

No. 23A27

IN THE SUPREME COURT OF THE UNITED STATES

RANSON LONG PUMPKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented:

Whether Long Pumpkin's right to confrontation was denied when the district court ruled that he could not cross-examine two important eye-witnesses "in any way" regarding their drug usage before, during, or after the car-jacking they allegedly observed, including their drug use on the day they showed up to testify?

These two witnesses had extensive drug histories, were using drugs during the alleged crime, used drugs regularly between the charged incident and trial, and used methamphetamine the day before the trial. Over Long Pumpkin's objection, the district court held that he could not question either witness "in any way" regarding their drug usage because this was a collateral, credibility matter.

In a split decision, the Eighth Circuit Court of Appeals affirmed the district court's determination. Both the majority and minority opinions cited to conflicting language and decisions from this Court and in various federal appellate decisions on the issue. Also in a split decision, the Eighth Circuit Court of Appeals denied Long Pumpkin's Petition for Rehearing and Petition for Rehearing En Banc.

List of Parties:

The parties to this action are Ranson Long Pumpkin, Defendant/Appellant, Moses Crowe, Co-Defendant/Appellant, and the United States of America. Crowe's Petition is separately pending before the Court.

List of Related Proceedings:

United States v. Long Pumpkin, File No. 5:18-cr-50010-JLV-3 (D.S.D. 2018) (judgment entered August 14, 2020)

United States v. Long Pumpkin, 56 F.4th 604 (8th Cir. 2022) (decision entered December 30, 2022)

United States v. Long Pumpkin, Appeal No. 20-2743 (*reh'g denied*) (8th Cir. 2023) (order entered April 21, 2023)

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Petition for Writ of Certiorari

I. Jurisdiction:

Long Pumpkin was convicted of several federal crimes in the United States District Court for the District of South Dakota, Western Division. *United States v. Long Pumpkin*, File No. 5:18-cr-50010-JLV-3 (D.S.D. 2018) (App. 13). Long Pumpkin appealed that conviction. The Eighth Circuit Court of Appeals granted in part and denied in part Long Pumpkin's claims for relief. *United States v. Long Pumpkin*, 56 F.4th 604, 608–09 (8th Cir. 2022) (decision entered December 30, 2022) (App. 1). The portion of Long Pumpkin's appeal that was granted did not relate to the Confrontation Clause challenge at issue in this Petition. Long Pumpkin sought rehearing by the panel and rehearing *en banc*, but his petition was denied. *United States v. Long Pumpkin*, Appeal No. 20-2743 (8th Cir. 2023) (order entered April 21, 2023) (App. 12). This Court has jurisdiction to consider his Petition pursuant to 28 U.S.C. § 1254.

II. Constitutional Provision Involved in this Case:

The Sixth Amendment to the United States Constitution states in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

III. Statement of the Case:

Long Pumpkin appeals the opinion and judgment of the Eighth Circuit Court of Appeals, entered on December 30, 2022, in which Long Pumpkin's conviction for car-jacking in the United States District Court for the District of South Dakota, Western Division, was affirmed. Long Pumpkin's indictment charged violations of 18 U.S.C. §§ 924 and 2119, which gave the District Court jurisdiction over the case pursuant to 18 U.S.C. § 3231. The Eighth Circuit's jurisdiction was premised upon 28 U.S.C. § 1291.

Long Pumpkin and Crowe were charged with car-jacking and discharging a firearm during the commission of a violent crime. The event allegedly happened in October of 2017.

There were only three witnesses to the events, Moore (the alleged victim), Maho (a/k/a Swan) and High Pipe. Moore's recollection of events was poor and his testimony was subject to substantial impeachment. This made Maho's and High Pipe's testimony critical to the government's case.

Long Pumpkin intended to cross-examine Maho and High Pipe on their ability to accurately perceive and recall events. Both had drug related histories that preceded October of 2017 and continued throughout the time Long Pumpkin's case was pending and up to the day the trial began. Both admitted to being high on methamphetamine during the alleged crime, that they chronically used drugs during the two year period between the event and trial, and that they showed up at trial under the influence of methamphetamine. Maho had been committed to a

detox facility one week prior to trial. Maho and High Pipe had been convicted of so many drug related felonies that they were unsure of the number. Both had violated probation, parole, or diversionary sentences by using drugs while under supervision.

On the day that they were set to testify, the government obtained material witness warrants to get them both locked up overnight so that they could sober up, and to prevent further drug usage by them during the trial. The government was able to obtain immunity for both witnesses, but that only protected them from state or federal prosecutions for drug related crimes. The immunity grants obtained by the government did not cover parole revocation proceedings, drug court suspensions, or probation violation actions.

The District Court recognized that drug use implicated the witnesses' ability to accurately perceive and recall events. But, in order to enable the government to obtain the testimony of these witnesses, and in order to shield the witnesses from potential legal consequences if they testified about their drug use, the District Court issued an Order "prohibiting defense counsel from inquiring in any way into either witness's controlled substance use prior to the events on trial, during the events on trial, or after the events on trial."

The District Court relied on three decisions by the Eighth Circuit Court of Appeals from 1986 to 1990 as authority for its position: *United States v. Singer*, 785 F.2d 228 (8th Cir. 1986); *United States v. Rubin*, 836 F.2d 1096 (8th Cir. 1988); and, *United States v. Jackson*, 915 F.2d 359 (8th Cir. 1990). Those decisions permitted a

trial court to partially limit cross-examination by defense counsel when the limitation pertained to “collateral” matters.

On appeal, the panel majority relied primarily upon the same Eighth Circuit cases cited by the District Court and upon a specific sentence within *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). *United States v. Long Pumpkin*, 56 F.4th 604, 608-09 (8th Cir. 2022). The dissent, which held that the District Court had violated Long Pumpkin’s right to confrontation, also relied upon *Davis v. Alaska* for its conclusion. *Long Pumpkin, supra*, at 615-16. And, it cited to the same Eighth Circuit cases that the majority relied upon, as well as a number of more recent Eighth Circuit Court of Appeals cases. *Id.*

Both the majority and dissenting opinions rely on the same body of case law, and almost all of these cases rely upon language within *Davis v. Alaska* as authority for their position on the issue. However, from this body of case law, the majority and the dissent have reached opposite conclusions as to the scope of the protection afforded to defendants under the Confrontation Clause. And, as set forth below, a number of cases from this Court, as well as from other federal courts of appeals, have reached conclusions that directly conflict with the majority’s Confrontation Clause analysis in Long Pumpkin’s case.

IV. Argument:

Long Pumpkin’s right to confront his accusers was violated by the blanket prohibition of any cross-examination into Maho’s and High Pipe’s drug usage prior

to or during the alleged crime, during the time between the alleged crime and Long Pumpkin's trial, and immediately before their trial testimony. There was no adequate substitution for cross-examination of these specific witnesses about their individual drug usage and how it impacted their abilities to perceive and recall events. Admission of this evidence would have ensured that the jury had information from which it could determine the reliability of the witnesses' testimony.

There are multiple reasons why Long Pumpkin's Petition for a Writ of Certiorari should be granted. First, the Eighth Circuit's erroneous decision was based on confusion created, in part, by language within this Court's decision in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Language within that decision appears to conflate "reliability" and "credibility." *Davis*, 415 U.S. at 318. The majority decision in *Long Pumpkin* also cites to a pre-*Davis* decision that similarly conflates these terms. *United States v. Banks*, 520 F.2d 627 (7th Cir. 1975). The permissible limits on cross-examination are not well understood, and the case law in this area reflects this lack of understanding. This is evidenced within the *Long Pumpkin* decision, wherein both the majority and dissenting opinions rely on the same case law to reach different results, and that case law relies on the *Davis* decision as authority.

Second, the Eighth Circuit's decision in *Long Pumpkin* directly conflicts with numerous decisions issued by this Court. By oversimplifying the analysis and

rejecting the distinction between reliability and credibility, the Eighth Circuit has, in essence, promulgated a rule that violates the parameters of the Confrontation Clause as previously articulated by this Court.

Third, the Eighth Circuit's decision in *Long Pumpkin* reveals a split among the circuits on this issue. The rule articulated by the Eighth Circuit is contrary to several decisions from the Third Circuit Court of Appeals, Seventh Circuit Court of Appeals, and the District of Columbia Court of Appeals.

A. Language in *Davis v. Alaska* has led to confusion as to what limits may be placed on cross-examination:

Confusion exists within and without the Eighth Circuit as to the limits that may be placed on cross-examination. This confusion is demonstrated in the *Long Pumpkin* decision where the majority and dissent both rely on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), as authority for their opposing determinations. *Long Pumpkin*, 56 F.4th at 609, 616. And, both the majority and dissenting opinions rely on *United States v. Singer*, 785 F.2d 228 (8th Cir. 1986), *United States v. Rubin*, 836 F.2d 1096 (8th Cir. 1988), *United States v. Jackson*, 915 F.2d 359 (8th Cir. 1990), and *United States v. Hodge*, 594 F.3d 614 (8th Cir. 2010), as authority for their opposing conclusions on the same issue. *Long Pumpkin*, 56 F.4th at 608, 616-17. Reflective of the circularity of the confusion, *Singer*, *Rubin*, and *Jackson*, all cite back to *Davis v. Alaska* as a basis for their conclusions, which lead to seemingly opposite results, and which were used to support opposite conclusions reached by the majority and dissent in *Long Pumpkin*.

In the majority's decision in *Long Pumpkin*, these cases stand for the proposition that drug use by a witness goes to their credibility, which is a "collateral" issue and can be limited within a cross-examination without violating the Confrontation Clause. *Long Pumpkin, supra*, at 608-09. For the dissent, these cases stand for the proposition that the prohibition imposed in *Long Pumpkin's* case was not on a collateral matter because it impaired his ability to test the truthfulness and accuracy of the witnesses' perceptions, thus his right to confrontation was violated. *Id.* at 616-18.

The problem with these courts' reliance on *Davis* stems from the use of ambiguous language within that decision. In *Davis*, the Court stated, "[o]n these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318.

Both the majority and minority opinions in *Long Pumpkin* quoted this sentence from *Davis*. *Long Pumpkin*, 56 F.4th at 609, 616. This sentence appears to conflate the concepts of credibility with reliability. To the majority in *Long Pumpkin*, that sentence meant that the distinction between credibility and reliability was "questionable." *Id.* at 609. Thus, rather than assess the direction of the examination or its intended purpose, the majority took a categorical approach to the analysis. It held that drug usage goes to credibility, and, as such, is collateral

to the substance of a witness's testimony. *Id.* at 608 ("We have characterized a witness's drug use as a matter pertaining to the credibility of the witness, and others likewise have said that the issue of a witness's drug use has considerable relevance to credibility."). Collateral matters, per the majority, may be excluded from a cross-examination without offending the Confrontation Clause. *Id.* at 608-09. The *Long Pumpkin* majority cites to numerous cases that similarly distinguish between collateral and non-collateral matters, even though the *Davis* decision never draws this distinction. Instead, *Davis* addresses the distinction between cross-examinations that test a witness' perceptions and memory and those that generally seek to discredit a witness by impeachment. *Davis, supra*, 415 U.S. at 316. In regard to the former, *Davis* held that it was reversible error for a trial court to prohibit cross-examination into these matters. *Id.* at 320. It is only in subsequent decisions that lower courts have characterized the later as "merely collateral" and not subject to a Confrontation Clause challenge.

This conflation of the terms "credibility" and "reliability" is not limited to that one sentence in *Davis*. In a pre-*Davis* decision from the Seventh Circuit Court of Appeals, *United States v. Banks*, 520 F.2d 627 (7th Cir. 1975), the Court melded reliability and credibility into one concept: ". . . evidence of drug use at the time of trial is clearly relevant to the matter of a witness' credibility as a possible indication of a drug-related impairment in his ability accurately to recollect and relate factual occurrences while testifying." *Banks*, at 631. For the majority, *Banks*

stands for the proposition that drug usage is categorically a credibility (i.e. collateral) matter, 56 F.4th at 609, even though the *Banks* Court found reversible error when the trial court prevented the defendant from cross-examining a witness as to his drug usage. *United States v. Banks*, 520 F.2d 627, 631 (7th Cir. 1975) (“Once a proper foundation has been established, through, for example, a showing of reasonably contemporaneous drug use, the issue is open for inquiry. The jury may not properly be deprived of this relevant evidence of possible inability to recollect and relate.”).

The result of *Long Pumpkin* is the establishment of a binary assessment regarding the kind of limitations that can be placed on cross-examination before a violation of the Confrontation Clause occurs. If the subject matter of the examination, without regard to context, falls in to the category of “collateral” matters (as determined by prior case law), the trial court may limit the cross-examination without violating the defendant’s right to confrontation. As discussed below, this approach is not consistent with *Davis*, violates the principles of several other decisions rendered by this Court, and is contrary to multiple decisions within the Eighth Circuit and from other federal circuits.

B. *Long Pumpkin* conflicts with well-established Supreme Court precedent:

The majority opinion in *Long Pumpkin* mis-construed the *Davis* decision and was wrong in conflating reliability with credibility and suggesting that they mean the same thing. Decisions from this Court have been clear for many years:

Examinations designed to challenge the reliability of a witness's ability to accurately perceive and recall events are protected by the Confrontation Clause.

In *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666 (1990), the Court stated, “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” In *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986), the Court held that defendants must be allowed to elicit, through cross-examination, “facts from which jurors could appropriately draw inferences relating to the reliability of the witness.”). And, in *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S. Ct. 480, 483, 102 L. Ed. 2d 513 (1988), the Court stated that the Confrontation Clause is violated when cross-examination is limited in a way that denies jurors from hearing facts from which they could draw inferences related to the reliability of a witness. All of these cases clearly delineate reliability from credibility and mandate that cross-examinations on matters related to reliability are protected by the Confrontation Clause.

Most specifically on point, the Court has addressed the distinction between reliability and credibility in the context of drug usage. In *Wilson v. United States*, 232 U.S. 563, 34 S. Ct. 347, 58 L. Ed. 728 (1914), the Court instructed that a Confrontation Clause analysis is necessarily context specific, and that drug usage may be directly related to reliability if it calls in to question the witness's ability to accurately perceive and recall events:

But as we read the record, the evidence was not offered or admitted for its bearing upon her character, but rather to show that she was so much addicted to the use of the drug that the question whether, at the moment of testifying, she was under its influence, or had recovered from the effects of its last administration, had a material bearing upon her reliability as a witness. It seems to us that in this aspect the evidence was admissible.

Wilson, 232 U.S. at 568.

The Eighth Circuit's assessment that the distinction between reliability and credibility was questionable, and its establishment of a non-contextual, categorical structure for the analysis of limitations placed on cross-examination, violates the well-established principles articulated by this Court over the past one hundred years. Reliability is distinguishable from credibility. The Confrontation Clause protects a defendant's right to delve in to matters that may affect the reliability of a witness's testimony. This includes drug usage by a witness. Thus, the limitations placed on Long Pumpkin by the District Court violated his right to confrontation. And, the Eighth Circuit's analysis affirming that result created a rule that is contradictory to the primary purpose of the Confrontation Clause and inconsistent with precedent from this Court.

C. The Eighth Circuit's approach conflicts with other Eighth Circuit decisions and decisions from other circuits:

The approach taken by the majority in *Long Pumpkin*, particularly its determination that drug usage is a "collateral" credibility matter and not protected by the Confrontation Clause, conflicts with numerous decisions within and without the Eighth Circuit.

The decision in *Long Pumpkin* conflicts with numerous prior cases from within the Eighth circuit. In *United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992), the Court rejected the notion that drug use by a witness is merely collateral. It held that the defendant's right to confrontation was violated when he was prohibiting him from cross-examining a witness regarding her recent failure of a drug test because this denied him the ability to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 770 (internal quotation omitted).

In *United States v. Hodge*, 594 F.3d 614, 618 (8th Cir. 2010), the Court stated that "[p]rior drug abuse may be relevant when the witness's memory or mental abilities are legitimately before the court." Ironically, and reflective of its misapprehension of the issue, the panel majority in *Long Pumpkin*, relied upon *Hodge* for the assertion that "drug use [is] a matter pertaining to the credibility of the witness." *Long Pumpkin*, 56 F.4th at 608.

Numerous cases from other circuits have reached conclusions opposite to those reached by the Eighth Circuit in *Long Pumpkin*. In each of these cases, the courts have noted that cross-examinations that delve into issues pertaining to reliability, including drug use by the witness, are protected by the Confrontation Clause. In *United States v. Cameron*, 814 F.2d 403, 405 (7th Cir. 1987), the Court held that "[e]vidence that a witness has used illegal drugs may be probative of the

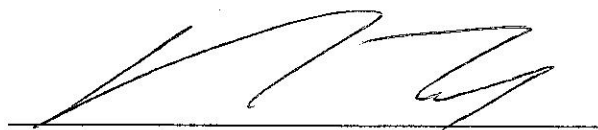
witness' possible inability to recollect and relate.”) (internal quotation omitted). In *United States v. Banks*, 520 F.2d 627, 631 (7th Cir. 1975), the Court stated that cross-examination related to drug use was “clearly relevant” in order to test the witness’s “ability accurately to recollect and relate factual occurrences while testifying.” In *United States v. Kearney*, 420 F.2d 170, 173 (D.C. Cir. 1969), the Court held that it was “undeniable” that a defendant may cross-examine a witness on drug usage “in an effort to attack a witness's competency and capacity to observe, remember and recall.” In *United States v. Fowler*, 465 F.2d 664, 665–66 (D.C. Cir. 1972), the Court stated that the defendant was entitled to cross-examine a prosecution witness “as to whether he was using narcotics at the time he observed appellant commit the alleged offense” in order to test “his powers of observation at the time he observed the offense.”). In *United States v. Frezzell*, 793 F. App'x 133, 136 (3d Cir. 2019), the Court held that a defendant must be able to cross-examine a witness on drug usage to reveal “whether, at the moment of testifying, he or she was under its influence, or had recovered from the effects of its last administration, has a material bearing upon his or her reliability as a witness and is therefore admissible.” In *United States v. Sampol*, 636 F.2d 621, 666–67 (D.C. Cir. 1980), the Court stated that drug usage was relevant to test the witness’s “capacity to observe the events in question.”

V. Conclusion:

The decision and analysis in *Long Pumpkin* conflicts with well-established

precedent from this Court, as well as numerous decisions from within the Eighth Circuit and from other federal appellate circuits. The result of that decision is not only the violation of Long Pumpkin's right to confrontation, but the establishment of a simplistic, categorical approach to Confrontation Clause assessments. For these reasons, Long Pumpkin asks this Court to issue its Writ of Certiorari.

Dated August 15, 2023

A handwritten signature in black ink, appearing to read 'John R. Murphy', written over a horizontal line.

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