No.

In the

Supreme Court of the United States

October Term 2018

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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May 13, 2019

Question Presented

In Petitioner's jury trial on federal drug offenses, the district court allowed a prosecution witness to testify under Fed. R. Evid. 801(d)(2)(E) to out-of-court statements made by a non-testifying codefendant that implicated Petitioner in a heroin conspiracy. Ten months after Petitioner's trial, the non-testifying codefendant executed an affidavit exonerating Petitioner by stating (i) that statements attributed to him in Petitioner's trial were false and (ii) that he was not present on the night of the alleged drug transaction with Petitioner. The Eighth Circuit affirmed the district court's denial of Petitioner's Rule 33(b)(1) motion for new trial based on newly discovered evidence without a hearing on the non-testifying codefendant's affidavit.

Ten circuits, including the Eighth in Petitioner's case, have held that testimony from a non-testifying codefendant does not qualify as newly discovered evidence for purposes of Fed. R. Crim. P. 33(b)(1). In conflict, the First Circuit allows district courts to consider such testimony as newly discovered evidence. This conflict raises an important question: **Should a district court automatically exclude exculpatory testimony from a non-testifying codefendant as not newly discovered evidence or should that court determine whether such testimony requires a new trial in the interest of justice?**

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 12, 2019, 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, after guilty verdicts in a jury trial during October 2016.

Opinions Below

The slip opinion of the court of Appeals, *United States v. Peebles*, No. 18-1369, 2019 WL 1431109 (8th Cir. Mar. 12, 2019), appears in the Appendix to this petition. That opinion affirmed the district court's denial of Petitioner's motion for new trial based on newly discovered evidence. Petitioner did not seek a rehearing. The Memorandum and Order of the district court also appears in the Appendix along with the Judgment in a Criminal Case filed January 3, 2017, in Eastern District of Missouri case number 4:14-cr-00345-ERW-10. The first opinion of the court of appeals on a different new trial motion, *United States v. Peebles*, 883 F.3d 1062 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 265, 202 L. Ed. 2d 177 (Oct. 1, 2018) (No. 18-5394), also appears in the Appendix.

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) after the district court denied his motion for new trial filed under Fed. R. Crim P. 33(b)(1) based on newly discovered evidence. The Eighth Circuit filed its opinion and judgment on March 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.1.

Constitutional and Statutory Provisions and Rules 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.

Fed. R. Crim. P. 2

> These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Fed. R. Crim. P. 33

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take

additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Mo. S. Ct. R. 4–4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

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 . . . .

Statement of the Case

This is the second direct appeal of Petitioner 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; Appendix 5a.) This second appeal follows from the district court's denial of Petitioner's Rule 33(b)(1) motion for a new trial based on newly discovered evidence. (Appendix 11a–14a.)

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. (Trial 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; Trial Tr. 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; Trial Tr. 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 Ex. 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 jury convicted Petitioner Peebles after two hours of deliberation. (Trial Tr. vol. V, 7; Trial Tr.: Jury Trial–Jury Verdict, 2.) The district court denied Petitioner Peebles's motion for new trial and sentenced him to two concurrent 120-month sentences on January 3, 2017. Petitioner Peebles filed his Motion for New Trial Based on Newly Discovered Evidence with affidavits from Joseph Rander and Patrick Deaton on October 31, 2017. (ECF Doc. 756.) Rander had pleaded guilty to two counts involving cocaine and cocaine base on October 13, 2015. (ECF Doc. 318.) His Guilty-Plea Agreement included this sentence, "On or about April 2, 2013, and in the early morning hours of April 3, 2013, Joseph Rander, while at 5911A Highland, distributed 9 ounces of heroin (244.7 grams) to Casey Peebles." (ECF Doc. 318 at 7.) During the plea colloquy, the district court judge explained that the drug quantity for purposes of sentencing would include the amount heroin along with amounts of cocaine and cocaine base. (ECF Doc. 761 at 21.) The district court sentenced Rander to two concurrent sentences of sixty months on March 3, 2016. (ECF Doc. 493.)

Rander did not testify at Appellant Peebles's trial in October 2016. Rander signed an affidavit on August 13, 2017. (ECF Doc. 756-1.) He stated the following in his affidavit:

> 1.) That I was a defendant in case number 4:14-cr-0345-ERW-DDN, in the Eastern District of Missouri.

> 2.) That during and throughout the life of the charged case of conspiracy I never knew or came in contact with Casey Peebles.
>
> 3.) That I was never at 5911 Highland on the night of April 2-3, 2013.
>
> 4.) That any statements attributed to me on that night in the presence of any person is absolutely false.
>
> 5.) That at least eleven individuals were contained in the indictment charging me with being a member of the conspiracy. Of the eleven people charged, I do not know Casey Peebles or Leah Douglas.
>
> 6.) That the statements made by Quantiae Harris in a trial, in case number 4:14-cr-00345-ERW-DDN, United States v. Peebles, were absolutely untrue as they related to me having told him anything in regard to Casey Peebles at any time.

(Exhibit A, Motion for New Trial Based on Newly Discovered Evidence, ECF Doc. 756-1; Appendix 16a.)

Appellant Peebles requested an evidentiary hearing on his motion for new trial based on newly discovered evidence. (ECF Doc. 763.) The district court denied the request for a hearing (ECF Doc. 766), and the district court denied the motion for new trial on February 8, 2018 (ECF Doc. 768). Casey Peebles filed a notice of appeal on February 16, 2018. (ECF Doc. 769.)

On March 5, 2018, a panel of the Eighth Circuit affirmed the district court's denial of motion Peebles's motion for judgment of acquittal as well as the denial of his first motion for new trial based on four evidentiary rulings by the district court. *United States v. Peebles,* 883 F.3d 1062 (8th Cir. 2018) (Appeal No. 17-1126).

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. 883 F.3d at 1068.
- 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). 833 F.3d at 1069.
- 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. 883 F.3d at 1069.
- 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. 883 F.3d at 1069–70.
- 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. 883 F.3d at 1070–71.

Petitioner Peebles filed a timely petition for rehearing by the panel

and en banc on April 5, 2018. The Eighth Circuit denied those petitions on May 10, 2018. Petitioner Peebles filed a timely petition for writ of certiorari on July 25, 2018. The question presented was

> 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?

United States v. Peebles, 883 F.3d 1062 (8th Cir. 2018), *cert. denied,* 139 S. Ct. 265 (Oct. 1, 2918) (No. 18-5394).

While his first appeal (No. 17-1126) was pending, Petitioner began a second appeal (No. 18-1369) in the Eighth Circuit to appeal the denial of his Rule 33(b)(1) motion for a new trial without an evidentiary hearing. While the second appeal was pending, Petitioner moved to supplement the record with a second affidavit from Joseph Rander, which stated

> 1.) That on approximately 13th day of August, 2017, I had prepared and submitted an affidavit for the defense attorney for Casey Peebles in case # 4:14-cr-00345 (ERW) (DDN)
>
> 2.) That affidavit specifically targeted statements wrongly attributed to me by government witness Quantee Harris.
>
> 3.) That I have made several efforts to contact defense attorney Patrick Deaton.
>
> 4.) Each of my efforts have failed. However, it has come to my attention that defense attorney Patrick Deaton, in recognition of ethical concerns, would not speak to me without consent of my attorney of record.
>
> 5.) It is important to note that I have been trying to assure defense attorney Patrick Deaton, that I fully intend to testify

> to the information contained in the aforementioned affidavit of August, 2017.
>
> 6.) That my statements therein are true and accurate and that I intend to repeat them under oath, if necessary, whether it is a hearing or trial.
>
> 7.) Finally, I fully authorize, the defense, to depose or question me on behalf of Casey Peebles. Clearly, if Casey Peebles convictions rests on statements I never made then I wish to correct the injustice and I am willing to testify to that extent.

(Exhibit C, Appellant's Motion to Supplement Record with Joseph Rander's August 2018 Affidavit; Appendix 23a.)

The Eighth Circuit issued its opinion on March 12, 2019, affirming the denial of Petitioner's Rule 33(b)(1) motion for new trial. Appendix 1a–3a. In its three-page per curiam opinion, the Eighth Circuit ruled that Joseph Rander's post-trial affidavit was not newly discovered evidence because the factual basis for the testimony in the affidavit existed before trial. *Id.* at 3a. The Eighth Circuit granted Petitioner's motion to supplement the record with Rander's second affidavit. *Id.* Petitioner Peebles did not seek rehearing. This petition for a writ of certiorari follows within ninety days of March 12, 2019.

Reasons for Granting the Petition

1. This petition shows the conflict in the circuits on whether exculpatory testimony from a non-testifying codefendant should be considered "newly discovered evidence" under Fed. R. Crim. P. 33(b)(1), which allows a district court to grant a motion for new trial based on newly discovered evidence in the interest of justice.

The majority rule interpreting Fed. R. Crim. P. 33(b)(1) holds that district courts have no authority to grant a new trial based on "newly discovered evidence" if the newly discovered evidence is testimony from a non-testifying codefendant. The Eighth Circuit followed that rule in Petitioner's case. App 2a–3a. The majority reason that such evidence is merely "newly available" and does not satisfy Rule 33(b)(1)'s requirement that the evidence supporting a motion for new trial be newly discovered after the trial. The majority rule ends any further consideration of a Rule 33(b)(1) motion for new trial if the court determines the evidence offered in support of a new trial motion is merely newly available. Ten circuits, including the Eighth, follow the majority rule. *See, e.g., United States v. Taylor*, 600 F.3d 863, 869 (7th Cir. 2010): *United States v. Owen*, 500 F.3d 83, 88 (2d Cir. 2007); *United States v. Jasin*, 280 F.3d Cir. 355 (3d. Cir. 2002): *United States v. Glover*, 21 F.3d 133, 138 (6th Cir. 1994); *United*

States v. Muldrow, 19 F.3d 1332, 1339 (10th Cir. 1994); *United States v. Dale*, 991 F.2d 819, 839 (D.C. Cir. 1993); *United States v. Rogers*, 982 F.2d 1241, 1245 (8th Cir. 1993); *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992); *United States v. DiBernardo*, 880 F.2d 1216, 1224-25 (11th Cir. 1989); *United States v. Metz*, 652 F.2d 478, 480 (5th Cir. 1981).

The First Circuit is in conflict with the majority rule. An example of the First Circuit's rule is *United States v. Hernandez-Rodriguez,* 443 F.3d 138, 144 (1st Cir. 2006) ("This circuit has long held that exculpatory affidavits from codefendants who exercised their Fifth Amendment privilege not to testify may constitute 'newly discovered evidence' for Rule 33 purposes.") (quoting *United States v. Montilla-Rivera*, 115 F.3d 1060, 1065-66 (1st Cir. 1997)). In the First Circuit, therefore, a district court does not do what the court did when Petitioner Peebles filed his Rule 33(b)(1) motion for new trial–automatically exclude the affidavit from consideration. Instead, the First Circuit evaluates the non-testifying codefendant's affidavit under a four-part test:

> The defendant bears the weighty burden "to establish that 'the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial.' "

Hernandez-Rodriguez, 443F.3d at 143 (quoting *Montilla-Rivera*, 115 F.3d at 1064-65).

While the cases cited above for the majority and minority rules

involve codefendants who invoked their Fifth Amendment privilege not to testify, that should not preclude the Court from granting this petition. Petitioner did not subpoena Joseph Rander, the non-testifying codefendant in Petitioner's case who made the exculpatory affidavit, as a witness for good reason and not for lack of diligence. Months before Petitioner's trial, Joseph Rander had implicated Petitioner in a drug conspiracy with Rander's factual admissions in his Guilty-Plea Agreement. (ECF Doc. 318 at 7, Oct. 13, 2915) ("On or about April 2, 2013, and in the early morning hours of April 3, 2013, Joseph Rander, while at 5911A Highland, distributed 9 ounces of heroin (244.7 grams) to Casey Peebles.").

Due diligence should not require Petitioner Peebles to subpoena the declarant Joseph Rander while the Government makes its case with hearsay. The burden should have been on the Government to have made an affirmative showing that declarant Joseph Rander was unavailable before admission of Rander's out-of-court statements. *See* David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378 (1972).

> 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.

Id. at 1403 (footnote omitted). This argument especially applies in the instant case because Joseph Rander was in the Bureau of Prisons at the

time of the trial in October 2016. He would have been serving a sentence of sixty months imposed on March 3, 2016. (ECF Doc. 493.)

2. The majority rule makes on an arbitrary distinction between the phrases "newly available evidence" and "newly discovered evidence."

There are strong arguments against a rule that categorically excludes post-conviction exculpatory statements by codefendants from consideration as newly discovered evidence. *See* Mary Ellen Brennan, *Interpreting the Phrase "Newly Discovered Evidence": May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for New Trial Under Rule 33?,* 77 Fordham L. Rev. 1095 (2008). First, the rule automatically excludes a particular type of evidence from a remedy created as a safety valve to protect an innocent person from conviction. A proper exercise of discretion when the "interest of justice so requires" under Rule 33 should require a more thoughtful determination.

> [G]iven the "[i]n the interests of justice" standard of Fed. R. Crim. P. 33, there seems little distinction between evidence which a defendant could not present because he did not know of it and evidence he could not present because the witness was unavailable despite exercising due diligence.

United States v. Montilla-Rivera, 115 F.3d 1060, 1066 (1st Cir. 1997) (remanding for a hearing to reconsider denial of a motion for new trial grounded on exculpatory affidavits of defendants who did not testify at trial). Why distinguish between evidence the defendant did not know about

and evidence that the defendant could not present because it was unavailable? Is it that important to guard the integrity of verdicts at the expense of protecting someone who is innocent? A bright line rule excluding evidence such as Joseph Rander's affidavit contravenes the spirit of Rule 33, which focuses on "the interest of justice," and Rule 2, which focuses on "just determination" and "fairness of administration."

Second, the majority's approach is based on flawed reasoning. It interprets "discovered" in a way that equates a defendant's awareness of his own innocence with an awareness of a codefendant's exculpatory testimony. This approach focuses on "discovered" and neglects to consider "evidence." *See United States v. Jasin,* 280 F.3d 355, 369 n.1 (3d Cir. 2002) (Ambro, J., concurring). Appellant Peebles was aware of his innocence and testified to it at trial. (Trial Tr. vol. IV, 111–150.) How could he have been aware of what Joseph Rander would say in his affidavit? In his guilty plea agreement with the Government, Rander admitted being present in the Highland Avenue apartment on the night of April 2 and providing heroin to Casey Peebles. (ECF Doc. 318 at 7.) But there was no evidence at trial that Peebles knew Joseph Rander. Even Quantiae Harris's testimony did not claim Joseph Rander knew Appellant Peebles. Despite working in the Randers' drug trafficking for ten years (Trial Tr. vol. II, 161), Harris had never seen Peebles before (Trial Tr. vol. II, 257).

Evidence is something that furnishes proof. *Merriam-Webster's*

Collegiate Dictionary 433 (11th ed. 2005). Mere awareness that someone has the capacity to exonerate the defendant is not evidence. Appellant Peebles not only lacked the statements in Joseph Rander's affidavit at his trial, Peebles did not have particularized knowledge of what Rander would say. Judge Ambro made the same argument in *Jasin:*

> [T]his case survives the [newly discovered] prong because Jasin not only lacked the statements in Ivy's affidavit at his trial, he did not even have particularized knowledge of what Ivy would say.

United States v. Jasin, 280 F.3d 355, 369 (3d Cir. 2002) (Ambro, J., concurring).

What the Eighth Circuit and the majority rule considers to be newly available evidence should also be considered to be newly discovered under appropriate circumstances. The risk that a codefendant's post-trial exculpatory statements lack credibility is not as great as the risk in relying on testimony by a paid government informant like Quantiae Harris, who testified to implicate Petitioner in a drug conspiracy in the hope of a reduced sentence, about out-of-court statements by an alleged coconspirator. Any concern about reliability of post-conviction exculpatory statements by non-testifying codefendants can be adequately safeguarded by the other requirements used by the First Circuit for post-trial exculpatory statements by non-testifying codefendants. Under its interpretation of Rule 33(b)(1), the First Circuit requires "the defendant to

establish that 'the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial.'" *United States v. Montilla-Rivera,* 115 F.3d 1060, 1064–65 (1st Cir. 1997) (quoting *United States v. Tibolt,* 72 F.3d 965 (1st Cir. 1996). (See the discussion of the *Berry* test below.)

The district court found that defense counsel's affidavit did not demonstrate the necessary due diligence to discover the evidence in Rander's affidavit. (ECF Doc. 768, at 3; Appendix 14a.) The district court reasoned that defense counsel did not attempt to interview Rander before trial or subpoena him as a witness. (*Id.*) Why would a diligent defense counsel subpoena Rander as a witness when Rander had signed his Guilty-Plea Agreement, confessing to handing nine ounces of heroin to Peebles on the night of April 2 (ECF Doc. 318)? Attempting to interview Rander would have appeared fruitless since defense counsel would not have been able to talk to Rander without permission of Rander's lawyer. *See* Missouri Supreme Court Rule 4–4.2 (communication with person represented by counsel). In over twenty-five years of defending federal criminal cases, defense counsel cannot remember ever receiving permission to interview a codefendant except on occasions when the codefendant was a family member. The law usually does not require counsel to do something that is fruitless in order to preserve a claim or right. The district court clearly erred in finding defense counsel failed to establish the necessary due

diligence regarding the newly discovered evidence, Joseph Rander's exculpatory testimony.

The district court also erred in reasoning that there was ample evidence of Petitioner's guilt. The following points show otherwise:

- The jury deliberated for two hours before reaching guilty verdicts on the charges of conspiracy and possession with intent to distribute. (Trial Tr. vol. V, 7; Trial Tr.: Jury Trial–Jury Verdict, 2.) The jury instructions were not complicated and did not include any other counts.
- Most of the evidence in the trial described what the conspirators, apart from Peebles, did. The case agent testified that he had no knowledge of any connection Casey Peebles had to the Randers drug trafficking until Peebles's arrest on the night of April 2, 2013, despite the fact officers had been investigating the Randers since 2011. (Trial Tr. vol. III, 132.)
- Quantiae Harris testified he had worked for ten years as a "doorman" for the Randers, letting people in and out of locations such the Highland Avenue apartment to purchase drugs, yet he had never seen Peebles before April 2. (Trial Tr. vol. II, 161, 190, and 257.)
- The initial indictment filed October 29, 2014, did not charge Joseph Rander or Casey Peebles with any conspiracy involving

heroin. (ECF Doc. 2.) That indictment charged Joseph Rander with conspiracies involving cocaine (Count I) and cocaine base (Count III). (*Id.*) Those counts did not name Casey Peebles. (*Id.*) Count II charged a conspiracy involving heroin, but Count II did not name Joseph Rander or Casey Peebles, only Michael E. Shorty, Tyrone Short Sr., and Hartzell Moore Sr. (*Id.*)

- Leah Douglas did not see Appellant Peebles in possession of heroin on the night of April 2 so she did not testify that Peebles handed drugs to the third person in the Land Rover, Vernon Wescott. (Trial Tr. vol. II, 138–39.)
- The Government had no evidence of Petitioner's fingerprints (Trial Tr. vol. III, 54–62) or DNA on the Ziploc bag police found insider Leah Douglas's pants leg.

Joseph Rander's testimony probably would have resulted in an acquittal if had been considered along with (1) testimony about the drug-sniffing police dog that alerted to the rear seat where Douglas had been sitting but did not alert to narcotics on the driver's side of the Land Rover or driver's seat where Petitioner had been sitting (Trial Tr. vol. III, 193–95) and (2) Leah Douglas's first post-arrest explanation to police that she stole the heroin found in her pants from her boyfriend, not from the two men in the Land Rover with her, Petitioner and Vernon Wescott (Trial Tr. vol. II, 93).

Another reason the distinction between the phrases "newly available"

and "newly discovered" is arbitrary is that the same courts do not make that distinction for witnesses other than codefendants. *See United States v. Fulcher*, 250 F.3d 244, 246–49 (4th Cir. 2001) (affirming grant of new trial based on post-trial testimony of government agent "that he may have led defendants to believe they were authorized to conduct the entire operation on behalf of the government"); *Montilla-Rivera*, 115 F.3d at 1066 (citing *United States v. Garland*, 991 F.2d 328, 335 (6th Cir. 1993) (ordering a new trial although defense knew of witness's existence before and during the trial but did not locate him until after trial)); *United States v. Ouimette*, 798 F.2d 47, 51-52 (2d Cir. 1986) (remanding for hearing on whether Rule 33 motion for new trial was warranted because of witness's proposed testimony that police pressured him not to testify). Granting this petition would allow the Court to resolve uncertainty in the meaning of "newly discovered evidence" for purposes of Rule 33(b)(1).

3. District courts should have full discretion to grant new trials under Fed. R. Crim. P. 33(b)(1) in the interests of justice.

We all make mistakes. We know from news stories that juries sometimes convict innocent people, some of whom had been sentenced to death. Since the first use of DNA evidence to exonerate a defendant in 1989, 365 other defendants have been exonerated through the use of DNA

evidence. Innocence Project, *DNA Exonerations in the United States,* https://innocence project.org/dna-exonerations-in-the-united-states (last visited April 26, 2019). Rule 33(b)(1) does not give judges the authority to set convicted defendants free–only to order a new trial in the interest of justice. In making such an important decision, why arbitrarily prohibit judges from considering a particular category of evidence? There is no good reason to impose such a restriction through caselaw. The guiding principle of our criminal justice system should be concern about mistakenly convicting an innocent person.

There are already adequate safeguards in place to prevent a district court judge from being bamboozled by an exculpatory affidavit from a non-testifying codefendant. If nothing else, the district court can hold an evidentiary hearing in which the non-testifying codefendant is subject to cross examination by the prosecution. In addition, the district court can evaluate any exculpatory testimony under what is known as the *Berry* test because of an 1851 decision of the Supreme Court of Georgia. *Berry v. State*, 10 Ga. 511 (Ga. 1851) (setting out four-part test and using it to deny motion for new trial). Berry had moved for a new trial after being of larceny and sought to introduce an affidavit alleging the prosecution had hired a witness to befriend Berry in an attempt to elicit evidence of Berry's guilt. *Id.* at 516. The *Berry* court used this test:

> that it is incumbent on a party who asks for a new trial, on the

> ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only–viz; speaking to facts, in relation to which there was no evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted fore. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

Id. at 527. Courts still use this test today. 3 Charles Alan Wright, Andrew D. Leipold, Peter J. Henning, Sarah N. Welling, *Federal Practice and Procedure* § 584 (4th ed. 2011).

Petitioner contends that evidence admitted under Fed. R. Evid. 801(d)(2)(E) appears more unreliable than exculpatory testimony from a non-testifying codefendant. So it does not make sense on a Rule 33(b)(1) motion to exclude automatically exculpatory testimony from a non-testifying codefendant while allowing a conviction based on out-of-court statements admitted as non-hearsay under Fed. R. Evid. 801(d)(2)(E) through the testimony of a paid informant who is testifying in exchange for a reduced sentence. (See testimony of Quantiae Harris, Trial Tr. vol. II, 155-56.) At least hearsay admitted under the exceptions in Fed. R. Evid. 803 has indicia of reliability. The majority rule's interpretation of "newly discovered evidence" unnecessarily restricts judicial power and is so arbitrary that it violates a defendant's Fifth Amendment right to due process of law. It will probably be a rare occasion when a movant can

overcome judicial skepticism with exculpatory testimony from a non-testifying codefendant. "Moreover, there is no sign that chaos has reigned in the First Circuit since the *Montilla-Rivera* decision." *United States v. Jasin*, 280 F.3d 355, 370 (3d Cir. 2002) (Ambro, J., concurring).

4. This petition presents a good case for resolving the circuit conflict over the interpretation of "newly discovered evidence" for the application of Rule 33(b)(1) because the exculpatory affidavit of a non-testifying codefendant shows Petitioner's convictions were based on false testimony.

This Court has denied three certiorari petitions on the same circuit conflict. *See Griffin v. United States*, 489 Fed. Appx. 679 (4th Cir. 2012), *cert. denied,* 568 U.S. 1193 (2013) (No. 12-485); *Jasin v. United States*, 280 F.3d. 355 (3d Cir.), *cert. denied,* 537 U.S. 947 (2002) (No. 01-10649); *Cunningham v. United States*, 141 F.3d 1189 (11th Cir. 1998) (Table), *cert. denied,* 526 U.S. 1003 (1999) (No. 98-724). These petitions show the issue is not going away and needs resolution. The majority's bright-line rule excluding post-trial exculpatory affidavits by non-testifying codefendants from consideration on a Rule 33(b)(1) new trial motion restricts the district court's discretion to remedy injustice.

That restriction is especially important in Petitioner's case because

the non-testifying codefendant's affidavits establish that the Government's informant, Quantiae Harris, gave false testimony when he testified Joseph Rander gave heroin to Petitioner on the night of April 2. Two of the three petitions cited above, *Griffin* and *Jasin*, did not involve the issue of false testimony. In the third case, *Cunningham*, the Eleventh Circuit issued its decision without a written opinion. It appears from reading the Brief of Appellant (1997 WL 33625774), the Brief for the United States (1998 WL 34184018), and Appellant's Reply Brief (1997 WL 33625773) that *Cunningham* did not present an issue of false trial testimony by a prosecution witness.

Newly discovered evidence that a prosecution witness testified falsely to material facts deserves extra scrutiny in a Rule 33(b)(1) motion for new trial.

> The use of perjured testimony may provide an independent basis for a new trial. To grant a new trial on this ground, this court must be satisfied that: 1) the testimony given by a material witness was false; 2) the jury might have reached a different conclusion; and 3) the party seeking a new trial was surprised by the false testimony and unable to meet it, or did not know of its falsity until after the trial.

United States v. McLaughlin, 89 F. Supp. 2d 617, 621 (E.D. Pa. 2000) (citations omitted) (ordering new trial because of false testimony by government witness).

> Although the third circuit never flatly adopted this as the controlling standard in cases where a defendant seeks a new trial based on perjured testimony or evidence, the court has

applied this standard in reviewing such cases.

Id. at 622; *but see United States v. Stout,* 2014 WL 5297948 *5 (E.D. Pa. 2014) (using probably-would-have-been-acquitted standard on a new trial motion alleging false testimony).

Petitioner's new evidence would pass this test. Joseph Rander's affidavits establish that Quantiae Harris gave false testimony about Rander's participation in a drug transaction on the night of April 2. This testimony was material not just because Harris claimed to have been present but because Rander's participation with Petitioner provided the foundation under Fed. R. Evid. 801(d)(2)(E) for the admission of Harris's testimony about Rander's out-of-court statements, which were also false, implicating Petitioner. The jury might have returned not guilty verdicts but for Harris's testimony. Petitioner did not know of its falsity until after trial because he had no idea who Joseph Rander was or whether he had been present in the apartment on the night of April 2.

The majority's bright line rule does not promote the appearance of fairness in our criminal justice system because its application denies an evidentiary hearing on the Rule 33(b)(1) motion. How much time would it have taken the district court to have held a hearing with testimony from Joseph Rander and subject him to cross-examination? Without a hearing we are left wondering why Joseph Rander would subject himself to a perjury charge when he was in the custody of the Bureau of Prisons or on

supervised release. There was no evidence at trial that Joseph Rander knew Petitioner or had any dealings with Petitioner before the night of April 2, 2013. Law officers, who had been investigating the Rander family drug trafficking operation since 2011, had no idea Petitioner had any connection to the Randers until they arrested Petitioner on the night of April 2. (Trial Tr. vol. III, 132.) Joseph Rander's affidavits disprove that he (Rander) was engaged in a conspiracy with Petitioner as required by Fed. R. Evid. 801(d)(2)(E) in order to admit Harris's testimony about Rander's alleged out-of-court statements.

In affirming the denial of Petitioner's Rule 33(b)(1) motion for new trial, the Eighth Circuit stated, "In light of the ample evidence presented at trial of Peebles's guilt, the district court was also well within its discretion to conclude it was not probable that the evidence in the affidavit would have resulted in an acquittal." (Slip op. at 3; Appendix 3a.) Joseph Rander's affidavit stated that he was willing to testify; he did not limit himself to the matters in his affidavit. It was too early for the district court and Eighth Circuit to conclude nothing Rander had to say would have changed the outcome of Petitioner's trial without first listening to what Rander had to say in a hearing on the new trial motion.

The majority's bright-line rule excluding post-trial exculpatory testimony by non-testifying codefendants sends a message that our justice system is unwilling to consider its conviction of Petitioner was a mistake.

Protecting the finality of judgments is not as important as protecting the integrity of jury trials for people accused of crimes. The majority's rule is in conflict not only with First Circuit's rule but with Fed. R. Crim. P. 2's stated purposes of "the just determination of every criminal proceeding" and "fairness in administration" as well Petitioner's right to due process of law under the Fifth Amendment**.** The First Circuit has a better approach "that results in a practical application of Rule 33 that, by restoring discretion to the trial judge, both provides a safety valve for wrongly convicted defendants and–through the *Berry* test–screens out meritless motions." Brennan, 77 Fordham L. Review 1095, 1136.

Conclusion

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

Respectfully submitted,

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