No.

In the

Supreme Court of the United States

October Term 2017

Casey Peebles,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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July 25, 2018

Question Presented

In Petitioner's jury trial on federal drug offenses, the district court allowed a prosecution witness to testify to out-of-court statements made by a nontestifying codefendant that implicated Petitioner in a conspiracy to possess heroin with the intent to distribute it. The district court relied on Federal Rule of Evidence 801(d)(2)(E) for admission of the out-of-court statements. In *United States v. Inadi,* 475 U.S. 387 (1986), this Court held that the confrontation clause did not require a showing of unavailability of the declarant as a condition to admission of out-of-court statements by a nontestifying coconspirator. In *Bourjaily v. United States,* 483 U.S. 171 (1987), this Court held that the Confrontation Clause did not require the district court to make inquiry into the independent indicia of reliability of the out-of-court statements. But in *Inadi* and *Bourjaily*, the out-of-court statements had been recorded. In Petitioner's trial, however, there were no recordings of the original statements, just testimony from a police informant about what the nontestifying codefendant allegedly said.

Do *Inadi* and *Bourjaily* adequately protect an accused's Fifth Amendment due process right to a fair trial and his Sixth Amendment right to confrontation when the out-of-court statements admitted under Fed. R. Evid. 801(d)(2)(E) were not recorded and are a significant part of the prosecution's case?

Parties to the Proceedings Below

The Petitioner, Casey Peebles, was the defendant in the district court and the appellant in the Eighth Circuit. He has been represented at all times in the United States District Court (Eastern District of Missouri) and United States Court of Appeals (Eighth Circuit) by Thomas Patrick Deaton Jr., an attorney in private practice as a solo practitioner, whose mailing address is 6614 Clayton Road, #231, St. Louis, Missouri 63117.

Respondent, the United States of America, has been represented by United States Attorneys Richard G. Callahan and Jeffrey B. Jensen, Eastern District of Missouri; Acting United States Attorney Carrie Costantin; and Assistant United States Attorneys Michael A. Reilly, Edward L. Dowd III, Stephen R. Casey, and Tiffany G. Becker, 111 South Tenth Street, 20th Floor, St. Louis, Missouri 63102. Respondent prosecuted the case in the district court and was the appellee in the Eighth Circuit.

There were several codefendants in the district court under the initial and superseding indictments. Casey Peebles was the only defendant who went to trial. The codefendants were Thomas Rander, Michael E. Shorty, Joseph Rander, Bobby Gene Rander, Benjamin Lowe, Quantiae Harris, Daquarious Blackwell, Tyrone Short Sr., Hartzell Moore Sr., Leah Douglas, and Lisa Rander.

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Petition for Writ of Certiorari

Casey Peebles respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 5, 2018, which affirmed his two concurrent sentences of 120 months' imprisonment imposed by the United States District Court for the Eastern District of Missouri on January 3, 2017.

Opinions Below

The slip opinion of the court of appeals, *United States v. Peebles*, 883 F.3d 1062 (8th Cir. 2018), appears in the Appendix to this petition. The Eighth Circuit denied petitions for rehearing and rehearing en banc on May 10, 2018. Although there is no reported opinion by the district court, a copy of the Judgment in a Criminal Case filed January 17, 2014, in Eastern District of Missouri case number 4:14-cr-00345-ERW-10 appears in the Appendix. A portion of the trial transcript is included in the Appendix with the district court's ruling on the Fed. R. Evid. 801 issues at issue in this petition.

Jurisdiction

The United States District Court for the Eastern District of Missouri originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Thereafter, Petitioner appealed his sentence to the United States Court of Appeals for

the Eighth Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Eighth Circuit filed its opinion and judgment on March 5, 2018. The court of appeals denied timely petitions for rehearing en banc and rehearing by the panel on May 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions Involved

U.S. Const. amend. V

> No person shall be held to answer for a capital, other otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Fed. R. Evid. 801 Definitions That Apply to This Article; Exclusions from Hearsay

> (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying as the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

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

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

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

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or

believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

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

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D), or the existence of the conspiracy or participation in it under (E).

Fed. R. Evid. 802. The Rule Against Hearsay

Hearsay is not admissible unless any one of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

21 U.S.C. § 841(a)(1)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or

21 U.S.C. § 841(b)(1)(B)(i)

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(B) In the case of a violation of subsection (a) of this section involving–

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

. . .

If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . .

18 U.S.C. 3553(e)

Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Statement of the Case

This is a direct appeal of Casey Peebles's convictions after a jury trial for conspiring to distribute 100 grams or more of a substance containing heroin (Count II) and for possessing 100 grams or more of a mixture or substance containing heroin with the intent to distribute it (Count V). (ECF Doc. 621 in case number 4:14-cr-00345-ERW-10.) The district court imposed two concurrent sentences of 120 months' imprisonment, two concurrent eight-year terms of supervised release, and a $200.00 special assessment (ECF Doc. 706).

A grand jury superseding indictment filed on October 15, 2015, charged Petitioner Peebles with two felony offenses involving heroin in violation of 21 U.S.C. § 841(b)(1)(B)(i). (ECF Doc. 328.) Count II charged Tyrone Short Sr., Hartzell Moore Sr., and Casey Peebles with conspiring with each other and with Michael E. Shorty, Joseph Rander, and other persons to distribute heroin and to possess heroin with the intent to distribute it. (ECF Doc. 328 at 2–3.) Count V charged Casey Peebles, acting together with Leah Douglas and others on or about April 2, 2013, with possessing 100 grams or more of a mixture or substance containing heroin, also in violation of 21 U.S.C. § 841(b)(1)(B)(i). (ECF Doc. 328 at 4.)

Petitioner Peebles's indictment resulted from his arrest on the night of April 2, 2013, after he left an apartment at 5911A Highland Avenue in the City of St. Louis. (TR., Vol. II, 278–84.) On that night police officers

seized 247.3 grams of a mixture containing heroin from a passenger, Leah Douglas, in the Land Rover Petitioner Peebles was driving. (Trial Tr., Vol. III, 90.) A group of people, Joseph Rander and others related to him, used the Highland Avenue apartment to distribute controlled substances in St. Louis that they had obtained in California. (Trial Tr., Vol. II, 161–89.) Petitioner Peebles testified in his defense that he did not know Leah Douglas possessed heroin on the night of April 2. (Trial Tr., Vol. IV, 114.) He also testified that he did not know any of the Randers or their associates in their drug trafficking business. (Trial Tr., Vol. IV, 136.)

Law officers' first contact with the Randers in the St. Louis metropolitan area was on September 29, 2011, on Interstate 70 in St. Charles County, Missouri. (Trial Tr., Vol. I, 7–8.) Almost a year later, on August 27, 2012, an agent of the Drug Enforcement Administration seized 1,974 grams of cocaine from Marnina James after stopping her at a bus station in Albuquerque, New Mexico. (Trial Tr., Vol. I, 33–42.) Marnina James had transported cocaine to St. Louis about twenty times. (*Id.* at 13–14.)

Police arrested Quantiae Harris after a traffic stop in St. Louis on March 20, 2013. (Trial Tr., Vol. II, 151.) He began to provide law officers with information about the Randers' drug trafficking. (Trial Tr., Vol. II, 151–55, 192.) Quantiae Harris continued to act as an informant for the police in April 2013. (Trial Tr., Vol. II, 224–25.) He told law officers that the

Randers had a kilogram of heroin in a second floor apartment at 5911A Highland Avenue. (*Id.* at 207–09.) As a result of information from Harris, police officers assigned to a DEA drug task force in the City of St. Louis began watching 5911A Highland Avenue late in the evening of April 2, 2013. (Trial Tr., Vol. II, 272–77.) These officers were Joseph Somogye, Mark Biondolino, Blake Witzman, and Michael Sisco. (*Id.*) They parked in the 5800 block of Highland Avenue with a view of the building at 5911A. (Trial Tr., Vol. II, 273; Vol. III, 29.)

Around midnight, Casey Peebles arrived at that address driving a Land Rover. (Trial Tr., Vol. II, 278.) Petitioner Peebles went inside the apartment at 5911A Highland and returned to his Land Rover within five to fifteen minutes. (*Id.*) Police received a telephone call from Quantiae Harris saying that someone had just left the apartment with a quantity of heroin. (Trial Tr., Vol. II, 281; Vol. III, 36.)

The police, who had seen Casey Peebles enter and leave the apartment around midnight, followed his Land Rover to the end of the 5900 block at Highland's intersection with Hodiamont Avenue. (Trial Tr., Vol. II, 281-82.) The police stopped the Land Rover after it made a right turn onto Hodiamont. (Trial Tr., Vol. III, 36.) The police removed the driver (Petitioner Peebles), the front seat passenger (Vernon Wescott), and the rear seat passenger (Leah Douglas). (Trial Tr., Vol. II, 283–84.) At this point, despite investigating the Randers' drug trafficking since 2011, the officers

had never come across the name Casey Peebles or a nickname for him. (Trial Tr., Vol. III, 132.)

The police did not find any heroin after initially searching Petitioner Peebles, his passengers, and the Land Rover. (Trial Tr., Vol. III, 46–47.) The police called for a woman police officer to do a more thorough search of Leah Douglas. (Trial Tr., Vol. II, 45.) Officer Erin Bercherer arrived, searched Douglas, and found a Ziploc bag of powdery substance in the right pants leg of Douglas. (*Id.* at 45–46.) Laboratory analysis of the substance established that the bag contained 247.3 grams of a substance containing heroin. (Trial Tr., Vol. III, 90.)

A canine officer, Jermaine Jackson, also came to the scene of the Land Rover stop. (Trial Tr., Vol. III, 190.) His canine partner, Barron Z, had been trained to detect the odor of narcotics. (Trial Tr., Vol. III, 187.) Officer Jackson walked his dog around the Land Rover and allowed him to go inside front and rear seats of the Land Rover. (Trial Tr., Vol. III, 192–94.) Barron Z alerted to the presence of the odor of illegal drugs on the passenger-side door frame (*Id.* at 193) and in the rear seat (*Id.* at 194), where Leah Douglas had been sitting (Trial Tr., Vol. III, 39).

A group of officers set out to arrest Petitioner Peebles on the October 2014 indictment on December 11, 2014. (Trial Tr., Vol. IV, 6–7; Defense Exh. F.) The officers first went to home of Petitioner Peebles's elderly mother, Rose Peebles, at 1468 Engelcrest Drive in St. Louis County, a single

family house. (Trial Tr., Vol. IV, 9–10.) Petitioner Peebles was not there. (Trial Tr., Vol. IV, 10.)

That same morning the officer next went to 2237 Outlook Drive in St. Louis County. (Trial Tr., Vol. IV, 10.) This was a single family house purchased by Donna Ward in 2009 before she married Petitioner Peebles in November 2012. (Trial Tr., Vol. IV, 13.) Donna Ward Peebles came home after 7:00 a.m. from her job as a nurse's assistant at a hospital in St. Charles, Missouri. (Trial Tr., Vol. IV, 22–23.) She discovered that her house had been ransacked by the officers when they arrested Petitioner Peebles there that morning. (*Id.* at 36–37.) The officers did not have a search warrant for the house. They arrested Casey Peebles there. (Trial Tr., Vol. IV, 36.)

A jury trial began in district court on October 3, 2016. (Trial Tr., Vol. I, 4.) Over defense counsel's objection based on Fed. R. Evid. 801, 802, and 805, Quantiae Harris testified to statements Joseph Rander said in the apartment on the night of April 2. (Trial Tr., Vol. II, 198–206.) Harris testified that Joseph Rander made the following statements to him:

- Yes, he had called me and told me he needed me to work the door. (Trial Tr., Vol. II, 207.)
- He said Twin people fit'n to come through, we fit'n to be on, we fit'n to be back together. (Trial Tr., Vol. II, 208.)
- He had told me I need you to work the door; so when he come, I

need you to open the door for me. (Trial Tr., Vol. II, 209.)

- Well, he had got a call, he had got a call from him telling him he was about to pull up; so he had told me to go to the door. (Trial Tr., Vol. II, 209.)
- When he had left after I had notified the police that he had got the drugs and left, when I had went back downstairs, that's when Joseph Rander had told me he had gave him 9 ounces, he had fronted him. (Trial Tr., Vol. II, 222.)

Harris testified that he did not know the person's name who came to the door on the night of April 2 (Trial Tr., Vol. II, 211), and he had never seen him before (Trial Tr., Vol. II, 257). Harris made a courtroom identification of Petitioner Peebles (Trial Tr., Vol. II, 152) as the person who took "stuff" from Joseph Rander on the night of April 2 (Trial Tr., Vol. II, 214.).

The panel rejected all six arguments on appeal by Casey Peebles:

- the panel concluded the evidence was sufficient to convict Petitioner Peebles on the counts of conspiracy and possession with intent to distribute (Arguments I and II in Petitioner's Brief);
- the panel concluded that Joseph Rander's out-of-court statements were admissible as non-hearsay statements by a coconspirator under Fed. R. Evid. 801(d)(2)(E) (Argument III);

- the panel ruled, in reliance on *Ohler v. United States,* 529 U.S. 753, 759-60 (2000), that Petitioner Peebles could not raise as an issue about his impeachment by an *Alford* plea because he introduced evidence of the plea during his direct examination by defense counsel (Argument IV);
- the panel concluded there was no violation of Fed. R. Evid. 702 in allowing a police officer to testify from his experience that drug dealers use young women like Leah Douglas as drug couriers (Argument V); and
- the panel ruled that the district court did not abuse its discretion in prohibiting cross-examination of police officers about their participation in the 2006 World Series ticket scandal (Argument VI).

Petitioner Peebles filed a timely petition for rehearing by the panel and en banc. The Eighth Circuit denied those petitions on May 10, 2018. This petition for a writ of certiorari follows within ninety days.

Reasons for Granting the Petition

1. This petition presents an important federal question that should be settled by this Court: whether Fed. R. Evid. 801(d)(2)(E) should allow admission of testimony about unrecorded nontestimonial statements made by a nontestifying codefendant who was available to testify for the prosecution–testimony that otherwise would not be admissible according to the rule against hearsay, Fed. R. Evid. 802.

There is a hole in this Court's reasoning in its decisions with regard to the Sixth Amendment's confrontation clause and the admission of out-of-court statements by a nontestifying coconspirator under Fed. R. Evid. 801 (d)(2)(E). The hole leaves unprotected an accused's Sixth Amendment right to confrontation and his Fifth Amendment due process right to a fair trial when the out-of-court nontestimonial statements were not recorded and are a significant part of the prosecution's case. This Court's reasoning is explained in two decisions, *United States v. Inadi,* 475 U.S. 387 (1986), and *Bourjaily v. United States,* 483 U.S. 171 (1987). In those decisions, this Court held that the Sixth Amendment's Confrontation Clause did not require (1) the showing of unavailability of the declarant as a condition to admission of out-of-court statements of a nontestifying coconspirator (*Inadi*)

and (2) a trial court inquiry into the independent indicia of reliability of a statement by a coconspirator (*Bourjaily*). *United States v. Inadi,* 475 U.S. 387, 399 (1986); *Bourjaily v. United States,* 483 U.S. 171, 182 (1987). In those two cases, unlike Petitioner's, there was no dispute that the nontestifying declarant made the statements whose admission was at issue because the Government presented recordings of the statements. In *Inadi* and *Bourjaily,* therefore, there was no dispute that a coconspirator had made the statements admitted under Fed. R. Evid. 801(d)(2)(E). This Court reasoned that the Confrontation Clause's reliability concerns were adequately addressed because Fed. R. Evid. 801(d)(2)(E)'s approach to statements of a coconspirator had "a long tradition of being made outside the compass of the general hearsay exclusion." *Bourjaily,* 483 U.S. at 183. It is time for this Court to re-examine whether reliability should be a concern in Confrontation Clause jurisprudence in the circumstances of Petitioner's case.

In Petitioner's case (1) no evidence exists for the out-of-court statements themselves except the testimony of a codefendant who is testifying in the hope of a reduced sentence and (2) the out-of-court statements are a significant part of the prosecution's case. Petitioner Peebles was at a disadvantage because, even according to the Government's version of events, Petitioner was not present when the statements were allegedly made. The foundation for admission of the statements is further

weakened in Petitioner's case because he disputed his involvement in any conspiracy with the declarant or the witness. All the reasons for admitting other types of hearsay because of their indicia of reliability as exceptions under Fed. R. Evid. 803 to the rule against hearsay do not apply to Fed. R. Evid. 801(d)(2)(E). Under the circumstances, the reliability of hearsay evidence should be based on more that just a past practice of admitting coconspirator statements.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801. Hearsay is inadmissible unless otherwise allowed by federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. Fed. R. Evid. 802. The Federal Rules of Evidence contain a number of exceptions to the rule against hearsay regardless of the availability of the declarant as a witness. Fed. R. Evid. 803. There are exceptions, for example, for statements made as excited utterances, Fed. R. Evid. 803(2); statements made for medical diagnosis or treatment, Fed. R. Evid 803(4); records of a regularly conducted activity, Fed. R. Evid. 803(6); and public records, Fed. R. Evid. 803(8). All of these exceptions are admissible even though they are hearsay. The reasoning behind their admission is that their circumstances make them reliable. In the case of business records, for example, the authors "are generally disinterested parties." David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal*

Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1403 (1972). The Advisory Committee Notes to Fed. R. Evid. 803 provide explanations for the hearsay exceptions in that rule.

In contrast, the so-called coconspirator exception to the rule against hearsay in Rule 803(d)(2)(E) provides that a coconspirator's statements are not hearsay. There is no basis for admitting coconspirator statements for their reliability because the statements are neither reliable nor trustworthy, mainly because of the witness. In Petitioner's case, witness Quantiae Harris was a codefendant who had pleaded guilty and was testifying in the hope of a reduced sentence. He had prior convictions. While he was on pretrial release in this case, he picked up a new drug charge in federal court to which he also pleaded guilty. It defies common sense to base a law on the belief that conspiring criminals are likely to be telling the truth. Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule,* 52 Mich. L. Rev. 1159, 1166 (1954). Petitioner's case illustrates this. Something more should be required for admission of coconspirator statements to assure their reliability when offered as evidence of an accused's guilt.

Petitioner presents this Court with the situation that concerned the three dissenters in *Bourjaily. See Bourjaily,* 483 U.S. 171, 202 n.11 (Blackmun, J,, dissenting).

Given the fact that the reliability foundation of this exemption

> is not as strong as that for traditional hearsay exceptions, I am inclined to agree that the Confrontation Clause might well demand a particularized reliability analysis where a statement is a significant part of the prosecution's case, before such statements could be admitted over a defendant's objection.

Id. (citations omitted). A significant part of the prosecution's case against Petitioner Peebles was the testimony of Quantiae Harris about Joseph Rander's alleged out-of-court statements on the night of April 2. Petitioner's counsel made a motion in limine before trial and a timely objection during trial to Harris's testimony. The Government used Harris's testimony about Rander's alleged statements to connect Petitioner to the Randers' drug-dealing conspiracy. Prior to the night of April 2, 2013, law enforcement officers, who had been investigating the Randers since September 2011, had no information that Peebles had any connection to the Randers.

"The hearsay rule and the requirements of the Confrontation Clause help to ensure that the evidence used to convict a defendant is reliable, trustworthy, and, importantly, subject to adversarial testing." Jessica K. Weigel, *Hearsay and Confrontation Issues Post-Crawford: The Changing Course of Terrorism Trials,* 89 N.Y.U. L. Rev. 1488, 1490 (2014). Under the particular but not unusual circumstances of Petitioner's case, the Confrontation Clause demands "a particularized reliability analysis." Instead of routinely admitting Quantiae Harris's testimony under Rule 801(d)(2)(E), the district court should have considered the totality of circumstances of his testimony, including whether he was testifying as part

of a plea agreement in the hope of a reduced sentence.

2. This petition presents a troublesome evidentiary issue that commonly arises in federal trials on charges of conspiring to possess illegal drugs with the intent to distribute them: the relationship between testimony under Fed. R. Evid. 801(d)(2)(E) and sentence leniency under 18 U.S.C. § 3553(e).

It is no coincidence that *Inadi, Bourjaily,* and Petitioner's case all involved charges of conspiring to commit federal offenses involving controlled substances. The criminal docket at any federal courthouse is full of drug cases. More than anything else, Fed. R. Evid. 801(d)(2)(E) is a rule of necessity for law enforcement.

> It has also been candidly proposed by commentators, and implicitly acknowledged by the Advisory Committee for the Federal Rules of Evidence, that the exception is largely a result of necessity, since it is most often invoked in conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial.

United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979) (citing Levie, *Hearsay and Conspiracy,* 52 Mich. L. Rev. 920, 989 (1959); Advisory Committee's Note to Rule 801, quoted in 4 Weinstein's Evidence at 801–36). "Frankly, the underlying co-conspirator exception to the hearsay rule makes little sense as a matter of evidence policy." *United States v. Goldberg,* 105 F.3d 770, 775 (1st. Cir. 1997) (affirming conviction after trial in which out-of-

court conversations admitted under Fed. R. Evid. 801(d0(2)(E)). Under the necessity rationale, it would be difficult for the prosecution to prove a defendant's participation in an illegal conspiracy without introducing evidence of coconspirator statements to establish a defendant's agreement to participate in the conspiracy. That is especially true in most conspiracy cases involving illegal drugs because everything about the enterprise is illegal and conducted as much as possible in secret.

The foundation requirements for admission of out-of-court statements under Fed. R. Evid. 801(d)(2)(E) do not protect the accused's constitutional rights under the Confrontation and Due Process Clauses. Rule 801(d)(2)(E) requires that the out-of-court statement "was made by the party's coconspirator during and in furtherance of the conspiracy." Caselaw requires evidence independent of the statements themselves to lay the foundation. "[T]he independent evidence requirement is not so much a requirement as an excuse." Davenport, 85 Harv. L. Rev. at 1388.

> By allowing the prosecution to appeal to independent evidence as an excuse for introducing otherwise unreliable hearsay, the courts are saying in effect: "As long as you can show me one piece of independently admissible evidence tending to prove the defendant's guilt, we will deny the right of confrontation as to these other pieces."

Id. at 1390.

> It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it is quite another to say that because we hate conspirators, we will treat harshly everyone *accused* of conspiracy.

Id. at 1391 (Italics in the original) (footnote omitted). The Government accused Petitioner Peebles of conspiring to commit drug crimes, but he denied participating in any drug crimes or having any relationship with the Rule 801(d)(2)(E) declarant, Joseph Rander.

The federal sentencing guidelines for drug cases provide powerful incentives for offenders, once indicted, to race to the courthouse to cooperate with Government in the hope of a favorable guilty plea agreement. *See* U.S.S.G. § 5K1.1, Substantial Assistance to Authorities. In addition to those Guidelines, mandatory minimum sentences set by statute limit the sentencing authority of the district court. *See* 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). Only the Government can request a sentence below a mandatory minimum set by statute–but only if the offender has provided "substantial assistance" to the Government. 18 U.S.C. §§ 3553(e). "Substantial assistance" usually means participating in a proffer interview with government prosecutors and law enforcement agents. It often means testifying for the Government in a drug conspiracy trial. It is then up to the Government to decide whether the defendant's assistance has been substantial and enough to qualify for a motion for downward departure either below the Guidelines sentencing range or below the mandatory minimum sentence. 18 U.S.C. § 3553(e).

The reward for substantial assistance in the form of testimony can be substantial. In Petitioner's case, for example, the codefendant Quantiae

Harris was facing a sentence of at least ten years and possibly as high as twenty years. (Trial Tr., Vol. II, p. 160.) Harris received concurrent sentences of only fifty-five months in two federal drug cases, the first case in which he was a codefendant with Petitioner and the second case for distributing methamphetamine while on pretrial release in the first case. Petitioner's case, therefore, like so many other drug cases in federal court, has a troublesome evidentiary issue because of the relationship between testimony allowed under Fed. R. Evid. 801(d)(2)(E) and incentives for lenient sentencing in 18 U.S.C. § 3553(e).

3. This petition presents the Court with an excellent case for clarifying the application of Fed. R. Evid. 801(d)(2)(E) because of the lack of evidence connecting Petitioner to a drug-dealing conspiracy independent of the out-of-court statements by the nontestifying codefendant.

Petitioner Peebles testified that he dropped by the apartment on the night of April 2 to pick up a woman, not to obtain drugs. The admission of the out-of-court statements by a nontestifying codefendant was important evidence for the Government. Although the Government had been investigating the Randers' drug dealing for months, the Government did not have any indication of Petitioner's involvement until the night of his arrest outside an apartment used by the Randers to distribute drugs. The

Government's evidence that Petitioner was involved in drug-dealing depended on the testimony of two codefendants, Quantiae Harris and Leah Douglas. The latter witness was not a member of the Randers' drug-dealing conspiracy.

When testimony is offered as evidence of guilt under Fed. R. Evid. 801(d)(2)(E) under these circumstances, an accused's due process right to a fair trial and his right to confront the evidence against him demand, at a minimum, heightened scrutiny of the reliability and trustworthiness of the evidence. An even better approach would also require the prosecution to make an affirmative showing that the declarant is unavailable. *See* Davenport, 85 Harv. L. Rev. at 1403. This Court has declined to hold that the Confrontation Clause required a showing of unavailability as a condition to admission of out-of-court statements by a nontestifying coconspirator. *United States v. Inadi,* 475 U.S. 387, 399 (1986). In *Inadi,* this Court did not consider whether the Due Process Clause's fundamental fairness guarantee required a showing of unavailability. "There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble about and exhaust his own, often scarce resources to attempt to produce the declarants." Davenport, 85 Harv. L. Rev. at 1403. That is especially true in Petitioner's case because the declarant, Joseph Rander, would have been in the Bureau of Prisons serving a sentence of

sixty months imposed on March 3, 2016, at the time of Petitioner's trial in October 2016.

Without at least heightened scrutiny in a case like this, there will be a lack of confidence in the correctness of a guilty verdict–and for good reason. In August 2017 following Petitioner's October 2016 trial, Petitioner's counsel received an affidavit from Joseph Rander in which he denied making any of the statement Quantiae Harris attributed to him, and furthermore, denied being present on the night of April 2 and denied knowing or having any relationship with Petitioner Peebles. (ECF Doc. 756-1, Exh. A.) Rander's affidavit was the subject of a motion for new trial based on newly discovered evidence. (ECF Doc. 756.) The district court denied the motion with an evidentiary hearing (ECF Doc. 768), and an appeal of that ruling is pending in the Eighth Circuit as Appeal No. 18-1369.

Crawford's protection against testimonial hearsay is of no help against unrecorded nontestimonial hearsay admitted under Rule 801(d)(2)(E) during the testimony of a codefendant testifying as part of a plea bargain for a reduced sentence. "Under *Crawford* . . . the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability." *Whorton v. Bockting,* 549 U.S. 406, 420 (2007) (holding in a habeas corpus case that *Crawford* did not announce a watershed rule of criminal procedure that could be applied retroactively). Before *Crawford, "*under *Roberts*, an out-of-court

nontestimonial statement not subject to cross-examination could not be admitted without a judicial determination regarding reliability." *Id.* In the instant situation, the accused needs protection of his right to a fair trial by the Fifth Amendment's Due Process Clause.

> [i]f the Confrontation Clause does not apply to coventurer hearsay uttered in a nontestimonial manner, criminal defendants need not be helpless against the revisionist coconspirator hearsay exception; they should seek shelter in due process.

Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause,* 64 Fla. L. Rev. 1669, 1704 (2012). Fundamental fairness is the main component of constitutional due process protection. The fundamental fairness doctrine comes from the belief "that a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955).

This Court should consider whether admission of unrecorded nontestimonial statements under Fed. R. Evid. 801(d)(2)(E) by an unreliable witness can be part of a fair trial according to current trial procedures in federal court. Although an accused is presumed innocent until a unanimous jury verdict determines the accused is guilty beyond a reasonable doubt, the trial judge determines whether the accused and the declarant of the out-of-court statements were members of a conspiracy. In making a determination on the admissibility of evidence under Fed. R. Evid. 103, caselaw allows the judge to make the determination on a preponderance-of-the-evidence

standard. *United States v. Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978). How fair is it for the trial judge to make that determination on so low a burden of proof for unrecorded statements testified to by a codefendant testifying as part of a plea agreement for a reduced sentence *before* the jury decides whether the accused is guilty of a conspiracy or of any other crimes?

Stricter scrutiny or exclusion of unrecorded out-of-court statements by an alleged coconspirator will not be a hardship on law enforcement. Agents and officers will still have all the usual means of investigation to assist them.

- They can use trap-and-trace devices and pen registers to learn the telephone numbers for out-going and incoming calls on a target's phone.
- Officers and agents can obtain a court order to intercept telephone conversations and communications such as text messages.
- Officers and agents can make undercover purchases of drugs.
- They can conduct surveillance outside of houses, apartments, or businesses where they suspect drug-dealing is occurring and obtain search warrants for those locations.

All of these means of investigation would collect more reliable evidence of guilt than the admission of unrecorded out-of-court statements by a nontestifying codefendant as evidence of the accused's participation in a

conspiracy.

"The absence of case law construing the application of the Due Process Clauses to unreliable hearsay is easily explained: The exclusion of such hearsay was until recently the job of the Confrontation Clause. . . . *Crawford* and subsequent cases has laid the groundwork for new due process arguments." Trachtenberg, 64 Fla. L. Rev. at 1706. This Court needs to fill the hole left by *Inadi* and *Bourjaily*. Only trustworthy and reliable evidence should be admissible against an accused in a criminal case. Whether grounded in the Due Process Clause or Confrontation Clause, Petitioner Peebles's relief should be a new trial or a remand for the district court to inquire into independence evidence of the statements' reliability and trustworthiness and Joseph Rander's availability.

Conclusion

The Court should grant the petition for a writ of certiorari under Sup. Ct. R. 10(a).

Respectfully submitted,

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