

No.

IN THE SUPREME COURT OF THE UNITED STATES

ZACHARY GAGE PEBLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

When the government is the proponent of evidence at a criminal trial, it bears the burden of establishing both authentication and chain of custody. Authentication requires that the government show that the evidence is what the government claims it is. Chain of custody requires that the government show that it is improbable that the original item has been contaminated or altered. When the proffered evidence is a recording that a law enforcement officer has made of a conversation with a defendant, the showing of both authentication and chain of custody can be established by the testimony of the law enforcement officer who was a participant in the conversation.

When the proffered evidence is, instead, a recording of an intercepted phone call using a third party's software and hardware for the interception, recording, storage, and retrieval of the recording, a more elaborate showing of authentication and chain of custody is required. The Tenth Circuit, in affirming Mr. Pebbley's conviction, cited and agreed with a 1999 decision in which the Tenth Circuit said it had adopted a flexible approach when determining whether the proponent of telephone recording evidence has laid sufficient foundation. The Tenth Circuit also said that it only required a "level of minimal familiarity" for a witness to be able to testify to the identification of a voice.

Question presented: whether in the United States in the 21st century, where digital techniques such as CGI (computer generated images), photoshop, green screens, and "deepfakes" make it almost impossible to tell an authentic image or voice recording from one that has been created or altered, a "flexible" and "minimal" approach to authenticity and chain-of-custody issues for digital recordings is sufficient to protect the due process rights of a criminal defendant.

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ATTACHMENTS TO PETITION:

Attachment 1: *United States v. Pebley*, 846 F. App'x 671 (10th Cir. 2021) (unpublished)

Attachment 2: Judgment in a Criminal Case filed 4/30/2020

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PETITION FOR WRIT OF CERTIORARI

Zachary Gage Pebley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

PREVIOUS OPINIONS AND ORDERS

In *United States v. Pebley*, 846 F. App'x 671 (10th Cir. 2021) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment wherein Zachary Gage Pebley, the Petitioner herein, was the Appellant/Defendant. See Attachment 1 (attached hereto). This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment affirmed a Judgment in a Criminal Case filed in the United States District Court for the Eastern District of Oklahoma, in *United States v. Zachary Gage Pebley*, Case No. CR-19-83-Raw. See Attachment 2 (attached hereto).

JURISDICTION

The Tenth Circuit reviewed the Judgment in a Criminal Case under the authority of 28 U.S.C. § 1291. On February 18, 2021, the Tenth Circuit filed the Order and Judgment now presented for review. Attachment 1 (attached hereto). Neither party requested a rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. § 1254(a), applicable in the courts of appeals, which permits a writ of certiorari to be “granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” Mr. Pebley was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISIONS

Rule 901, Federal Rules of Evidence

Rule 901. Authenticating or Identifying Evidence

(a) IN GENERAL. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) EXAMPLES. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

STATEMENT OF THE CASE

1. District Court Proceedings

An Indictment filed in the Eastern District of Oklahoma charged Zachary Gage Pebley with one count of bank robbery pursuant to 18 U.S.C. §§ 2113(a) & 2113(d); and one count of use, carry, and brandish a firearm during and in relation to a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). Jury trial proceeded on January 21-22, 2020. During the trial, the district court admitted, over Mr. Pebley's objections, Government's Exhibits 59, 60, and 61, which were short audio recordings that the government proffered as excerpts of telephone calls Mr. Pebley had made while he was an inmate at the Carter County Jail in October 2019.

One government witness who testified regarding Exhibits 59, 60, and 61 was Melissa Darter, an administrative assistant at the Carter County Sheriff's Office. In her testimony, Ms. Darter established that when inmates are booked into the Carter County Jail, they are given an identification number (an "ID Number"). To make a telephone call, an inmate must type in their ID Number. All calls are recorded, and the inmates are told that their calls may be recorded. The vendor for the Carter County Jail's phone system is City Tele Coin, and the recordings are stored on the vendor's main server. The phone system works properly and the recordings are accurate. Ms. Darter is able to use the City Tele Coin system to retrieve recordings by typing in an inmate's ID Number. The jail can copy the calls onto a disk. Mr. Pebley had been at the Carter County Jail in October 2019. *Id.* at 257. Ms. Darter had been asked to make a copy of Mr. Pebley's jail calls, and she had done that. She had not made any alterations or deletions. She gave the disk to FBI agent Steve West. On cross-examination, Ms. Darter agreed that all inmate phone call recordings are stored by City Tele Coin, which is a third party. Ms. Darter did not know City Tele Coin's procedures for storage of the telephone calls, and she did not have any information regarding how

her search for an inmate's telephone calls was processed and the recordings retrieved. A second government witness regarding Exhibits 59, 60, and 61 was Agent West. He testified that, based on small talk he had with Mr. Pebley during a three hour period while transporting him between jail facilities, he was familiar with Mr. Pebley's voice. Agent West identified one of the voices on the calls admitted as Exhibits 59, 60, and 61 as being Mr. Pebley's.

After the district court overruled Mr. Pebley's objection based on authenticity and chain-of-custody, the audio recordings (Exhibits 59, 60, and 61) were played for the jury. In Exhibit 59, a speaker said he had not been knocked out, and that he had a bag full of money. In Exhibit 60, a speaker said that he was alone and drove "there" in a truck. In Exhibit 61, a speaker said that the government had "everything" in reference to evidence, including the gun and the money. After completion of trial, the jury returned a verdict of guilty on both counts.

2. Direct Appeal

Mr. Pebley timely appealed the Judgment in a Criminal Case (Attachment 2) to the Tenth Circuit. He argued that the lower court erred in denying Mr. Pebley's objection to Exhibits 59, 60, and 61 and in admitting those exhibits into evidence. He argued that the voice recordings of Exhibits 59, 60, and 61 needed a more elaborate authentication because of the involvement of a third-party vendor, City Tele Coin. Tenth Circuit precedents regarding authenticity of voice recordings had involved firsthand knowledge of law enforcement officers as participants in the recorded telephone calls and had not involved third-party vendors. *United States v. Bush*, 405 F.3d 909, 917-19 (10th Cir. 2005); *United States v. Smith*, 692 F.2d 693, 698 (10th Cir. 1982). Mr. Pebley had also argued that the error in admitting the three recordings was not harmless.

The Tenth Circuit panel unanimously affirmed the Judgment in a Criminal Case. The panel said that the standard of review was whether the district court had abused its discretion in admitting

the three recordings. *Pebley*, 846 F. App'x at 673. The panel reaffirmed the previous “flexible approach” that the Tenth Circuit had adopted in the context of phone recordings in determining whether the proponent of the evidence has laid sufficient foundation. *Id.* at 673-74, *citing United States v. Green*, 175 F.3d 822, 829-30 (10th Cir. 1999). The panel said that the Tenth Circuit would “not reverse the district court’s ruling ‘unless the foundation was clearly insufficient’ to ensure the recording’s accuracy.” *Pebley*, 846 F. App'x at 674, *quoting Green*, 175 F.3d at 830. The panel said that the Tenth Circuit had rejected “inflexible foundation criteria” and that the testimony of Ms. Darter and Agent West was “enough to ensure the recordings’ reliability.” *Pebley*, 846 F. App'x at 674-75.

REASONS FOR GRANTING A WRIT

Reason No. 1 - Important Question of Federal Law

Certiorari is appropriate when “a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). This basis for review is presented here because the issue in this case is an important question of federal law that has not been decided by this Court, but should be.

It has been 50 years since the Memorex cassette tape television ad campaign that asked “Is it live or is it Memorex?” <https://www.npr.org/2019/09/03/749019831/the-voice-that-shattered-glass> (last accessed May 10, 2021). In those 50 years, recording has been transformed by the digital revolution. The world now has computer-generated imagery (CGI) that is difficult to tell from authentic live action. Adobe Photoshop and similar software enables even a casual user to alter a photograph in a myriad of ways. “Deepfakes” use artificial intelligence and deep learning to make images, or voice recordings, of fake events.

<https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them> (last accessed May 10, 2021).

In this technological context, authentication of evidence proffered by the government when an individual's liberty is at stake should require more than the "flexible standard" adopted by the Tenth Circuit in a 1999 case and now given a new endorsement by that court of appeals in 2021. This Court should revisit the question of authenticity of recordings in the 21st century given the ease and proliferation of digital alterations or creations.

Even if this Court does not want to use Mr. Pebley's case to introduce a new standard for authenticity in the digital age, this Court should still grant certiorari to address the Tenth Circuit's acceptance of the presence of a third-party vendor in the chain of custody without requiring more from the government in proffering the evidence in Mr. Pebley's case. The government should not be able to "outsource" evidence creation to non-governmental entities and then omit having those commercial parties be part of the authentication and chain-of-custody presentation at a criminal trial.

Reason No. 2 - Conflict Among Courts of Appeals

Certiorari is also appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." S. Ct. R. 10(a). The Tenth Circuit's opinion reaffirmed a "flexible approach" for determining whether the proponent of audio recordings has laid a sufficient foundation. *Pebley*, 846 F. App'x at 673-74, *citing Green*, 175 F.3d at 829-30. *Green* was decided in 1999 and in turn cited the *Smith* Tenth Circuit case from 1982 as authority for the flexible approach. *Green*, 175 F.3d at 829-30, *citing Smith*, 692 F.2d at 698. *Smith* in turn cited a Second Circuit decision that "varying circumstances of particular cases ... militate

against ... the adoption of inflexible criteria.” *Smith*, 692 F.2d at 698, quoting *United States v. Fuentes*, 563 F.2d 527, 532 (2d Cir.), cert denied, 434 U.S. 959 (1977).

In citing and quoting *Fuentes* almost 40 years ago, the Tenth Circuit disregarded the next sentence of the Second Circuit’s decision:

On the other hand, since recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration, we have adopted a general standard, namely, that the government “produce clear and convincing evidence of authenticity and accuracy” as a foundation for the admission of such recordings.

Fuentes, 563 F.2d at 532. In *Fuentes*, the Second Circuit ultimately rejected all of the defendants’ arguments based on the admissibility of tape recordings because the government had satisfied this higher standard of “clear and convincing evidence of authenticity and accuracy.” *Id.* at 532-33. *See also United States v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir. 1991) (citing *Fuentes* and quoting above language regarding the “clear and convincing” standard).

The Tenth Circuit created a split of the circuits in 1982 when it adopted the language of *Fuentes* cautioning against an “inflexible” approach while disregarding the “general standard” that voice recordings should have “clear and convincing evidence of authenticity and accuracy.” Moreover, the Tenth Circuit is not the only circuit that quoted the language of *Fuentes* rejecting a rigid rule for authentication without noting the “clear and convincing” standard that *Fuentes* said was the “general rule” for authentication of recordings. *See, e.g., United States v. Collins*, 715 F.3d 1032, 1036 (7th Cir. 2013) (discussing *Fuentes* in some detail, but not mentioning *Fuentes*’ “clear and convincing” general rule); *United States v. Bright*, 630 F.2d 804, 820-21 (5th Cir. 1980) (same).

Subsequent Second Circuit cases, while not repudiating the “clear and convincing” standard set out in *Fuentes*, have appeared to distinguish it.

In *Fuentes*, we upheld the admission of tapes as sufficiently authenticated by evidence of an unbroken chain of custody. [Citation omitted.] However, our upholding the authentication of tapes by establishing a chain of custody in the absence of testimony by a contemporaneous witness to the recorded conversations does not imply, as appellant suggests, that such a witness cannot provide equally sufficient authentication without proof of a chain of custody.

United States v. Tropeano, 252 F.3d 653, 661 (2d Cir. 2001). In 2003, the Second Circuit quoted the language of the “clear and convincing” general standard from *Fuentes* and found that the recordings admitted into evidence in the case under review had been adequately authenticated using the *Fuentes* rule. *United States v. Hamilton*, 334 F.3d 170, 186-87 (2d Cir. 2003). The *Hamilton* court, however, also cited *Tropeano*. *Id.* at 186.

The cited cases show confusion among the United States courts of appeal regarding the correct standard by which the government should show authenticity and chain of custody for audio recordings. While *Fuentes* stated the general rule that the government must establish these matters by “clear and convincing evidence,” other courts of appeal have emphasized the need for a “flexible” approach with only “minimal” familiarity with a voice needed to authenticate a recording. The cases do not always distinguish between situations where law enforcement was a party to the conversation and situations such as Mr. Pebley’s, where no member of law enforcement was a party to the conversation and the recordings had been in the hands of a commercial third-party. This Court should grant certiorari and take this opportunity to provide guidance to the United States courts of appeal on an issue of due process to defendants in criminal cases that is imperative in the 21st century, given the almost 50 years since the question was posed: “Is it live or is it Memorex?”

CONCLUSION

Certiorari review is appropriate because the subject of authentication and chain-of-custody of voice recordings in the digital age has not been previously addressed sufficiently by this Court. Additionally, this Court should give clear guidance to all federal courts that the presence of a third-party vendor in the chain of custody of a recording that the government proffers at a criminal trial increases the scrutiny that must be given to authenticity of that recording. This Court should reverse the Order and Judgment and remand to the Tenth Circuit to apply stricter standards of authenticity to its review of Mr. Pebley's conviction.

Additionally, the Tenth Circuit's opinion below creates a split of the circuits, and a review of case law from several courts of appeals reveals that there is no consensus view on the proper standard for authentication for voice recordings, even when a third-party is involved in the capture, storage, and retrieval of the recording. This Court should give all federal courts guidance on this important issue of authenticity of recordings in the 21st century. Having issued an opinion giving guidance and a new standard for sufficient authenticity of audio recordings such as the ones admitted in Mr. Pebley's trial, this Court should reverse the Order and Judgment and remand to the Tenth Circuit to apply that new standard in a new review of Mr. Pebley's conviction.

Respectfully submitted,

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