No. _____

In the

Supreme Court of the United States

_____

Lamon Demetrus Wright,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

What manner of hearsay should be considered "reliable" when federal courts decide whether the government has established "good cause" to deny confrontation in a supervised release revocation?

PARTIES TO THE PROCEEDING

Petitioner is Lamon Demetrus Wright, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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Under prevailing law, courts considering alleged violations of federal supervised release may admit hearsay if they find "good cause" to dispense with confrontation, an inquiry that depends heavily on the reliability of the hearsay evidence in question. But courts of appeals have issued conflicting and sometimes incoherent precedent as to what makes hearsay reliable in this context. This Court should grant certiorari and either dispense with the good cause test for confrontation in supervised release cases altogether, eliminate the role of subjective and conflicting reliability inquiries in this test, or identify clear and uniform standards for determining what manner of evidence is reliable in this context
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lamon Demetrus Wright seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is electronically reported at *United States v. Wright*, 2022 WL 16757075 (5th Cir. November 8, 2022) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on November 8, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves 18 U.S.C. § 3583, which states in relevant part:

> (a) In General.—
>
> The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).
>
> (b) Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

***

(e) Modification of Conditions or Revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

***

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

***

(h) Supervised Release Following Revocation.—

When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

The Petition also involves the Fifth Amendment to the United States Constitution, which states:

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 offence 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 be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. District Court Proceedings

In 2006, Petitioner Lamon Demetrius Wright sustained convictions for bank robbery and use of a firearm in connection with a crime violence (the bank robbery) in the Western District of Texas. *See* (Record in the Court of Appeals, at 17). He received two terms of imprisonment and two terms of supervised release. *See* (Record in the Court of Appeals, at 18-20). After his release, the Northern District of Texas accepted jurisdiction over Mr. Wright's supervision. *See* (Record in the Court of Appeals, at 9). In January of 2020, it revoked one of term of release (stemming from count one) because he used methamphetamine and fell out of compliance with other technical requirements of supervised release. *See* (Record in the Court of Appeals, at 32-33). He received a term of a year and a day imprisonment. *See* (Record in the Court of Appeals, at 33). Because the court took no action on his remaining term of supervision, he remained subject to its restrictions. *See* (Record in the Court of Appeals, at 33).

Mr. Wright began his second term of release on December 7, 2020, *see* (Record in the Court of Appeals, at 228), during which time he worked for Fed Ex, bought a car, and helped his mother, who suffers from dementia, *see* (Record in the Court of Appeals, at 142). But on May 6, 2021, the Dallas County Sherriff's Department received a call from a woman reporting a domes-tic disturbance. *See* (Record in the Court of Appeals, at 98, 102-104). She said that her boyfriend choked her at her home, *see* (Record in the Court of Appeals, at 105), and then left the scene, *see* (Record in

the Court of Appeals, at 105). The caller identified the assailant as Lamon Wright. *See* (Record in the Court of Appeals, at 104, 116).

According to the dispatcher, the caller sounded breathless and frightened. *See* (Record in the Court of Appeals, at 103). A responding officer from the Sherriff's Department provided the same description of her demeanor. *See* (Record in the Court of Appeals, at 112-113). He saw visible marks on her neck, *see* (Record in the Court of Appeals, at 113-114), as well as blood and scratches on her face, (Record in the Court of Appeals, at 116); (Govt's Exh. 10, at 3:15-3:35), though she wasn't sure she'd been struck, and wasn't sure where the blood came from, *see* (Govt's Exh. 10, at 3:15-3:35, 6:21). Questioning from an EMT show his suspicion that the caller was under the influence of drugs, presumably an inference from her demeanor. *See* (Govt's Exh. 10, at 6:45). There isn't any other evidence of that.

The caller told the responding officer that her boyfriend had choked her because he suspected her of sexual involvement with another person. *See* (Record in the Court of Appeals, at 117-118). She said that after he did so, he packed up his things and left her home. *See* (Record in the Court of Appeals, at 117-118). The responding officer never saw Lamon Wright that night. *See* (Record in the Court of Appeals, at 118). The officer could not corroborate the account by way of a match to his clothing or car, nor by the presence of any of his belongings in his car. *See* (Record in the Court of Appeals, at 121-122). He simply wasn't encountered that night. *See* (Record in the Court of Appeals, at 121).

After learning of his assault warrant for the above incident, a Probation Officer petitioned the court to revoke the defendant's supervised release. *See* (Record in the Court of Appeals, at 228-231). The Petition alleged that Mr. Wright had used drugs, missed drug tests, patronized a sex worker, and assaulted his ex-girlfriend. *See* (Record in the Court of Appeals, at 228-230). The parties proceeded to a revocation hearing, and Mr. Wright pleaded true to all allegations save the most significant, namely that he choked his then-girlfriend. *See* (Record in the Court of Appeals, at 94-95).

Over due process objections, the district court admitted a recording of the 911 call, *see* (Record in the Court of Appeals, at 101), a body cam of the officer speaking to the declarant, *see* (Record in the Court of Appeals, at 111), and the declarant's written complaint, *see* (Record in the Court of Appeals, at 116). The government argued that it had established good cause to admit out-of-court statements because the declarant simply refused to cooperate with the government. *See* (Record in the Court of Appeals, at 100-101). The court agreed, relying on two factors: 1) the declarant's refusal to participate, and 2) the court's view that the government assembled "an overwhelming amount of evidence, including the officers and the woman who was on the other end of the nine-one-one call…" (Record in the Court of Appeals, at 101).

The government produced three live witnesses, including a 911 dispatch operator who talked to the caller, *see* (Record in the Court of Appeals, at 96), the Sherriff's Deputy who went to the scene, *see* (Record in the Court of Appeals, at 107),

and a victim witness coordinator, *see* (Record in the Court of Appeals, at 123). The dispatch operator and responding officer recounted their conversations with the caller, *see* (Record in the Court of Appeals, at 98-105, 111-113), and sponsored her recorded and written statements over due process objections, *see* (Record in the Court of Appeals, at 99-101, 110-111, 116). The responding officer also introduced pictures of the caller's neck and hands. *See* (Record in the Court of Appeals, at 113-116). For her part, the witness coordinator testified that the caller repeatedly missed meetings with the prosecutor's office and ultimately said that she feared Mr. Wright. *See* (Record in the Court of Appeals, at 123-127).

At the conclusion of the evidence, the defense argued that no evidence corroborated the caller's claim that Mr. Wright had even been present at the scene, that he was the one who caused the injuries, nor that he caused them under the circumstances outlined by the caller. *See* (Record in the Court of Appeals, at 132-134). The court reiterated its good cause findings, made on the same grounds: the reliability of the evidence and the government's inability to get the witness in spite of its best efforts. *See* (Record in the Court of Appeals, at 136). Notably, it did not find that the declarant feared the defendant. *See* (Record in the Court of Appeals, at 136). To the contrary, the court said "who knows why she didn't come around, but she did not come around." (Record in the Court of Appeals, at 136).

The court found that Mr. Wright committed the disputed assault and imposed the statutory maximum of five years imprisonment, with no further term of release

to follow. *See* (Record in the Court of Appeals, at 68). All told, he has been sentenced to six years a day, all in addition to his initial term of imprisonment imposed in 2006.

B. Appellate Proceedings

Petitioner appealed, contending that the district court erred in admitting hearsay evidence over his objection, which admission denied him a due process right to confront his accuser. *See* Initial Brief in *United States v. Wright*, No. 21-11059, 2022 WL 897414, at **8-9 (5th Cir. Filed March 8, 2022)("Initial Brief"). Specifically, he challenged the admission of the caller's statement accusing him of assault, noting that it lay far away from scientific evidence in its reliability, and that it was uncorroborated insofar as it identified him as the assailant. *See* Initial Brief, at **8-9. He also pointed out that the district court disclaimed any finding as to the reason for the caller's absence at the hearing. *See id.* at *9. Given this disclaimer, he contended, the court of appeals could not infer that she failed to appear out of fear of Mr. Wright.

The court of appeals affirmed on de novo review. *See* [Appendix A]; *United States v. Wright*, 2022 WL 16757075, at *1 (5th Cir. November 8, 2022)(unpublished). It applied a balancing test that compared Mr. Wright's interest in confrontation to the government's interest in avoiding it, taking account of the perceived reliability of the caller's statements. *See Wright*, 2022 WL 16757075, at *1.

Though it acknowledged that Petitioner maintained a substantial interest in confronting his accuser, it thought his interest was "tempered" by his ostensible failure to "propose an alternative theory of events." *Id.* (quoting *United States v.*

Alvear, 959 F.3d 185, 189 (5th Cir. 2020). Without discussing the district court's disclaimer – "who knows why she didn't come around?" – it inferred that caller's absence arose from her fear of Mr. Wright. *See id.*

Finally, it cited three factors that, in its view, rendered the caller's statements reliable: 1) the physical injury visible to police officers and the impression of fear that she left on them, 2) that she swore to police officers that Petitioner had choked her for about a minute, and 3) that in the court's view, "the record does not indicate any ulterior motive she may have had to lie about what happened." *Id.*

REASONS FOR GRANTING THIS PETITION

Under prevailing law, courts considering alleged violations of federal supervised release may admit hearsay if they find "good cause" to dispense with confrontation, an inquiry that depends heavily on the reliability of the hearsay evidence. But courts of appeals have issued conflicting and sometimes incoherent precedent as to what makes hearsay reliable. This Court should grant certiorari and either dispense with the good cause test for confrontation in supervised release cases altogether, eliminate the role of subjective and conflicting reliability inquiries in this test, or identify clear and uniform standards for determining what manner of evidence is reliable in this context.

A. The right of confrontation in supervised release revocations is an important constitutional protection against erroneous imprisonment.

Section 3583(a) of Title 18 authorizes federal sentencing courts to impose a term of supervised release following the conclusion of a defendant's term of imprisonment. Congress intended the term of release to promote the defendant's rehabilitation, and to facilitate his or her successful integration to the community. *United States v. Johnson*, 529 U.S. 53, 59 (2000).

Notwithstanding its rehabilitative purpose, supervised release may lead to very substantial terms of imprisonment, as this case of a five-year revocation

sentence attests. A defendant like Petitioner, who was initially convicted of a Class A felony, may be sentenced to five years imprisonment upon revocation. *See* 18 U.S.C. §3583(e)(3). Defendants convicted of lesser felonies face three years imprisonment (if initially convicted of a Class B or C felony), two years imprisonment (Class D felony), or one year (Class E felony). *See* 18 U.S.C. §3583(e)(3).

Several other factors combine to magnify the stakes in revocation proceedings for many federal defendants. Defendants who have been convicted of more than one count may face consecutive terms of imprisonment on revocation, sometimes multiplying the potential penalty manyfold. *See United States v. Gonzalez*, 250 F.3d 923, 927 (5th Cir. 2001)(collecting cases). Further, a defendant who suffers revocation does not necessarily complete his or her obligations to the court at the end of the new term of imprisonment. Rather, he or she may be placed on another term of supervised release, which may lead to yet another revocation. *See* 18 U.S.C. §3583(h). And the cumulative term of imprisonment over multiple revocations is not limited by the initial term of supervised release. *See United States v. Spencer*, 720 F.3d 363, 368-370 (D.C. 2013)(so holding, and agreeing with cases from the Fifth and Tenth Circuits on this point).

Notably, federal supervised release differs from other forms of conditional release in one important respect: it does not prevent or offset the defendant's term of incarceration. Both parole and probation offer conditional release as a substitute for a term of imprisonment. Parole, abolished in the federal system, but still practiced in many states, permits the defendant to serve the remainder of an imposed sentence in

the community, provided that he or she complies with certain restrictions. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)("The essence of parole is release from prison, before the completion of a sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence."). And probation allows a convicted defendant to "avoid prison altogether," again provided he or she complies the conditions of release. *Haymond v. United States*, 139 S. Ct. 2369, 2381 (2019)(plurality opinion); *see also Escoe v. Zerbst*, 295 U.S. 490, 492 (1935)(describing probation as "an act of grace to one convicted of a crime.").

By contrast, supervised release does not substitute for imprisonment, but rather adds to it. Specifically, supervised release follows the end of a term of imprisonment without offsetting the amount of imprisonment impoed. *See United States v. Granderson*, 511 U.S. 39, 50-51 (1994) ("Supervised release, in contrast to probation, is not a punishment in lieu of incarceration."); *Johnson v. United States*, 529 U.S. 694, 725 (2000)("Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term imposed at the time of initial sentencing.") (Scalia, J., dissenting); *United States v. Thompson*, 777 F.3d 368, 372 (7th Cir. 2015) ("Parole mitigates punishment; supervised release augments it. ..."). For that reason, a defendant's violation of the terms of supervised release may in some cases cause the defendant's total amount of imprisonment to exceed the otherwise applicable statutory maximum. *See Haymond*, 139 S. Ct. at 2382. Of course, the tendency of a factual finding to increase the maximum punishment is in

most contexts treated as one of momentous constitutional significance. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2001).

In sum, revocations of supervised release "are high stakes proceedings, proceedings that take on the character of serious criminal prosecutions." *United States v. Ferguson*, 752 F.3d 613, 621 (4th Cir. 2014)(Davis, J., concurring). And all of these consequences – substantial terms of imprisonment, sometimes consecutive, new and additional terms of supervised release, and exposure to imprisonment beyond that authorized by the jury's verdict – can flow from conduct that isn't even criminal in itself, such as missing a drug test. *See* 18 U.S.C. 3583(d).

This Court has recognized that parolees and probationers enjoy certain due process rights in proceedings that may lead to revocation. These include:

> include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (**d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);** (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972)(emphasis added)(parole); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)(probation).

There is good reason to doubt that *Morrissey* and *Gagnon* state the due process minimum applicable to those facing federal supervised release revocations. As noted above, *Morrissey* and *Gagnon* deal with defendants who might – upon revocation – be compelled to serve a term of imprisonment that the district court could have lawfully

imposed (and in the case of parole, did impose) at the initial sentencing. By contrast, at least some supervised release revocations may result in terms of imprisonment exceeding the maximum term of imprisonment available at the time of initial sentencing. As one member of a Second Circuit panel has recently concluded, this difference between parole and probation on the one hand, and supervised release on the other, strongly suggests supervised release revokees should receive more robust constitutional protections, including a right of confrontation. *United States v. Peguero*, 34 F.4th 143, 175–180 (2d Cir. 2022)(Underhill, J., dissenting).

B. Reliability determinations made in this context are confused and conflicting, and will likely remain so without this Court's intervention.

As the emphasized passage of *Morrissey* shows in the preceding paragraph, this Court has permitted those adjudicating a probation or parole revocation to deny the right of cross-examination if he or she "specifically finds good cause for not allowing confrontation." The courts of appeals have assumed that this good cause exception applies to supervised release revocations. *See United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006); *United States v. Doswell*, 670 F.3d 526, 530 (4th Cir.2012); *United States v. Alvear*, 959 F.3d 185, 189 (5th Cir. 2021); *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir.1999); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir.1994).

Further, the courts of appeals have all employed a balancing test to determine whether such good cause justifies the admission of hearsay, comparing the revokee's interest in confronting the declarant with the government's interest in preventing

that confrontation. *See United States v. Jones*, 818 F.3d 1091, 1099–1100 (10th Cir. 2016)(citing *United States v. Chin*, 224 F.3d 121, 124 (2d Cir.2000); *Comito*, 177 F.3d at 1170; *Barnes v. Johnson*, 184 F.3d 451, 454 (5th Cir.1999); *Frazier*, 26 F.3d at 114; *United States v. Bell*, 785 F.2d 640, 642 (8th Cir.1986); *United States v. Jordan*, 742 F.3d 276, 279 (7th Cir.2014); *Doswell*, 670 F.3d at 530; *United States v. Jackson*, 422 Fed. Appx. 408, 410–11 (6th Cir.2011) (unpublished); *United States v. Lloyd*, 566 F.3d 341, 344 (3d Cir.2009); *United States v. Stanfield*, 360 F.3d 1346, 1360 (D.C.Cir.2004); *United States v. Taveras*, 380 F.3d 532, 536 (1st Cir.2004)).[1]

In conducting this balancing test, these courts have found the reliability of the government's evidence to play an important role– reliable evidence reduces the revokee's interest in cross-examination. *See Chin*, 224 F.3d at 124; *Alvear*, 959 F.3d at 189; *Jordan*, 742 F.3d at 280; *Comito*, 177 F.3d at 1171; *Jones*, 818 F.3d 1091, 1099–1100. But as will be seen, the holdings of the courts of appeals as to what kind of evidence constitutes sufficiently "reliable" hearsay to dispense to with confrontation have been a mess.

At least two courts have described "oral and unsworn statements to the police" as "'the least reliable type of hearsay.'" *United States v. Timmons*, 950 F.3d 1047, 1051 (8th Cir. 2020)(quoting *United States v. Sutton*, 916 F.3d 1134, 1140 (8th Cir. 2019)(quoting *Comito*, 177 F.3d at 1171); *see also United States v. Colon-Maldonado*, 953 F.3d 1, 12 (1st Cir. 2020)(statement to Probation Officer rather than police

[1] The Second Circuit dispenses with the good cause analysis when the challenged hearsay statement would be admissible under the Rules of Evidence. *See United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006).

officer). The court below, by contrast, has held that such statements constitute the functional equivalent statements made under oath because lying to the police carries criminal liability. *See Alvear*, 959 F.3d at 190 ("Here, Alvarez filed a police report and instituted court proceedings against Alvear based on allegations of an altercation that night. These actions—if false or frivolous—carry with them sufficient negative consequences to justify crediting them with more reliability than 'unsworn hearsay generally.'")(quoting *United States v. McCormick*, 54 F.3d 214, 225 (5th Cir. 1995)). On this critical point, the contrast could not be sharper; some courts regard a large and recurring class of hearsay statements as the least reliable kind of hearsay, while another thinks it bears guarantees of trustworthiness.

Notably, all courts seem to accept that sworn and written statements to the police should be more readily admitted than oral unsworn statements to the police. *See Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003); *Comito*, 177 F.3d at 1171; *Timmons*, 950 F.3d at 1051. But of course sworn written affidavits made to the police are the very core of testimonial statements. *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). This Court and the Framers of the Sixth Amendment have regarded testimonial statements as more suspect than spontaneous oral communications, a judgment the courts below seem to have inverted in the supervised release context. *See Crawford*, 541 U.S. at 51-52.

The courts have also treated lab reports in contrary ways, a critical and recurring issue in supervised release cases, due to the high number of them that turn on allegations of drug use. Several courts have held that scientific or laboratory

reports are sufficiently reliable to justify dispensing with confrontation. *United States v. Grandlund*, 71 F.3d 507 (5th Cir. 1995); *United States v. Bell*, 785 F.2d 640 (8th Cir. 1986)(probation); *United States v. Penn*, 721 F.2d 762 (11th Cir. 1983)(probation)). The court below reasoned that "a releasee's interest in cross-examining a laboratory technician regarding a scientific fact" is minimal because the truth of the fact can best be "verified through the methods of science" rather than "through the rigor of cross-examination." *United States v. Minnitt*, 617 F.3d 327, 333 (5th Cir. 2010)(quoting *McCormick*, 54 F.3d at 222). By contrast, the Fourth Circuit has repeatedly refused to find reports of a drug test categorically reliable. *See Doswell*, 670 F.3d at 530; *United States v. Ferguson*, 752 F.3d 613, 619–20 (4th Cir. 2014). And of course this Court has expressed skepticism that scientific and laboratory reports may be regarded as so reliable as to render cross-examination a superfluity. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-319 (2009).

The courts have also divided as to the significance of detail in a hearsay statement. The Third, Eighth and D.C. Circuits have regarded detail as an indicator of reliability, and generality as a measure of unreliability. *United States v. Lloyd*, 566 F.3d 341, 345–46 (3d Cir. 2009); *Bell*, 785 F.2d at 644; *Crawford,* 323 F.3d at 129 (parole case). By contrast, the Seventh Circuit has said exactly the opposite, that "[t]he level of detail included in the report does not allay our concerns about its accuracy or neutrality," because "[t]estimony is often detailed, and we do not assume it is impartial or correct on that basis alone." *United States v. Jordan*, 742 F.3d 276, 280–81 (7th Cir. 2014)

Finally, the courts of appeals have divided as to the reliability of hearsay coming from those who recently ended a romantic or personal relationship with the accused. The court below has twice found that such statements are reliable in the absence of a specific reason to suspect "any ulterior motive [the declarant] may have had to lie about what happened." *United States v. Wright*, 2022 WL 16757075, at *1 (5th Cir. 2022)(unpublished); *Alvear*, 959 F.3d at 191. Other circuits, however, have treated this circumstance as an indicator of unreliability. *Bell*, 785 F.2d at 643–44 (finding police reports unreliable because they were the result of a "personal and adversarial" relationship); *accord Timmons*, 950 F.3d at 1051; *United States v. Lloyd*, 566 F.3d 341, 345–46 (3d Cir. 2009).

As can be seen, the courts of appeals have issued conflicting precedent as to what kind of unsworn hearsay carries sufficient reliability to deny confrontation. Sometimes, their judgments about reliability contradict those of this Court in the Sixth Amendment context. In addition, the court below has provided wholly incoherent standards for assessing the defendant's interest in cross-examination. More particularly, it has found that either of two opposite situations both reduce the defendant's interest confrontation, and justify the admission of hearsay.

In the opinion below and in *Alvear*, cited extensively by the court below, the court held that hearsay may be regarded as reliable when either: a) defendants "had 'ample opportunity to refute the Government's evidence via methods other than cross-examination.'" *Alvear*, 959 F.3d at 189 (citing *Minnit*, 617 F.3d at 333–334), or b) "they do not propose an alternative theory of events" *id.* (citing *United States v.*

Carrion, 457 F. App'x 405, 411 (5th Cir. 2012)(unpublished), *Minnitt*, 617 F.3d at 335, and *McCormick*, 54 F.3d at 225)); *Wright*, 2022 WL 16757075, at *1 (quoting *Alvear*, 959 F.3d at 189).

But these are opposites. A defendant who proposes and substantiates an alternative theory of the underlying facts has found an alternative to confrontation. Conversely, a defendant whose case depends entirely on cross-examination will necessarily have failed to develop and substantiate an alternative theory of the facts. Neither of them will enjoy any right to confront his or her accuser before suffering revocation, a situation that effectively reads the due process right of confrontation in supervised release cases out of the precedent.

This level of conflict and incoherence is to be expected in the application of an evidential reliability test for hearsay. Recent history teaches as much, as this Court recognized in the Sixth Amendment context:

> Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. *See, e.g., People v. Farrell*, 34 P.3d 401, 406–407 (Colo.2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (C.A.4 2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), *see Nowlin v. Commonwealth*, 40 Va.App. 327, 335–338, 579 S.E.2d 367, 371–372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was not in custody and not a suspect,

> *see State v. Bintz*, 2002 WI App. 204, ¶ 13, 257 Wis.2d 177, ¶ 13, 650 N.W.2d 913, ¶ 13. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell, supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens v. People*, 29 P.3d 305, 316 (Colo.2001).

Crawford, 542 U.S. at 63. For that reason, this Court can expect supervised release revocation cases – implicating a core constitutional protection against wrongful imprisonment – to be resolved on opposite bases and accidents of geography. This Court can cure that problem by either dispensing with the good cause test, minimizing the role of reliability determinations in that test, or by establishing clear and uniform standards for reliability in this context.

C. The issue is important.

The issue is important and merits the Court's attention. As noted above, revocations of supervised release can lead to very substantial terms of imprisonment, sometimes even exceeding the statutory maximum. Further, the issue affects a large number of people, and may result in a significant volume of incarceration. Recently, federal courts have revoked an average of 4,659 terms of release each year. *See Peguero*, 34 F.4th at 164, n. 17 (citing Admin. Office of U.S. Courts, Judicial Business of the United States Courts (2018–2021) (Tables E-7A)). In an overwhelming number of cases, supervised release revocations lead to imprisonment. *See Peguero*, 34 F.4th at 163.

The issue is also important aside from the sheer number of people experiencing supervised release revocation. Cases adjudicating supervised release may be influential in probation and parole adjudications. And when courts of appeals get the

reliability determinations wrong, they risk sending people to prison for conduct that they may not have undertaken. This is a paradigmatic injustice, the avoidance of which merits this Court's resources.

D. This case is an ideal vehicle.

The present case is an exceedingly strong vehicle to address the conflicts outlined above. The defendant received five years in prison, eliminating any concern that his release will moot or reduce the significance of the case's resolution. The issue was fully preserved in district court and the court of appeals, as the court below acknowledged. *See Wright*, 2022 WL 16757075, at *1. And the hearsay statement at issue here – ordinary eye-witness testimony, not derived from a scientific test – is hardly one whose reliability lies outside the realm of reasonable dispute. The standards for determining reliability, or the relevance of reliability considerations in the good cause determination, could well decide whether Petitioner's five-year sentence stands or falls.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 6th day of February, 2023.

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