No. 18-____

IN THE

Supreme Court of the United States

SEMYYA CUNNINGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 807 of the Federal Rules of Evidence, the residual hearsay exception, provides that a hearsay statement that is not admissible under one of the other exceptions is not excluded by the rule against hearsay if, among other things, "the statement has equivalent circumstantial guarantees of trustworthiness." The question presented is:

Whether a finding of "circumstantial guarantees of trustworthiness" may be premised on a district court's belief in the truth of the hearsay statement, and its assessment of the credibility of the hearsay witnesses, rather than the circumstances surrounding the making of the statement.

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Semyya Cunningham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals upholding the application of the residual hearsay exception and affirming Cunningham's conviction, App. 1a, is available at 761 F. App'x 203 (4th Cir. 2019). The district court's order granting the government's motion in limine and ruling the hearsay at issue admissible, App. 17a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 807(a) provides:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

STATEMENT OF THE CASE

The residual hearsay exception of Federal Rule of Evidence 807 was intended to be used "very rarely, and only in exceptional circumstances." Fed. R. Evid. 803(24), advisory committee notes (1974).[1] Fearful that "an overly broad residual exception could emascu-

[1] The residual hearsay exception was originally enacted as two separate provisions of the Federal Rules of Evidence, one for available declarants (Rule 803(24)) and one for unavailable declarants (Rule 804(b)(5)). In 1997, those rules were combined into Rule 807, with no intended change in meaning. *See* Fed. R. Evid. 803(24), 804(b)(5) (repealed 1997).

late the hearsay rule," *id.*, the drafters of the exception included rigorous requirements to limit its application, the most important of which is that a statement possess "circumstantial guarantees of trustworthiness." Fed. R. Evid. 807(a)(1); *see also United States v. El-Mezain*, 664 F.3d 467, 498 (5th Cir. 2011) (trustworthiness is "the lodestar of the residual hearsay exception analysis").

In this insurance fraud case, the Fourth Circuit remarkably held that Kourtnee Green's hearsay statements could meet this requirement, despite circumstances belying trustworthiness, simply because the district court believed them. Green, who died several years before trial, purportedly told her mother and an insurance-fraud investigator that she did not sign the checks giving the proceeds of her life insurance policy to Petitioner Cunningham, her best friend. The district court found this hearsay trustworthy despite undisputed evidence that:

(i) Green withheld the existence of her policy from her mother for months, despite suffering from terminal cancer;

(ii) upon learning of the policy, Green's mother claimed forgery to the insurer while impersonating Green; and

(iii) Green's mother threatened to evict Green from her home, despite her terminal cancer, if she contradicted those impersonated claims of forgery.

The Fourth Circuit held that the district court could "discount" these circumstances because the idea that Green had *actually* given the proceeds to Cunningham—and, therefore, that her hearsay denials of the same were *actually* false—was "not as

credible" as the government's witnesses' competing accounts that she had not.

This decision warrants this Court's review and correction. It deepens an existing circuit split over the proper role (if any) of credibility in the trustworthiness standard, and contravenes both the text and purpose of Rule 807(a)(1), which is properly concerned with a declarant's *incentives* for truth or falsity, not the *actual* truth or falsity of his statements. This case is an excellent vehicle for this court to visit this recurring issue, as it is a one-issue case. The petition for certiorari should be granted.

A. Factual Background

Petitioner Cunningham was a practicing nurse who sold insurance part-time. Pets. C.A. Br. 4. In April 2014, she sold a $250,000 life insurance policy to Kourtnee Green, her lifelong best friend. App. 2a-3a. Three months later, Green was diagnosed with pancreatic cancer. *Id.* at 3a. No longer able to live independently, Green gave up her apartment and moved in with her mother. *Id.* at 3a.

Following Green's diagnosis, and with her consent, Cunningham took over payment of the policy premiums. Pets. C.A. Br. 5. She also changed Green's contact and beneficiary information on the policy, replacing Green's address with her own and Green's mother and brother with two of Cunningham's close friends. *Id.* In addition, she submitted a request for "accelerated death benefits," pursuant to which she received, in January 2015, a check for $182,219. App. 2a-3a. Cunningham deposited the insurance check in Green's bank account and then transferred the funds to herself through a personal check drawn on Green's account. *Id.* at 3a.

Green's mother, Senoria Rogers, observed the transactions in Green's checking account. App. 3a. Although aware of Green's cancer diagnosis and responsible for her care, she knew nothing of Green's policy and was startled by the amounts. Pets. C.A. Br. 6-7. As Rogers acknowledged at trial, her daughter had never told her of the insurance policy despite the fact that they had been living together for six months and jointly dealing with Green's terminal cancer. *Id.* She asked her daughter about the transactions, and Green purportedly responded that she did not know the source of the deposit or give a personal check to Cunningham. App. 3a-4a.

Upon learning the source of the funds, Rogers telephoned the insurer to claim fraud and forgery by Cunningham. App. 3a-4a. While making these accusations—which were recorded by the insurer—Rogers pretended to be Green, giving Green's full name, social security number, and other identifying information as her own. Pets. C.A. Br. 7. According to Rogers, Green was in the next room when this occurred, and thus knew of (and consented to) the impersonation. App. 21a-22a.

Shortly thereafter, Cunningham discovered that her accounts were frozen and telephoned Green. She asked Green to acknowledge that she had signed the checks, at which point Rogers interrupted and warned Green that if she did so—which Rogers said would be a "lie[]"—Green would have to go live with Cunningham or her brother. App. 4a.

Two weeks later, Green and Rogers jointly participated in an unrecorded telephone interview with a fraud investigator for the insurance company. App. 4a. With her mother on the line, Green confirmed Rogers' forgery allegations, telling the investigator

that she did not change the address or beneficiary information on the policy, request accelerated death benefits, or give the policy proceeds to Cunningham. *Id.* Green later made substantially the same assertions in forgery affidavits and a recorded interview with police, during which her mother reminded her, on tape, of her earlier threat of eviction. *Id.*; Pets. C.A. Br. 9.

Green died six months later, in September 2015. App. 4a. Rogers and Green's brother received the death benefits from her insurance policy. *Id.* at 3a.

B. Proceedings Below

In August 2017, Cunningham was indicted in the United States District Court for the Eastern District of Virginia on charges of fraud and money laundering. App. 5a. Ten days before trial, the government moved in limine under Rule 807 to admit Green's statements to her mother and the fraud investigator that she did not give the insurance proceeds to Cunningham. *Id.* Anticipating Cunningham's defense that Green voluntarily gave her the insurance proceeds, the government asserted that Green's hearsay was the "[m]ost [p]robative [e]vidence" on that issue, and went "to the very heart of whether a fraud was committed." Pets. C.A. Br. 10, 27. The government did not seek to admit the forgery affidavits or the recorded police interview, but offered them, for purposes of its pretrial motion only, as "corroborating evidence" with respect to the moved-upon statements. *Id.* at 10.

After taking live testimony and listening to the recordings of both the impersonation and the police interview, the district court ruled Green's hearsay admissible. App. 14a. On the issue of trustworthiness, the district court noted that it "accept[ed]" and

"believe[d]" the testimony of the government's witnesses, finding their accounts "consistent." *Id.* at 15a-16a. The hearsay was thereafter admitted in evidence at Cunningham's trial, and she was convicted on all counts. *Id.* at 5a.

Post-trial, the district court issued a written order expanding upon its reasoning. App. 17a. For Green's statements to her mother, the district court found trustworthiness in the fact that the women had "a close relationship," and the statements were made "in their mutual home." *Id.* at 20a. For the later statements to the investigator, the district court found that Green had made them "to ensure the proceeds of her life insurance policy were given to the beneficiary of her choice," and that a false statement "would risk the company's denial of the benefits, not to mention risk violating state and federal law." *Id.*

The district court acknowledged that Green had been threatened with eviction if she contradicted her mother's impersonated forgery claims, but held that, even assuming the threat was "more than bluster," Green's statements were still trustworthy because Cunningham had failed to prove them false. App. 21a. As the district court wrote: "[T]he Defendant has presented no evidence to suggest that Green was *actually persuaded to lie* because of that 'threat.'" *Id.* (emphasis added).

On appeal, Cunningham argued that this was error, noting that "guarantees of trustworthiness" depended not on whether Green *actually* lied, but whether her circumstances showed *incentives* to lie, which was clearly the case for a dependent declarant like Green. Pets. C.A. Br. 13-14. Like the district court, however, the court of appeals viewed the issue as one of actual rather than potential falsity. As the court of appeals

saw it, the district court had "considered and rejected" the idea that Green could have gifted the proceeds to Cunningham, finding it "not as credible" as the competing accounts of the government's witnesses. App. 10a. The court of appeals found no abuse of discretion in the district court's "discounting [Cunningham's] version of events," and finding trustworthiness on that basis. *Id.* at 13a. The court of appeals also rejected the idea that the district court's findings were improperly premised on corroborating evidence, holding that "the district court did not look beyond the immediate circumstances of the deceased witness['s] statements to other corroborating evidence in the record." *Id.* at 12a (internal citation and quotation marks omitted).

Importantly, the "discounting" upheld by the court of appeals did not involve disputing the *facts* of Green's situation. That is, the district court did not make, and the court of appeals did not uphold, findings that Green's mother had *not* actually impersonated or threatened Green, or that Green had *not* withheld the policy from her mother. Those facts were either admitted by Green's mother or captured on audiotape (or both), and, hence, they were not Cunningham's "version of events." App. 13a. Instead, the "version of events" that the district court was entitled to "reject[]" was the claim that Green had actually given the insurance proceeds to Cunningham, and, hence, that her hearsay statements were false.

REASONS FOR GRANTING THE PETITION

The decision below merits this Court's review. It conflicts with the recent decision of the Eleventh Circuit in *Rivers v. United States*, 777 F.3d 1306 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 267 (2015), which held that trustworthiness under the residual excep-

tion may *not* be premised on the credibility of witnesses or a judicial finding as to the truth of the hearsay. In addition, the Fourth Circuit's analysis was deeply flawed, because the ultimate truth or falsity of evidence—hearsay or otherwise—is an issue reserved for the trier of fact. Rule 807 requires that a court make a threshold finding of reliability based on "circumstantial guarantees of trustworthiness." The manifest purpose of this requirement is defeated if a court may overlook circumstances belying trustworthiness when, in the court's view, the hearsay appears to be true. Finally, the question whether credibility plays a role in the trustworthiness of hearsay is a recurring one that will not be answered by the forthcoming amendments to Rule 807. Here, that question is squarely presented and outcome-determinative, making this case ideal for this Court's review. This case thus meets all of the Court's criteria for further review, and certiorari should be granted.

A. The Decision Below Conflicts with a Decision of the Eleventh Circuit and Deepens an Existing Conflict Over the Role of Credibility in Trustworthiness.

The decision below conflicts with the decision of the Eleventh Circuit in *Rivers*, 777 F.3d 1306. This Court should intervene to resolve that conflict.

1. *Rivers* arose out of a post-conviction claim of ineffective assistance under 28 U.S.C. § 2255. 777 F.3d at 1307. The claimant, Rivers, alleged that his trial counsel had failed to advise him to plead guilty, causing him to lose a potential reduction in sentence for acceptance of responsibility. *Id.* at 1308-09. Rivers' lawyer had died, and thus to rebut Rivers' claim of deficient advice, the government called a

different lawyer, who had represented Rivers' co-defendant at trial, to testify that Rivers' lawyer had said that he had discussed a possible guilty plea with Rivers and that Rivers would not accept it. *Id.* at 1310-11.

Over Rivers' hearsay objection, the district court admitted this statement under the residual exception, finding it trustworthy due to the credibility of the lawyer-witness, whose account the district court accepted over the "incredible and perjurious" account of Rivers, and the fact that the hearsay simply rang true:

> [It] strains credulity for this Court to believe that an experienced and competent criminal defense attorney such as [Rivers' lawyer] would not have fully discussed * * * a government plea offer with his client before trial.

777 F.3d at 1311.

The court of appeals held that this was error. Acknowledging the Third Circuit's statement in *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978), that the "reliability of the reporting of the hearsay by the witness" was a proper part of the trustworthiness analysis, the court of appeals rejected this idea. 777 F.3d at 1313 n.6. The court of appeals reasoned that such a witness could be cross-examined like any other, and that the "fundamental question" was instead the trustworthiness of the absent declarant. 777 F.3d at 1313. More fundamentally, the court of appeals also observed that the trustworthiness of the declarant could *not* be premised on crediting the hearsay account—or, conversely, on rejecting Rivers' account that the hearsay was false—because such an

approach would fail to address all incentives potentially facing the declarant:

> If [Rivers' lawyer] was providing constitutionally effective assistance of counsel, we agree with the district court that he would have had every incentive to tell the truth to [witness]. But if he was failing as completely as Rivers alleges, he would have had every incentive to dissimulate.

Id. at 1315.

Thus, under the Eleventh Circuit's approach, "circumstantial guarantees of trustworthiness" can exist *only* where the declarant is incentivized to tell the truth under *any* version of the underlying facts, a standard that necessarily eschews favoring one account of events over another. In this case, by contrast, the Fourth Circuit found no error where "the district court considered Cunningham's counter-narrative and explained its reasoning for discounting her version of events." App. 13a. The two decisions are thus in direct conflict, and this Court's review is warranted.

2. The Eleventh Circuit's decision in *Rivers* conflicts not only with the decision below, but also with unpublished decisions of district courts in the Third Circuit that have relied on *Bailey* and expressly considered witness credibility as a factor in trustworthiness under Rule 807. In the tax-evasion prosecution of *United States v. Manfredi*, No. 07-352, 2009 WL 3823230, at *1 (W.D. Pa. Nov. 13, 2009), criminal defendants sought to call a close relative to testify to the hearsay statement of a deceased relative that he had given the defendants "more money than they w[ould] ever need." Citing *Bailey*, the district

found this statement lacking in trustworthiness, and hence inadmissible under the residual exception, in part because of the witness's familial relationship to the defendants and, hence, her "inherent bias in favor of them." *Id.* at *3.

Pecorella-Fabrizio v. Boheim, No. 08-348, 2011 WL 5834951, at *5 (M.D. Pa. Nov. 16, 2011), a civil-rights action decided by a different district judge in the Third Circuit, similarly followed *Bailey* and cited the "inherent bias" of the witness as a reason to exclude hearsay proffered under Rule 807. There, to oppose the defendants' summary judgment motion, the plaintiffs sought to introduce the hearsay statement of a deceased eyewitness that she had observed police involvement at the incident in issue. Again relying on *Bailey*, the court held the hearsay lacked the trustworthiness required by Rule 807 in part because the witness who heard the declarant-eyewitness make the statement was herself one of the plaintiffs. *Id.*

The fact that these cases cited witness credibility as a reason *not* to find trustworthiness—rather than, as in the district court's decision in *Rivers*, as a reason to find it—does not distinguish them from *Rivers*, and hence there is a clear conflict between Eleventh and Third Circuit case law. This was the conclusion of Professor Capra, the Reporter to the Judicial Conference Advisory Committee on Evidence Rules, who cited this very conflict when he noted, "There is a dispute about whether the trustworthiness of the in-court witness should be taken into account." Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 Fordham L. Rev. 1577, 1605 (2017). The only part of Professor Capra's analysis that may (now) be inaccurate is his observation that the Third Circuit is "alone" in

assessing the reliability of the in-court witness under Rule 807. *Id.* at 1606. As the decision below in this case shows, witness credibility is an accepted factor for judicial consideration in the Fourth Circuit as well.

B. The Decision Below Is Erroneous.

The court of appeals erred in holding that Green's hearsay could be deemed trustworthy based on the district court's findings as to the truth of the hearsay and the credibility of witnesses. That error warrants this Court's review and correction.

1. Federal Rule of Evidence 807 allows for the admission of hearsay not covered by a recognized exception upon a threshold determination by the trial court that, among other things, the hearsay possesses "circumstantial guarantees of trustworthiness." Fed. R. Evid. 807(a)(1). The adjective "circumstantial" indicates that the "guarantees" required by the Rule pertain to the situation of the declarant at the time of the statements. This reading of the Rule's plain language is consistent with the rationale for the hearsay exceptions recognized at common law (and currently reflected in Rules 803 and 804), which derive their status as exceptions from the circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 819-20 (1990). Proper considerations for trustworthiness therefore include any facts bearing on the declarant's contemporaneous incentives to speak truthfully or falsely.

Not included in "circumstantial" guarantees of trustworthiness, however, are facts extrinsic to the declarant's situation, even if highly probative of the ultimate veracity of the hearsay. Thus, a declarant's out-of-court statement is not "circumstantial[ly]"

trustworthy merely because it happens to align with other evidence. This conclusion holds true for all of the recognized hearsay exceptions, not merely the residual exception. A statement does not, for example, "become admissible as a present sense impression merely because someone else testifies to the same impression at trial." David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. Rev. 867, 879 (1982).

The fact that a court may find the other evidence credible, and thus *believe* the hearsay to be true, does not change this analysis. For all hearsay exceptions, a court's role is limited to assessing the factual prerequisites for application of the exception. Is the statement an excited utterance? Is it a dying declaration? Whether the statement is true or false is an entirely separate question that plays no role in the court's analysis. *Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 578 (6th Cir. 2013) ("[T]he factual accuracy of the statement is not pertinent when considering whether the hearsay exception applies."); *see also* Fed. R. Evid. Art. VIII, advisory committee notes (1972) ("For a judge to exclude evidence because he does not believe it has been described as 'altogether atypical, extraordinary.'" (quoting James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932, 947 (1962)). That is because the ultimate question of the truth or falsity of hearsay—and the evidentiary weight it should be given—is "left to the sole discretion of the trier of fact." *United States v. Kalymon*, 541 F.3d 624, 633 (6th Cir. 2008).

2. *Idaho v. Wright* teaches that the same analysis prevails even if one ignores the word "circumstantial" and simply applies the common law principles that underlie the Federal Rules of Evidence. In *Wright*, this Court held that, for hearsay admitted under Idaho's analogue to Rule 807, the "particularized guarantees of trustworthiness" required by the Confrontation Clause could arise only by virtue of the hearsay's "inherent trustworthiness, not by reference to other evidence at trial." 497 U.S. at 822. As the Court reasoned, the concerns underlying the hearsay rule could be mollified only by circumstances making cross-examination "superfluous," even if the truth of the hearsay statement could be shown by extrinsic evidence. *Id.* at 820. As the Court observed:

> A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made * * * may even be such that the declarant is particularly *un*likely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant's state of mind when he made the statements; the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.

497 U.S. at 822-23. The Court thus drew a distinction between the ultimate *truth* of a hearsay statement and the *reliability* of the declarant, holding that only evidence of the latter could serve as "guarantees of trustworthiness," given the rationale for the hearsay rule.

To be sure, *Wright* was decided under the Confrontation Clause, not the Federal Rules of Evidence. But

its analysis was grounded entirely in common law evidentiary principles rather than constitutional ones. Accordingly, its logic and holding should apply even where, as here, constitutional concerns are absent.

3. The Fourth Circuit's conclusion that Green's hearsay could be deemed trustworthy based on the district court's "discounting [Cunningham's] version of events" does violence to the plain text of Rule 807. App. 13a. Whether phrased in terms of the implausibility of Cunningham's defense or the plausibility of Green's hearsay—which are, of course, the same thing—the question whether Green was telling the truth bears no relationship to the contemporaneous circumstances surrounding the hearsay that Rule 807 requires a district court to evaluate. Simply "discounting" the possibility that Green lied does nothing to address her incentives to lie, and instead bypasses that threshold step altogether. App. 13a.

Even setting aside Rule 807's plain language, the decision below similarly fails the test of common-law hearsay principle. By concluding that Green's hearsay was trustworthy *because* it was true, the district court usurped the role of the trier of fact and collapsed the distinction between trustworthiness and truth that this Court articulated in *Wright*. More fundamentally, no statement can be said to be "trustworthy" if one must first believe it to be true in order to conclude it was not coerced. Yet that was exactly the analysis of the Fourth Circuit.

4. There can be no doubt that, had the district court properly focused its inquiry on "circumstantial guarantees of trustworthiness," Green's hearsay would have been excluded. Nothing about Green's statements suggests that they were any more trustworthy

than ordinary, inadmissible hearsay, and the undisputed facts of her situation show that they were not.

For reasons known only to her—but fully consistent with Cunningham's defense that Green intended to leave her life insurance proceeds to Cunningham, her best friend—Green withheld the existence of her policy from her mother for six months, despite suffering from terminal cancer and living together under the same roof. She did not deny giving the proceeds to Cunningham until her mother happened to learn of both the policy and the proceeds entirely by accident. When that happened, Green's mother committed Green to a particular version of events, first by claiming forgery while impersonating Green and then by threatening her with eviction if she contradicted that claim. These undisputed facts are far more suggestive of coercion than free choice.

Moreover, even if these circumstantial pressures were absent, the district court's affirmative reasons to find trustworthiness in Green's statements still would not withstand scrutiny. The district court found that Green's initial statements to Rogers were trustworthy because they were made "in their mutual home," and that Green and Rogers had a "close relationship" which included Rogers "caring for Green * * * as Green battled cancer." App. 20a. Even if it were self-evident that a close personal relationship bolsters reliability as a general matter—and courts disagree on that point[2]—it does not do so in circumstances where the

[2] *United States v. End of Horn*, 829 F.3d 681, 686 (8th Cir. 2016) (residual exception inapplicable because nothing "inherently trustworthy" about statement to former spouse); *United States v. Atkins*, 618 F.2d 366, 373 (5th Cir. 1980) (residual exception inapplicable because "Inglet's relationship to Atkins tended to make the letters unreliable").

statement concerns the personal interests of the listener. As Green's next of kin and caretaker, Rogers stood to benefit from Green's life insurance policy, and ultimately did. Green's closeness to and dependence on her mother would only have made it harder for her to be honest if, in fact, she had given her life insurance proceeds to Cunningham. The district court's reasoning thus fails to account for the relationship of the subject matter of a statement to its circumstantial reliability, and, relatedly, the difficulty of telling a dear relative that she will not inherit after one's death.

The district court's affirmative reasons to find trustworthiness in Green's later statements to the fraud investigator are even less convincing. Its claim that Green's statements would "ensure the proceeds of her life insurance policy were given to the beneficiary of her choice," App. 20a, simply *assumes* that Green's hearsay statements reflected her genuine intent, wholly discounting her mother's prior claims of forgery and threat of eviction. And the record was completely devoid of evidence that Green was ever advised that a false statement to the insurer would "risk the company's denial of the benefits, not to mention risk violating state and federal law." *Id.* Nor were any potential legal consequences obvious, as Green was not under oath during the interview in question. To be sure, a trial court's evidentiary decisions are subject to review for abuse of discretion, a deferential standard. But that standard is *always* violated when, as here, the court's decision rests on "facts" with no basis in the record. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling . . . on a clearly erroneous assessment of the evidence.").

C. The Role of Credibility in the Residual Exception's Trustworthiness Standard is a Recurring Issue Critical to the Integrity of the Hearsay Rule.

The question whether the trustworthiness of residual hearsay may be premised on a judicial finding as to the truth of the hearsay is a recurring one and fundamental to maintaining the integrity of the hearsay rule. It will not be resolved by the forthcoming amendments to Rule 807, and accordingly this Court's intervention is necessary.

1. As Professor Bellin has observed, "The residual exception was never intended to serve as a platform for the creation of broad hearsay exceptions." Jeffrey Bellin, *The Case for eHearsay*, 83 Fordham L. Rev. 1317, 1322 (2014). Quite to the contrary, the drafting history of the residual exception demonstrates great reluctance on the part of both the Advisory Committee and Congress to allow any "catchall" hearsay exception in a category-based system. As initially proposed, the residual exception allowed for the admission of hearsay not covered by a recognized exception if supported by "comparable" guarantees of trustworthiness. Fed. R. Evid. 803(24), advisory committee notes (1974). This proposal was rejected by the House of Representatives for "injecting too much uncertainty into the law of evidence." *Id.* (internal quotation marks omitted). The version ultimately enacted into law replaced "comparable" with "equivalent," consistent with the drafters' intent *not* "to establish a broad license for trial judges to admit hearsay state-

ments that do not fall within one of the other exceptions." *Id.*[3]

There is a "consensus of scholarly opinion" that, contrary to the drafters' intent, "courts construing the residual exceptions have been quite liberal in finding evidence trustworthy enough to be received." Roger C. Park, *Hearsay, Dead or Alive?*, 40 Ariz. L. Rev. 647, 651-52 (1998). As a result, application of the residual exception has not been limited to "exceptional circumstances" as originally intended. Fed. R. Evid. 803(24), advisory committee notes (1974). As one commentator observed in 1993, the federal residual exceptions and their state equivalents "have been reported in more than 140 federal cases and in more than ninety state cases" since their initial enactment in 1975. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 Fla. St. U. L. Rev. 787, 790 (1993). A similar analysis conducted by Professor Capra in 2017 suggested that the trend had continued, as he catalogued "about 200 cases" involving the residual exception that had been reported over the period from 2007 through 2017. Capra, *supra*, p. 12, at 1603.

Predictably, the over-use of the residual exception has led to inconsistency in the case law, such that "the admissibility of hearsay evidence in any given case varies from federal court to federal court based on the peculiar approach followed in a particular jurisdiction." David A. Sonenshein & Ben Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay*

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[3] The drafting history of the residual exception is thoroughly recounted in a 1979 Congressional Research Service report. *See* Murl A. Larkin, Cong. Research Serv., Rep. No. 79-94, Residual Exceptions to the Hearsay Rule under the Federal Rules of Evidence 3-4 (1979).

Rule?, 64 U. Kan. L. Rev. 715, 724 (2016). Lacking guidance from this Court, lower courts developed their own standards, with the result that some circuits have "carved out specific, categorical types of out-of-court statements that are routinely introduced under the residual exception, including bank records and other business records, plea agreements to [P]onzi schemes, statements made in furtherance of conspiracies, and testimony given by child witnesses." *Id.* (footnotes omitted). This is contrary to the principle that categorical hearsay exceptions should be created only by Congress, as well as to the drafters' intent that the residual exception would be reserved for case-by-case applications.

3. The pending amendment to Federal Rule of Evidence 807 is intended to address this pronounced confusion in the case law. As of December 2019, absent contrary action by Congress, the text of Rule 807(a) will read as follows:

> Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804;
>
> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

Fed. R. Evid. 807(a) (effective Dec. 1, 2019).

With respect to the trustworthiness requirement, the text of the amended Rule differs from the current one by requiring that guarantees of trustworthiness be merely "sufficient," rather than "equivalent" to those supporting the recognized exceptions. In addition, it expressly allows a court to consider corroborating evidence when assessing trustworthiness, resolving an issue that had previously divided courts. Capra, *supra*, p. 12, at 1584 & n.29; Sonenshein & Fabens-Lassen, *supra*, p. 20, at 727-30.

Importantly for present purposes, however, the revisions to Rule 807 do not resolve the question presented here, i.e., whether a court may find that hearsay is trustworthy based upon a credibility assessment. In fact, the accompanying Advisory Committee Notes are explicit that credibility is an issue separate from corroboration, and not properly part of the trustworthiness inquiry:

> In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. * * * To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Fed. R. Evid. 807 (effective Dec. 1, 2019), advisory committee notes (2017). Although the Notes are "a useful guide in ascertaining the meaning of the Rules," *Tome v. United States*, 513 U.S. 150, 160 (1995) (plurality opinion), they are not themselves part of the Rules, and hence the portion quoted above does not moot the question presented here. Accordingly, this Court's review of the decision below is still appropriate.

4. This case is an ideal vehicle for this Court to address the question whether credibility plays a role in assessing trustworthiness under Rule 807. It presents a situation in which a court discounted circumstances belying trustworthiness *solely* on the basis of a credibility determination, *not* because of corroborating evidence. Indeed, the court of appeals rejected the idea that the district court had premised the admission of Green's hearsay on corroboration. App. 12a. The decision below thus boils down to the holding that the district court could find trustworthiness in Green's hearsay specifically because it believed the witnesses to the hearsay, despite circumstances belying trustworthiness and even *without* extrinsic evidence supporting the truth of the hearsay. Rarely is an issue so carefully crystallized and presented.

In addition, this case is ideal for another reason, namely the singularity of the issue raised. The admission of Green's hearsay was the only issue raised on appeal, as well as outcome-determinative at trial. By the government's own telling, Green's hearsay was the "[m]ost [p]robative [e]vidence" of fraud, Pets. C.A. Br. 10, 27, and indeed it was the only *direct* evidence at all on the only disputed issue in the case, Green's intent and actions with respect to her policy proceeds. All of the government's other trial evidence was fully

consistent with Cunningham's claim that Green intended to leave her insurance proceeds to her best friend but, for reasons which require no explanation, did not want her immediate family to know she was making such a generous gift.[4]

Finally, although the case law on the trustworthiness standard of the residual exception does not fall into in any clear fact pattern, this case is as emblematic as any that the Court will encounter in this field because it presents the issue of trustworthiness in stark terms. Further percolation in the lower courts is unlikely to yield a case that better displays the tension between "guarantees of trustworthiness" and a judicial finding of truth, or one more representative of that broader pattern. If the court of appeals was correct that the district court's subjective view of the truthfulness of Green's hearsay was a proper consideration, then its decision must be affirmed. But if not, not.

* * *

Kourtnee Green's hearsay was admitted based on the district court's mistaken view of the trustworthiness requirement and the court of appeals' mistaken view of the judicial role in applying that requirement.

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[4] The Fourth Circuit passed on the question of whether the admission of Green's hearsay was harmless error. But there can be no dispute that evidence which the government itself described as the most important in the case—and the centerpiece of the government's argument at summation—had a material impact on the jury's verdict. Moreover, any argument of harmless error runs afoul of the fact that to be admitted in the first place, the district court had to find—and did—that Green's hearsay met Rule 807's requirement of being "more probative" on the point in question than any other evidence that the proponent of the hearsay—here, the government—could obtain.

As a result, Semyya Cunningham was wrongly convicted. She deserves a new trial, and the fair application of the Federal Rules of Evidence demands no less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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