

No. 21-7544

IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

ORIGINAL

ERSKINE D. SALTER,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR CERTIORARI

ERSKINE D. SALTER,
10591-003
FCI TALLADEGA
PMB 1000
TALLADEGA, ALABAMA 35160

QUESTION PRESENTED FOR REVIEW

DID THE ELEVENTH CIRCUIT COURT OF APPEALS DECIDE A FEDERAL
QUESTION IN A WAY IN CONFLICT WITH THE DUE PROCESS CLAUSE
OF THE UNITED STATES CONSTITUTION?

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LIST OF PARTIES IN COURT BELOW

The caption set out above contains the name of all the parties.

**CITATIONS OF OPINIONS AND ORDERS
IN CASE**

The Supervised Release revocation hearing of Petitioner was held in the United States District Court for the Southern District of Alabama and is set forth in Appendix A.

The revocation proceedings of Petitioner was appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the conviction in all respects in an opinion reported at United States v. Salters, 2011 U.S. App. LEXIS 25579 (11th Cir. Aug. 25, 2021), and set forth in Appendix B.

The denial of rehearing/rehearing en banc in the United States court of Appeals for the Eleventh Circuit is not reported, but is set forth in Appendix C.

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on August 25, 2021. Rehearing was sought and denied on December 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment, United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

In 2009 Erskine D. Salter was sentenced to 120 months imprisonment, followed by 8 years of supervised release (SRT) upon his guilty plea to a 21 U.S.C. § 846 conspiracy to violate 21 U.S.C. § 841(a)(1), possession with intent to distribute more than 500 grams of cocaine. There was no direct appeal. On October 20, 2017, Salter began serving SRT, subject to the standard conditions of release.

On October 6, 2020, the probation office petitioned the court [Appendix D] to revoke Salter's SRT alleging he violated the following conditions:

"The defendant shall not commit another federal, state or local crime. In that on or about January 2019 and continuing until July 2019, the offender engaged in conduct constituting Conspiracy to Possess with Intent to Distribute Cocaine and Marijuana in violation of 21 U.S.C. § and Possession with Intent to Distribute Marijuana in violation of 21 U.S.C. § 841."

"The defendant shall not commit another federal, state or local crime. In that, on January 10, 2020, the offender was found to be trafficking Opium, in violation of 13A-12-231 of the Alabama Criminal Code, a Class A felony."

"The defendant shall not commit another federal, state or local crime. In that, the offender possessed a firearm on or about July 12, 2019, the offender possessed a firearm on or about July 12, 2019, the offender possessed a firearm and ammunition."

"The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer. In that, the offender associated with Paul Antonio Burke, Jr., a convicted felon, on multiple occasions from March 2019 until June 2019 without permission of the probation officer."

Prior to the revocation hearing, Salter moved the court to require that the government disclose the identities of the confidential informants who provided authorities with information relating to the alleged violations. (doc. 114). He also moved to exclude an Alabama Department of Forensic Science (ADFS) report which concluded that DNA found on a pistol was likely Salter's. (doc. 116). The in limine motion objected to the government's plan to offer the DNA report in evidence without testimony from the forensic expert who produced it. (Id.). Both the disclosure motion and the DNA motion were denied. (doc. 140). Salter's renewed objections were again denied during the bearing. (Id.).

The district court denied the motion to disclose the identities of the confidential informants on the basis that the informants' out of court statements were "... being offered not for the truth of what's being said, but to explain why the officer did what they did." (doc. 140).^{1/} At the conclusion of the bearing the court emphasized that he took the confidential informant hearsay "in the sense that I told you I would, which is to explain why he may have gone out to be in certain places at certain times to make observations and not really giving a lot of credence to what he might have been told." (Id.).

Mobile County Sheriff's narcotics investigator John McLain was the government's principal witness at the revocation hearing. His testimony

^{1/} Salter objected when Deputy McLain first testified about confidential informant hearsay. The court overruled the objection but gave Salter "a standing objection to this testimony." (doc. 140).

largely tracked information in an affidavit he had used to obtain State search warrants.^{2/} (Gov't Ex. 1, doc. 125). The McLain affidavit was admitted over hearsay objection. (doc. 140). McLain testified that three confidential informants at various times provided information about Salter's drug activities.^{3/} McLain used the informants' information to investigate Salter's travels, associations, and activities from December 2018 to July, 2019, and to prepare the search warrant affidavit. McLain testified that on several occasions he saw Salter and Paul Burke, Jr., who had been convicted of a drug offense, together under suspicious circumstances.^{4/} (doc. 140). McLain arranged for an informant to make a controlled buy of a small amount of marijuana from Salter.^{5/} McLain concluded from these observations that Salter's conduct was consistent with drug trafficking, however Salter was not charged with any crimes. (doc. 140).

In July 2019 McLain executed a search warrant at the residence of Salter's girlfriend, Britney Williams and found a pistol which was under the mattress in the master bedroom used by both Williams and Salter.^{6/} The Alabama Department of Forensic Sciences (ADFS) analyzed DNA taken from the pistol.^{7/} McLain, over objection, testified that the ADFS concluded that there was a one in 357 trillion chance that the DNA found on the pistol was left by someone other than Salter. McLain is not a DNA

2/ Search warrants were executed on July 12, 2019, at three locations: 18 Breydon Court, in Mobile, Salter's girlfriend's residence which Salter gave the USPO as his address of record; 210 Patricia Avenue, Prichard, Salter's father's residence; and 311 Snyder Drive, Prichard, his mother's residence.

3/ Informant 2's information was relayed to McLain by another deputy. (doc. 140). Informants 1 and 3 were McLain's sources who were working off their drug case. (Id.).

scientist who prepared the DNA analysis report did not testify at the revocation hearing. The ADFS report was admitted into evidence over objection.^{8/}

USPO Brandi Broome testified, over hearsay objection, that in August 2020 she learned that during a January 2020 traffic stop Mobile County authorities had seized seven pints of codeine syrup from Jermaine Smith, one of her probationers. Broome then questioned Smith. She testified, over hearsay objection, that Smith told her that Salter had asked him to transport the codeine from Texas to Alabama.^{9/} Smith did not testify at the revocation hearing. The court admitted into evidence, over objection, Smith's written statement about the codeine, which was prepared at Broome's direction.^{10/}

Salter testified at the hearing that he was aware of McLain's surveillance. He denied involvement in drug activity and offered innocent explanations for the activities which McLain described. Salter specifically denied asking Smith to transport codeine syrup.

Salter testified that he knew Britney Williams owned a gun, but said he was unaware that a pistol was in the residence. He said Williams

4/ The revocation petition alleged that Salter's association with Burke, who had been convicted of a drug offense, was a SRT violation.

5/ McLain did not witness the marijuana exchange, but testified he searched the informant before and immediately after the buy and recovered marijuana.

6/ Williams claimed ownership of the pistol. (Def. Ex. 1 doc. 125).

7/ The report concludes that "The probability of including a random, unrelated individual [other than Salter] as a potential contributor to the mixture of genetic traits detected in the major component of Item 18 is approximately 1, of 357 trillion (3.578×10^{14}) Caucasian individuals and 1 of 57.8 trillion (5.788×10^{13}) African American individuals." (doc. 125).

normally kept it in one of her vehicles. Salter denied handling the gun and had no explanation for the reported presence of his DNA on it. Salter admitted to association with Paul Burke,^{11/} and to unauthorized out of state travel to take his girlfriend to a Mississippi airport as well as traveling to Orlando, Florida.

Defense counsel conceded that Salter was in technical violation of SRT, but argued that the government failed to prove that Salter committed drug offenses or possessed a firearm. "We're not straying away from that he violated his probation (sic). But it's a grade C, it's a grade C, and we request that." (Id.).

The court revoked Salter's SRT and imposed a 57 month sentence to be followed by eight years of supervised release. (doc. 126). A 57 month revocation sentence is the high end of the U.S.S.G. guideline range for a Grade A violation for a person in Criminal History Category of V. U.S.S.G. § 7B1.4(a). The court said the "57 months [sentence] is because of the fact that you were continuing to deal drugs while you were under supervision and your possession of a firearm, which indicates to me you're a danger to the community." (doc. 140).

8/ Salter's possession of the firearm is alleged as two grounds for SRT revocation. (doc. 104)

9/ Salter was not charged in connection with the codeine syrup. (doc. 140). However the revocation petition alleged that Salter violated SRT as a result of Smith's possession of the codeine.

10/ Smith's statement reads in principle part:

"On 1/9/20 I was contacted by Erskine Salter, "EJ". We discussed that I was in Houston, TX with my job. He asked me to do him a favor and pick up codeine syrup from one of his associates. I agreed and transported seven 16 ounce containers of codeine syrup from Houston TX to Alabama. I was stopped from the Mobile County Sheriff's Department on the interstate ... I

Salter filed a timely appeal and raised:

I. Whether the revocation judgment and sentence should be vacated where the district court admitted into evidence, over objection, critical hearsay testimony and documentary evidence, but did not weigh Salter's right to confront adverse witnesses' unavailability as required by due process, Rule 32.1(b)(2)(C) Fed. R. Crim. P., and United States v. Frazier, 26 F.3d 110 (11th Cir. 1994).

On August 25, 2021, a panel of the Eleventh Circuit held the district court did not abuse its discretion by revoking Salter's supervised release or imposing a 57-month sentence based on improperly admitted hearsay evidence, and even if the district court did commit error in admitting testimony and affidavit, the error was harmless because properly admissible evidence established that Salter had committed the associated violations. See Appendix B at 5.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

The panel's determination that introduction of DNA report, probation officer's testimony, and affidavit of the probationer was not inadmissible without the right to confront violated Salter's due process rights and Fed. R. Crim. P. 32.1(b)(2)(C).

told [the officer] that I had 7 pints of codeine syrup in my cooler and I was transporting it for Erskine Salter.

I was released and the syrup was seized. I did not disclose the information regarding the seizure of the codeine syrup to my probation officer until [8/6/2020] ... I had multiple conversations with MCSO deputy Clinton Law and I advised him of the times and locations that Erskine Salter and Paul Burke, Jr. were engaged in illegal drug activity." (Gov't Ex. 3 doc. 125).

11/ Salter's association with Paul Burke is alleged as a basis for SRT revocation for association with convicted felons. (Doc. 104)

ARGUMENT FOR ALLOWANCE OF WRIT

This case illustrates the erosion of the due process right set-out in Morrissey v. Brewer, 408 U.S. 417 (1972)(holding that "the minimum requirements of the due process" in parole revocation proceeding include "the right to confront and cross-examine adverse witnesses").

In Morrissey v. Brewer, the U.S. Supreme Court established the minimum requirements of due process in parole revocation hearings. Among these requirements, a parolee must have the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation). Subsequent to Morrissey, Congress abolished parole and established the current system of supervised release. Morrissey's due process minimum rights have been applied to supervised release revocation hearings.

In articulating the Morrissey standard, appellate courts have established a two-step inquiry. Courts start by determining if the supervisee's right to confront witnesses has been implicated. Normally, that means courts look at whether the district court actually admitted hearsay. For the second step, courts look to whether the Government has shown good cause to overcome the defendant's right to confront the hearsay declarant arrayed against him. To determine good cause, courts are required to weigh the supervisee's interest in confrontation of a particular witness against the Government's proffered reasons for denying the confrontation. In this weighing, the Government may also prevail when the hearsay testimony has strong indicia of reliability.

Since grade A violations require the revocation of a supervised release, U.S. Sentencing Guidelines Manual § 7B1.3(a)(1)(2018), a

supervisee's interest in confrontation is heightened when such violations are at issue.

In determining whether the Government has shown good cause to overcome the defendant's right to confrontation in a supervised release revocation hearing, inferential conclusions from the testimony and the documentary evidence are sufficient to evaluate and find good cause.

Here a substantial amount of hearsay evidence was introduced over objection, in the form of informant statements contained in the state search warrant that was admitted into evidence, testimony from investigator McLain, laboratory reports, and the affidavit of the probationer and USPO Brandi Broome.

The panel holding that the error was harmless given the grade A violations found to have been committed disregards that the evidence presented to substantiate the grade A violations was also subject to the hearsay requirement and challenged at the revocation hearing. The objection prompted the court to state at the close of the evidentiary hearing:

"consciously through the government's case -- set aside the information from the informants, both the ones who caused the agent to go out and begin the surveillance to begin with. I took it in the sense that I told you I would, which is explain why he may have gone out to be in certain places at certain times to make observations and not really giving a lot of credence to what he might have been told."

This same information was relied upon by the panel although the district court would not, based on confrontation concerns. Notably, the testimony by Mobile County Sheriff narcotics investigator John McLain largely tracked the state search warrant affidavit he prepared in support of it. The search warrant was rife with hearsay that was not allowed to be challenged by cross-examination and the Court failed to conduct a balancing test as explained in Morrissey.

The culmination of investigator McLain's own observations failed to produce criminal activity by a preponderance of the evidence as required in revocation hearings. McLain surveilled Salter on numerous occasions prior to the issuance of a search warrant, however, these observations only suggested that Salter had contact with other individuals known to have a criminal record by McLain. McLain's own conclusions regarding what possibly was occurring during these observations is wholly speculative and cannot be deemed evidence that rises to the level required.

In sum, the panel entertained evidence of "suspicious activities and lack of credibility" to deduce that the preponderance of the evidence standard had been met.

The panel's conclusions are troubling and deserve consideration by the United States Supreme Court to square the holding in Morrissey and its progeny with the arbitrary use of hearsay in the supervised release revocation process.

INTRODUCTION OF DNA REPORT

The veracity of the DNA report was challenged by defense counsel, including the inability to contest several theories that may have explained the presence or lack thereof of Salter's DNA on the gun found under the mattress. Importantly, Salter provided the affidavit of his girlfriend Britney Williams stating that she was the owner of the firearm. Testimony was given that USPO Brandi Broome was informed that Williams owned the firearm for personal protection as a small business owner but stored it in her vehicle. Salter testified and Broome confirmed that Salter had driven Williams to the airport prior to the search of the residence. Investigator McLain testified to the discovery of the firearm during the search but could offer nothing further because he

lacked expertise in the field of DNA analysis.

Salter was denied the ability to examine the report's author or expert regarding the theory of transference or cross-contamination to challenge the presence of his DNA.

In Morrissey, the Supreme Court explicitly identified "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)" as one of several minimum requirements of due process that apply to revocation hearings. *Id.* at 488-89. These requirements are formalized in the Federal Rules of Criminal Procedure. Under 32.1, defendants are entitled to "an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear." Fed. R. Crim. P. 32.1(b) (2)(C).

Here, the record is clear regarding the DNA report, the district court weighed both parties positions by considering both their written findings and oral arguments at the hearing, and the government argued that the expense required to produce the forensic scientist was good cause to proceed without him. The government also argued that the report was reliable given its preparation by the Alabama Department of Forensic Sciences. The district court also expressly noted that, even if the DNA report was not admissible the evidence presented was still sufficient to reach the same result. The Appeals Court found Salter did not meet his burden of showing that the report was unreliable or that it "actually served" as a basis for the sentence.

Given that it was established at the hearing that Salter's girlfriend Britney Williams was the legal owner of the firearm, the

firearm was located in her residence; USPO Brandi Broome was informed that Ms. Williams owned a firearm for personal protection as a small business owner but usually stored it in her vehicle; and the firearm was inside the residence because Ms. Williams left the state for a extended period prior to the search, there was no evidence upon which to base that Salter possessed a firaerm without the unchallenged DNA report. See e.g. United States v. Ferguson, 752 F.3d 613 (4th Cir. 2014)(Reliability is an important factor but not a dispositive one. Relying on the stationery on which the report appears as evidence of reliability does not abviate the requirement to show good cause. Similarly, the existence of corroborating evidence does not relieve the government's burden of proffering a sufficient justification for the absence of the witness. Because there was no evidence of good cause, as Doswell requires, the introduction of the laboratory report was error.).

The government's proffered justification of the expense required to produce the forensic scientist as good cause is lacking when balancing one of Salter's core procedural rights. See Crawford v. Washington, 541 U.S. 36, 62 (2004) ("dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

The appeal court's reasoning regarding introduction of the DNA Report cannot be squared with the record nor the principles of the confrontation clause. For this reason certiorari should be granted. See United States v. Doswell, 670 F.3d 526 (4th Cir. 2012).

**INTRODUCTION OF EVIDENCE FROM USPO
BRANDI BROOME AND JERMAINE SMITH**

Testimony was provided by USPO Brandi Broome over hearsay objection, that in August 2020 she learned that during a January 2020 traffic stop Mobile County authorities had seized seven pints of codeine syrup from Jermaine Smith, one of her probationers. Broome then questioned Smith. Broome testified, over hearsay objection, that Smith told her that Salter had asked him to transport the codeine from Texas to Alabama. Salter was not charged in connection with the codeine syrup. However, the revocation petition alleged that Salter violated SRT as a result of Smith's possession of the codeine. Smith did not testify at the revocation hearing. The court admitted into evidence, over objection, Smith's written statement about the codeine which was prepared at Broome's direction.

In this instance, the district court failed to balance Salter's right to confrontation. The Eleventh Circuit panel, however, amounts the resulting admissions as information used to corroborate and provide context for what prompted the officer's investigation of Salter's probation violations.

It cannot be seriously disputed that without the unchallenged statements of Jermaine Smith and testimony by USPO Broome about this event there is not a iota of evidence that Salter engaged in violation of 13A-12-231 of the Alabama Criminal Code. The District Court and Court of Appeals cloke there position in the harmless error doctrine to negate the stripping of Salter's confrontation right. Furthermore, considering the importance and deeply-rooted history of the constitutional right to confrontation, its violation is much more substantive than the

type of technical or nominal error that originally motivated the harmless error standard. The Supreme Court described the right to cross-examination as "the constitutionally prescribed method of assessing reliability." The Supreme Court's reasoning in Crawford illustrates the idea that stripping a defendant of the confrontation right may create significant harms that are invisible after the fact. Even if a defendant may seem obviously guilty. The fact that it is a revocation hearing and not trial does not detract from its rationale.

THE QUESTIONS RAISED IN THIS WRIT ARE IMPORTANT

The Eleventh Circuit has decided a important question of federal law that is contrary to the United States Constitution's gurantees and should be addressed by this Court.

Every year thousands of revocation hearings are conducted nationally in Federal District Court's across the country. The use of hearsay evidence to substantiate alleged violations of the terms of supervised release is a important issue with wide reaching implications.

CONCLUSION

This petition for writ of certiorari should therefore be granted.

Respectfully submitted,
Erskine Salter
ERSKINE D. SALTER
#10591-003