No. 20-7231

IN THE SUPREME COURT OF THE UNITED STATES

TROY BAKER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

REPLY BRIEF FOR PETITIONER

Dated: July 14, 2021

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REPLY BRIEF FOR PETITIONER

Petitioner's petition, his brief below in the Court of Appeals, and his pleadings in the district court uniformly argue that the district court's admission of an out-of-court statement that Petitioner did the crime violated his rights under the Confrontation Clause to confront and cross-examine the witnesses against him because the jury would inevitably consider the testimony for the truth of the matter asserted.

The government's contention that the circuit courts are uniformly allow this kind of evidence is mistaken.

As Petitioner said in his petition, the circuit courts are split on the use of background evidence naming the defendant as the person who did the crime when the evidence is ostensibly admitted to explain the investigation. This kind of background evidence is irrelevant, undermines the Confrontation Clause, and jury instructions cannot remove the unfair prejudice the evidence causes.

This case presents an ideal vehicle for the Court to grant certiorari because the issue was preserved below and the error was not harmless.

ARGUMENT

I. Petitioner has consistently asserted that the disputed evidence violated his rights under the Confrontation

> Clause and that jury instructions could not cure the prejudicial effect of the evidence.

In this Court, in the Court of Appeals, and in the district court, Petitioner said that evidence offered by the government that an out-of-court witness said that she saw Petitioner wearing gloves and packaging drugs in a house at Euclid, Ohio violated his rights under the Confrontation Clause to confront and cross examine the witnesses against him.

The district court allowed the evidence to show the background of the investigation and cautioned the jury to only use it for that purpose.

But, except in circumstances where a defendant makes the propriety of the police investigation an issue, this kind of evidence is inherently prejudicial and improper and limiting instruction cannot cure the prejudice.

The evidence is just as powerful than the evidence this Court held violated a defendant's confrontation rights in Bruton v United States, 391 U.S. 123 (1968). In Bruton, the Court held that a defendant was deprived of his rights under the Confrontation Clause when his non-testifying co-defendant's confession that named him as a participant in the crime was introduced at their joint trial, even though the trial court told the jury to consider the confession only against the co-defendant. The Court said:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences so vital to the defendant, that

> the practical and human limitations of the jury system simply cannot be ignored.

Bruton v. United States, 391 U.S. at 135.

Justice Stewart elaborated on this holding. He said:

> A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. See the Court's opinion, ante, at 136 n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissable against the accused, rather than admissible for the little it may be worth.

Bruton v. United States, 391 U.S. at 138, Stewart, J. concurring (citations omitted).

This Court calls the holding in Bruton a narrow exception to the general rule that the law will assume that jurors follow their instructions. Richardson v. Marsh, 481 U.S. 200, 207 (1987). But Richardson does not apply to what happened here. In Richardson, the Court held the Confrontation Clause was not violated by the admission of a non-testifying accomplice's confession when the Court gave a proper limiting instruction and the confession was redacted to eliminate not only the defendant's name, but any reference to his existence. Richardson v. Marsh, 481 U.S. at 211.

Here there was no such redaction. To the contrary, the government referred to the specific accusation in its opening statement, elicited the same

information from Officer Buchs, and then referred to the tip again in its closing argument. In the opening statement the government said:

> So, lets take it from the top. The first point, the background of this investigation. You are going to learn that members of the Euclid Police Department received a tip that the defendant stayed at 566 East 260th Street in Euclid and that he wore rubber gloves as he packed marijuana and heroin for sale there. So the police, they opened an investigation to try to see if this was true.

Trial Tr., R. 99, Page ID # 628.

Officer Buch's testimony repeated the information. Then, in closing the government said:

> This investigation started with a tip to the Euclid Police Department about Troy Baker at 566 East 260th Street. And as a result of that tip, the detectives began building an investigation of Troy Baker.

Trial Tr., R. 101, Page ID # 901.

Baker's case is unlike the circumstances in another case cited by the government—Tennessee v. Street, 471 U.S. 409 (1985). In Street, the defendant confessed, then recanted his confession saying it had been derived from a written statement that his alleged accomplice had given to law enforcement. Street objected when the government had one of its witnesses read the accomplice's statement to the jury to show the differences between that statement and Street's confession.

The Court allowed the evidence but observed that there were no

alternatives to presenting the accomplice's confession. Tennessee v. Street, 471 U.S. at 415–16. Street reinforces Bruton by recognizing the inherent prejudice from an out-of-court confession and requiring the exclusion of the confession or its redaction when it is possible to do so "without detracting from the alleged [non-hearsay] purpose for which the confession was introduced." Jones v. Basinger, 635 F.3d 1030, 1050 (7th Cir. 2011) (quoting Tennessee v. Street, 471 U.S. at 415).

Neither exclusion nor redaction took place here. Instead of testimony that "based on information received" the police commenced an investigation, the government presented specific testimony by an out-of-court witness saying that the defendant packaged drugs at the house in Euclid, Ohio, the very conduct for which he was on trial.

The presumption that jurors follow instructions disappears when the evidence they are told to ignore directly implicates the defendant. Bruton v. United States, 391 U.S, at 135–37. Courts do not expect jurors to parse instructions for subtle meaning the way lawyers might. Kansas v. Carr, 577 U.S. 108, 122 (2016). Out-of-court evidence that the defendant did the crime charged is at least as incriminating as the confession of a co-defendant

naming the defendant.[1]

The Court should grant the petition for writ of certiorari, and should conclude that the evidence presented here was so inherently prejudicial that instructions could not cure the prejudice and that the evidence violated Baker's rights to confront and cross-examine the witnesses against him.

II. The Court should grant certiorari to resolve the disagreement among the circuit courts about the use of background evidence that includes statements saying that the defendant did the crime.

The cases the government cites to say that the circuit courts do not disagree are not uniform. Some courts find error in the admission of "background evidence" naming the defendant, while others see no error at all. Compare Jones v. Basinger, 635 F.3d at 1051–52 with United States v. Jiminez, 564 F.3d 1280, 1288 (11th Cir. 2009) and United States v. Lubrano, 529 F.2d 633, 637 (2d Cir. 1975).

Many courts express concerns about the use of out-of-court statements

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[1]The cases that the government says hold that juries follow instructions are not on point. In Kansas v. Carr the Court held that jurors could be presumed to follow instructions to consider jointly sentenced capital defendants separately. Kansas v. Carr, 577 U.S. at 125. In Weeks v. Angelone, 528 U.S 225, 234 (2000) the Court held that a capital jury was presumed to follow instructions about considering mitigating evidence. In Jones v. United States, 527 U.S. 373, 394 (1999) the Court held that the jury was presumed to follow instructions about the effect of a deadlock in their deliberations. None of these cases involved out-of-court testimony that the defendant did the crime.

naming or implicating the defendant, even thought they find the error harmless. United States v. Gomez, 529 F.2d 412, 417 (5th Cir. 1976) (harmless error), United States v. Sarli, 913 F.3d 491, 500–503 (5th Cir. 2019) (same). Because the cases differ, the Court should grant certiorari to guide the lower courts.

III. The error was not harmless.

Here, the error was not harmless. The drugs were found in the basement "man cave" in his mother's house that Baker, his six brothers, and his nephew frequented. True, Baker stayed at the house, but not continuously. DNA that matched his was found on the bags containing the drugs, but no comparison was done with the DNA of his brothers and nephew.

No one saw Baker sell drugs, nor was his DNA on the gloves and packaging materials found in the trash.

The out-of-court accusation naming Baker likely tipped the scales from merely possessing the drugs to possessing them with the intent to distribute them. It is impossible to say the error was harmless, given the equivocal nature of the other evidence and the jury's evident struggle to understand how to apply the accusation. The government cannot show beyond a reasonable doubt that the evidence did not contribute to the conviction. United States v. Sarli, 913 F.3d at 502–03 (Duncan, J., dissenting in part).

CONCLUSION

Baker preserved the issue. The issue comes up frequently. It is one thatthe lower courts do not treat uniformly. The Court should grant the petition for certiorari.

Dated: July 14, 2021

Respectfully submitted,

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