No. 22-6731

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_Page@fd.org

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1. Conflicting standards of reliability and weakened protections against erroneous revocation merit certiorari on the question presented.

Due process requires protection against revocation on erroneous grounds, including the right of cross-examination in the absence of an explicit finding of good cause to deny it. *See Morrissey v. Brewer*, 408 U.S. 471, 488-489 (1971). Though *Morrissey* involved parole revocation, supervised release revocations may involve even more profound liberty interests, for a variety of reasons. A single violation can give rise to consecutive sentences multiple counts. *See United States v. Gonzalez*, 250 F.3d 923, 927 (5th Cir. 2001)(collecting cases). Supervised release revocations can produce new terms of release. *See* 18 U.S.C. §3583(h). Such revocations can even produce cumulative terms of imprisonment that exceed the maximum punishment for the initial offense. *See United States v. Haymond*, ____U.S.____, 139 S.Ct 2369, 2390-2391 (2019)(Ailto, J., dissenting).[1]

As the courts of appeals have interpreted *Morrissey*'s cross-examination guarantee, however, it offers precious little procedural protection against revocation on erroneous grounds. Specifically, the courts of appeals interpret the good cause requirement generally to excuse cross-examination as to "reliable" information. *See*

[1] The government points out that Petitioner's cumulative term of imprisonment – his original sentence plus his sentence of imprisonment imposed on revocation – did not exceed his maximum term of imprisonment for the original offense alone. *See* (Brief in Opposition, at 12). It's correct of course. But unless the Court wishes to establish different standards of reliability for defendants sentenced close to the statutory maximum at initial sentencing – a confusing and cumbersome regime that would add to the complexity of revocations, and which finds no support in the text or structure of 18 U.S.C. §3583(e) or Fed. R. Crim. P. 32.1 – the generally applicable standards of reliability must take into account this aspect of supervised release.

United States v. Jones, 818 F.3d 1091, 1099–1100 (10th Cir. 2016); *United States v. Chin*, 224 F.3d 121, 124 (2d Cir.2000); *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999); *United States v. Jordan*, 742 F.3d 276, 279 (7th Cir.2014). More concerningly, their standards for assessing "reliability" are vague,[2] conflicting,[3] and low[4].

Practically speaking, *Morrissey* as the courts of appeals understand it essentially guarantees nothing more than a right to cross-examination unless the same district court that ultimately decides the facts concludes, without the benefit of cross-examination, that the unexamined declarant was probably telling the truth. This effectively reads *Morrissey*'s cross-examination guarantee out of the law, or at least collapses it with the right to insist of proof by a preponderance of the evidence. Any district court that didn't think the declarant probably reliable wouldn't be very likely to the revoke the defendant anyway.

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[2] *See United States v. Franklin*, 51 F.4th 391, 397 (1st Cir. 2022)(" Of course, 'indicia of reliability' is a protean concept, and the list provided is non-exhaustive.").

[3] *See* (Petition for Certiorari, at 10-12); Note 6, *infra*.

[4] *See United States v. Taylor*, 931 F.2d 842, 847 (11th Cir. 1991)("Admission of hearsay evidence in probation hearings does not violate due process, as long as it bears **some indicia** of reliability.")(emphasis added); *id.* ("**The defendant must show** '(1) that the challenged evidence is materially false or unreliable, and (2) that it actually served as the basis for the sentence.'")(emphasis added)(quoting *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir.1984)); *accord United States v. Charlton*, No. 09-14114, 398 Fed.Appx. 537 (11th Cir. 2010)(unpublished); *see also United States v. Balboa*, 614 F. App'x 605, 608 (3d Cir. 2015)(unpublished) (holding that a criminal complaint and a pair of arrest warrants – which of course require nothing more than probable cause – "bear sufficient indicia of reliability to overcome a hypothetical hearsay objection."); *Franklin*, 51 F.4th at, 396 (in district court's reliability determination regarding admission of hearsay at supervised release revocation, reviewing "judgment calls with considerable deference").

The solution to this problem is the adoption of clear and uniform standards of reliability, or some means of deciding the good cause analysis without reference to reliability at all. This case presents a good opportunity to consider these standards, as it turns precisely on whether the declarant's statements were reliable. *See United States v. Wright*, No. 21-11059, 2022 WL 16757075, at *1 (Nov. 8, 2022)(unpublished). The court below thought these statements reliable, *see United States v. Wright*, No. 21-11059, 2022 WL 16757075, at *1 (Nov. 8, 2022)(unpublished), even though nothing corroborated their assertion that Petitioner was even present at the scene of the offensive conduct.[5]

2. This Court should not attempt a piecemeal solution to the conflicting standards of reliability prevailing in the lower courts.

The government resists review on the ground that "petitioner does not identify any decision of another court of appeals that has reached a contrary result on analogous facts." (Brief in Opposition, at 9). It may or may not be the case that another court of appeals would resolve the same case differently. The government, after all, cannot point to an analogous case that produced the same result. But likely, the standards of reliability are not stated clearly enough to know what the outcome

[5] As the government notes, the district court did describe the evidence against Petitioner as "overwhelming." (Brief in Opposition, at 7). But this only shows how little the reliability guarantee is worth if it is not tethered to clear and appealable standards. The evidence against Petitioner was an out-of-court statement by Petitioner's ex-partner asserting that he choked her, together with her demeanor and physical marks on her body showing that she'd been choked. An "overwhelming" case would have contained a shred of evidence – over and above the untested word of the declarant -- that Petitioner had been anywhere near the scene of the crime that night. If a single witness, uncorroborated in her identification of the defendant, strikes a district court as "overwhelming," one must pause to wonder what that court would find "passably sufficient" and what manner of evidence would strike it as "reliable enough." If the Due Process Clause is to offer meaningful protection against erroneous revocation, the reliability question cannot be committed entirely to the standardless discretion of a single district judge.

of this case would be anywhere, which is part of the reason for review. Certainly, some circuits have expressed caution about relying on the accusations of a revokee's romantic partner at the end of a relationship. *See United States v. Lloyd*, 566 F.3d 341, 345–46 (3d Cir. 2009); *United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986)(probation case); *Timmons*, 950 F.3d at 1051. And many distinguish between scientific and eyewitness evidence, regarding the latter as less reliable than the former. *See Bell*, 785 F.2d at 643-644; *United States v. Penn*, 721 F.2d 762 (11th Cir. 1983)(probation). Further, this Court's Sixth Amendment precedents treat an out-of-court affidavit given to a police officer with suspicion, not deference. *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). So Petitioner could certainly make a reasonable case that the statements were not sufficiently reliable to defeat confrontation.

But the absence of a direct conflict between the circuits on identical factual scenarios is well beside the point. It is enough that the courts of appeals ascribe

conflicting significance to the same factors, which they do,[6] [7] and that history teaches that lower courts will never achieve spontaneous consensus as to which factors make hearsay more or less reliable, which it does[8]. This Court should take the case and identify some clear standard for assessing reliability, or else dispense with it as a controlling consideration in revocations. This Court can't be expected to pick through each possible factual permutation, achieving uniformity over a thousand grants of certiorari.

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[6] ***Compare*** *United States v. Timmons*, 950 F.3d 1047, 1051 (8th Cir. 2020) (describing "oral and unsworn statements to the police" as "'the least reliable type of hearsay.'" (quoting *United States v. Sutton*, 916 F.3d 1134, 1140 (8th Cir. 2019)(quoting *Comito*, 177 F.3d at 1171), and *United States v. Colon-Maldonado*, 953 F.3d 1, 12 (1st Cir. 2020)(statement to Probation Officer rather than police officer), ***with*** *United States v. Alvear*, 959 F.3d 185, 189 (5th Cir. 2021)(decision to file a police report and institute court proceedings makes declarant more reliable because it subjects declarant to punishment for false allegations); ***compare*** *United States v. Minnitt*, 617 F.3d 327, 333 (5th Cir. 2010)(treating scientific evidence as presumptively reliable) ***with*** *United States v. Doswell*, 670 F.3d 526, 530 (4th Cir.2012) (declining to do so), and *United States v. Ferguson*, 752 F.3d 613, 619–20 (4th Cir. 2014)(same); ***compare*** *Lloyd*, 566 F.3d at 345–46 (level of detail increases reliability), ***with*** *Jordan*, 742 F.3d at 280–81 (detail does not independently establish reliability); ***compare*** *Wright*, 2022 WL 16757075, at *1, and *Alvear*, 959 F.3d at 191 (accusation of former romantic partner treated as reliable absent some further motive to falsely accuse) ***with*** *Bell*, 785 F.2d at 643–44 (finding police reports unreliable because they were the result of a "personal and adversarial" relationship), and *Timmons*, 950 F.3d at 1051 (same), and *Lloyd*, 566 F.3d at 345–46 (same).

[7] While the government notes that courts of appeals do not use categorical rules to assess reliability, *see* (Brief in Opposition, at 13-15), it seriously contests the existence of conflicting standards for reliability in only one case: where the government seeks to introduce unsworn statements to the police, *see* (Brief in Opposition, at 14, n.3). It suggests that the Fifth Circuit does not regard unsworn statements to the police as more reliable than hearsay generally. *See* (Brief in Opposition, at 14, n.3). The relevant passage in *Alvear*, however, is an effort to analogize a police report to a sworn statement, on the ground that false statements to the police (and frivolous lawsuits) can be punished, just like perjury. *See Alvear*, 959 F.3d at 191 ("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)). It is not a simple recognition of the value of an oath, as the government incorrectly reads it. At any rate, *Alvear* is not the only case to treat unsworn statements to the police as reliable. *See Franklin*, 51 F.4th at 398-399; *Charlton*, *supra*.

[8] *See Crawford*, 542 U.S. at 63.

3. The question presented is fully implicated by the facts of this case and its resolution in the opinion below.

The government next opposes review on the grounds that Petitioner did not challenge the propriety of a balancing test below. *See* (Brief in Opposition, at 11-12). But even if the Court were to accept the use of a balancing test to determine good cause, it does not follow that the test necessarily encompasses a district court's evaluation of evidential reliability. Certainly, it does not require application of the vague and conflicting standards now prevailing in the courts of appeals.

Below, Petitioner contended in plain terms that the untested statements of the declarant lacked reliability. *See* Appellant's Brief in *United States v. Wright*, No. 21-11059, 2022 WL 1651230, at *25-26 (5th Cir. Filed March 18, 2022)("Appellant's Brief"). He proposed a clear standard below, namely, that non-scientific evidence generally lacks sufficient guarantees of reliability to dispense with cross-examination. *See* (Appellant's Brief, at 25). Should it take the case, this Court may choose to adopt that standard, or it may, with the case fully presented, decide the case on some other clear standard of its own making. Or, it may conclude from its efforts to formulate clear standard of reliability, and armed with the history of the reliability inquiry in the Sixth Amendment context, that any effort to do so is futile. All of these would be reasonable resolutions of the question presented, which simply asks 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. *See* (Petition for Certiorari, at i). That question is

likely dispositive of the case in the opinion of the court below, so it is fully presented here.

4. The absence of categorical rules does not preclude, but rather aggravates and conceals, the conflict in the courts of appeals.

Finally, the government questions the extent of division in the courts below, pointing out that none of them have adopted categorical rules regarding the reliability of evidence. *See* (Brief in Opposition, at 13-15). But the absence of clear rules in the courts of appeals hardly makes the outcomes more predictable. Nor does it reduce the likelihood that the same case would be resolved in opposite ways in different jurisdiction; at most it simply conceals the degree of conflict prevailing below. In any case, the courts of appeals have issued clear statements about the effect of various factors that may impact reliability, and have concluded that they point in distinctly opposite directions. *See* Note 6, *supra*. That these conflicts might be overcome by other factors on a case by case does not much minimize their significance. Opposite propositions of law are controlling constitutional questions. And if, as the government essentially suggests, the case-by-case nature of the reliability question has devolved it entirely to the discretion of the district court, *Morrissey*'s cross-examination guarantee has retained little value. The defendant already has a right to avoid punishment when the district court simply doesn't think the government has proven its case. *Morrissey* is intended to provide a **further** guarantee that the decision will be made after cross-examination in most cases. *See Morrissey*, 408 U.S. at 488-489.

Nearly twenty years ago, this Court noted that lower courts were unable to achieve consensus as to what kind of hearsay carried sufficient guarantees of reliability to render cross-examination unnecessary to a just result. *See Crawford*, 542 U.S. at 63. It explained that "[r]eliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable," and that "[s]ome courts wind up attaching the same significance to opposite facts." *Id*. The government provides absolutely no reason to think that the supervised release context would improve the chances of consensus. Nor does the extant precedent. This Court should grant certiorari to establish uniform standards of reliability, or to dispense with reliability as a controlling factor.

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 8th day of May, 2023.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner