 841(b)(1). (Notice Regarding Enhanced Statutory Punishment, R. 32, Page ID# 81-82). Prior to trial, Count Four of the indictment,

alleging possession with intent to distribute fentanyl was dismissed by motion of the united states, (Minute Entry Jury Trial Day 1, R 44, Page ID #138-139). Beginning November 25, 2019 in which inadmissible hearsay evidence was clearly introduced by the court, as confirmed by records of the court.

Counsel then asks officer Toth as indicated in Appendix A (Court of Appeals, order, incase #20-5587, page 10 of 16 at 4-6 "Is that your theory of the conspiracy count, that during those days, when my client was in custody, that the conspiracy was that Ms McFarland agreed to move drugs to her apartment?"

At 7 the witness responds, "yes" the witness then further states "but I also had information from narcotics detectives that"

At 8 counsel objects at this moment stating "I am going to object to hearsay"

At 9, the court then interjects stating "You're asking for the basis of his understanding".

At 10, in a good faith attempt to correct the court's misinterpretation of the question counsel explains "I ask him for his - if that was his theory"

At 11, the court then further interjects by stating "And he's attempting to tell you. But you have ask him for a question that calls for hearsay, so he can answer your question as it was posed to him"

Please note: here the court assumed the role of a litigant, as counsel's question was clearly answered by the first word post the subjected question "yes" and in doing so prejudiced this petitioner's constitutional protections as it relates to the Sixth amendments confrontational clause See Crawford v Washin

-Pgton...and Hemphill v New York. The record of the court clearly confirms, any response by the witness beyond "yes" was solicited by the court in error.

At 13 Counsel concedes, out of respect for the court, as it relates to this error, in the presence of the jury which would have undermined the integrity of the judicial proceedings, as the jury relies on the court for guidance, as counsel states "Fair enough", thus allowing the court to solicit otherwise inadmissible hearsay statements before the jury and rendering a complete evisceration of this Petitioner's fundamental right to confront witnesses against him, whom he and/or his co-defendant, at no point and time, impaired, delayed obstructed and/or prevented the availability of the witness and or witnesses of the subjected hearsay statement nor was the subjected hearsay statement a dying declaration, as the government simply did not make these witnesses available to the defense at trial.

And at 14-18, the government's witness officer Toth relayed a damning third party of yet an additional third party substantive/material statement "I had information from narcotics detectives They had information that a female by the name of Jen McFarland that lived on Jason Drive has had previous contact and relationship with Mr. Duerson and that she was storing drugs, guns, and money for Mr. Duerson in the conspiracy of their drug trafficking"

The fifth Circuit held in United States v. Jones 92d F.3d 219 (5th Cir 2019) "Testifying officers may refer to out of court statements to provide context for their investigation or explain background facts, so long as the out of court

statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions." When such evidence comes into play, to explain the prosecutor must circumspect in its use, and the trial court must be vigilant in preventing its abuse. Such vigilance is necessary to preserve the core guarantees of the confrontation clause. A witness's statement to police that the defendant is guilty to the crime charged is highly likely to influence the direction of the criminal investigation. But a police officer can not repeat such out of court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officers were able to obtain a search warrant. Statements exceeding the limited need to explain an officer's actions can violate the Sixth amendment - where a nontestifying witness specifically links a defendant to a crime, testimony becomes inadmissible hearsay". And here on page 11 of 16 at 3, in this case, the court states, officer Toth's testimony was "otherwise inadmissible hearsay", despite the fact that Mr Duerson and/or his co-defendant, at no point and time impaired, delayed, obstructed and or prevented, the availability of the actual witness/witnesses of the subjected hearsay statement nor was the subjected hearsay statement a dying declaration, the government simply failed to make the witnesses available to the defense at trial. And in the strange or unusual event the subjected hearsay was solicited by counsel, it would constitute direct conflict with United states v Jones, confirming "For invited error to permit

waiver of the Sixth amendment right to confrontation, a purposeful rather than inadvertent inquiry into the forbidden matter must be shown. The Sixth amendment guarantees defendants the right to confront all accusers, whether present or absent at trial. A defendant may cross-examine the government's witnesses and probe seeming inconsistencies without risking the unwitting admission of incriminating hearsay. To hold otherwise would eviscerate the protections of the confrontation clause by forcing defendants to choose between their right to vigorously cross-examine the testifying witness and their right to confront out-of-court accusers". *United States v. Jones* also held "Police officers cannot, through their trial testimony, refer to the substance of statements given to them by non testifying witnesses in the course of their investigation, when those statements inculcate the defendant. An officer's testimony need not repeat the absent witness's exact statement to implicate the confrontation clause. Rather, where an officer's testimony leads to clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, confrontation clause protections are triggered". As officer Toth's testimony alleged exact and incriminating statements of an out-of-court declarant and of yet another out-of-court declarant, both of whom were accusers but also made unavailable for confrontation to the defense.

As the syllabus in *Hemphill v. New York* explained "The Sixth amendment does not suggest any open-ended exceptions from the confrontation guarantee was "most naturally read" to admit "only those exceptions established at the time of the founding" *Id.*, at 56, see *Giles v. California*, 554 U.S. 353, 377.

In this case the court never instructed the jury on the weight to be given to out-of-court testimonies however such testimonies was offered to which counsel objected.

The Petitioner was found guilty by the jury on November 27, 2019. Mr Jason Rapp was retained by petitioners family 3/25/2020 sentencing was held 5/22/2020 in which the petitioner was given 200 months. An upward departure from 151-188. A notice of appeal was entered 6-1-2020 (Doc #104) Appellant brief was filed by Mr. Rapp 11-30-2020. see Appendix(d) A reply brief was filed 3-30-2021 see Appendix(E). The court of Appeals affirmed the conviction 10-4-2021. See appendix (a) A petition for an en banc rehearing was filed by the petitioner(prose) 10-21-21. see appendix (f) An order denying the petition for en banc rehearing. was given 12-10-21. see appendix (B) A motion to withdraw the mandate and appoint counsel was denied 2-3-22. see appendix (c)

REASONS FOR GRANTING THE PETITION

THE WRIT IN THIS CASE SHOULD BE GRANTED BECAUSE THE COURT HAS RECENTLY AFFIRMED THE IMPORTANCE OF THE CONFRONTATION CLAUSE IN HEMPHILL V NEW YORK. THE TRIAL COURTS DECISION TO ADMIT UN-CONFRONTED TESTIMONIAL HEARSAY OVER HEMPHILL'S OBJECTION VIOLATED HIS FUNDAMENTAL RIGHT AND THE SAME APPLIES IN THIS CASE. THE UN-CONFRONTED TESTIMONIAL HEARSAY WAS OBJECTED TO BECAUSE IT WAS NOT PART OF COUNSEL'S TRIAL STRATEGY FOR IT TO BE LET IN. HOWEVER, IT WAS ALLOWED IN. THE SIXTH CIRCUIT COURT OF APPEALS CITES US V DAVIS F.3d 660, 670 (6th Cir 2009) "HOLDING THAT THE DISTRICT COURTS ADMISSION OF HEARSAY STATEMENTS DID NOT VIOLATE THE DEFENDANTS RIGHTS UNDER THE CONFRONTATION CLAUSE BECAUSE THEY WERE ONLY OFFERED AS THE BACKGROUND TO THE OFFICERS INVESTIGATION". THE FIFTH CIRCUIT CLEARLY DOES NOT ALLOW POLICE OFFICERS, THROUGH THEIR TRIAL TESTIMONY TO REFER TO THE SUBSTANCE OF STATEMENTS GIVEN TO THEM BY NON TESTIFYING WITNESSES IN THE COURSE OF THEIR INVESTIGATION, WHEN THOSE STATEMENTS INCULPATE THE DEFENDANT. SEE TAYLOR V. CAIN, 545 F.3D 327, 335 (5TH CIR.2008) WHERE THE SIXTH CIRCUIT PERMITTED THE TESTIMONY. THE FIFTH CIRCUIT STATES "AN OFFICERS TESTIMONY NEED NOT REPEAT THE ABSENT WITNESSES EXACT STATEMENT TO IMPLICATE THE CONFRONTATION CLAUSE" RATHER, "WHERE AN OFFICER'S TESTIMONY LEADS TO THE CLEAR AND LOGICAL INFERENCE THAT OUT-OF-COURT DECLARANTS BELIEVED AND SAID THAT THE DEFENDANT WAS GUILTY OF THE CRIME CHARGED, CONFRONTATION CLAUSE PROTECTIONS ARE TRIGGERED" U.S. V. KIZZEE, 877 F.3D 650, 656 (5TH CIR. 2017). THE SIXTH CIRCUIT DOESN'T LIMIT AN OFFICERS TESTIMONY OR ASSOCIATE SAID TESTIMONY WITH CONFRONTATION CLAUSE PROTECTIONS.

THE FIFTH CIRCUIT VACATED THE JUDGMENT OF CONVICTION IN U.S. V. JONES, 924 F. 3D 219 (5TH CIRCUIT 2019) BECAUSE THE AGENTS TESTIMONY ABOUT HIS CONFRONTATION WITH THE INFORMANT POINTED DIRECTLY AT THE DEFENDANT AND HIS GUILT IN THE CRIME CHARGED, IT WAS NOT A PERMISSIBLE US USE OF TIPSTER EVIDENCE ACCORDING TO THE FIFTH CIRCUIT. IN ADDITION, THE INADMISSIBLE EVIDENCE WAS HIGHLY INCRIMINATING (AS IS IN THIS CASE), AND THERE WAS NO WAY TO DETERMINE WHETHER THE JURY WOULD HAVE CONVICTED THE DEFENDANT SURELY ON THE UN-CONFRONTED TESTIMONY OR ANY OF THE OTHER EVIDENCE (AS IN THIS CASE).

THE FIFTH CIRCUIT STATES THAT THE TRIAL COURT MUST BE VIGILANT IN PREVENTING THE ABUSE OF THE OUT-OF-COURT) STATEMENTS, WHEN SUCH EVIDENCE COMES INTO PLAY STATING " SUCH VIGILANCE IS NECESSARY TO PRESERVE THE CORE GUARANTEES OF THE CONFRONTATION CLAUSE" ID. IN THE PRESENT CASE THE TRIAL COURT PROVOKED THE STATEMENTS.

THE FIFTH CIRCUIT CLEARLY HAVE DIFFERENT VIEWS AND RULES AS IT PERTAINS TO THE CONFRONTATION CLAUSES' "BEDROCK" GUARANTEE AS ESTABLISHED IN CRAWFORD AND REAFFIRMED IN HEMPHILL.

THE PRESENT CASE IS OF IMPERATIVE IMPORTANCE AND REQUIRES IMMEDIATE DETERMINATION IN THIS COURT BECAUSE CONSTITUTIONAL RIGHTS ARE ON THE LINE AND FUNDAMENTAL GUARANTEES OUR FOREFATHERS HAVE PUT IN PLACE ARE AT STAKE.

IT WAS NOT THE INTENT OF THE PEOPLE TO ENTRUST THE COURT WITH THE AUTHORITY TO DEPRIVE ITS CITIZENS OF LIBERTY THROUGH INCONSISTENT APPLICATION IF THE LAW WHERE ONE CIRCUIT RULES DIFFERENT FROM THE OTHER WHERE A LIBERTY INTEREST IS AT STAKE, NOR WAS IT THE INTENT OF OUR FOUNDING FATHERS TO ALLOW THE CONSTITUTIONAL RIGHTS OF ITS CITIZENS BE EVISCERATED BY ESOTERIC PITFALLS THAT SERIOUSLY JEOPARDIZE THE INTEGRITY AND FUNDAMENTAL FAIRNESS OF JUDICIAL PROCEEDINGS. FOR THESE REASONS WE RELY ON THE SUPREME COURT IN ITS PRIMARY FUNCTION IN ASSURING LAWS ARE EQUALLY APPLIED AND ESTABLISH THE LAWS OF THE LAND AS THE RIGHT TO CONFRONT ONES ACCUSERS IS A FUNDAMENTAL GUARANTEE ENSHRINED IN THE CONSTITUTIONAL OF THE UNITED STATES OF AMERICA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard Duerson

Date: 3-1-22