No. 18-1506

In the Supreme Court of the United States

JULIAN MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not violate the Confrontation Clause because it did not rely on testimony relating to an out-of-court statement made by petitioner's non-testifying co-defendant in adjudicating petitioner's guilt.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

United States v. *Hoskins*, No. 13-cr-772 (Dec. 2, 2016)

United States Court of Appeals (7th Cir.):

United States v. *Faulkner*, No. 14-3332 (July 15, 2015)

United States v. *Cunningham*, No. 15-1607 (Sept. 14, 2015)

United States v. *Brown*, No. 15-2933 (July 28, 2017)

United States v. *Pagan*, No. 16-1496 (July 28, 2017)

United States v. *Hawthorne*, No. 16-3149 (July 28, 2017)

United States v. *Faulkner*, No. 16-2860 (Mar. 19, 2018)

United States v. *Sykes*, No. 16-3525 (Mar. 19, 2018)

United States v. *King*, No. 16-1275 (Dec. 6, 2018)

United States v. *Hoskins*, No. 16-2260 (Dec. 6, 2018)

United States v. *Martin*, Nos. 16-3084 & 16-4212 (Dec. 6, 2018)

Supreme Court of the United States:

Hawthorne v. *United States*, No. 17-8371 (May 14, 2018)

Sykes v. *United States*, No. 18-5373 (Oct. 1, 2018)

Faulkner v. *United States*, No. 18-5966 (Oct. 15 2018)

Hoskins v. *United States*, No. 18-8218 (Apr. 1, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 910 F.3d 320. The order of the district court is not published in the Federal Supplement but is available at 2019 WL 532248.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2018. A petition for rehearing was denied on January 4, 2019 (Pet. App. 39a). On March 26, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including June 3, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of participating in a racketeering conspiracy, in violation of 18 U.S.C. 1962(d); one count of being an accessory after the fact to murder, in violation of 18 U.S.C. 3; one count of conspiring to possess a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 846; and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 17a-20a. The court sentenced petitioner to 310 months of imprisonment, to be followed by five years of supervised release. *Id.* at 21a, 27a-28a. The court of appeals affirmed. *Id.* at 1a-16a.

1. Petitioner and his two co-defendants, Nathaniel Hoskins and Torrie King, were members of a Chicago gang known as the Imperial Insane Vice Lords (Vice Lords), which controlled drug operations in parts of Chicago's west side. Pet. App. 1a-2a. The Vice Lords had an established hierarchy, with their top three positions known respectively as "the King," "the Don," and "the Prince." *Id.* at 3a (internal quotation marks omitted). During the time of the conspiracy, petitioner served as the Prince, and Hoskins "was vying to be the King." *Ibid.*

The Vice Lords "held meetings, controlled certain areas, and used punishments to maintain control over lower-level members." Pet. App. 3a. Petitioner was centrally involved in the gang's actions. *Ibid.* On one occasion, for example, petitioner provided Vice Lords member Raymond Myles with a weapon and ordered him to kill a particular victim whom Myles did not know. *Ibid.* Myles was reluctant to carry out the murder and instead beat the victim with the weapon that petitioner had provided. *Ibid.* On another occasion, petitioner and King plotted to kill a member of a rival gang, and petitioner "recruited Myles to help with this job." *Id.* at 4a.

Petitioner, King, and Myles were thwarted in carrying out the murder, however, when law enforcement arrived at the location of the planned crime and "forced them to abandon the plan." *Ibid.*

On April 27, 2011, Vice Lords member Andre Brown murdered a man named Marcus Hurley outside of a convenience store. Pet. App. 3a; Presentence Investigation Report (PSR) ¶ 18. The murder was committed in retaliation for an incident involving members of a rival gang. Pet. App. 3a. Petitioner, Hoskins, and King "sought to shelter Brown following the murder." *Ibid.* In particular, petitioner helped Brown change his appearance and paid for Brown's hotel room at the Red Roof Inn, where Brown hid after the murder. *Id.* at 12a.

2. A federal grand jury charged petitioner with various crimes related to his actions with the Vice Lords, including participating in a racketeering conspiracy and being an accessory after the fact to Hurley's murder. Superseding Indictment 1-14, 20-23, 37. Hoskins and King were charged in the same indictment and were tried jointly with petitioner in a bench trial. Pet. App. 2a.

At trial, the government elicited testimony from Investigator Andrew Marquez, who interviewed Hoskins about Hurley's murder after Hoskins's arrest. Pet. App. 10a, 44a-45a. The district court, sitting as the trier of fact, allowed the testimony but recognized that it would be improper to consider anything Hoskins said about petitioner and King as evidence of their guilt. *Id.* at 44a, 57a. Investigator Marquez testified that Hoskins told him that "an hour after the murder of Marcus Hurley, [Hoskins] was in a car with [petitioner], Andre Brown, and Gregory Hawthorne, and that he was informed by Andre Brown that he had just committed this murder." *Id.* at 52a.

The government introduced additional evidence at trial that placed petitioner with Hoskins and Brown shortly after the murder of Hurley. For example, another police officer, Sergeant John Xiques, testified that within an hour of the murder he observed petitioner and Hoskins together in a car with two other individuals. Trial Tr. 520 (testimony that this observation was made "approximately a half hour, 45 minutes or so, a little longer" after the murder); *id.* at 529 (testimony that the shooting occurred "[a] little after 5:00" and the observation was made "[s]ometime around 6:00"). Sergeant Xiques testified that petitioner was in the driver's seat and Hoskins was in the front passenger seat. *Id.* at 520, 529. Officer Brian McHale testified that he arrived at the car "a minute or two" later and observed an empty driver's seat, Hoskins in the front passenger seat, Brown and Hawthorne in the back seat, and petitioner standing "across the street." *Id.* at 537-541. Officer McHale described the clothing Brown was wearing at that time, *id.* at 542, which was different than the clothing he had worn an hour earlier as he approached the murder scene, *id.* at 370-371.

The government also introduced evidence to show that petitioner helped Brown hide and change his appearance after the murder. For example, in a recorded call between petitioner and Hoskins that occurred on April 30, 2011, three days after the murder, petitioner told Hoskins that Brown was "up here with me the last couple days" and that it had "been hot, they put the police on the mother f**ker, and all types of s**t." GX 36A, Target Phone 1, Call No. 2507, at 3; see Gov't C.A. Br. 35; see also Trial Tr. 59, 347 (describing how calls were marked as evidence at trial). Additional calls established how petitioner "help[ed] Brown change his

appearance" and "paid for his room at the Red Roof Inn." Pet. App. 68a (citing calls).

The district court found petitioner guilty of racketeering conspiracy, drug conspiracy, being a felon in possession of a firearm, and being an accessory after the fact to Hurley's murder. Pet. App. 4a, 23a-24a. In explaining the evidence that supported conviction of petitioner and his co-defendant King on the accessory count, the court, citing the numbers assigned to recorded phone calls, stated:

> The evidence in this part are the photographs of both [petitioner and King] with Mr. Brown in the days after the murder. And, more important, the tapes, where both admit they are hiding him and, in [petitioner's] case, helping Brown change his appearance. [Petitioner] also paid for his room at the Red Roof Inn. * * * The calls with this count, I wrote down a number of them, but it's 96, getting the key to Mr. Hoskins. 248, King and Brown talking to [petitioner]. 373, [petitioner] and King bringing Brown's girlfriend out. 392, Brown to [petitioner] and King. * * * 721, 731, 774, where [petitioner] admits he is hiding him. * * * 1088, Brown is asking [petitioner] for clothes. 1270, 1470, 1477, 1512, 1523, 1526, 1551, 1577, 1581, 1587, 1879. Some of the last ones, [petitioner] at some point says that [Brown] has cut his hair and they talk about [Brown] getting a new tattoo. 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.

Id. at 68a-69a.

The district court sentenced petitioner to 310 months of imprisonment on the racketeering conspiracy, to be followed by five years of supervised release; 180 months of imprisonment on the accessory count, to be followed by three years of supervised release; and 120 months of imprisonment on each of the remaining counts, to be followed by three years of supervised release. Pet. App. 21a, 27a. The court directed that the sentences run concurrently, for a total of 310 months of imprisonment, to be followed by five years of supervised release. *Ibid.*

3. The court of appeals affirmed. Pet. App. 16a. As relevant here, the court rejected petitioner's argument that his conviction on the accessory count should be vacated on the ground that admission of Hoskins's post-arrest statement violated petitioner's Confrontation Clause rights. *Id.* at 10a-13a. The court recognized that under this Court's decision in *Lee* v. *Illinois*, 476 U.S. 530 (1986), "a judge's reliance on a non-testifying co-defendant's pretrial confession as evidence against the defendant violate[s] the Confrontation Clause." Pet. App. 11a. "The question," the court explained, "is whether the district court relied on Hoskins's unexamined confession to find [petitioner] guilty of being an accessory after the fact." *Id.* at 12a.

Based on a review of the record in this case, the court of appeals found that the district court "did not use Hoskins's pretrial confession against [petitioner]," or "rely on Hoskins's statement in finding [petitioner] guilty." Pet. App. 12a-13a. The court of appeals observed that the district court had "acknowledged that it could not use those statements against [petitioner] because Hoskins did not testify." *Id.* at 12a. And the court of appeals noted that the district court's summary of the evidence establishing petitioner's guilt on the accessory

count showed that "the district court relied on photographs, tapes, testimony from officers, and other circumstantial evidence." *Ibid.* "Because the district court did not use Hoskins's pretrial confession against [petitioner]," the court of appeals found that no Confrontation Clause violation occurred. *Id.* at 12a-13a.

ARGUMENT

Petitioner asks the Court to "summarily reverse the decisions below" (Pet. 12) on the premise that the district court expressly relied on Hoskins's pretrial confession in violation of the Confrontation Clause. But the court of appeals correctly rejected that factbound premise, which lacks support in the record, and petitioner identifies no other basis for review of his Confrontation Clause claim. In any event, any error would be harmless in light of the substantial evidence of petitioner's guilt. And this case is a poor vehicle for review because petitioner challenges only one count of conviction and vacatur of that conviction would have no effect on his multiple concurrent sentences. The petition for a writ of certiorari should be denied.

1. Petitioner argues (Pet. 9-14) that this Court should summarily reverse the court of appeals' decision, asserting the court wrongly determined that "the district court did not use Hoskins's pretrial confession against" him. Pet. App. 12a-13a. But the court did not err in its examination of the record on that issue, much less commit the sort of "depart[ure] from the accepted and usual course of judicial proceedings" that might warrant a summary reversal. Sup. Ct. R. 10(a).

Although petitioner asserts that the court of appeals' decision "runs afoul of *Lee v. Illinois*," Pet. 9 (capitalization and emphasis omitted), the court correctly recognized that this Court's decision in *Lee* v. *Illinois*,

476 U.S. 530 (1986), "enforces the bedrock rule that absent an opportunity for cross-examination, the Confrontation Clause prohibits the use of out-of-court testimony as substantive evidence against the accused." Pet. App. 11a-12a. Petitioner's objection to the court of appeals' decision thus turns not on its articulation of the legal rule drawn from *Lee*, but its resolution of the factual question "whether the district court relied on Hoskins's unexamined confession to find [petitioner] guilty of being an accessory after the fact to murder." *Id.* at 12a.

The court of appeals correctly found that the district court did not rely on Hoskins's confession in adjudicating petitioner's guilt on the accessory count. Pet. App. 12a. The district court expressly recognized that it would be improper to consider Hoskins's out-of-court confession as evidence against petitioner. *Id.* at 44a, 57a. Consistent with that approach, and as the court of appeals summarized, "the district court relied on" other evidence, including "photographs, tapes, testimony from officers, and other circumstantial evidence," to find petitioner guilty of serving as an accessory after the fact to Hurley's murder. *Id.* at 12a. Indeed, the district court catalogued the evidence that it considered in finding petitioner guilty and did not reference Hoskins's post-arrest statement as part of the evidence supporting petitioner's conviction. *Id.* at 68a-69a; see *id.* at 12a.

Petitioner nonetheless contends that the district court "expressly relied on Hoskins's pre-trial statement" when the court stated that petitioner was "'with Mr. Brown right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes.'" Pet. 10 (quoting Pet. App. 68a-69a). Although petitioner contends (Pet. 12) that "the District Court's findings

could only have been based on statements by Martin's non-testifying co-defendant," other record evidence supported the court's finding that petitioner was with Brown shortly after the murder and that Brown had changed his clothing. Sergeant Xiques testified that he observed petitioner, Hoskins, and two other individuals in a car together "[s]ometime around 6:00," within an hour of the murder, which had occurred "[a] little after 5:00." Trial Tr. 529; see *id.* at 520. Officer McHale arrived at the car just "a minute or two" later and observed Hoskins, Brown, and Hawthorne in the vehicle, and petitioner standing "across the street." *Id.* at 537-541. And Officer McHale described Brown's clothing at that time, which was different from the clothing he was wearing an hour earlier as he approached the scene of the shooting. *Id.* at 542; see *id.* at 370-371 (testimony describing surveillance tape of Brown shortly before the murder).

The district court's reference to petitioner being with Brown "right after the murder, within an hour of it, where Mr. Brown has suddenly changed his clothes" appears to have been drawn from that evidence, rather than Hoskins's post-arrest statement. Pet. App. 68a-69a. Indeed, Hoskins said nothing in his post-arrest statement about Brown having changed clothes, whereas Officer McHale identified Brown's changed clothing in his testimony. Trial Tr. 542. The court also made no reference to the most incriminating portion of Hoskins's out-of-court statement—namely, that Brown had explicitly told Hoskins and petitioner about the murder when they met shortly after it occurred. Had the court in fact relied on Hoskins's out-of-court statement as evidence that petitioner and Brown were together shortly after the murder, the court would not

likely have omitted that highly probative additional fact.

Petitioner asserts (Pet. 11) that Hoskins's post-arrest statement provided "the only direct proof of [petitioner's] knowledge of the underlying crime of murder." To the extent petitioner argues that the district court was required to rely on direct evidence rather than circumstantial evidence of petitioner's knowledge, no precedent supports his contention. See, *e.g.*, *United States* v. *Morgan*, 385 F.3d 196, 204 (2d Cir. 2004) (observing that a guilty verdict may be based entirely on circumstantial evidence); *United States* v. *Guel*, 184 F.3d 918, 922 (8th Cir. 1999) (upholding conviction for accessory after the fact based on circumstantial evidence that the defendant knew that the individual he helped had committed the predicate offense). As the court of appeals recognized, the district court permissibly "relied on photographs, tapes, testimony from officers, and other circumstantial evidence" in concluding that petitioner was aware of Brown's crime. Pet. App. 12a. For example, the district court specifically cited "the tapes, where [petitioner and King] admit they are hiding [Brown] and, in [petitioner]'s case, helping Brown change his appearance." *Id.* at 68a. In some of those tapes, petitioner said he had cut Brown's hair and talked about how Brown was "getting a new tattoo." *Ibid.*; see GX 36B, Target Phone 2, Call Nos. 1587, at 1, and 1879, at 6. The court also noted that petitioner "paid for [Brown's] room at the Red Roof Inn," in an effort to hide him. Pet. App. 68a. And the court observed that petitioner was with Brown shortly after the murder, by which point Brown had already changed his clothing. *Id.* at 68a-69a. Based on "all of this" circumstantial evidence, the court found "beyond a reasonable

doubt" that petitioner "knew why [he] w[as] hiding Mr. Brown." *Id.* at 69a.

Petitioner thus cannot demonstrate that the district court used Hoskins's post-arrest statement against petitioner, let alone that the court "expressly relied" on Hoskins's post-arrest statement in finding petitioner guilty. And petitioner's factbound disagreement with the court of appeals' analysis of the record does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("[This Court] do[es] not grant * * * certiorari to review evidence and discuss specific facts.").

2. In any event, this case would be a poor vehicle for review because any potential Confrontation Clause violation was harmless beyond a reasonable doubt and because a ruling in petitioner's favor would not affect his overall sentence.

a. Even if petitioner could establish, contrary to the evidence, that the district court considered Hoskins's out-of-court statements in adjudicating petitioner's guilt, any error was harmless because the other evidence against petitioner not only corroborated the out-of-court statements but also independently supported petitioner's conviction for being an accessory after the fact to Hurley's murder. Indeed, the court separately found petitioner's co-defendant King guilty of being an accessory after the fact to the murder, even though Hoskins's out-of-court statement did not refer to King. See Pet. App. 81a (district court finding that King knew of the murder because "[t]here is just phone call after phone call" demonstrating that King was seeking to shelter Brown and "it would make no sense to be sheltering [Brown]" without knowing of his underlying offense).

As noted, p. 10, *supra*, an overwhelming body of evidence established that petitioner was seeking to shelter Brown, independently supporting the district court's finding that petitioner knew of Brown's crime and sought to help him avoid detection. That evidence, which included "photographs, tapes, testimony from officers, and other circumstantial evidence," Pet. App. 12a, showed that petitioner "admit[ted]" he was "hiding [Brown]," "help[ed] Brown change his appearance," and "paid for [Brown's] room at the Red Roof Inn" in an effort to hide him, *id.* at 68a. Because that evidence showed beyond a reasonable doubt that petitioner was guilty of being an accessory after the fact to Hurley's murder, any error in considering Hoskins's out-of-court statements was harmless. See *Lee*, 476 U.S. at 547 (recognizing "the possibility" that a trial court's error in considering a co-defendant's "untested confession" in violation of the Confrontation Clause "was harmless when assessed in the context of the entire case against [the defendant]").[*]

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[*] Petitioner asserts (Pet. 12) that the government "forfeited" a harmless-error argument below by focusing on the fact that the district court did not rely on Hoskins's post-arrest statements in adjudicating petitioner's guilt. But this Court "may affirm on any ground that the law and the record permit," *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), and the overwhelming evidence of petitioner's guilt that the government identified as the basis for the district court's verdict also illustrates that if the district court had instead relied on Hoskins's out-of-court statement, any Confrontation Clause error would have been harmless. See *Schweiker* v. *Hogan*, 457 U.S. 569, 584-585 & n.24 (1982) (an appellee may assert an argument "for the first time" in this Court "as a basis on which to affirm [the lower] court's judgment" and the argument "may be decided on the basis of the record developed in [the lower] court").

b. Finally, this case would be a poor vehicle for addressing the question presented because petitioner would receive little practical benefit from a decision in his favor. Petitioner challenges only his conviction for being an accessory after the fact to Hurley's murder, which resulted in a 180-month prison sentence that runs concurrently to the sentences for his other counts of conviction. See Pet. 5 ("[Petitioner's] conviction on Count Six—the District Court's determination that [petitioner] was an accessory after the fact after a murder—provides the basis for this petition."); Pet. App. 18a, 27a (Judgment). Petitioner has not separately sought review of his conviction on the racketeering conspiracy count, for which he was sentenced to a concurrent term of 310 months of imprisonment, to be followed by five years of supervised release. Pet. App. 18a, 27a. In the absence of any claim that would affect that longer concurrent term of imprisonment, this Court's review of petitioner's Confrontation Clause claim is particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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