NO. _____

In The
Supreme Court of the United States

JOSEPH HOWARD DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 14, 2019

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH HOWARD DAVIS

Petitioner,

-v-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Joseph Howard Davis respectfully prays that a writ of certiorari issue to review the judgment below.

QUESTION PRESENTED

I. Is an out-of-court statement by a non-testifying informant which identifies the defendant as a drug dealer hearsay, as in the Second Circuit, or not, as in the Fourth Circuit?

OPINIONS BELOW

The Fourth Circuit affirmed Petitioner's conviction and 260 month sentence for Distribution of Methamphetamine. The opinion of that court appears at Appendix A to this petition.

The judgment of the United States District Court for the Western District of North Carolina appears at Appendix B to this petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed Petitioner's conviction and sentence on March 19, 2019. That court had jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Davis did not file a petition for rehearing in the case. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

"Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. Rule 801(c) (2014).

"Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court. Fed. R. Evid. Rule 802 (2011)

STATEMENT OF THE CASE

On April 18, 2017, a grand jury in the Western District of North Carolina charged Mr. Davis in a Bill of Indictment with: (1) Conspiracy to Distribute Methamphetamine from 2014 through October, 2016; (2) Possession of a Firearm in Furtherance of a Conspiracy to Distribute Methamphetamine on September 29, 2016; (3) Distribution of Methamphetamine on October 12, 2016; and (4) Possession of a Firearm by a Felon on October 19, 2016. On July 25, 2017, a jury acquitted Mr. Davis of Conspiracy to Distribute Methamphetamine and Possession of a Firearm in furtherance thereof and convicted him of Distribution of Methamphetamine on October 12, 2016, and Possession of a Firearm by a Felon on October 19, 2016. On

February 7, 2018, the District Court sentenced Mr. Davis to 260 months imprisonment, filing the judgment on February 12, 2018. Mr. Davis had already appealed the judgment on September 11, 2017.

On March 19, 2019, the United States Court of Appeals for the Fourth Circuit affirmed Mr. Davis's conviction and sentence.

STATEMENT OF THE FACTS

The government alleged that Mr. Davis engaged in a conspiracy over the course of more than two years to distribute more than 500 grams of a mixture containing methamphetamine. [JA 73]. It alleged that, during this conspiracy, Mr. Davis possessed an unidentified firearm in furtherance of that conspiracy on September 29, 2016, distributed methamphetamine on October 12, 2016, and possessed two identified firearms on October 19, 2016. [JA 73-74].

To attempt to prove the conspiracy it alleged, the government offered at trial the testimony of three alleged coconspirators. Tangie Carroll, Roderick Roberts, and Reggie Shaw each testified that he or she conspired with Mr. Davis to distribute methamphetamine. Ms. Carroll testified that Mr. Davis helped facilitate three different purchases of a pound of methamphetamine from Mr. Shaw when Mr. Shaw was not in town. [JA 252-55]. Mr. Roberts testified that he purchased a pound of methamphetamine from Mr. Davis twice at Mr. Shaw's apartment while Mr. Shaw was not in town. [JA 266-67]. Mr. Shaw testified that he sold methamphetamine and that Mr. Davis "handled customers for me." [JA 276]. Specifically, Mr. Shaw testified that Mr. Davis received "one to two ounces [of methamphetamine] every day

for approximately nine months." [JA 286]. The jury acquitted Mr. Davis of the conspiracy described by Ms. Carroll, Mr. Roberts, and Mr. Shaw. [JA 454].[1]

Mr. Davis, in his testimony, admitted that he possessed the firearms identified in the fourth count of the indictment. [JA 342]. Moreover, Mr. Davis and the government had stipulated prior to trial that Mr. Davis "has a prior conviction for a crime punishable by more than a year," that "the two rifles seized in this case are 'firearms' for purposes of the charges in this case," and that "[the rifles] traveled in and effected [sic] interstate commerce." [JA 90].

The only contested conduct for which the jury convicted Mr. Davis was the alleged distribution of methamphetamine on October 12, 2016, to Stephanie Metcalf. Ms. Metcalf did not testify and Mr. Davis denied distributing methamphetamine to her. [JA 350-51]. Therefore, all of the evidence suggesting that Mr. Davis's testimony was inaccurate came from law enforcement officers who testified regarding their interaction with Ms. Metcalf and alleged interaction between Ms. Metcalf and Mr. Davis.[2]

Officer Jeff Jenkins was "an investigator in the Vice and Narcotics Unit of the Hickory Police Department" and "a task force officer with Homeland Security Investigations." [JA 206-07]. Officer Jenkins told the jury that he "had an informant that had come forward to [him] and stated that they were currently purchasing

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[1] Because the jury acquitted Mr. Davis of the conspiracy, they did not address the allegation of possession of a firearm in furtherance of the conspiracy. [JA 299-300, 370].

[2] The government alleged that William Greene, who had pled guilty to conspiring with Mr. Davis, was present at the alleged October 12, 2016, drug transaction. Mr. Greene testified for the government at trial — regarding the guns that were the subject of Count Four of the indictment — but did not testify that he witnessed anything at the October 12, 2016, meeting after driving there with Ms. Metcalf.

methamphetamine from Joseph Davis and could facilitate a purchase during a controlled buy while cooperating with us in that investigation." [JA 207-08]. The informant identified by Officer Jenkins was later identified as Stephanie Metcalf. Officer Jenkins testified that on September 28, 2016, Ms. Metcalf purchased 34 grams of what turned out to be rock salt from Mr. Davis and identified a photograph that Officer Jenkins had taken as the substance Mr. Davis sold to Ms. Metcalf. [JA 208-09]. Officer Jenkins further testified that "we did a second controlled purchase after the first one in which we were attempting to buy two ounces of crystal methamphetamine, again utilizing the same … informant purchasing from Joseph Davis." [JA 209-10]. During cross-examination, Officer Jenkins testified that "I was not with her [Ms. Metcalf] during the purchase. I was just with her during the briefing of the buy and then afterwards." [JA 224]. Despite not having witnessed the interaction, Officer Jenkins testified that "there were three people in the car whenever they set with Mr. Davis to purchase the methamphetamine," that "the purchase took place at Mr. Davis's apartment complex" which was "a very large apartment complex, but the buy took place at the mailboxes for the apartment complex," and that "[i]t was dark … but there was a lot of streetlights. They actually met just very close to one of the streetlights so there was good lighting to see who was coming in and identify vehicles and people that were involved." [JA 210]. No person associated with the trial of this case questioned the propriety of Officer Jenkins relating facts to the jury which he did not witness. Nor did anyone question Officer Jenkins regarding the source of his information regarding the details of the events to

which he testified. Mr. Davis's trial counsel did, in his cross-examination of Officer Jenkins, ask Officer Jenkins whether he was present for the alleged purchase by Stephanie Metcalf of methamphetamine from Mr. Davis, and Officer Jenkins testified that he was not. [JA 224].[3]

Officer Jenkins also testified that he was involved in the communication allegedly planning the controlled transaction. He testified that "[Ms. Metcalf] was communicating with Mr. Davis [via] a series of text messages that were sent from actually two different cell phone numbers that he was using." [JA 212]. The contacts on the phone which Officer Jenkins testified was Ms. Metcalf's identified one number which provided some of the incoming messages as "Joseph Davis" and one number as "Joseph other." [JA 214]. Officer Jenkins testified that the text messages from "Joseph Davis" and "Joseph other" arrived sporadically over twelve hours. [JA 222-23]. Officer Jenkins did not indicate whether the phone he alleged to be Ms. Metcalf's received any messages or calls from any other phone over those twelve hours. When the prosecutor asked if Officer Jenkins was "present when text messages were being sent from the informant *to Mr. Davis*," Officer Jenkins answered affirmatively, adding that "I was sitting beside [Ms. Metcalf] as all the messages were sent back and forth." [JA 212 (emphasis added)]. Officer Jenkins testified that he "took digital photographs of her actual phone with the messages showing" and the government

[3] At the time Officer Jenkins testified to events for which he was not present, no one in the courtroom mentioned that anything might be amiss. While undersigned counsel did not represent Mr. Davis at the trial, one might guess the reason for the lack of any objection to this procedure by defense counsel or the court (or by the officer himself) is that everyone but the prosecutor believed that Ms. Metcalf would testify to events that she would claim to have witnessed.

offered the photographs as evidence at trial.[4] [JA 213]. Mr. Davis objected and requested a voir dire in which to question Officer Jenkins regarding the basis for his assertion that he knew the identity of the person sending Ms. Metcalf the text messages. [JA 213]. The court denied Mr. Davis's request for a voir dire and overruled the objection, admitting the photographs of the text messages displayed on the phone. [JA 213].

Officer Jenkins testified that, during the twelve hours in which he and Ms. Metcalf arranged the transaction, there was one completed phone call from Ms. Metcalf to another person. [JA 212]. Officer Jenkins testified that he recorded the call, identifying it to the jury as "a recording that … of the phone call placed from [Ms. Metcalf] *to Mr. Davis*." [JA 220 (emphasis added)]. Officer Jenkins testified that on the call, "[a]s I recall, *Mr. Davis* stated that he was still at work and [Ms. Metcalf] asked how much — asked a question about price, to which he responded." [JA 220 (emphasis added)]. The government offered the recording as evidence at trial. Officer Jenkins testified that he "recognize[d] the female voice" and that it was Ms. Metcalf's.[5] Officer Jenkins further testified that he "recognize[d] the male voice on the conversation" and that it was Mr. Davis. [JA 221]. Mr. Davis objected to the identification of his voice and the court overruled the objection. [JA 221]. After the objection had already been overruled, the prosecutor asked Officer Jenkins how he

[4] As the government did not offer Ms. Metcalf's testimony at trial, there is no evidence suggesting how Officer Jenkins concluded that the phone was Ms. Metcalf's "actual phone."

[5] That Officer Jenkins would testify that he recognized the voice on the recording as Ms. Metcalf's is odd. He had already testified that he was with her when she made the phone call and that he recorded the call.

was familiar with Mr. Davis's voice. [JA 221]. Officer Jenkins testified that "prior to meeting him, just via phone calls.[6] At a later date, when we approached [Mr. Davis] and interviewed him, we had a couple of hours of speaking back and forth while in his residence and during an interview [at the investigators' office]." [JA 221].

Officer Joseph Barringer testified that he was "a Special Agent with the Department of Homeland Security assigned to a narcotics and bulk cash smuggling group out of Charlotte." [JA 145]. Officer Barringer further testified that he was "involved in a controlled purchase of methamphetamine from [Mr. Davis]" and that Ms. Metcalf "had met with local law enforcement officials and explained that she had been involved in the distribution of methamphetamine and heroin in the Catawba County area and identified the defendant as one of her sources of supply in this case." [JA 162-63].

Officer Duane Barnes testified that he was a "[n]arcotics detective, Alexander County Sheriff's Office" who also worked "with Homeland Security as a task force officer." [JA 238]. Officer Barnes testified that he was the undercover officer who accompanied Ms. Metcalf to the alleged "controlled buy" of methamphetamine on October 12, 2016, specifically that he "got in the vehicle with Ms. Metcalf and Mr. Greene and went to a location — Mr. Davis's residence where we met him there." [JA 238]. Mr. Greene drove the car, Ms. Metcalf sat in the middle, and Officer Barnes sat in the passenger seat. [JA 238-39]. Officer Barnes testified that "[w]e pulled in at

[6] Officer Jenkins testified to hearing a single phone call which he concluded contained Mr. Davis's voice. That there was never much effort in this trial to ascertain that the testimony of witnesses described only those events they actually witnessed suggests that by using the plural "phone calls," Officer Jenkins was describing calls that non-testifying witnesses told him involved Mr. Davis.

the mailbox … and waited approximately ten minutes. Mr. Davis pulls up to the driver's side of the vehicle I was in. When he arrives, I let Ms. Metcalf out. She walks around and gets in the passenger seat of Mr. Davis's car." [JA 239]. Officer Barnes testified that the people in the car he referred to as "Mr. Davis's car" conducted a drug transaction, "talked for just a few minutes," and then Ms. Metcalf "comes back and gets in the car." [JA 241]. Officer Barnes did not testify that he had ever seen Mr. Davis before October 12, 2016, and he did not testify to any identifying information about the person who was in the car with Ms. Metcalf.

William Greene testified that he was, in fact, the driver of the car in which Ms. Metcalf travelled to conduct the "controlled buy" on October 12, 2016. [JA 296]. Mr. Greene testified that he was "friends with Mr. Davis." [JA 291]. The prosecutor did not ask Mr. Greene if Mr. Davis was present at the "controlled buy."[7]

Mr. Davis testified and denied being the person in the car with Ms. Metcalf on October 12, 2016. [JA 350-51]. Mr. Davis denied being the person who discussed the "controlled buy" via text messages with a phone allegedly used by Ms. Metcalf. [JA 353]. Mr. Davis denied being the person on the recorded phone call with Ms. Metcalf. [JA 355].

The jury convicted Mr. Davis of distributing 50 grams or more of methamphetamine on October 12, 2016. [JA 456-57]. On February 7, 2017, the court sentenced Mr. Davis to 260 months imprisonment, filing the judgment on February 12. [JA 534-39].

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[7] Mr. Greene did testify that he and Ms. Metcalf had bought small amounts of drugs from Mr. Davis on other occasions. [JA 289].

Mr. Davis appealed the judgment and sentence. [JA 462].

The United States Court of Appeals for the Fourth Circuit affirmed Mr. Davis's conviction and sentence on March 19, 2019. Addressing Mr. Davis's argument regarding the hearsay evidence, that court wrote that:

> What is apparent from Officer Jenkins's testimony, as well as Officer Barringer's, is that both were explaining *why* they solicited the Informant as an informant. Because the Informant had told them that she had been purchasing methamphetamine from Davis, the officers concluded that she, as an informant, would work credibly in participating in a controlled buy from Davis. Thus, the testimony was offered not for the truth of whether the Informant had in fact purchased methamphetamine from Davis on prior occasions, but rather as an explanation — or a motive — for the officers' using the Informant in setting up the controlled buy. In these circumstances, the testimony was not even hearsay barred by Federal Rule of Evidence 802.

United States v. Davis, 918 F. 3d 397, 401 (4th Cir. 2019). After briefing but before argument in the case, Mr. Davis had filed as supplemental authority the then-recent case of *United States v. Demott*, 906 F.3d 231 (2d Cir. 2018), wherein the government conceded that similar identifying evidence from a non-testifying witness was hearsay and the Second Circuit had described that concession as having been wisely made since the evidence "should not have been offered." *Demott* at 248. The Fourth Circuit did not mention the *Demott* case in its opinion.

SUMMARY OF ARGUMENT

For many decades, evidence scholars have agreed that testimony which explains an investigation by repeating a non-testifying informant's report which identified the defendant is inadmissible hearsay. Two of the United States Courts of Appeal have reversed convictions due to the improper admission of such evidence,

including one just months before the Fourth Circuit published the opinion in Mr. Davis's case. In affirming Mr. Davis's conviction despite the fact that the trial court allowed a law enforcement officer to testify that a non-testifying informant had identified Mr. Davis as the person who sold her drugs, the Fourth Circuit created a situation where evidence which is inadmissible in the Second and Third Circuits is admissible in the Fourth Circuit. Only this Court can unify this principle of evidence throughout the federal Courts of Appeal.

ARGUMENT - REASONS FOR GRANTING THE PETITION

That law enforcement agents commonly use informants to learn of activity which ultimately becomes the subject of an investigation is well-known to both the administers of law-and-order and the libertarians who seek to protect citizens from a too-powerful police state. This Court for more than fifty years has condoned the practice of gathering information in this fashion.[8] Indeed, over forty years ago — in the infancy of the ongoing "War on Drugs" — the director of the FBI wrote that "the informant is THE with a capital "T" — THE most effective tool in law enforcement today — state, local, or federal."[9] Typically, the "raw intelligence" provided by informants is merely the start of the investigation, and by the time a case reaches trial the government provides the jury with far more evidence than the report of one person that another is involved in criminal behavior. On those occasions when the

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[8] *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966).

[9] Webster, *The Director: Why the FBI Needs Undercover Snoops*, Los Angeles Herald Examiner, June 2, 1978, at A-21.

government's investigation has not uncovered additional evidence, the informant is permitted to testify to his or her personal knowledge of crimes committed, though the common law rule against hearsay — codified in the Federal Rules of Evidence[10] — does not permit a law enforcement officer to testify that one person told him or her that another person had committed a crime.

When a prosecutor must present the informant to a jury, an obvious problem with witness credibility arises from the nature of informant recruitment itself.[11] Therefore, the prosecutor has a strong incentive to present the information provided by the informant without presenting the informant to the jury. Zealous prosecutors have noticed the numerous exceptions to and exemptions from the federal hearsay rules which allow them to do exactly that. At issue in this case is the definition of hearsay itself as a statement which "a party offers in evidence *to prove the matter asserted in the statement*."[12] By asserting that the informant's identification of the defendant as the perpetrator of the crime is offered only to explain the activity of the investigators rather than to prove the defendant a criminal, the government is able to launder the informant's raw intelligence into admissible legal evidence.

Courts and scholars have noted the danger this strategy poses to the truth-seeking purpose of a criminal trial for some time. In 1993, the Third Circuit Court of

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[10] Fed. R. Evid. Rule 802 (2011) ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.")

[11] The FBI director who established the "Top Echelon Criminal Informant Program" in 1961 instructed agents to "develop particularly qualified, live sources within the upper echelon of the organized hoodlum element who will be capable of furnishing … quality information." House Committee on Government Reform, *Everything Secret Degenerates: The FBI's Use of Murderers as Informants, 3rd Report*, H.R. Rep. No. 108-414 at 454 (2004).

[12] Fed. R. Evid. Rule 801(c) (2014) (emphasis added).

Appeals decided *United States v. Sallins*, a firearm-by-felon case where the trial judge permitted a law enforcement officer to testify to the jury that the police had been told that there was a black man with a gun dressed in all black at a particular spot in Philadelphia.[13] The additional evidence before the jury was that police had gone to that spot and saw a man throw an object on the ground. One officer chased the man while another went where the object was thrown. The object turned out to be a gun, the man was Mr. Sallins, and Mr. Sallins was a convicted felon.[14] On appeal, Mr. Sallins challenged the admission of the hearsay evidence, and the government defended it by arguing that the testimony was offered not to prove that a black man with a gun was at the location where police went, but rather to explain why the police went to the location in the first place. The Court of Appeals reprinted a lengthy quote from an evidence treatise:

> In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient. However, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight; the likelihood of misuse great.[15]

The court added that "[i]f the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is

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[13] *United States v. Sallins,* 993 F.3d 344 (3d Cir. 1993).
[14] The jury did not hear that this was the second trial of Mr. Sallins. At the first, the judge excluded the hearsay evidence and the jury was unable to reach a verdict.
[15] *2 McCormick On Evidence* § 249, at 104 (4th ed. 1992).

being introduced for a material non-hearsay purpose."[16] Then, considering the "need for the evidence" and the "likelihood of misuse," the Court of Appeals ordered that Mr. Sallins receive a new trial absent the contested hearsay.

Just nine months later, the Second Circuit decided *United States v. Reyes*, a drug conspiracy case.[17] There, the trial judge permitted the law enforcement agent to testify that a non-testifying co-conspirator[18] told the officer that Mr. Reyes and another defendant, Mr. Stein, were "involved in the criminal enterprise" and that Mr. Stein, who lived in New York, "had been in Connecticut" at the time that cocaine was to be collected there.[19] Despite the fact that the court had instructed the jury not to consider the hearsay "as proof of the truth of what was said,"[20] the Court of Appeals identified the same problem with the evidence as the Third Circuit had identified in *Sallins*, explaining that "the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice."[21] After a thorough review of the "relevance and importance" of the hearsay evidence presented as "background" as well as the "assessment of potential prejudice," the Court of Appeals reached the same decision as the Third Circuit in *Sallins* — that Mr. Reyes and Mr. Stein must receive a new trial absent the hearsay evidence.[22]

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[16] *Sallins*, at 346.
[17] *United States v. Reyes*, F.3d 65 (1994).
[18] The statement occurred after the co-conspirator's arrest so the "statement of a coconspirator" exception to the hearsay rule did not apply. *See* Fed. R. Evid. Rule 801(d)(2)(E) (2014).
[19] *Id.*, at 67-68.
[20] *Id.*, at 69.
[21] *Id.*, at 70.
[22] *Id.*, at 71-72.

Thus, long before Mr. Davis's trial and appeal, two federal Courts of Appeal had prohibited the government from repeating for the jury a non-testifying informant's identification of the defendant. Those courts had specifically rejected the government's justification for the tactic — that law enforcement agents were merely explaining their activity during the investigation rather than testifying to the truth of the informant's statement. And, after Mr. Davis's trial but before the argument on appeal, the Second Circuit considered that type of testimony once again in a drug conspiracy case where the informant's identification and the law enforcement officer's testimony was nearly identical to that in Mr. Davis's case.

In *United States v. Demott*, the government charged a defendant, Mr. Gambuzza, with conspiracy to distribute "Molly," or MDMA, in Syracuse, New York.[23] The trial court allowed the detective who investigated the conspiracy to tell the jury that a non-testifying "source" told him that Mr. Gambuzza was a major distributor of "Molly" in the area. The trial court also allowed the detective to tell the jury that his source had told him that Mr. Gambuzza was involved in a cocaine transaction that was to take place at a particular location. At trial, the government successfully argued that the informant's statements were not offered to prove what the informant said but simply to explain the reason the detective went to that location.[24] On appeal, the government conceded that the contested statements were hearsay, and the Court of Appeals explicitly described that concession as "wisely" made since the evidence

[23] *United States v. Demott*, 906 F.3d 231 (2018).
[24] *Id.*, at 247-48.

"should not have been offered."[25] Even so, that court specifically addressed the contrary argument (which succeeded at the trial), writing that "[t]o the extent the informant's statements to [the detective] might have had some slight insignificant relevance, as explaining why the detective went to [the location], this could have been adequately conveyed by eliciting that an informant had given information about expected activities at that location, without repeating the new information about Gambuzza's dealings in the new form of Molly, of the … cocaine in the trunk, or of the planned 'narcotics transaction slash robbery.'"[26] Because of the improperly admitted hearsay[27], the Court of Appeals ordered that Mr. Gambuzza receive a new trial absent the inadmissible evidence.

The informant in Mr. Davis's case gave very similar "background" information to the law enforcement officers as the informant in *Demott*. In its opinion, the Fourth Circuit even highlighted the challenged testimony — that "I had an informant that had come forward to me and stated that they were currently purchasing methamphetamine from Joseph Davis" and that "[the informant] had met with local law enforcement and … identified the defendant as one of her sources of supply in this case."[28] Without mentioning the *Demott* decision and the government's "wise"

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[25] *Id.*, at 248.
[26] *Id.*
[27] The *Demott* court did include the unfortunate dicta that "hearsay may at times be received to explain relevant background circumstances." *Id.* This is not correct, since the admission of hearsay evidence violates the Federal Rules of Evidence. Fed. R. Evid. Rule 802 (2014). If the informant's statements are admitted to explain relevant background circumstances, they are not hearsay. Fed R. Evid. Rule 801(c) (2014).
[28] *United States v. Davis*, 918 F.3d 397, 400-01 (4th Cir. 2019)

decision to concede that the evidence was hearsay,[29] the Fourth Circuit held that the evidence was not hearsay at all. It explained the decision using the very argument that the *Demott* court (and the others cited, *infra*) had explicitly rejected — writing that "[w]hat is apparent from Officer Jenkins's testimony, as well as Officer Barringer's, is that both were explaining why they solicited the informant as an informant" and concluding that "the testimony was not even hearsay barred by [the Rules of Evidence]" since "the informant's out-of-court statement was not offered for its truth."[30] The Court of Appeals did not explain why it was "apparent" to the Fourth Circuit that such evidence was not offered for the truth when it was equally "apparent" to the Second Circuit, just a few months before, that such evidence is hearsay.

Importantly, the Fourth Circuit betrayed the fact that its decision rested, at least in part, on its belief that the government could lawfully offer hearsay identification testimony using the subterfuge of explaining the background of the investigation. In support of its ultimate conclusion that the informant's identification of Mr. Davis was not hearsay, the Fourth Circuit wrote that the officers were explaining to the jury that "the officers concluded that she, as an informant, would work credibly in participating in a controlled buy from Davis."[31] The only person who works "credibly" is a person whose purpose is to be believed, as a witness at trial is

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[29] The Second Circuit decided *Demott* in October, 2018, after the briefing in Mr. Davis's appeal was complete. Prior to argument in January, 2019, Mr. Davis submitted that case to the Fourth Circuit as supplemental authority.
[30] *Id.*, at 401.
[31] *Id.*

urged to be. There is no requirement that a person is "credible" to be useful as a monitored purchaser of drugs, and thus an informant's credibility during the purchase is irrelevant. It is only when — as it was here — the officers are asking a jury to believe the informant's hearsay identification of the defendant that the informant's credibility is necessary to explain to the jury.

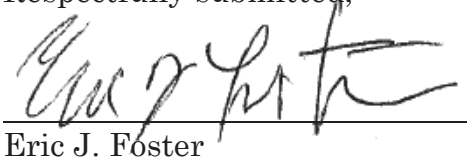
The Fourth Circuit's superficial analysis of the decades-old legal principles involving the balance between allowing law enforcement to explain their investigation and prohibiting the introduction of hearsay evidence should alone be sufficient for this Court to allow Mr. Davis's petition for certiorari. However, by issuing its opinion without either mentioning that balance or addressing the opposite decision by another circuit court just months before, the Court of Appeals has, in essence, created a different rule for this type of evidence in the Fourth Circuit. District Courts in the Fourth Circuit, consistent with the *Davis* opinion, may allow the government to offer the testimony of a law enforcement officer that a non-testifying informant identified the defendant as someone whose actions must be investigated merely by asserting that it is not offering that identification as an identification of the defendant. This rule contrasts with that of the Second and Third Circuits, which require a district court to consider the need for the evidence and the likelihood of its misuse.

CONCLUSION

This Court will review those opinions of the Courts of Appeal which "[have] so far departed from the accepted and usual course of judicial proceedings … as to call

for an exercise of this Court's supervisory power."[32] The Fourth Circuit Court of Appeals, by ignoring law so settled to have been described in a treatise on evidence for decades, has done so. Moreover, since two other circuit Courts of Appeal have applied the law as described in the treatise, the Fourth Circuit has "entered a decision in conflict with another United States court of appeals on the same important matter."[33] Therefore, this Court must allow Mr. Davis's writ of certiorari to correct the erroneous decision below.

Respectfully submitted,



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[32] Sup. Ct. Rules Rule 10 (2019).
[33] Id.