No. _____

# In The
# Supreme Court of the United States

KENNETH E. FAIRLEY,

*Petitioner,*

versus

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

HERBERT V. LARSON, JR.
*Counsel of Record*
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
hvl@hvllaw.com

*Attorney for Kenneth E. Fairley*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED FOR REVIEW

Historically, this Court has limited the evidence admitted pursuant to the "coconspirator exception" to the hearsay rule (FRE 801(d)(2)(E)) to statements made during and in furtherance of *criminal* conspiracies. The limitation results from the Court's understanding of the common-law history of this exception to the hearsay rule, the plain language of the rule, and its legislative history.

The Fifth Circuit, however, along with the Second, Ninth, and D.C. Circuits, have expanded the coconspirator exception to the hearsay rule, and now admit hearsay statements made when there is only a *non-criminal* relationship between the "coventurers." This is in contrast to the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, all of which continue to require that the conspiracy described in FRE 801(d)(2)(E) be a *criminal* one.

In Fairley's case, the crux of the Government's evidence consisted of three tape recordings made by the coconspirator over a year after any criminal conspiracy had ended. Nevertheless, the Fifth Circuit, relying on its earlier holdings that "a conspiracy [for purpose of hearsay exclusion] may be shown 'merely by engaging in a joint plan [] . . . that was non-criminal in nature,'" deemed the recordings admissible, because they evidenced an ongoing, non-criminal "joint venture."

Thus, the issue presented is:

> Whether FRE 801(d)(2)(E) permits the admission of out-of-court statements that were

**QUESTION PRESENTED FOR REVIEW** –
Continued

not made during and in furtherance of a *criminal* conspiracy, but were instead made during a non-criminal "venture."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth E. Fairley respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals affirming Fairley's conviction on Count 1 of the indictment.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Fairley's conviction on Count 1, and reversing his convictions on Counts 2 and 3, is reported as *United States v. Fairley*, 880 F.3d 198 (5th Cir. 2018). The opinion of the United States Court of Appeals for the Fifth Circuit denying Fairley's petition for panel rehearing is not reported, but is attached to this petition as Appendix App. p. 1.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over these proceedings pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Fifth Circuit had jurisdiction over Fairley's appeal pursuant to 28 U.S.C. § 1291. Fairley timely petitioned the Court of Appeals for the Fifth Circuit for a rehearing, which was denied on February 26, 2018. This petition for a writ of certiorari is therefore timely, and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Evidence 801(d)(2)(E) provides:

**Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay**

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

* * *

**(2) An Opposing Party's Statement.** The statement is offered against an opposing party and:

* * *

> **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy.



## STATEMENT OF THE CASE

In March, 2016, a federal grand jury in the Southern District of Mississippi returned a seven (7) count indictment against Kenneth Fairley and Artie

Fletcher.[1] Count 1 alleged a criminal conspiracy (18 U.S.C. § 371) between Kenneth Fairley and Artie Fletcher, specifically, a conspiracy "to commit [an] offense against the United States," the offense being 18 U.S.C. § 641 – theft of government property.

Counts 2 and 3 of the indictment charged Fairley with substantive violations of 18 U.S.C. § 641, and Counts 4-7 alleged violations of 18 U.S.C. §§ 1956 and 1957, *i.e.*, money laundering.[2] Because Fletcher pled guilty the Friday before trial, Fairley was the lone defendant, and he stood trial on only the first three counts of the indictment.

### 1. The scheme, and the trial

Broadly speaking, the indictment alleged a conspiracy to defraud the Department of Housing and Urban Development (HUD), by means of a scheme between Fletcher and Fairley: Fletcher provided "seed money" to a non-profit entity controlled by Fairley, Pinebelt, for two construction projects that were funded by HUD, through the city of Hattiesburg, Mississippi. Fairley did work on the two projects using

---

[1] Although Artie Fletcher was originally named as a co-defendant in the indictment, the Friday before Fairley's trial, Fletcher entered a plea of guilty to a misprision of a felony (18 U.S.C. § 4) in a separate proceeding, and received a sentence of three years supervised release. *See United States v. Artie Fletcher*, #16-00016 in the Southern District of Mississippi, Hattiesburg Division.

[2] Counts 4-7 played no role at trial, because they were dismissed by the Government before the trial began.

"cheap local labor" instead of InterUrban, the purported contractor – a company owned by Fletcher. Fairley thus completed the projects for less than the amounts established by the HUD contracts. Fairley submitted (false) requests to HUD for the full contract amount. Upon receiving the funds from HUD, the "seed money" was partially repaid to Fletcher.

If everything had gone to plan, Fletcher would have gotten all his money back; HUD would have placed two rehabilitated houses in service; and Fairley would have received the difference between the contract price and the actual cost of the rehabilitation work.[3] But things did not go as planned. Although HUD paid out all the funds for the two projects in July and August, *2011*, Fletcher received only part of his "seed money" back. Moreover, the two projects were not completely rehabilitated as of the time that HUD made its two payments. And finally, Fairley was not able to provide HUD with supporting documentation for all the claimed expenses on the projects. Accordingly, a criminal investigation began, one resulting in the indictment of Fletcher and Fairley.

At trial, to prove the existence of the conspiracy (since neither Fletcher nor Fairley testified), the Government relied almost exclusively upon three

[3] In the eyes of the Government, however, regardless of whether this "scheme" "worked," it was nevertheless theft, and conspiracy to commit theft, because Fairley and Pinebelt were only entitled to be reimbursed for the money Pinebelt actually put into the projects, plus a reasonable overhead.

recordings of conversations between Fletcher and Fairley.[4] These conversations were recorded by Fletcher on December 9, *2012*, (*i.e.*, over a year after the money was "stolen" from HUD) without Fairley's knowledge. Fletcher ultimately turned the recordings over to the Government as part of his cooperation with it.

The conversations Fletcher had surreptitiously recorded were admitted in the Government's case-in-chief, over the objection of defense counsel. Relying on FRE 801(d)(2)(E), the Government contended that these conversations were during the conspiracy, and in furtherance of it – even though all of the objectives of the theft conspiracy had been accomplished over a year earlier, and the principal topic of the conversations was the repayment of the balance of the money Fairley owed Fletcher. Nevertheless, the district court admitted the conversations – but without actually listening to the tapes, or even reading transcripts of them.

### 2. The Appeal

Fairley was convicted on all three counts of the indictment. In his appeal to the Fifth Circuit, Fairley

---

[4] The recordings were preserved digitally, on a "thumb drive," which was itself introduced into evidence, over the objection of defense counsel. There were three conversations, but as was explained by counsel for the Government "sometimes the conversation is broken up, and it kind of repeats on another one, if the court please. But there are three separate conversations." The recordings were played for the jury, and the jury was given transcripts of the conversations, which were identified but not introduced into evidence.

argued that his convictions on all three counts should be reversed, because of errors in the indictment, jury instructions, and verdict form. Fairley also argued on appeal that these recordings were hearsay, and improperly admitted, because they were made well after the conspiracy had achieved its objective (the theft of the money), and had thus ended. Moreover, the conversations were not *in furtherance* of the conspiracy, but were instead part of Fletcher's efforts to be repaid, and to gather evidence to support the civil suit he had filed against Fairley for the money owed him.

In its opinion, a panel of the Fifth Circuit held that "[b]ecause errors in the indictment, jury instruction, and verdict form directly undermined Fairley's defense,"[5] Fairley's conviction under counts two and three had to be vacated. The panel affirmed Fairley's conviction on Count 1, but remanded the case to the district court for resentencing on that count, consistent with its "practice."[6]

In affirming Fairley's conviction on Count 1, the panel rejected Fairley's argument that the "prominently featured tape recorded conversations between Fairley and Arthur Fletcher"[7] were improperly admitted, because they were hearsay. It found that "Fairley's argument misunderstands the nature of the

[5] App. p. 2.

[6] Without holding a resentencing hearing, the district court imposed the same sentence on Count 1 as it had previously imposed on Counts 1, 2 and 3, less the special assessment on the two vacated counts.

[7] App. p. 27.

coconspirator exception . . . [because he] focuses on the overt acts charged in the indictment. . . ."[8] Citing *United States v. Nelson*, 732 F.3d 504 (5th Cir. 2013), and *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) for the legal proposition that "a conspiracy [for the purpose of hearsay exclusion] may be shown 'merely by engaging in a joint plan [] that was **non-criminal** in nature,'" the panel found the admission of the tapes was not error, because " . . . the two men had not yet concluded their joint venture"[9] (emphasis added).

Fairley petitioned for rehearing, App. p. 45. Fairley contended that the conspiracy was clearly over and that the phone call was not a "division of the proceeds" but instead a clear effort to collect more money after the proceeds were in fact "long gone." Fairley also argued that such an interpretation of FRE 801(d)(2)(E) was contrary to the case law of the Supreme Court, it was contrary to the legislative history of the rule, and it was a reading of the rule that had been adopted by a *minority* of the Circuits. The Fifth Circuit denied this petition for rehearing on February 26, 2018.

These rulings of the Fifth Circuit (and other Circuits) and the jurisprudence on which they rest, are the impetus for this petition. As shown below, review by this Court is appropriate under no fewer than three of

---

[8] App. p. 29.

[9] App. p. 30.

the considerations set forth in Rule 10 of the Rules of this Court.

## ARGUMENT AND REASONS FOR GRANTING THE WRIT

### Introduction

The coconspirator exception to the hearsay rule, as set out in FRE 801(d)(2)(E), is unquestionably the exception most frequently utilized by prosecutors – both state and federal. Potentially, it comes into play in every criminal case. Moreover, it is a rule with a very low threshold. Although the rule provides that any statement admitted under the rule had to have been made during and in furtherance of *the* conspiracy, sweeping conspiracy indictments coupled with expansive judicial interpretations of "during" and "in furtherance" have greatly extended the reach of the rule.

But until relatively recently, the rule's reach was limited to statements made during a *criminal* conspiracy. As this Court has implied, and several of the Circuits have explicitly stated, any other interpretation of FRE 801(d)(2)(E) conflicts with the plain language of the rule itself; its legislative history; and the common-law sources of this "deeply rooted" hearsay exception. Most importantly, expanding the rule to permit hearsay testimony about *non-criminal* ventures during a *criminal* trial expands the scope of the rule

tremendously.[10] Review by this Court is required to ensure that the important trial rights protected by the rule remain intact.

### 1. The Fifth Circuit has decided this important federal question in a way that conflicts with relevant decisions of this Court.

The exception created by FRE 801(d)(2)(E) was last addressed at length by this Court in *Bourjaily v. United States.*[11] In *Bourjaily*, the Court

> . . . granted certiorari to answer three questions regarding the admission of statements under Rule 801(d)(2)(E): (1) whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability.[12]

Significantly, in answering these questions, it was a given to the Court that the "conspiracy" addressed in the rule was criminal in nature:

---

[10] *See* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (2010).

[11] 483 U.S. 171 (1987).

[12] *Bourjaily v. United States*, 483 U.S. 171, 173 (1987).

> While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Rather, we have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements. To accommodate these competing interests, the Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration. *Id.*, at 65–66. Last Term in *United States v. Inadi*, 475 U.S. 387 (1986), we held that the first of these two generalized inquiries, unavailability, was not required when the hearsay statement is the out-of-court declaration of a coconspirator. Today, we conclude that the second inquiry, independent indicia of reliability, is also not mandated by the Constitution.[13]

As *Inadi* explains, at common law, the "indicia of reliability" were provided by the *criminal* nature of the venture:

> Those same principles [regarding the availability of the declarant] do not apply to coconspirator statements. Because they are

[13] *Id.* at 182.

made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an **illegal** conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their **illegal** aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an **illegal** conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

> These points distinguish co-conspirators' statements from the statements involved in *Roberts* and our other prior testimony cases. Those cases rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between co-conspirator statements and live testimony at trial. To the contrary, co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, "only clear folly would dictate an across-the-board policy of doing without" such statements. Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, The Future of Confrontation, 77 Mich.L.Rev. 1185, 1193, n.35 (1979). The admission of co-conspirators' declarations into evidence thus actually furthers the "Confrontation Clause's very mission" which is to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985), quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970).[14]

Since *Bourjaily*, the Court has not had occasion to further discuss the exact parameters of FRE 801(d)(2)(E). On two occasions, however, it has addressed, albeit not directly, the coconspirator exception to the hearsay rule.

---

[14] *United States v. Inadi*, 475 U.S. 387, 394–96 (1986) (emphasis added).

In *Crawford v. Washington*,[15] the Court revisited its decision in *Ohio v. Roberts*, and held that out-of-court statements that were *testimonial* in nature could not be admitted unless the declarant was both unavailable, and there had been a prior opportunity for cross-examination of the declarant. But *Crawford* left for another day the question of whether the core holding in *White v. Illinois*[16] – which had generally addressed the relationship between the hearsay rules and the Confrontation Clause – had been overruled:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.
>
> Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that

---

[15] *Crawford v. Washington*, 541 U.S. 36 (2004).

[16] *White v. Illinois*, 502 U.S. 346 (1992).

are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e.g.*, *Lilly*, 527 U.S., at 140–143 (BREYER, J., concurring); *White*, 502 U.S., at 366, THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125–131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U.S., at 352–353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under

> any definition. This case does, however, squarely implicate the second proposal.[17]

Four years after *Crawford*, the Court decided *Giles v. California*.[18] In *Giles*, the Court was called upon to decide whether a defendant forfeited his Sixth Amendment right to confront a witness against him when a judge had determined that a wrongful act by the defendant made the witness unavailable to testify at trial. In concluding that the theory of "forfeiture by wrongdoing" was not a founding-era exception to the right of confrontation, the Court's majority discussed, in passing (and in a footnote) the coconspirator exception to the hearsay rule:

> The dissent identifies one circumstance—and only one—in which a court may determine the outcome of a case before it goes to the jury: A judge may determine the existence of a conspiracy in order to make incriminating statements of co-conspirators admissible against the defendant under Federal Rule of Evidence 801(d)(2)(E). *Bourjaily v. United States*, 483 U.S. 171 (1987), held that admission of the evidence did not violate the Confrontation Clause because it "falls within a firmly rooted hearsay exception"—the test under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the case that *Crawford* overruled. In fact it did not violate the Confrontation Clause for the quite different reason that it was not (as an **incriminating** statement in furtherance of the conspiracy

---

[17] *Crawford v. Washington*, 541 U.S. 36, 59–61 (2004).

[18] *Giles v. California*, 554 U.S. 353 (2008).

> would probably never be) testimonial. The co-conspirator hearsay rule does not pertain to a constitutional right and is in fact quite unusual.[19]

In sum, although the Court has now conclusively determined that the Confrontation Clause is not implicated by the admission of coconspirator hearsay testimony at a criminal trial, it has never held, much less even intimated, that the "deeply rooted" rule embodied in FRE 801(d)(2)(E) encompasses non-criminal "coventure" evidence at a criminal trial.

### 2. The Circuit Courts are in conflict over whether the "conspiracy" in FRE 801(d)(2)(E) must be criminal in nature for the exception to apply.

Notably, the Fifth Circuit was the first Circuit to hold that the term "conspiracy" in FRE 801(d)(2)(E) extended to non-criminal joint ventures – even when the out-of-court statements were being offered against a defendant in a criminal case. But a careful examination of the case in which the Fifth Circuit so held – *United States v. Postal*[20] – and upon which all subsequent cases in the Fifth Circuit rest shows that the Circuit made a serious error in its holding.

---

[19] *Id.* at 374 (emphasis added).

[20] *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

In *Postal*, the Fifth Circuit, in a footnote, upheld the district court's decision to admit a ship's logbook, on the grounds that:

> . . . the logbook was properly admissible as a declaration of a coconspirator during and in furtherance of the conspiracy under Fed.R.Evid. 801(d)(2)(E). We do not, in making this determination, assume the conclusion we are seeking to reach that a conspiracy existed when the boat was purchased because it is not necessary that the conspiracy upon which the admissibility of the statement is predicated be that charged. **Moreover, the agreement need not be criminal in nature.** These observations are borne out by the legislative history of rule 801(d)(2)(E). "While (this) rules refers to a conconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator even though no conspiracy has been charged." S.Rep.No.93-1277, 93rd Cong., 2d Sess. 24, Reprinted in (1974) U.S. Code Cong. & Admin.News, pp. 7051, 7073. It is clear to us that the voyage was a "joint venture" in and of itself apart from the illegality of its purpose and that the logbook was therefore admissible as nonhearsay under the rule.[21]

But as is evident from a careful reading of this legislative history – and the cases cited in it – the Senate

---

[21] *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (emphasis added).

committee did not intend to "expand" 801(d)(2)(E) to reach non-criminal ventures – that was the purpose of 801(d)(2)(*D*). What the Senate Judiciary Committee (not the Advisory Committee) actually said in an "Additional Commentary" was:

> Rule 801(d)(2)(E). Hearsay Definitions: Statements Which Are Not Hearsay
>
> > The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine **that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been *charged***. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied* 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301,1304 (7th Cir. 1969).

1974 U.S.C.C.A.N. 7051, 7073 (emphasis added).

Noticeably absent from this "Additional Commentary" is any statement that the conspiracy *need not be criminal in nature*. And the two cases cited actually refute the suggestion that evidence of a non-criminal venture supports the admission of hearsay.

In *United States v. Rinaldi*[22] the Court of Appeals upheld the admission of hearsay, because it was part of a *criminal enterprise*, even though one had not been charged.

*United States v. Spencer* makes precisely the same point:

> It is hardly open to question but that defendant and Davis were engaged in a common enterprise, with the objective of dealing in and disposing of narcotics. * * * Defendant's acts of receiving money from Davis and delivering the heroin are proof of his participation in the **joint criminal venture**.[23]

*Id*. at 1304.

In short, through a misreading the Senate Committee's "Additional Commentary" – a misreading completely undermined by the cases specifically cited by the Senate Committee – the *Postal* Court radically expanded the scope of hearsay evidence admissible pursuant to FRE 801(d)(2)(E), by taking "crime" out of the word "conspiracy."

And the Fifth Circuit has never revisited its original erroneous conclusion, but has instead built upon it, up to, and including the decision in this case.[24]

---

[22] 393 F.2d 97, 99 (2nd Cir.), *cert. denied*, 393 U.S. 913 (1968).

[23] 415 F.2d 1301, 1304 (7th Cir. 1969).

[24] The genealogy of the current rule in the Fifth Circuit is relatively straightforward: *United States v. Nelson*, 732 F.3d 504, 516 (5th Cir. 2013), the case cited in *Fairley*, relies on *United*

The other Circuits fall neatly into two irreconcilable groups. The First,[25] Third,[26] Fourth,[27] Sixth,[28]

---

*States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011). *El-Mezain* in turn relies directly on *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). Although *El-Mezain* also cites *United States v. Holy Land Found. For Relief & Dev.*, 624 F.3d 685, 694 (5th Cir. 2010), and *United States v. Saimiento-Rozo*, 676 F.2d 146, 149 (5th Cir. 1982), *Holy Land* cites only *Saimiento-Rozo*, which in turns relies exclusively upon *Postal*.

[25] *United States v. Morrow*, 39 F.3d 1228, 1235 (1st Cir. 1994); *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997); *United States v. Fahey*, 769 F.2d 829, 838 (1st Cir. 1985); *see United States v. Ciresi*, 697 F.3d 19, 26 (1st Cir. 2012) (determining whether a single conspiracy or multiple conspiracies is constituted by "a set of *criminal activities*") (emphasis added); *see United States v. Dworken*, 855 F.2d 12, 25 (1st Cir. 1988) (determining whether an "illegal" conspiracy had been adequately established to qualify under the exception).

[26] *United States v. Jannotti*, 729 F.2d 213, 218 (3rd Cir. 1984); *United States v. Pecora*, 798 F.2d 614, 628 (3rd Cir. 1986); *United States v. Inadi*, 748 F.2d 812, 817 (3rd Cir. 1984) (emphasis added), *overruled on other grounds by United States v. Inadi*, 475 U.S. 387, 388 (1986).

[27] *United States v. Urbanik*, 801 F.2d 692, 697 (4th Cir. 1986); *see United States v. Broome*, 732 F.2d 363, 364 n.1 (4th Cir. 1984) (finding a sufficient showing of "an illicit association"); *see United States v. Chindawongse*, 771 F.2d 840, 845 (4th Cir. 1985) (finding a sufficient showing of participation in an "unlawful plan").

[28] *United States v. Lucido*, 486 F.2d 868, 869 (6th Cir. 1973); *United States v. Craig*, 522 F.2d 29, 31 (6th Cir. 1975) (holding that compliance with the coconspirator exception requires independent evidence to establish "a conspiracy or joint criminal venture"); *see United States v. Townes*, 512 F.2d 1057, 1058 (6th Cir. 1975) (holding a conspirator statement was admissible when evidence indicated the existence of "a criminal joint venture" between the co-defendants); *United States v. Blankenship*, 954 F.2d 1224, 1231 (6th Cir. 1992).

Seventh,[29] Eighth,[30] Tenth,[31] and Eleventh[32] Circuits all require that the association be a *criminal* one for the hearsay exception to be available.

---

[29] *United States v. Kendall*, 665 F.2d 126, 131 (7th Cir. 1981); *United States v. Coe*, 718 F.2d 830, 836 n.3 (7th Cir. 1983).

[30] *United States v. Meggers*, 912 F.2d 246, 248 (8th Cir. 1990); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Eisenberg*, 807 F.2d 1446, 1453 (8th Cir. 1986).

[31] *United States v. Arriola-Perez*, 137 F. App'x 119, 130 n.8 (10th Cir. 2005) (quoting *Crawford v. Washington*, 541 U.S. at 73 (Rehnquist, C.J., concurring); *but see United States v. Lahue*, 261 F.3d 993, 1008 n.20 (10th Cir. 2001).

[32] *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1050 (11th Cir. 1987); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982), *overruled on different grounds by United States v. Goldin Indus.*, 219 F.3d 1268, 1271 (11th Cir. 2000); *see United States v. Dickerson*, 248 F.3d 1036, 1050 (11th Cir. 2001) (ruling a statement satisfied the "in furtherance" requirement of the exception whenever it facilitated communication "to engage in the unlawful ends of the conspiracy").

Conversely, the Second,[33] Fifth, Ninth[34] and D.C.[35] Circuits have no such requirement, but instead permit out-of-court statements even when the partnership is a completely legal one. Accordingly, review by this Court is appropriate, to provide guidance to all courts regarding this recurring issue.

### 3. This is an important question of federal law which should be settled by this Court.

The role that coconspirator testimony now plays in federal criminal trials cannot be overstated. One need only look at the number of reported appellate

---

[33] *United States v. Russo*, 302 F.3d 37, 44 (2nd Cir. 2002); *see United States v. Stewart*, 433 F.3d 273, 293 (2nd Cir. 2006) (finding the "agency theory" applies to a "partnership for some criminal objective").

[34] *United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988) (internal quotations and citations omitted), *overruled on other grounds by People of Territory of Guam v. Ignacio*, 10 F.3d 608, 612 n.2 (9th Cir. 1993); *United States v. Siders*, 712 F. App'x 601, 603 (9th Cir. 2017) (quoting *United States v. Layton*, 855 F.2d at 1400); *see United States v. Peralta*, 941 F.2d 1003, 1007 (9th Cir. 1991) (the coconspirator exception permits the introduction of hearsay statements related to a joint venture with a lawful objective); *United States v. Siders*, 712 F. App'x 601, 603 (9th Cir. 2017) (quoting *United States v. Layton*, 855 F.2d at 1400); *see United States v. Peralta*, 941 F.2d 1003, 1007 (9th Cir. 1991) (the coconspirator exception permits the introduction of hearsay statements related to a joint venture with a lawful objective).

[35] *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983); *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006); *see United States v. Brockenborrugh*, 575 F.3d 726, 735 (D.C. Cir. 2009) (admission under the coconspirator statement exception is not contingent upon the finding of "an unlawful combination").

decisions addressing legal and factual questions arising under FRE 801(d)(2)(E) to have a sense, albeit a very imperfect one, of the frequency and intensity of the legal battles that are fought every day over the meaning and scope of this rule.[36]

This Court has stated more than once that a literal interpretation of the Confrontation Clause "could bar the use of any out-of-court statements when the declarant is unavailable. . . ."[37] However, the Court "rejected that view as 'unintended and too extreme.'"[38] But in removing the "availability of a witness" as a bar to coconspirator testimony, there was no indication whatsoever that the Court intended to remove "criminality" from the rule.

Doing so not only runs the risk of having the 801(d)(2)(E) "exception" swallow the larger rule,[39] it produces irreconcilable evidentiary conflicts at the trial level. It is impossible to give a coherent jury instruction regarding the weight a juror is to give to out-of-court testimony regarding a *non-criminal* agreement, in making his or her decision whether the different, *criminal* agreement charged in the indictment

---

[36] As of the date of this filing, FRE 801 had over 101,000 citing references, and FRE 801(d)(2)(E) was addressed or discussed in no fewer than 4,695 reported decisions.

[37] *Bourjaily v. United States*, 483 U.S. 171, 182 (1987), quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

[38] *Id.*

[39] *See* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (2010).

exists beyond a reasonable doubt. Permitting out-of-court testimony about *non-criminal* agreements in *criminal* trials also ignores the "during" and "in furtherance" requirements of the rule – not to mention the general rule of relevancy. Review by this Court of this important question is needed.

## CONCLUSION

In their dissenting opinion in *United States v. Inadi*,[40] Justices Marshall and Brennan sounded a cautionary note, as the Court's majority rejected "unavailability" as a requirement under FRE 801(d)(2)(E):

> The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee. See F. Heller, The Sixth Amendment 104 (1951); Stephen, The Trial of Sir Walter Raleigh, in 2 Transactions of the Royal Historical Society 172 (4th Series 1919). But the Framers, had they prescience, would surely have been as apprehensive of the spectacle of a defendant's conviction upon the testimony of a handful of surveillance technicians and a very large box of tapes recording the boasts, faulty recollections, and coded or ambiguous utterances of outlaws.

[40] 475 U.S. 387, 411 (1986).

For Kenneth Fairley, the "box of tapes" was reduced to a digital thumbdrive. And the "outlaws" were reduced to non-criminal "coventurers." One can only imagine what the Framers would have thought of Fairley's trial.

Wherefore, this Court is respectfully urged to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HERBERT V. LARSON, JR.
*Counsel of Record*
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
hvl@hvllaw.com

*Counsel for Kenneth E. Fairley*