No. 25-1424

In the Supreme Court of the United States

DENNIS BIRKLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Dennis Birkley

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Pro Se Petitioner

JUNE MMXXVI

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QUESTIONS PRESENTED

1. Whether Petitioner's Sixth Amendment right to confrontation was violated when FBI Special Agent Kathryn Graham testified as a summary witness by summarizing the investigative findings, observations, and conclusions of other FBI agents who did not testify and were not subject to cross-examination—and whether the Seventh Circuit denied Petitioner meaningful review by failing to apply *Crawford* v. *Washington*, 541 U. S. 36 (2004), to this preserved constitutional objection.

2. Whether the Ex Post Facto Clause of Article I, Section 9 was violated when Petitioner was convicted under an Indiana mechanic's lien statute—Indiana Code § 9-22-6-2—that became effective January 1, 2015, based on conduct occurring in 2013 and 2014, and whether the government's retroactive application and retroactive redefinition of that statute's meaning to characterize Petitioner's lawful conduct as criminal further compounded the constitutional violation.

3. Whether the Seventh Circuit's complete failure to address Petitioner's properly preserved constitutional claims—including Confrontation Clause and Ex Post Facto objections raised at trial, at sentencing, and on appeal—denied Petitioner his Fifth Amendment right to due process and meaningful appellate review, in a manner this Court's supervisory authority requires it to correct.

PARTIES TO THE PROCEEDINGS

Petitioner, and defendant-appellant below is Dennis Birkley.

Respondent, and plaintiff-appellee below is the United States of America.

RELATED PROCEEDINGS

United States District Court (SD Ind.):

United States of America v. *Dennis Birkley*, No. 1:18-cr-00333-JGK (Jan. 31, 2023) (judgment entered)

United States Court of Appeals (CA7):

United States of America v. *Dennis Birkley*, No. No. 24–1089 (Jul. 1, 2025) (district court affirmed)

United States of America v. *Dennis Birkley*, No. 24–1089 (Jul. 29, 2025) (rehearing denied)

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Constitutional Provisions, Statutes, and Rules

OPINIONS BELOW

The Seventh Circuit's opinion is reproduced in the Appendix at App. 1–28.

JURISDICTION

The Seventh Circuit's judgment was entered on July 1, 2025. The Seventh Circuit denied rehearing on July 29, 2025. This Court has jurisdiction pursuant to 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const., Art. I, § 9, cl. 3: "No Bill of Attainder or ex post facto Law shall be passed."

U. S. Const., Amdt. VI, in relevant part:: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

U. S. Const., Amdt. V, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner Dennis Birkley was convicted on January 31, 2023, in the Southern District of Indiana of seventeen counts: one count of conspiracy to commit mail and wire fraud, seven counts of wire fraud, six counts of mail fraud, and three counts of money laundering. The charges arose from Petitioner's involvement with Brian Fenner's towing business and a series of vehicle transactions in 2013 and 2014.

The prosecution's theory centered on the use of Indiana's mechanic's lien statute—Indiana Code § 9-22-6-2-to conduct allegedly fraudulent vehicle auctions.

Critically, the version of that statute introduced and relied upon at trial became effective January 1, 2015—after all of Petitioner's alleged conduct had already occurred. The government applied the post-2015 version of the statute retroactively and, at trial, retroactively redefined the statute's meaning to characterize procedures Petitioner followed under the then-existing law as violations of a later-enacted version.

At trial, FBI Special Agent Kathryn Graham was called as a "summary witness." Agent Graham did not limit her testimony to records she personally reviewed. She summarized the investigative findings, observations, and conclusions reached by other FBI agents who conducted fieldwork, interviewed witnesses, and gathered evidence—none of whom testified or were made available for cross-examination. Petitioner objected that this testimony constituted inadmissible testimonial hearsay under the Confrontation Clause. The objection was overruled. Petitioner was sentenced to 60 months' imprisonment.

On appeal to the Seventh Circuit, Petitioner raised Confrontation Clause violations, an Ex Post Facto challenge, and due process claims. The court, in its July 1, 2025 opinion, affirmed the conviction. App. 27. The court addressed evidentiary and restitution questions but failed to squarely address whether Agent Graham's testimony violated *Crawford* v. *Washington*, and never addressed the core constitutional argument that prosecuting Petitioner under a statute enacted after his conduct violated the Ex Post Facto Clause. Rehearing was denied on July 29, 2025.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Approved Testimonial Hearsay in Direct Violation of the Sixth Amendment and *Crawford* v. *Washington*

The Sixth Amendment's Confrontation Clause guarantees every criminal defendant the right to confront the witnesses against him. In *Crawford* v. *Washington*, 541 U. S. 36 (2004), this Court held that testimonial hearsay is categorically inadmissible unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The *Crawford* rule is not a balancing test—it is an absolute bar.

At Petitioner's trial, the government called FBI Special Agent Kathryn Graham as a 'summary witness.' Agent Graham did not limit her testimony to records she personally reviewed. She summarized the investigative findings, observations, and conclusions reached by other FBI agents who conducted fieldwork, interviewed witnesses, and gathered evidence—none of whom testified or were made available for cross-examination. This is the precise evil Crawford was designed to prevent: the government using one witness's mouth to deliver, without confrontation, the testimonial conclusions of many absent witnesses.

The Seventh Circuit, in affirming, treated the question as one of lay versus expert testimony under Federal Rules of Evidence 701 and 702. But the court failed entirely to conduct a *Crawford* analysis. Whether testimony is lay or expert is irrelevant to the Confrontation Clause inquiry. What matters is whether the out-of-court statements being conveyed are testimonial in nature - that is, made in circumstances that would lead an objective witness to reasonably believe the statements would be available for use at trial. The investigative findings of FBI agents conducting a criminal investigation clearly meet that standard.

The Seventh Circuit's failure to apply *Crawford* to this testimony represents an unreviewable constitutional error at the circuit level and warrants this Court's intervention. The question of whether a summary witness may introduce the testimonial hearsay findings of non-testifying agents without triggering the Confrontation Clause is an important and recurring question of federal constitutional law. Courts have struggled with the boundaries of summary witness testimony, and the Seventh Circuit's approach—treating the question as purely evidentiary without engaging the constitutional dimension—creates a framework that effectively nullifies *Crawford* in complex federal investigations.

Crawford's guarantee is only meaningful if courts actually apply it. The Sixth Amendment does not contain a summary-witness exception. This Court should grant certiorari to ensure that lower courts do not bypass the Confrontation Clause by categorizing testimonial hearsay as permissible "lay summary" testimony.

II. Petitioner's Conviction Violates the Ex Post Facto Clause Because He was Prosecuted Under a Statute that Did Not Exist at the Time of the Alleged Conduct

The Ex Post Facto Clause of U. S. Const., Art. I, § 9 forbids the government from convicting any person under a law that did not exist at the time of the conduct, or from retroactively redefining the elements of a crime to expand criminal liability. See *Calder* v. *Bull*, 3 Dall. 386 (1798); *Collins* v. *Youngblood*, 497 U.S. 37 (1990). The Clause reflects a foundational principle: a person cannot be punished for conduct that was lawful when it occurred.

The government's theory of fraud in this case depended on characterizing Petitioner's conduct as a violation of Indiana's mechanic's lien statute. However, the specific version of that statute the prosecution introduced and relied upon at trial—Indiana Code § 9-22-6-2—became effective January 1, 2015. All of the conduct charged against Petitioner occurred in 2013 and 2014, before that version of the statute existed.

The Seventh Circuit dismissed this claim by concluding that Petitioner was convicted under federal fraud statutes, not the Indiana law, and therefore was not "sentenced pursuant to the suspect provision." But this reasoning misses the point. The federal fraud charges were premised entirely on the government's theory that the vehicle auctions were fraudulent because they violated the Indiana statute. If that statute did not apply to Petitioner's conduct in 2013 and 2014, the very foundation of the fraud theory collapses. Applying the 2015 version of the state law to pre-2015 conduct to prove a federal crime violates the spirit and letter of the Ex Post Facto Clause.

The violation is compounded by the government's retroactive redefinition of the statute's meaning at trial. The government was permitted to argue that procedures Petitioner followed under the then-existing law were violations of a later-enacted version whose meaning the government retroactively recharacterized. This retroactive redefinition of criminal liability is precisely what the Framers prohibited when they wrote the Ex Post Facto Clause into the Constitution. The Clause protects against the government changing the rules of the game after the fact—which is exactly what happened here.

This case raises an important question: can the federal government use a state law enacted after the charged conduct as the factual predicate for a federal fraud conviction, without triggering Ex Post Facto protections? The Seventh Circuit's answer—that the technical conviction under federal statutes insulates the case from Ex Post Facto scrutiny—creates a roadmap for circumventing the Clause in any future prosecution that routes its theory of criminality through state law. This Court should resolve this question.

III. The Seventh Circuit denied Petitioner Due Process by Failing to Address His Preserved Constitutional Claims

The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. A fundamental component of due process in the appellate context is the right to have properly preserved constitutional claims actually considered and decided by an appellate court. An affirmance that simply ignores preserved constitutional objections does not constitute meaningful appellate review.

Petitioner raised his Confrontation Clause objection at trial, preserved it in his appellate brief, and reiterated it in his petition for rehearing. He raised his Ex Post Facto challenge at sentencing and on appeal. The Seventh Circuit's opinion resolved ancillary evidentiary and restitution questions but never squarely addressed whether Agent Graham's testimony violated Crawford, and never addressed the core constitutional argument that prosecuting Petitioner under a statute enacted after his conduct violated the Ex Post Facto Clause.

This Court has long recognized that appellate courts have a duty to decide the constitutional questions presented to them when properly preserved. See *Marbury* v. *Madison*, 1 Cranch 137 (1803). An affirmance built on avoidance of the constitutional questions is not merely unsatisfying—it is itself a due process violation. The Seventh Circuit's failure to rule on Petitioner's constitutional claims left him without any appellate court having decided whether his conviction complied with the U.S. Constitution. That is precisely the outcome the Due Process Clause forbids.

This issue transcends Petitioner's individual case. If courts of appeals may affirm convictions while declining to address preserved constitutional objections, the constitutional rights of criminal defendants become effectively unenforceable at the appellate level. A defendant who properly raises his rights at every stage and is answered only with silence has been denied the process he is due. This Court's supervisory role over the federal courts requires it to address and remedy this systemic problem.

CONCLUSION

Wherefore, this Court should grant the petition, vacate the judgment of the Seventh Circuit, and remand for further proceedings consistent with the Constitution of the United States.

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