NO. _____

IN THE

Supreme Court of the United States

DANIEL DAVIS,

PETITIONER,

V.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Manasseh, Gill, Knipe & Bélanger, P.L.C.
Ian F. Hipwell
Andre Belanger
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Ian@manassehandgill.com

QUESTIONS PRESENTED

1) Was the Sixth Amendment guaranty of the right of confrontation denied by the trial introduction of a handwritten statement of a state prison correctional officer, created as part of a formal investigation of a beating of a prisoner, when the statement was written five days after the event and purported to capture the observations of another correctional officer who allegedly relayed them over the phone to the author? Was the right of confrontation further violated when a second witness was allowed to state an observation of that same unavailable declarant?

PARTIES TO THE PROCEEDING

The petitioner is Daniel Davis, defendant and defendant-appellant in the courts below. The respondent is the United States, the plaintiff and the plaintiff-appellee in the courts below.

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OPINION BELOW

After a third trial, the Fifth Circuit's unpublished decision, affirming the convictions and sentence of a correctional officer, for one count of depriving an inmate of his civil rights by assault, conspiracy to obstruct justice, obstruction of justice, witness tampering, and perjury, is reported at *United States v. Davis*, 2022 U.S. App. LEXIS 1965, and 2022 WL 22600. Copy is included as **Appendix A**.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Since its decision was rendered on January 24, 2022, this Court's jurisdiction for a petitioner seeking a writ of certiorari within 90 days is timely invoked pursuant to 28 U.S.C. § 1254(1) and Rule 13.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;" Federal Rules of Criminal Procedure Rule 51 provides in relevant part:

> **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection…A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

STATEMENT OF THE CASE

This petition follows three trials of a former correctional officer at Louisiana State Penitentiary-Angola, accused and ultimately convicted of one count of deprivation of rights of a prisoner, allegedly occurring by physical beating, and for subsequent attempts to cover up that conduct. In the first trial, the defendant was acquitted of one of two counts alleging the beating, while the jury was unable to reach a verdict on the second, similar charge. He was convicted of all four counts charging him with the alleged cover up. After a second trial of the remaining count of deprivation of rights, the conviction was reversed when most of the jurors were found to have learned of the defendant's convictions in the first trial, and a new trial was ordered. The defendant was convicted of the remaining count of assaulting the prisoner at the conclusion of the third trial.

The Indictment, found at ROA.46-55 and **Appendix B**, initially charged three defendants with various crimes. Counts One and Two alleged deprivation of rights under color of law, in violation of Title 18, United States Code, Section §242. Count One alleged the assault of a handcuffed and shackled prisoner on January 4, 2014, on the tier of Shark 1 at Camp J, which was then the disciplinary unit of the Louisiana State Prison in Angola, Louisiana. Count Two charged the deprivation of rights of the same prisoner on a covered breezeway, between Shark 1 and the other three Shark unit components. The defendant, then the ranking correctional officer on duty, and another subordinate captain, John Sanders, were charged with the tier assault in Count One, while the same two individuals, plus a third subordinate

captain, James Savoy, were charged in Count Two, the conduct alleged on the breezeway. The evidence at all three trials showed the events surrounding these two charges occurred within moments of each other.

A fourth officer, Scotty Kennedy, cooperated early in the investigation, pleading guilty to a bill of information involving his participation in the assault and cover up. He agreed to testify in the subsequent case of his three fellow correctional officers. Before the first of the trials, the other two codefendants pled guilty to Count Two and their respective charges of falsifying reports in a federal investigation. Both also agreed to cooperate against Davis, although only Sanders and Kennedy testified along with other prison employees.

Just before the first trial the Government filed a "Brief Addressing Evidentiary Issues," seeking introduction of a one-page, handwritten statement by a guard tower correctional officer, Master Sergeant Katherine Minor, who at the time of the alleged assault, was over a mile away. The statement, written five days after the incident, purported to contain her recollection of contemporaneous observations made to Minor over the telephone of another guard tower employee, Patricia Seymore, then on site at the Camp J sally port tower on the morning of January 4, 2014. ROA.820-25. The statement, which could not be confronted, alleged rough treatment of the inmate by the defendant and others, including the defendant hitting the inmate, as they were escorting him to a van to be transported to the prison medical facility, the entrance to which had a similar guard tower in which Ms. Minor was located. While only read by Minor at the first two trials, the statement was ultimately mistakenly introduced

at the third trial and can be found at **Appendix C** and ROA.5422, marked U.S. Ex. 15a. We were told Ms. Seymore was ill and unavailable, continuously through all three trials, which we accepted in good faith, not insisting on medical testimony or exhibits.

The written statement of Ms. Minor purported to relate Ms. Seymore describing to Ms. Minor from her tower at the sally port, with a view towards the Shark unit, how the defendant and others were hitting the inmate and placing him into a patrol van to be escorted to the medical facility, coincidentally where Minor's guard tower was located. The Government represented that Ms. Minor could not remember anything about the event itself or the phone call, but the statement should be read into the record as a "present sense impression" under FRE Rule 803(1), or "excited utterances" under Rule 803(2), or as a "recorded recollection" under Rule 803(5).

Preserving a claim of error under Rule 51, Federal Rules of Criminal Procedure, the defense filed a Motion and Memorandum in Limine, opposing the introduction of the hearsay statements as a violation of the right of confrontation and because hearsay within hearsay was implicated by the claim Ms. Minor had forgotten the events. The Motion further noted that reading the statement rather than offering it into evidence was a distinction without meaning in a criminal trial, where the court should strive to protect the right of confrontation. **Appendix D** and ROA.826-840. The defense also noted that even if Ms. Minor's recollection was true, the details in the statement appeared to have been elicited from Ms. Seymore pursuant to

questioning from Ms. Minor, making the statements testimonial, such that the confrontation rights of the defendant should have controlled. ROA.830-31. The defendant also noted the written statement was prepared as part of the law enforcement investigation in the case, which should have invoked the testimonial "primary purpose" distinction of a police report set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), thereby disqualifying introduction of the statement.

The court ruled in favor of allowing Ms. Minor's statement to be read to the jury as either present sense impressions or excited utterance, a ruling which was made applicable in each of the three trials. We maintained at the appellate level and herein that this dual purpose is bizarre since both arguably deal with Ms. Minor's impressions about Ms. Seymore's utterances—and not just Ms. Seymore's utterances per se, and neither person was in position in court to faithfully recall Ms. Seymore's impression.

This violation of confrontation rights was compounded by the third trial when the Government expanded its request to include another utterance of Ms. Seymore, to be introduced through Lenora Ellis, the guard on the ground at the Camp J sally port, to the effect of Seymore asking her: "Did you see them beating that inmate?" In our pleading before the first trial, we specifically noted Ms. Seymore had made no comments to Ms. Ellis about a beating, according to her interview, memorialized in an FBI 302 report, page 4, attached to Defendant's Motion in Limine Opposing Hearsay Statements. **Appendix D**, ROA.839. Seymore merely inquired about what

was going on because of a jumpsuit over his head, and Ellis did not report seeing Davis beat the inmate, part of a critical element of Count Two. ROA.831.

The court rejected the argument that the statements were primarily testimonial, attempting to distinguish *United States v. Kizzie*, 877 F.3d 650, 656 (5th Cir. 2017), a case which actually reversed a conviction for the introduction of improper testimonial hearsay. **Appendix E**, Trial One, ROA.1389-93. By the third trial, while we re-urged our hearsay arguments (now also including the Seymore statement to Ellis), and argued the probative value did not outweigh prejudicial effect under FRE 403, the court repeated its finding that regarding the statements of Ms. Seymore to Ms. Minor, they were excited utterances and present sense impressions, and admissible under Rule 403, while holding likewise for the statement of Ms. Seymore to Ms. Ellis, although more probably it was a present sense impression. Rulings, Trial Three, **Appendix F**, ROA.3410-3421 and **Appendix G**, ROA.3602-03.

The testimony from Officer Lenora Ellis, relating the hearsay of Seymore, and only introduced at the third trial, included more than Seymore asking Ellis if she saw them beating the inmate, as first described by the prosecutor at ROA.3411. Indeed, it now included Seymore purportedly asking what had been wrapped around the inmate's head, followed by an explanation it was a substitute for a spit mask. And instead of Ellis answering Seymore's request if she had seen "them beating that inmate," Ellis demurred, saying they did not need to discuss the matter over the phone since, in her opinion, others, including those at Control Center, were listening, and they could cause gossip to be spread all over Angola. She opined the matter

needed to be discussed with supervisors and "people that knew what they were doing and not sergeants." ROA.3699-70. These statements further prove that these correctional officials realized what they purportedly saw and heard would more than likely primarily be utilized to establish or prove events potential to a later criminal prosecution.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In this case, the confrontation error is so egregious, that, although other testimony was introduced, if the jury chose to do so, it could have discounted all the testimony by other, plea bargained correctional officers, plus guards who may have been impeached, and convicted solely upon the offending testimony which the defense was unable to confront and contradict. The hearsay statements of a law enforcement, prison correctional officer were not introduced by that purported eyewitness, but instead by the handwritten statement of a second prison correctional officer, located over a mile away, who was talking on the phone to the purported eyewitness at the time of the charged incident. Although the defense stipulated to the medical unavailability of the eyewitness officer, no excuse was ever provided for the absence of any hearsay statement being obtained and offered by that purported eyewitness. The handwritten statement of the non-eyewitness was created five days after the event as part of an official investigation of the prisoner abuse. Upon its creation, its potential for use at a criminal trial cannot be doubted.

The Sixth Amendment provides that a criminal defendant has the right to be confronted with witnesses against him. "This bedrock procedural guarantee protects

against convictions based on out-of-court accusations that the defendant cannot test in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004); *United States v. Jones*, 930 F.3d 366, 375, (5th Cir. 2019). To satisfy the Confrontation Clause, "testimonial statements of witnesses absent from trial" may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. at 59. Statements are "testimonial" if their "primary purpose…is to establish or prove past events potentially relevant to later criminal prosecutions." *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006).

Presuming these words of the Supreme Court to be of paramount importance, the statement written by Sergeant Minor about what non-testifying declarant Seymore had said to her was very damaging to the defendant and could not be confronted. The additional hearsay offered by sally port guard Sgt. Lenora Ellis of the "new" statement of Seymore at the third trial, asking Ellis if she had seen the inmate being beaten, was equally damaging, corroborating what non-testifying Seymore had purportedly said to Ms. Minor: a beating had occurred, and at a particular place. It, too, could not be confronted.

Again, we urge finding that the written statement of non-eyewitness Ms. Minor was clearly created as a police report. When produced in discovery a year before the first trial, it was an exhibit to the Investigative Services Report of the incident at LSP Angola, created on January 9, 2014, five days after the incident. The interview was

conducted by the primary investigator and the officer in charge of the investigation. The ultimate 161-page investigative report was the master police report upon which the FBI and the Department of Justice relied for much of the investigation and prosecution. No doubt should exist that the report's primary purpose was to establish or prove past events relevant to a later criminal prosecution, and this statement was an integral part of that report. It was offered for its truth; constitutional error occurred. See *United States v. Kizzie*, *supra*, 877 F.3d at 656.

As a part of that police investigative report, the primary purpose of this statement was to try to prove the mishandling of the prisoner continued from the events on the prisoner tier (for which Mr. Davis had already been acquitted of Count One in the first trial) to those on the breezeway and beyond, as purportedly observed by this non-testifying witness. This witness, whom the defendant could not confront, was said to have viewed the incident from the vantage point of a tower. Seymore's credibility could not be tested in the crucible of cross examination, and no prior opportunity for cross examination existed. As structured by the court, counsel could only establish that Ms. Seymore was a known gossiper; that when she spoke from her tower to Ms. Ellis on the ground she was calm, not screaming or crying as the handwritten report of Ms. Minor said; and Ms. Ellis could not hear her utterances from the ground at the base of the tower. Third trial, ROA.3725; Second trial, ROA.2857-58. See also page 4 of the FBI 302 interview of Ms. Ellis, **Appendix D**, ROA.839.

We respectfully submit the district court and the Fifth Circuit Court of Appeals misapplied circuit jurisprudence from at least four important cases, including *Kizzie*, which followed *Crawford v. Washington* and *Davis v. Washington*. First, in *United States v, Duron-Caldera*, 737 F.3d 988, 991-93 (5th Cir. 2013), an illegal reentry case, an affidavit of a deceased grandmother, created on an immigration form, was introduced to counter any claim that the defendant derived citizenship by his mother having lived a certain amount of time in the United States. The affidavit was ruled primarily testimonial as functionally identical to what a witness would offer in direct examination. *Id.* at 993. Moreover, rejected was the argument that it was admissible since it had been created long before it would be used to inculpate the defendant. This so-called "accusation" test, proposed by a plurality of four Justices in *Williams v. Illinois*, 567 U.S. 50, 82-84, 132 S. Ct. 2221, 2242-43, 183 L.Ed. 2d 89 (2012), was rejected for at least four reasons. First, five justices were found to have rejected such a test; second, the Fifth Circuit found no support in the text of the Confrontation Clause for such a test; third, no support was found in Supreme Court precedents for holding the statement must have been meant to accuse a previously identified individual; and fourth, such a proposed test would rely on an overly-narrow view of the rationale behind the right of confrontation. To incorrectly assume the Confrontation Clause is designed to protect only against the motive to behave dishonestly misses the mark that the "crucible of cross examination" is also meant to protect against a wide range of witness reliability beyond personal bias, such as

perception, memory, narration, and sincerity. *Duron-Caldera*, *supra*, 737 F.3d at 993-996.

Of course, any consideration of the accusation test reviewed in *Duron-Caldera* is irrelevant since the statement of Ms. Minor was specifically created for ultimate use in a criminal case against Mr. Davis. She directly said her friend, Ms. Seymour, observed Mr. Davis hitting the inmate, which was the gravamen of the remaining civil rights count being adjudicated. As in *Duron-Caldera*, the statement was not harmless; it was an important part of the Government's case, and the Government emphasized it in opening and closing arguments.

In the second, important case, *United States v. Kizzie*, 877 F.3d 650, 656-58 (5th Cir, 2017), the introduction of a detective's questioning of a former confidential informant was found to have clearly led to the conclusion that the CI-declarant believed the defendant was guilty. Such introduction of out of court testimonial statements, even by implication, violated the Confrontation Clause. Our case is much more egregious. Nothing was merely implied. The declarant Seymore boldly stated Mr. Davis was guilty of hitting the prisoner. Having received the court's pretrial ruling, in her opening statement at the third trial, Government counsel was able to pave the way for this evidence which could not be confronted, explaining that while Seymore was unable to appear, "struggling with a cancer diagnosis," (a gratuitous observation, unfairly introduced) another officer, Katherine Minor, would tell the jury what her friend said as she saw it happening. The prosecutor then summarized what the statement would be. **Appendix H** and ROA.3624. By the third trial, Ms. Minor

had retired from her service at Angola. As in previous trials, even though she was over a mile away from the alleged incident, the prosecution had her describe the relatively unobstructed view she had from her tower at the medical facility, implying the non-testifying Ms. Seymore would have had an equally unobstructed view from the vantage point of her Camp J sally port tower to see the events on the Shark unit on the morning of January 4, 2014. ROA.3940-42.

For the third time, after having reviewed her anticipated testimony by the prosecutors, Ms. Minor again testified she could not remember what Ms. Seymore had said to her, despite remembering this had been the only time Ms. Seymore had ever called her shouting and upset. Third trial, ROA.3944; first trial, ROA.2002; and second trial ROA.3133. Defying credulity, this witness admitted on cross examination she met with the prosecution team before each trial, reviewed her report, and still could not only fail to recall the event, she could not even recall what she had written about it. ROA.3950-51. We truly had no opportunity to confront this critical declarant.

Lead Government counsel at the third trial would not concede Seymore's claimed observations would be limited to the prisoner being transported to the van, as opposed to having actually seen what happened on the breezeway of the Shark unit, the place of the alleged assault in Count Two. **Appendix I**, ROA.3414-16. While doubtful Seymore could have actually seen events on the breezeway because of an intervening wall, which was important to the defense and could not be confronted, even more important was another person, Katherine Minor, being able to introduce

Seymore's allegedly tearful summary of a beating, wherever it allegedly occurred, and which also could not be confronted. In connection with the double hearsay, the defense argued we basically had two people who could not be confronted about this event, Ms. Seymore purportedly because of her health and Ms. Minor, who stubbornly claimed she had no independent recollection of this event, so that she had to read her statement, **Appendix J** and ROA.3950-51.

The court had already ruled the handwritten statement was to be read by the witness but not published to the jury. See second trial comment by the judge: "Well, I certainly want to be consistent, so with that, that is the procedure we will follow now." ROA.3128. The error of introduction has been conceded by the Government in its Brief below at page 20, but argued as harmless. While we tried to stop it, wondering if we had contributed to the mistaken belief it had been pre-admitted (it had not), we believed we would lose credibility in front of the jury if we further objected. ROA.3944-46. Its introduction was very harmful.

The third important case is *United States v. Jones*, 930 F.3d 366, (5th Cir. 2019), another decision involving a confidential informant. In *Jones*, 930 F.3d at 376, the Fifth Circuit reiterated what it had said in *Kizzee*: "where an officer's testimony leads to the clear inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered." *Kizzee*, 877 F.3d at 657. Vigilance was deemed necessary to prevent the abuse which might occur when out-of-court statements are said not to be offered for the truth of the matter asserted, but instead to explain the officer's actions, often in

confronting the defendant on trial. *Jones*, 930 F.3d at 377-78. *See also United States v. Sarli*, 913 F.3d 491, 496-97 (5th Cir. 2019), reciting cases where relief was granted where, as here, the defendant's involvement in criminal activity was "hotly contested," and the Government depended on out-of-court testimony to implicate the defendant.

The fourth important case is *United States v. Ausbie*, 2022 U.S. App. LEXIS 7345 (5th Cir. March 21, 2022). Although ruled harmless error, the Government was found not to have met its burden of establishing that a police detective's reference to a non-testifying confidential informant's statement, identifying a co-defendant as a drug source, was non-testimonial. It was ruled inadmissible hearsay, with citations to cases including *Jones*, *Kizzee*, and *Sarli*, re-emphasizing that the right of confrontation trumps hearsay exception rules.

Again, in violation of the defendant's right of confrontation, out-of-court declarant, Seymore, herself a tower guard and law enforcement official, was reported in a hand written statement by Katherine Minor, another tower guard, as having said she thought Daniel Davis was beating the prisoner. This was enshrined in an official police report that formed an integral part of the prosecution of Mr. Davis. Seymore's written report was introduced as testimonial evidence. And her purported question to sally port guard, Lenora Ellis, asking if Ellis had seen the beating was introduced and given equal dignity, without the ability to confront Seymore. This was not the kind of harmless error discussed in *Ausbie*.

As previously noted, in her opening statement at the third trial, Government counsel told the jury Seymore was unable to appear, "struggling with a cancer diagnosis," but her testimony would be presented through Katherine Minor, who would tell the jury what her friend said as she saw it happening. **Appendix H** and ROA.3624. In addition to having been addressed in opening, the hearsay was argued in closing, with the prosecutor stressing Patricia Seymore "screaming over the phone from her tower to her friend Katherine Minor" that Mr. Davis was hitting the inmate and was "going to hurt him bad." **Appendix K**, ROA.4293-94. And in rebuttal, noting Seymore was "one person that the defense failed to talk about," after reminding the jury again about the conversation Seymore had with Minor about Mr. Davis "hitting that inmate," the prosecutor stressed that right afterwards she called Lenora Ellis, the sally port guard, and asked if she had seen "them beating that inmate." **Appendix L**, ROA.4324. These pivotal, unconfronted statements were improperly introduced, in violation of the defendant's right of confrontation. They were offered for the truth asserted: that the defendant was guilty of the charged conduct of beating the prisoner. And they were improperly emphasized in all three addresses by the prosecution to the jury: opening, close, and rebuttal.

As in *Jones*, here the Seymore "testimony" admitted and displayed to the jury through another officer's handwritten police report, directly inculpated Davis. For a verdict to survive a Confrontation Clause violation, no reasonable possibility must exist that the evidence might have contributed to the conviction. *United States v. Sarli*, 913 F.3d 491, 496 (5th Cir. 2019), *citing United States v. Alvarado-Valdez*, 521

F.3d 337, 341 (5th Cir. 2008) and *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). Introduction here was not harmless error beyond a reasonable doubt, and the error was compounded by reference in opening, closing and rebuttal argument.

Any argument that Ms. Seymore's statements to Ms. Minor were merely excited utterances or expressions of present sense impressions are rebutted by them being made between two law enforcement, correctional officers, while they were on duty, operating within their official capacities. *Crawford v. Washington*, 541 U.S. 36 (2004), clarified the landscape when it came to the conflict arising when the accused's constitutional confrontation rights collide with established evidentiary exceptions to the hearsay rule. In essence, testimonial evidence requires confrontation. In other words, the Constitution trumps the rules of evidence.

Second, the statements were memorialized in what was assuredly a police interrogation, five days after the purported incident happened. The statement was made a part of the official Angola investigation from which the FBI investigation began, and from which many of the various statements of the defendant and other witnesses were extracted, used to prosecute at least four individuals, and then introduced at the three trials of Mr. Davis.

The defense is not responsible for the investigators choosing to not separately obtain a statement from Ms. Seymore, the purported observer of the event, instead of relying upon the hearsay of another officer, over a mile away. Whatever ailments Ms. Seymore may have had which prevented her from appearing at any of the three trials, and which we accepted in good faith from the prosecutors, they assuredly did

not afflict her in the days immediately after the events of January 4, 2014, when she could have furnished her statement. It might still have been objectionable, but at least it would have been her own. But equally unbelievable were the continuous representations by Ms. Minor, even as late as the third trial, that her memory was not in the slightest bit refreshed by her handwritten statement of what she had written that Ms. Seymore had said to her. Presumably, at the barest minimum, she would have been shown that statement at least three times before that testimony.

The defendant was reduced to having to cross examine a piece of paper, not even written by the proponent of what was allegedly observed. And to add insult to injury, he had to do so at the last trial with the paper actually being introduced to the jury, and then sent to them for deliberations, instead of just being read, as in the prior two trials. The scales of justice were unfavorably tipped.

Furthermore, a last minute, never before elicited series of questions were introduced from unavailable Seymore, put to Camp J sally port guard Lenora Ellis, concerning the jumpsuit wrapped on the inmate's head, plus an unresponsive answer to a question purportedly made by Seymore. The answer to the latter, regarding whether Ellis had seen "them beating that inmate" was that they should not be discussing such a matter. The damage was irreparable. **Appendix M** and ROA.3699-3700.

Here, the Government stacked two evidentiary rules together that allowed for the admission of testimonial evidence: excited utterance and recorded recollection. Compounding matters was the numerosity of witnesses: the document was created

by a witness purporting to hear the excited utterance of another witness. It is undisputed that neither witness was available to independently, and from memory, recall what they saw, heard or did in the moments during and immediately after the alleged beating on the breezeway.

At trial, the defense cross examined and argued the inconsistent testimonies between the plea-bargained witnesses and how their respective testimonies were contradicted by Angola prison policies, the physical evidence, and medical expert opinion. Such irregularities could conceivably have resulted in an acquittal or hung jury, as it did in the first trial, which led to the acquittal of Count One and the hung jury for Count Two. Within this context the "handwritten statement" became vitally important. As related herein, the jury could completely discount the testimonies of the plea-bargained witnesses and convict Daniel Davis based upon the guard tower officer's testimony, admitted through the written words of another guard tower, miles away.

CONCLUSION

Daniel Davis may have been convicted by affidavit. The Government cannot bear the burden that he was not. The cross examination of this prejudicial, incriminating testimony was effectively limited to Lenora Ellis at the Sally Port entrance who reluctantly admitted that Ms. Seymore was a known "gossip" and that she did not hear her screaming from the opened window above her, while she was purportedly talking on the phone to her friend over a mile away. While helpful, it cannot replace cross examining Ms. Seymore herself, live in open court. The Fifth

Circuit failed to follow not only Supreme Court authority, but its own precedents. It should have placed the right to confront testimonial statements above hearsay rules. The conviction should be overturned.

Respectfully Submitted,

MANASSEH, GILL, KNIPE & BÉLANGER, P.L.C.

/s/ Ian F. Hipwell
IAN F. HIPWELL
Louisiana Bar No. 06947
ANDRE BELANGER
Louisiana Bar No. 26797
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Ian@manassehandgill.com

Dated: April 21, 2022

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 21st day of April, 2022, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* were served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Yael Bortnick
Thomas Chandler
U.S. Department of Justice Attorneys
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20530

Daniel Davis, #08606-095
FMC Rochester
Federal Medical Center
P.O. Box 4000
Rochester, MN 55903

Christopher J. Perras
Zachary Dembo
U.S. Department of Justice
601 D. Street, NW
Washington, D.C. 20004

Anita T. Channapati, Esq.
U.S. Department of Justice
Civil Rights Division, Criminal Section
4 Constitution Square
150 M Street NE
Suite 7.1130
Washington, D.C. 20530

/s/ Ian F. Hipwell
IAN F. HIPWELL

APPENDICES

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Respectfully Submitted,

MANASSEH, GILL, KNIPE &
BÉLANGER, P.L.C.

/s/ Ian F. Hipwell
IAN F. HIPWELL
Louisiana Bar No. 06947
ANDRE BELANGER
Louisiana Bar No. 26797
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Ian@manassehandgill.com

Dated: April 21, 2022