

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

ROBERT L. MAYFIELD,

*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 WRIT OF CERTIORARI**

---

JOHN S. BERRY, JR.

BERRY LAW FIRM

6940 O STREET, SUITE 400

LINCOLN, NEBRASKA 68510

Tel. (402) 466-8444

john@jsberrylaw.com

*Counsel of Record for Petitioner*

## **I. Question Presented**

Whether admission of out-of-court statements made by Robert Mayfield's alleged co-conspirators violated the hearsay exception of Rule 801(d)(2)(E).

## II. Table of Contents

I.	Question Presented.....	i
II.	Table of Contents.....	ii
III.	Table of Authorities.....	iii
IV.	Petition for Writ of Certiorari.....	1
V.	Opinions Below.....	1
VI.	Jurisdiction.....	1
VII.	Statutory and Constitutional Provisions Involved.....	1
VIII.	Statement of the Case.....	2
IX.	Reasons for Granting the Writ.....	2
X.	Conclusion.....	6

### Index to Appendices

Appendix A: Decision of the United States Court of Appeals for the Eighth Circuit, <i>United States v. Mayfield</i> , 909 F.3d 956 (8 <sup>th</sup> Cir. 2018)...	1a
Appendix B: Order Denying Petition for Rehearing <i>En Banc</i> .....	12a

### III. Table of Authorities

<u>Federal Cases</u>	<u>Page Number</u>
<i>Bourjaily v. United States</i> , 483 U.S. 171, 183 (1987).....	2, 3
<i>United States v. Bell</i> , 573 F.2d 1040 (8 <sup>th</sup> Cir. 1978).....	3, 4, 5
<i>United States v. Mayfield</i> , 909 F.3d 956 (8 <sup>th</sup> Cir. 2018).....	1
<i>United States v. Ragland</i> , 555 F.3d 706 (8 <sup>th</sup> Cir. 2009).....	4
<i>United States v. Zarco</i> , 915 F.3d 525, 528 (8 <sup>th</sup> Cir. 2019).....	2
<u>Statutes, Rules, and Constitutional Provisions</u>	
Fed. R. Evid. § 801(d)(2)(E).....	i, 1, 2, 3, 4
28 U.S.C. 1254(1).....	1

#### **IV. Petition for Writ of Certiorari**

Robert Mayfield respectfully petitions the Court for a writ of certiorari to review the opinion entered by the United States Court of Appeals for the Eighth Circuit on November 28, 2018.

#### **V. Opinions Below**

The decision of the United States Court of Appeals affirming the district court's ruling that the out-of-court statements of Mayfield's co-conspirators were admissible under Fed. R. Evid. 801(d)(2)(E) can be found at *United States v. Mayfield*, 909 F.3d 956 (8<sup>th</sup> Cir. 2018). It is appended to this petition. (App. A.). The order of the United States Court of Appeals denying Mayfield's Petition for Rehearing *En Banc* is unpublished but is also attached to this petition. (App. B).

#### **VI. Jurisdiction**

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 28, 2018. Mayfield filed a Petition for Rehearing *En Banc*, but the Court of Appeals denied that Petition on January 14, 2019. Mayfield has filed this petition within ninety days of that date, as extended by S. Ct. Rule 30.1. This Court therefore has jurisdiction under 28 U.S.C. 1254(1).

#### **VII. Statutory and Constitutional Provisions Involved**

##### **Fed. R. Evid. 801(d)(2)(E) (2014)**

(d) A statement that meets the following conditions is not hearsay:

(2) The statement is offered against an opposing party and:

(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).

### **VIII. Statement of the Case**

A jury convicted Robert Mayfield of one count of conspiracy to distribute and possess with intent to distribute methamphetamine on June 15, 2017. Before and during trial, Mayfield objected to the admission of evidence of hearsay statements of alleged co-conspirators. Over his objections, the district court admitted into evidence recordings of jailhouse phone calls allegedly between Mayfield and Anthony Harris, and the statements of Zachary Love through the testimony of alleged co-conspirators. Neither Love nor Harris testified. The district court improperly evaluated and admitted these hearsay statements under Rule 801(d)(2)(E), and the Eighth Circuit improperly affirmed the district court.

### **IX. Reasons for Granting the Writ**

The district court incorrectly analyzed the co-conspirator hearsay exception articulated by this Court in *Bourjaily v. United States*, 483 U.S. 171, 183 (1987). This failure resulted in the admission of hearsay statements, which ultimately resulted in a jury convicting Mayfield for participating in a “dry conspiracy”, which is a conspiracy where no physical evidence is offered and the conspiracy is evidenced only through the testimony of others. *United States v. Zarco*, 915 F.3d 525, 528 (8<sup>th</sup> Cir. 2019).

The Court of Appeals for the Eighth Circuit also erred when it affirmed the decision of the district court to admit the hearsay testimony of Harris and Love, neither of whom testified at trial. In doing so, it similarly analyzed the *Bourjaily* standard, and erroneously affirmed the district court analysis of the co-conspirator hearsay exception under Fed. Rule Evid. 801(d)(2)(E). This is so because the statements at issue were not made during the course and in furtherance of a conspiracy, and as such the government failed to establish by a preponderance of the evidence the existence of a conspiracy involving the alleged co-conspirators and Mayfield. Accordingly, this Court should reverse and remand this case for a new trial.

In the Eighth Circuit, the admissibility of out-of-court statements of purported co-conspirators is set forth in *United States v. Bell*, 573 F.2d 1040 (8<sup>th</sup> Cir. 1978). Under *Bell*, district courts are charged with the following:

(1) If the prosecutor propounds a question which obviously requires a witness to recount an out-of-court declaration of an alleged coconspirator, the court, upon a timely and appropriate objection by the defendant, may conditionally admit the statement. At the same time, the court should, on the record, caution the parties (a) that the statement is being admitted subject to defendant's objection; (b) that the government will be required to prove by a preponderance of the independent evidence that the statement was made by a coconspirator during the course and in furtherance of the conspiracy; (c) that at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and (d) that if the court determines that the government has failed to carry the burden delineated in (b) above, the court will, upon appropriate motion, declare a mistrial, unless a cautionary instruction to the jury to disregard the statement would suffice to cure any prejudice. The foregoing procedural steps should transpire out of the hearing of the jury. (2) After a ruling on the record that the

out-of-court declaration is admissible under Rule 801(d)(2)(E), the court may submit the case to the jury. The court should not charge the jury on the admissibility of the coconspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt. An appropriate instruction on credibility should be given, and the jury should be cautioned with regard to the weight and credibility to be accorded a coconspirator's statement.

*Id.* at 1044. Mayfield concedes that the district court properly followed the procedure set forth in *Bell*. Mayfield contends that the conclusion it reached was erroneous, however, under the principle articulated in *United States v. Ragland*, 555 F.3d 706 (8<sup>th</sup> Cir. 2009), that informative statements made to impress the listener are not generally in furtherance of a conspiracy. *Id.* at 713. The Eighth Circuit similarly erred in affirming the district court.

Over Mayfield's objection, the district court admitted hearsay statements made by Zachary Love through the testimony of three alleged co-conspirators – Kenneth Johnson, Angelo Ybarra, and Marlon Rupert. Johnson, Ybarra, and Rupert testified that Love supplied them with meth, which Love bragged having sourced from someone from California named “Rob” or “Robert” or the “Cali boys”. Johnson and Ybarra testified in court that they had seen Mayfield sell meth to Love, and that Mayfield was the person to whom Love referred as “Rob”.

Rupert testified that he met Mayfield in jail, where he learned that Mayfield was from California and where Mayfield told Rupert he had a relationship with Love. Based on this information, Rupert speculated that Mayfield was Love's source, though Love had never specifically told Rupert that Mayfield was his source.



The court also admitted recorded telephone conversations allegedly between Mayfield and Anthony Harris, another alleged co-conspirator, over Mayfield's objections. Police investigators testified that they listened to telephone calls made by Harris to a telephone number from California. Though the police investigator testified that the recipient of the calls was referred to as "Rob" or "Robert", he could not confirm whether the voice he heard belonged to Mayfield. Another investigator similarly testified that he had listened to telephone calls made by Harris to a California number to a person Harris referred to as "Robert". That investigator also was unable to identify Mayfield's voice based upon personal knowledge; rather, he offered opinion testimony that the call was made to Mayfield based upon his participation in the investigation. The government thus could not establish that Mayfield participated in these phone calls. As such, insufficient "independent evidence that the statement was made by a coconspirator during the course and in furtherance of the conspiracy" existed under the *Bell* standard. *Bell*, F.2d at 1044.

The erroneously-admitted statements from alleged co-conspirators, together with the Harris jail calls, resulted in Mayfield's conviction. The jury convicted Mayfield of a "dry conspiracy" without direct evidence that Mayfield possessed, distributed, sold, or agreed to sell narcotics, and based upon the testimony of co-conspirators and scant circumstantial evidence. Absent the erroneous district court rulings on co-conspirator statements and jail calls, Mayfield would not have been convicted.

## **X. Conclusion**

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,  
ROBERT MAYFIELD, Petitioner

/s/ John S. Berry  
John S. Berry, #22627  
BERRY LAW FIRM  
6940 O Street, Suite 400  
Lincoln, Nebraska 68510  
Telephone: (402) 466-8444  
Facsimile: (402) 466-1793  
Email: john@jsberrylaw.com  
Lawyers for Petitioner