
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

NO. 23A28

MOSES CROWE,
Petitioner,
-vs.-

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's constitutional right to confrontation was violated when, during his criminal jury trial, the district court restricted cross examination in a way that prevented the jury from learning and considering how the observations and perceptions of essential government witnesses may have been affected by the intoxicated state of those witnesses at the time they made their observations, their prolonged history of drug abuse for years thereafter, and the fact these key witnesses were under the influence of methamphetamine the day before they relayed their direct testimony to the jury.
2. Whether the Eighth Circuit's rejection of the legal underpinnings of the government's theory of prosecution at trial and the district court's erroneous application of the temporal limits of a carjacking rendered it impossible to determine whether Petitioner was convicted by a unanimous jury in violation of Petitioner's constitutional rights to a unanimous jury and a fair trial.

PARTIES TO THE PROCEEDING

Petitioner is Moses Crowe, the defendant-appellant below. Respondent is the United States of America, the plaintiff-appellee below.

RELATED CASES

United States v. Moses Crowe, File No. 5:18-cr-50010-JLV-2. U.S District Court for the District of South Dakota. Judgment entered August 14, 2020.

United States of America v. Ranson Long Pumpkin, No. 5:18-cr-50010-JLV-3, U.S District Court for the District of South Dakota. Judgment entered August 13, 2020.

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

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Petitioner Moses Crowe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

I. OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals (App. 001-023) is reported at 56 F.4th 604 and is reprinted in the Appendix to this Petition.

II. JURISDICTION

The Court of Appeals for the Eighth Circuit entered judgment on December 30, 2022. A petition for rehearing en banc was filed on January 27, 2023 and denied April 21, 2023. (App. 024). On July 7, 2023, Justice Kavanaugh granted Petitioner's Application for Extension of Time to file this Petition until August 23, 2023. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

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.

2. 18 U.S.C. § 2119 provides:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—(1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

IV. INTRODUCTION

This case arises as the result of prejudicial errors in a criminal jury trial and raises two important issues about what it means to receive a fair jury trial under the guarantees of the Sixth Amendment to the United States Constitution. Petitioner Moses Crowe was indicted for his alleged participation in the commission of a carjacking resulting in serious bodily injury and for discharging a firearm during and in relation to that carjacking.¹ Following a four-day trial held in the District of South Dakota, a jury returned guilty verdicts. Two of the district court's rulings at trial resulted in constitutional error of the first magnitude and require reversal for retrial.

First, the lack of physical evidence rendered the testimony of two eyewitnesses essential for the government to carry its burden of establishing Petitioner's presence when the carjacking occurred and any associated criminal culpability. Both eyewitnesses were under the influence of mind-altering intoxicants during the carjacking, abused those substances for years thereafter, and were under the influence of those substances the day before they relayed their eyewitness accounts to the jury. The intoxicated state of these witnesses during the carjacking and their prolonged history of drug abuse thereafter raise material questions about the reliability of their perceptions at the time of the carjacking and their ability to

¹ Petitioner was also convicted of possessing a firearm as a prohibited person in violation of 18 U.S.C. § 922(g)(1) during a separate incident unrelated to the carjacking—a conviction not relevant to this Petition.

accurately recall and relate those perceptions several years later. At trial, when defense counsel sought to expose this relevant drug use to the jury through cross examination as a means of testing the accuracy of the witnesses' direct testimony, the district court barred defense counsel from "inquiring in any way" into the witnesses' use of drugs before, during, or after "the events on trial." At trial and again on appeal, Petitioner argued the district court's restriction of Petitioner's ability to cross examine key government witnesses on the accuracy and reliability of their direct testimony was an unconstitutional infringement of his rights under the Confrontation Clause. A divided panel of the Court of Appeals for the Eighth Circuit affirmed the district court's sweeping prohibition on Petitioner's constitutional right to cross examine the witnesses whose direct testimony secured his conviction.

Second, the facts of this case raised a material question about the temporal limits of this particular carjacking under 18 U.S.C. § 2119. At trial, the government argued to the jury that the carjacking was an hours-long continuing offense that began at one location, continued to a separate location, and continued thereafter to a third location as various people came and went and as the victim sustained separate and distinct bodily injuries along the way. The district court's instructions to the jury allowed it to make such a finding. On appeal, the Eighth Circuit rejected the legal soundness of the government's theory of prosecution and held that the jury was not permitted to find that the carjacking was an event that continued all evening. The secondary effect of the Eighth Circuit's application of the law means the jury at trial was improperly instructed and makes it impossible to know

whether the jury was unanimous in its findings on essential elements.

The violation of Petitioner's rights under the Confrontation Clause and the legal impossibility of the government's theory of prosecution violated Petitioner's constitutional right to confront and cross examine the witnesses against him, violated his right to a unanimous jury, and violated his constitutional right to a fair trial. Each of these errors independently warrants reversal for retrial.

V. STATEMENT OF THE CASE

A grand jury charged Petitioner and two others with committing a carjacking resulting in serious bodily injury in violation of 18 U.S.C. § 2119 and discharging a firearm during and in relation to the carjacking in violation of 18 U.S.C. § 924(c)(1)(A)(iii), as well as aiding and abetting both offenses. The case proceeded to a jury trial where the facts of the carjacking were relayed to the jury by three witnesses: Phillip Moore, Vanessa High Pipe, and Jessica Maho.

At Walmart on October 12, 2017, Saul Crowe ("Saul"), Zach Perry, Vanessa High Pipe, and Jessica Maho were passengers in Phillip Moore's van. As Moore drove his van out of the Walmart parking lot, Saul pointed a gun at Moore's head and directed him to drive to the Ramkota Hotel across town. Petitioner Moses Crowe, Saul's brother, was not present when this occurred.

Shortly after the van arrived at the Ramkota, High Pipe and Maho testified Petitioner and Ranson Long Pumpkin appeared. Moore testified that Long Pumpkin entered the van from the rear side door and pulled Moore from the driver's seat into the back seat. While Long Pumpkin and Moore wrestled in the back seat, Moore

was punched in the face. Long Pumpkin then choked Moore to the point of unconsciousness. Maho fled the scene.

Saul then drove Moore's van to a location on Nike Road on the outskirts of Rapid City. Saul, Long Pumpkin, High Pipe, Perry, and Moore were inside the van. Moore regained consciousness a few times on the drive out to Nike Road, but each time Long Pumpkin choked him again until he fell unconscious. High Pipe testified Petitioner arrived at Nike Road in a separate vehicle. At Nike Road, Perry and Moore were assaulted and firearms were discharged before the party dispersed.

Moore positively identified Saul and Long Pumpkin as perpetrators, but he could not identify Petitioner as being present or having any involvement. The identification of Petitioner as being present or taking any actions that evening came exclusively from High Pipe and Maho, both of whom were under the influence of methamphetamine and other drugs during the event, abused methamphetamine for years after the event, and arrived at the courthouse to testify under the influence of methamphetamine, where they were arrested on material witness warrants.

At trial, defense counsel sought to cross examine High Pipe and Maho about their drug use during the carjacking, for years thereafter, and the day before their testimony and how that drug use may have affected each's ability to accurately perceive and recall the events each relayed to the jury in her direct testimony. However, the district court barred defense counsel from "inquiring in any way" into Maho's and High Pipe's use of drugs before, during, or after "the events on trial."

VI. REASON FOR GRANTING THE PETITION

A. **Petitioner's inability to inform the jury of High Pipe's and Maho's intoxicated state during the carjacking, their drug abuse for years after the carjacking, and their drug use the day before trial violated the rights guaranteed to Petitioner by the Confrontation Clause and conflicts with longstanding Supreme Court precedent.**

The Confrontation Clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” *USCS Const. Amend. 6*. A primary interest secured by the Confrontation Clause is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). Cross-examination is the principal means by which the believability of a witness and the truth of her testimony are tested by delving into the witness’ story to test the witness’ perceptions and memory. *Id.* Under the Confrontation Clause, defense counsel should be permitted to expose facts from which jurors, as the sole triers of fact and credibility, may draw inferences relating to the reliability of witnesses. *Id.* at 318. The Confrontation Clause commands that the reliability of witness testimony be assessed in a particular manner: by testing in the crucible of cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). “Prior drug abuse may be relevant when the witness’s memory or mental abilities are legitimately before the court.” *United States v. Hodge*, 594 F.3d 614, 618 (8th Cir. 2010) (citing *United States v. Cameron*, 814 F.2d 403, 405 (7th Cir. 1987)).

The events at the Ramkota happened quickly, chaotically, and under cover of

darkness. There was inconsistent testimony about who took what actions. The only witnesses to these events were under the influence of methamphetamine at the time they made their observations, abused methamphetamine for years thereafter, and used methamphetamine the day before their trial testimony. Generally, the ability of defense counsel to cross examine a witness about her ability to accurately perceive and recall the events to which she is testifying is an essential defense function guaranteed by the Confrontation Clause. Specifically in this case, High Pipe's and Maho's intoxicated states and prolonged history of drug use was a key component of the theory of defense considering the absence of additional evidence to corroborate their testimony. During opening statements the day before High Pipe and Maho arrived to testify and before the district court entered its sweeping prohibition, defense counsel told the jury it would hear about High Pipe's and Maho's drug use. However, the district court's unexpected mid-trial sweeping prohibition on referencing High Pipe's and Maho's drug use kept defense counsel from keeping its promise to the jury and meant the theme and theory of defense presented to the jury during opening statements had to be abandoned mid-trial, that a prepared line of questioning had to be jettisoned, and that closing arguments had to be entirely refashioned mid-trial.

To support its holding that the district court's prohibition on cross examining High Pipe and Maho about their drug use did not violate Petitioner's rights, the Eighth Circuit majority relied 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) for the categorical proposition that witness drug use affects only the witness's *credibility* (as opposed to her *reliability*). Therefore, the majority concluded, cross examination into the collateral matter of a witness's drug use can be limited without running afoul of the Confrontation Clause. *United States v. Long Pumpkin*, 56 F.4th 604, 608-09 (8th Cir. 2022). The cases relied on by the majority purportedly rely on this Court's opinion in *Davis v. Alaska*, 415 U.S. 308 (1974) as authority. The dissent relied on the same authority to correctly conclude that the issue of High Pipe's and Maho's drug use went directly to the reliability of their observations and that the district court's prohibition violated Petitioner's rights under the Confrontation Clause. Petitioner respectfully submits that the majority opinion's reasoning finds no support in either the Sixth Amendment or this Court's prior precedent and should be reversed so that his rights under the Confrontation Clause can be restored.

B. The Eighth Circuit's rejection of the legal underpinnings of the government's theory of prosecution and the district court's erroneous application of the temporal limits of the carjacking means the jury was improperly instructed and makes it impossible to determine whether it was unanimous in its findings on essential elements.

Congress has defined the crime of carjacking to be the "taking" of a motor vehicle from the person or presence of another by force, violence, or intimidation. See 18 U.S.C. § 2119. The crime is not in the *possession* of a vehicle after that vehicle has been taken; the crime is in the *taking*. Therefore, depending on the facts

of the case, the temporal limits of the taking (*i.e.* when the taking begins and when it ends) may create a material question of fact for the jury, as it did in this case.

During trial, after the government rested its case, defense counsel made an oral motion for judgment of acquittal based on the argument that Saul acquired total and permanent control over Moore's van at Walmart before Petitioner arrived and that therefore the taking of Moore's van was a completed offense when Saul pointed a gun at Moore and forced him to drive to a location he did not intend to go. The district court denied the motion and said the jury was free to conclude that the taking of Moore's van was an ongoing event that continued through the events at Nike Road regardless of whether Moore ever regained possession of his van. The Eighth Circuit unanimously rejected the district court's analysis of the temporal limits of the carjacking considered by the jury. *United States v. Pumpkin*, 56 F.4th 604, 611 (8th Cir. 2022). The Eighth Circuit nevertheless upheld the jury's verdict because there was evidence from which the jury *could have* concluded that two separate takings occurred. According to the Eighth Circuit, a reasonable jury could have considered the eyewitness testimony in this case and concluded that Saul took Moore's van at Walmart before Petitioner was present *but also* that Saul, Long Pumpkin, and Petitioner *all* took Moore's van *again* at the Ramkota.

A reasonable jury *could have* examined the evidence and concluded that two separate and distinct takings occurred, but there is no way to know whether the jury did so considering the district court's erroneous view of the temporal limits of this particular carjacking. If, as the Eighth Circuit posits, a reasonable jury could

have concluded that Saul took Moore's van at Walmart before Petitioner was present, it is essential to know whether Moore ever regained possession of his van such that it could have been taken from him a second time when Petitioner was present. That is a question that should have been resolved by a jury under the Eighth Circuit's analysis. If even a single juror listened to the testimony and was not persuaded that Moore ever regained possession of his van between Walmart and the Ramkota, then Saul's carjacking of Moore was a completed offense before Petitioner is alleged to have appeared. In that event, whatever involvement Petitioner may have had in assaulting Moore or discharging a firearm did not occur "during and in relation to a carjacking" but rather occurred *after* a carjacking, negating an essential element of the charged offense.

The prejudicial error at trial can be illustrated again in the context of the "serious bodily injury" element. At trial, the government argued, and the district court incorrectly allowed the jury to find, that the taking of Moore's van was a continuing event at Nike Road when Moore was pistol whipped. The government asked the jury to find that the injuries Moore sustained as a result of that pistol whipping were serious bodily injuries that occurred during and in relation to a carjacking. The Eighth Circuit said the injuries Moore received at Nike Road did not occur during and in relation to the carjacking and attempted to cure the resulting prejudice to Petitioner by invading the province of the jury and concluding that Long Pumpkin's strangulation of Moore at the Ramkota was "serious bodily injury" as a matter of law. Whether Long Pumpkin's strangulation of Moore caused

him “serious bodily injury” as Congress has defined that term is a jury question. Under the Eighth Circuit’s view of the temporal limits of the carjacking, it is impossible to know whether the jury was unanimous in its finding that Moore sustained “serious bodily injury during and in relation to a carjacking.” If even a single juror concluded that Long Pumpkin’s strangulation did not result in serious bodily injury as that term has been defined by Congress, then Petitioner’s conviction is in violation of his right to a unanimous jury.

The Eighth Circuit’s rejection of the temporal limits of the carjacking assigned by the district court makes it impossible to determine whether Petitioner was convicted by a unanimous jury and requires reversal. The Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). The district court’s erroneous view of the law allowed the jury to cumulatively group several takings of Moore’s van and any injuries he sustained on October 12, 2017 to determine whether he was the victim of a carjacking resulting in serious bodily injury. If the district court had correctly applied the law in the manner stated by the Eighth Circuit, under the unique facts of this case, it would have required the jury to return special interrogatories as to whether separate taking occurred and, if so, when Moore’s serious bodily injury was sustained. Under the Eighth Circuit’s view of the temporal limits of the carjacking, knowing the answer to that question is of critical importance, because Petitioner was not present for both possible takings. There is no way to cure the prejudice to Petitioner but to remand for retrial.

VII. CONCLUSION

The analysis employed by the Eighth Circuit conflicts with guarantees of the Confrontation Clause as envisioned by the Framers and with this Court's well-established prior precedent. Further, circuit courts have issued conflicting decisions leading to confusion about a criminal defendant's rights under the Confrontation Clause. The simple and straight-forward facts of this case make it a good vehicle for this Court to settle the law for the benefit of those availing themselves to the guarantees of the Sixth Amendment and for the proper, efficient, and uniform administration of justice. The petition for a writ of certiorari should be granted.

Dated this 23rd day of August, 2023.

Respectfully submitted,



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