No. _____

IN THE

Supreme Court of the United States

JULIAN MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES C. DUNLOP
KIRSTEN E. MORAN
EMMA J. LANZON
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60607

ILANA GELFMAN
Counsel of Record
JONES DAY
100 High Street
Boston, MA 02110
(617) 960-3939
igelfman@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the District Court's express reliance on an out-of-court statement of a non-testifying co-defendant as a basis for finding the defendant guilty violated the defendant's rights under the Confrontation Clause.

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INTRODUCTION

The Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him. This constitutional right stems not only from the need to ensure a defendant receives a fair trial, but also from the need to test the reliability of evidence presented at trial through the trusted crucible of cross-examination. The District Court flagrantly violated Julian Martin's Sixth Amendment right to confront and cross-examine all witnesses against him. It admitted and expressly relied upon non-testifying co-defendant Nathaniel Hoskins's post-arrest statement in finding Martin guilty of a crime, even though Martin had no opportunity to cross-examine Hoskins. In affirming the District Court's erroneous verdict, the Seventh Circuit sanctioned this violation of Martin's Sixth Amendment right. The circumstances in this case so far depart from what the Constitution demands that they call for a writ of certiorari—indeed, they warrant summary reversal.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 910 F.3d 320. App. 1a-16a. Its order denying a petition for rehearing is reproduced at App. 39a. The District Court's order is reproduced at App. 17a-38a.

JURISDICTION

The Seventh Circuit entered judgment on December 6, 2018, and denied panel rehearing on January 4, 2019. App. 1a-16a, 39a. On March 26, 2019, Justice Kavanaugh granted Petitioner's application to extend the time to file a petition for a writ of certiorari from April 4, 2019 to June 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. Legal Background

The Sixth Amendment commands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The Amendment's primary concern 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." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). That rigorous testing is compatible with a notion "deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

The right to confront one's accusers has been embedded in this country's legal framework since prior to the Founding. In *Crawford v. Washington*, this Court detailed the historic injustices and "principal evil[s]" that have resulted from relying on *ex parte* examinations as evidence against the accused. 541 U.S. 36, 51 (2004). Sir Walter Raleigh's trial for treason, in which he was denied the right to confront his accuser and alleged co-conspirator, encapsulated the "degrad[ation] and injur[y]" that occurs when an accused is denied the right to confront his accuser. *Id.* at 44; *Raleigh's Case*, 2 How. St. Tr. 1, 15–16 (1603).

The right to confrontation limits such flagrant abuses by requiring "witnesses to confront the accused 'face to face.'" *Id.*

The Confrontation Clause's truth-finding function "is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross examination," *Lee v. Illinois*, 476 U.S. 530, 541 (1986), which is why "the arrest statements of a codefendant have traditionally been viewed with special suspicion." *Id.* To alleviate this problem, this Court has placed limitations on how and when a co-defendant's confession may be used in criminal trial. In *Bruton v. United States*, 391 U.S. 123, 126 (1968), this Court prohibited the admission of a co-defendant's confession that inculpates another defendant during a joint jury trial. In so holding, this Court recognized that instructing the jury to use the statement only against the co-defendant who made it could not prevent "the substantial risk that the jury . . . looked to the incriminating extrajudicial statements in determining [the defendant's] guilt." *Id.*

Subsequently, in *Lee v. Illinois*, this Court held that during joint bench criminal trials, district courts are prohibited from relying on one co-defendant's post-arrest confession when determining another co-defendant's guilt. 476 U.S. at 542–43. The co-defendants in *Lee* were jointly tried for murder during a bench trial. *Id.* In finding one defendant guilty "the trial judge expressly relied on [his co-defendant's] confession and his version of the killings." *Id.* at 538; *see also id.* at 543 ("[I]t is not necessary to speculate as to whether the factfinder would consider the uncross-examined hearsay; the judge expressly so relied."). This Court reversed the judgment. *See id.* at 547. This

Court explained that "[t]he danger against which the Confrontation Clause was erected—the conviction of a defendant based, at least in part, on presumptively unreliable evidence—actually occurred." *Id*. at 543.[1]

Put another way, this Court held that the Confrontation Clause prohibits district courts from expressly relying on a non-testifying co-defendant's unexamined confession in finding a defendant guilty of a crime. This prohibition on express reliance reaffirms "the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id*. at 541.

B. Factual and Procedural Background

i. Indictment

The investigation of a Chicago-area gang known as the Imperial Insane Vice Lords ("IIVL") culminated in an indictment dated September 26, 2013 against two dozen individuals, including Petitioner Julian Martin. On December 9, 2014, the grand jury issued a superseding indictment. The superseding indictment alleged that from approximately 1996 to September 2013, the IIVL trafficked drugs and used vio-

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[1] Though the *Lee* Court proceeded to assess whether the co-defendant's statement bore sufficient indicia of reliability, such an inquiry is no longer relevant under *Crawford*. *See Crawford*, 541 U.S. at 61 (observing that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, must less the amorphous notions of 'reliability.'").

lence to maintain its drug trafficking territory and organization. It further alleged that the IIVL was at war with a rival gang known as the Four Corner Hustlers in the spring of 2011, and that various members of the IIVL participated in the murder of Marcus Hurley and the attempted murders of Brian Smith and Tony Carr as part of that war.

The superseding indictment charged Martin with participation in a Racketeering Influenced and Corrupt Organization ("RICO") (Count One), being an accessory after the fact to murder under 18 U.S.C § 3 (Count Six), conspiracy to commit murder under 18 U.S.C. § 1959(a)(5) (Count Seven), possession of a firearm in relation to a violent crime under 18 U.S.C. § 924(c)(1)(A) (Count Eight), conspiracy to possess with intent to distribute narcotics under 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) (Count Nine), and unlawful possession of firearms under 18 U.S.C. § 922(g)(1) (Count Twenty-two). The District Court had subject matter jurisdiction over Martin's criminal case under 18 U.S.C. § 3231. Martin's conviction on Count Six—the District Court's determination that Martin was an accessory after the fact after a murder—provides the basis for this petition.

ii. Trial

Martin filed an amended motion to sever on October 2, 2014, based on statements by multiple co-defendants that incriminated Martin.[2] In particular, Martin argued that co-defendant Nathaniel Hoskins's post-arrest statement implicated Martin in Count Six (harboring of Andre Brown after Brown murdered

[2] The District Court denied Martin's original motion to sever without prejudice as premature. (Dkt. 475.)

Marcus Hurley) and the enterprise alleged in Count One (RICO count). The District Court granted in part Martin's amended motion to sever, but denied it as to co-defendant Hoskins. Consequently, Martin was tried jointly with co-defendants Nathaniel Hoskins and Torrie King in a two-week bench trial.

During trial, the Government attempted to show that the IIVL was a RICO enterprise that conspired to traffic drugs and commit acts of violence, such as the murder of Hurley and attempted murders of Smith and Carr. The defense countered by showing that there was no evidence connecting the alleged attempted murders with the alleged RICO enterprise.

The Government presented evidence during trial that on April 27, 2011, IIVL member Andre Brown shot and killed Marcus Hurley (a member of the Four Corner Hustlers). During the Government's presentation of its case, it called to the stand Andrew Marquez, a DEA investigator who interviewed Hoskins after his arrest on October 8, 2013. Marquez testified in detail about a post-arrest interview he conducted with Hoskins regarding the Hurley murder. App. 45a-58a. Martin's attorney objected, arguing that admitting Hoskins's out-of-court statements constituted a Confrontation Clause violation because Hoskins did not testify at trial and the statements were not subject to cross-examination. App. 42a-44a. The District Court responded by ordering that "any statements that [Hoskins] made about Mr. Martin" not be introduced, adding, "I am only human." App. 43a-44a.

Despite the District Court's admonition, the Government introduced crucial unexamined co-defendant statements about Martin through Investigator

Marquez's testimony. Specifically, Marquez testified that Hoskins had told him that "an hour after the murder of Marcus Hurley he [Hoskins] was in a car with Julian Martin, Andre Brown, and Gregory Hawthorne, and that he was informed by Andre Brown that he had just committed this murder." App. 52a. Marquez's testimony regarding Hoskins's statement directly inculpated Martin under Counts One and Six, and provided the only direct evidence that Martin knew that Brown had committed a murder—a necessary element of the offense of accessory after the fact.

iii. Verdict

In finding Martin guilty of being an accessory after the fact under Count Six, the District Court echoed the contents of Hoskins's unexamined statement. The District Court found that Martin was "with Mr. Brown right after the murder, within an hour of it . . . " and that this, together with other evidence, "show[ed] . . . that they knew why they were hiding Mr. Brown." App. 69a. Hoskins's statement thus provided a key element of Count Six: knowledge of the specific crime to which Martin was an accessory.

Indeed, the District Court later confirmed that it had considered the contents of Hoskins's out-of-court statement during a point of clarification by the Government. During the District Court's verdict, the Government made a clarification that King was not in the car when the information about Marcus Hurley's murder was conveyed, stating that "the evidence at trial was that Mr. Martin was in the car with Mr. Hoskins, Mr. Brown and Mr. Hawthorne." App. 80a. The District Court agreed, stating "All right. I did, yes, I was thinking that Mr. King was there." App. 81a. But there was no evidence outside of Hoskins's statement

showing that Martin was in the car with Hoskins, Brown, and Hawthorne an hour after the murder.

iv. Seventh Circuit Proceedings

In Martin's briefs and oral arguments before the Seventh Circuit, he argued that the District Court violated his Confrontation Clause rights under *Lee v. Illinois*, 476 U.S. 530 (1986), by expressly relying on his non-testifying co-defendant's unexamined post-arrest statement in finding him guilty as an accessory after the fact under Count Six. Martin argued that Investigator Marquez's statement was the direct link placing Martin together with Hoskins, Brown, and Hawthorne when Brown stated that he had murdered Hurley, and thus was the only direct proof of Martin's knowledge of the murder. Martin explained that the District Court relied on Marquez's testimony when it stated that Martin was "with Mr. Brown right after the murder, within an hour of it," which directly linked to Hoskins's pretrial confession stating that Brown had conveyed that he had committed the murder. This constituted the key element for the conclusion that Martin "knew Mr. Brown committed the murder." App. 69a. Martin argued that the admission of this evidence was not harmless because it directly established an essential element of Count Six.

In its response, the Government argued that the District Court did not rely on Hoskins's post-arrest confession. The Government did not argue that Hoskins's confession bore indicia of reliability. Furthermore, the Government was silent on the harmless error issue with regard to Martin's Confrontation Clause argument.

The Seventh Circuit affirmed Martin's conviction. App. 1a. The Seventh Circuit cited a portion of the

verdict transcript, purportedly to show that the District Court did not utilize Hoskins's pretrial confession against Martin; however, in doing so, the Seventh Circuit cited the District Court's very statements which Martin argues were derived from Hoskins's pretrial confession ("I'll also add that both of them were with Mr. Brown right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes." App. 12a.). The Seventh Circuit then stated that "[t]his reasoning reveals that the district court relied on photographs, tapes, testimony from officers, and other circumstantial evidence." App. 12a. But the Court of Appeals did not address Martin's arguments about the origin of the District Court's findings. Martin petitioned the Seventh Circuit for reconsideration of its ruling. The Seventh Circuit denied the petition on January 4, 2019.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION RUNS AFOUL OF *LEE V. ILLINOIS*

In *Lee v. Illinois*, this Court held that a trial judge violates the Confrontation Clause by expressly relying on a non-testifying defendant's pre-trial confession in determining a co-defendant's guilt. 476 U.S. at 542–43. *See also Johnson v. Tennis*, 549 F.3d 296, 301 (3rd Cir. 2008) (stating that "express reliance by a trial judge on a non-testifying defendant's pre-trial confession which facially implicates a co-defendant in determining that co-defendant's guilt" amounts to a violation of *Lee*) (emphasis omitted); *see United States v. Cardenas*, 9 F.3d 1139, 1155 (5th Cir. 1993) (same). The Seventh Circuit held that the District Court's verdict did not violate Martin's confrontation right because the District Court did not use Hoskins's pretrial

confession against Martin. Despite the Seventh Circuit's assertion to the contrary, in finding Martin guilty, the District Court expressly relied on portions of Hoskins's pre-trial confession as substantive evidence against Martin. The Seventh Circuit compounded this error by citing the portion of the District Court's verdict derived from Hoskins's pre-trial confession and designating it as properly relied-upon evidence.

An essential element of Count Six, accessory after the fact to murder under 18 U.S.C. §3, is proof beyond a reasonable doubt that the defendant knew of the underlying offense. See *United States v. Osborn*, 120 F.3d 59, 64 (7th Cir. 1997) (defendant's knowledge of the underlying offense is an element of accessory after the fact). Thus, the District Court needed to find beyond a reasonable doubt that Martin knew that Brown committed murder in order to convict Martin on Count Six.

In its verdict, the District Court expressly relied on Hoskins's pre-trial statement as a basis for finding Martin guilty on Count Six. During trial, Marquez testified that Hoskins had told him that:

> "an hour after the murder of Marcus Hurley he [Hoskins] was in a car with Julian Martin, Andre Brown, and Gregory Hawthorne, and that he was informed by Andre Brown that he had just committed this murder."

App. 52a. During its verdict, the District Court stated, in relevant part:

> "I'll also add that both of them were with Mr. Brown right after the murder, within an hour of it, where Mr. Brown has suddenly changed

> his clothes. So all of this shows to me, beyond a reasonable doubt, that they knew why they were hiding Mr. Brown."

App. 68a-69a.

The District Court's statement, which places Martin, Hoskins, Brown, and Hawthorne together within an hour of the murder and concludes that they "knew why they were hiding Mr. Brown," is succinctly drawn from, and directly mirrors, Investigator Marquez's testimony regarding Hoskins's pretrial confession. Furthermore, the only direct proof of Martin's knowledge of the underlying crime of murder came from that same out-of-court statement: Hoskins told Marquez that Brown, while sitting in the car, had related that he had committed the murder. This constitutes express reliance on a non-testifying co-defendant's post-arrest statement, which violates Martin's Confrontation Clause rights under *Lee*.

In reviewing the District Court's decision, the Seventh Circuit failed even to cite the language from Marquez's testimony that showed the District Court's express reliance on Hoskins's out-of-court statement, much less analyze this language as the basis for the District Court's verdict. Instead, the Seventh Circuit reached its conclusion that the "[D]istrict [C]ourt did not use Hoskins's pretrial confession against Martin" without evaluating the District Court's reliance on the key statements from Hoskins on which the District Court's verdict depends. *See* App. 11a-13a. The Seventh Circuit omitted any discussion of whether the District Court relied upon or considered Hoskins's out-of-court statement, as well as any analysis regard-

ing Martin's argument that the District Court's findings could only have been based on statements by Martin's non-testifying co-defendant.

Incredibly, the Seventh Circuit itself *expressly relied* upon the very portions of the District Court's verdict that echo reference Investigator Marquez's testimony regarding Hoskins's out-of-court statement. App. 12a ("I'll also add that both of them were with Mr. Brown right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes."). Hoskins's unexamined statement that Martin was in the car with Brown "an hour after the murder," App. 52a, was the only evidence in the record placing Martin in the car with Brown "within an hour" of the murder.

The Seventh Circuit's failure to recognize and address the District Court's express reliance on a key piece of an unexamined co-defendant's testimony against Martin, which established an essential element of his guilt, deprived Martin of his right to cross-examine witnesses and due process. It calls for this Court to summarily reverse the decisions below.

This case is well-positioned for summary reversal because the Government has forfeited any argument that Martin's Confrontation Clause violation constituted harmless error.[3] In Martin's Opening Brief to

[3] The Government has also forfeited any argument that Hoskins's out-of-court statement bore indicia of reliability. The Government argued only that "[b]ecause the statement was not used against Martin its reliability is irrelevant." Brief of the United States at 40, *United States v. King*, 910 F.3d 320 (7th Cir. 2018) (No. 16-4212 and 16-3084)). It did not argue that Hoskins's

the Seventh Circuit, he argued that the admission of Hoskins's post-arrest statement was not harmless error, citing the fact that the out-of-court statement unambiguously established an element of Count Six and presented facts not otherwise in evidence. Although the Government addressed harmless error in response to Martin's argument on sentencing issues, it was silent on the harmless error issue with regard to Martin's Confrontation Clause argument. As a result, the Government has forfeited this argument.

Moreover, the Seventh Circuit's error was not harmless. The admission of a co-defendant's statement is harmless only if there is no reasonable possibility that the relevant statement might have contributed to the defendant's conviction. *See Chapman v. United States*, 386 U.S. 18, 24 (1967) (describing harmless error rule). Whether an error is harmless beyond a reasonable doubt depends upon factors such as 1) the importance of a witness's testimony in the prosecution's case, 2) whether the testimony was cumulative, 3) the presence or absence of corroborating or contradictory evidence, and 4) the overall strength of the prosecution's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

As previously explained, Hoskins's pretrial confession was the only evidence that directly placed Martin, Hoskins, Hawthorne, and Brown together in a car within an hour of the murder, with Brown confessing to the murder in the others' presence. Hoskins's unexamined confession neatly presented

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statement was reliable. In any event, as noted above, the reliability inquiry is no longer relevant under *Crawford*. *See Crawford*, 541 U.S. at 61.

facts to the District Court that were not otherwise able to be pieced together from the record. Thus, Hoskins's statement was crucial. The Seventh Circuit's error was therefore not harmless.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, 380 U.S. at 405. This Court's jurisprudence has borne out this principle, cautioning that the "truthfinding function of the Confrontation Clause is uniquely threatened" when a co-defendant's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. *Lee*, 476 U.S. at 541.

The District Court's reliance on the post-arrest confession of Martin's non-testifying co-defendant undermined the constitutional principle articulated in *Lee*. It threatened the "truthfinding function" of both the Confrontation Clause and the trial itself. Finding Martin guilty on Count Six was in direct violation of this Court's prohibition of evidence that "distort[s] the truthfinding process." *Id.* at 542. Here, like in *Lee*, "[t]he danger against which the Confrontation Clause was erected—the conviction of a defendant based, at least in part, on presumptively unreliable evidence—*actually occurred.*" *Id.* at 543 (emphasis added).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

JAMES C. DUNLOP
KIRSTEN E. MORAN
EMMA J. LANZON
JONES DAY
77 West Wacker Drive,
Suite 3500
Chicago, IL 60607

ILANA B. GELFMAN
Counsel of Record
JONES DAY
100 High Street
Boston, MA 02110
(617) 960-3939
igelfman@jonesday.com

Counsel for Petitioner

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