IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2023 TERM

SAMUEL SHERMAN PETITIONER

V.

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the lower courts misapplied this Court's holding in Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993), and the requirements of Rule 14, F.R.Crim.P. in a way that prejudicially violated Sherman's Sixth Amendment right of confrontation.

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TABLE OF AUTHORITIES

PARTIES

The parties in this litigation are Samuel Sherman and the United States of America. Donald Bill Smith was also a defendant at trial. The appeals of Sherman and Smith were argued together and decided in a single opinion.

PROCEEDINGS BELOW

In the United States District Court for the Eastern District of Arkansas, this case was United States v. Donald Bill Smith and Samuel Sherman a/k/a Big Hitt, 4:19-CR-00514-DPM.

In the United States Court of Appeals for the Eighth Circuit, this case was United States v. Samuel Sherman a/k/a Big Hitt, No. 22-2044. It was consolidated for argument and opinion with United States v. Donald Bill Smith, No. 22-2063.

CITATION TO OPINION BELOW

The decision of the Court of Appeals for the Eighth Circuit is cited as United States v. Sherman, 81 F.4th 800 (8th Cir. 2023).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The original opinion of the Eighth Circuit was issued on August 30, 2023, but a timely petition for rehearing en banc was denied on October 18, 2023. Copies of the opinion and the order denying rehearing are in the Appendix. This petition, being filed within 90 days thereof, is timely. Rule 13, RULES OF THE SUPREME COURT OF THE UNITED STATES.

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> ...nor be deprived of life, liberty, or property, without due process of law...

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right ...to be confronted with the witnesses against him....

Rule 8, Federal Rules of Criminal Procedure. Joinder of Offenses or Defendants

> (a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
>
> (b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 14. Federal Rules of Criminal Procedure. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

STATEMENT OF THE CASE

Samuel Sherman seeks certiorari to review the affirmance of his conviction for conspiracy to kill a government witness. 18 U.S.C. § 1512.

The superseding indictment in this case alleged:

- ❑ Count 1: That Donald Bill Smith and Sherman conspired to kill witness Susan Cooper.
- ❑ Count 2: That Smith killed Susan Cooper. Sherman was not charged in this count.
- ❑ Count 3: That for about a decade, Smith and Sherman were in the methamphetamine business.
- ❑ Count 4: That Smith and Sherman conspired for Smith to use a gun in relation to a drug trafficking offense. The count specifically refers to the participation of "Individual # 1" and "Individual #2" but not Sherman.
- ❑ Count 5: That Smith and Sherman "aiding and abetting each other" used a gun to kill Cooper.
- ❑ Special Findings. This makes clear that the Smith is accused of actually perpetrating the homicide and that there is no allegation of Sherman's physical participation.

The government's case may be summarized thus: The deceased, Susan Cooper, was working as an informant for state and federal drug enforcement agencies. She cooperated against 25 to 30 people, and she had given testimony against several defendants.

One of the persons on whom Cooper informed was Sherman. In 2015, she made five controlled purchases of methamphetamine from Sherman and his sister while Sherman was on supervised release. Id. Her handler agent Eddie Keathley was an eyewitness to the purchases and made audio and video recordings of the transactions. (R 1539) The government filed a petition to revoke Sherman's supervised release. (R 179) On June 6, 2016, Keathley testified at Sherman's detention hearing and the photographs and audio/video recordings also were introduced. (R 150) Susan Cooper did not testify. (R 1540) Sherman was ordered detained.

After losing the detention hearing, Sherman agreed to be a cooperating witness and informant. He was released in order to perform his agreement. However, the government was not satisfied with his work and decided to proceed with the revocation hearing. Sherman's federal defender and the Assistant U.S. Attorney negotiated a resolution

to the revocation proceedings. (R 188) The hearing on the revocation petition was set for September 29, 2016. (R 191) On September 23, 2016, the government made a plea offer, and the case was essentially resolved. (R 188) Sherman decided to plead guilty and cooperate for a lesser sentence. (R 1541) The evidence against Sherman on the drug case was strong: Keathley was an eyewitness and there were recordings and photographs of the transactions. It was obvious to Sherman that he had no defense, even without Cooper. (R 1539-1540). Sherman also confessed to the sales in a proffer. (R 1543)

The government presented trial testimony that Smith and Sherman had threatened Sherman. (E.g. testimony of Tammy Edwards at R 531). However, in the days leading to her death, Cooper had also received several threatening messages from persons other than Smith and Sherman. (R 153)

The government alleged, based upon phone records, that on September 26, 2016, Smith drove some 140 miles from Malvern (in the Western District of Arkansas) to Batesville (in the Eastern District) — Batesville was where Sherman was living and working— and was there for some 40 minutes before driving back to Malvern. (Testimony of

Yvonne Maier, R. 1215-1281)

At trial, the government presented testimony from Racheal (sic) Cooper, Susan Cooper's former sister-in-law, that she had arranged with Smith to get drugs from Susan Cooper. Racheal Cooper testified that at the rendezvous for the drugs Smith shot and killed Susan Cooper. (R 305-445). Parris Davis, a former girlfriend of Smith, testified that Smith told her that he had killed Susan Cooper. (R 964-1031) Smith was arrested. Jim Porter came forward and told law enforcement that he helped Smith bury Susan Cooper's body. Her body was then located and exhumed. Porter testified at the trial. (R 639-719)

The government conceded that Sherman was nowhere around during the killing of Susan Cooper or her subsequent burial. There was no testimony purporting to quote Sherman that he had anything to do with Susan Cooper's death. The case against Sherman thus was circumstantial.

Sherman's motion for severance (Doc. 88) had been denied just before the pretrial hearing. (Doc. 132) Sherman renewed it then and said it would continue to be renewed during the trial. The District Court acknowledged that the request had been preserved. (9/1/21 hearing at 4)

Instead of severance, the District Court repeatedly told the jury to consider the persons quoting Smith as admissible against "Smith only." Sherman repeatedly asserted that the "Smith only" instruction was insufficient to ameliorate the prejudice under the circumstances of this case, (R. 300)

Racheal Cooper testified that she served time in the Arkansas prison system for hindering apprehension for her involvement in Susan Cooper's death. She knew nothing about any supposed involvement by Sherman. (R. 431)

The following is a summary of how the issue was handled in the trial.

In the trial, Sherman notified the judge that the "Smith only" instruction might be necessary in the testimony of Laura Hembree, a friend of Smith. The Court told the jury that he would say "Smith only" or "Sherman only" at the appropriate places in the trial. (R 483)

Before the testimony of Jim Porter, Sherman alerted the court of the upcoming testimony and renewed his position that an instruction was insufficient and that severance was the only appropriate remedy (R 627-628) The Porter testimony included this colloquy:

> Q. Okay. Did Mr. Smith ever say anything to you about why this woman was dead on the property?
> A. She (sic) said she was—yeah. Later on, yeah.
> Q Okay,
> A. Said she was going to testify against his uncle.
> (R 654)

The "Smith only" instruction was then given. (R 655-656)

Jason Kelly Frazier, a former employee of Smith, claimed that Smith had confessed to him. The "Smith only" instruction was given at R 891, applied inter alia to the following:

> Q. (By AUSA) So I want to ask you, when you talked to Don, who did he say was involved in the murder?
> A. Him. There was somebody he said was Ole Boy— I don't know who Ole Boy is—and Rachael.
> Q. Okay. Ans why did he say Susan was killed?
> A. For snitching.
> Q. Do you know who she was snitching on?
> A. Sam Sherman.
> Q. That's what he told you?
> A. Yes. (R 898)

The objection was renewed at R 905-906.

There was an extensive discussion outside the presence of the jury about statements made by Frazier about his relationship with Smith. Sherman argued that:

> (T)he discussion of irrelevant transactions that are a half decade outside the count 3 allegation of conspiracy and a different drug et cetera et cetera and that there is no, there's no plausible basis for this to be admitted against Mr. Sherman. Which, I again argue to the Court that this is yet another reason why Mr. Sherman's case should be severed and Mr. Sherman be excused from the remainder of these proceedings, and the government can proceed separately against him with evidence that's admissible only against Mr. Sherman. (R 950-951)

The motion was denied. There was then a discussion about various text messages to be admitted only against Smith in the testimony of Parris Davis, the former girlfriend of Smith. The severance motion was again made and denied. (R 962)

In Davis's testimony, this occurred:

> Q Okay. What did he tell you about his involvement with
> Susan Cooper and what happened
> A. He explained that he was in a situation where she could
> send him to prison, and he didn't want that to happen.
> MS. GARDNER: Your Honor, I think we need the Smith-only instruction.
> THE COURT: Agreed. Smith only, ladies and gentlemen, about what Mr. Smith said, assuming he doesn't mention Mr. Sherman in those words. I think it's going to be just about what he said. So

Smith only, you with me? Good.
BY MS. GARDNER:
Q When you said she was involved in something that could
send him to prison, specifically what was that?
A There was a situation where there was some drug dealing
going on, and she cooperated with the police.
Q Who was involved in the drug dealing?
A Donald and Mr. Sherman, but I don't know, because I guess that's what I was told.
Q He told you himself and Mr. Sherman?
A Yes, ma'am.
Q And why was he getting involved with Mr. Sherman and
Ms. Cooper? Why was he concerned about them?
A That was one of the things I kept asking him, and he just
kept saying that he could go to prison, as well. He owed him, the other person. He owed his -- that was his bro, like, so he owed him. They were in that together, so he felt obligated.

(R 974-975)

Smith's text conversations with Davis were introduced at R 985-989. Another "Smith only" instruction was given at R 1008 dealing with her grand jury testimony. At R 1023-1024 the Court corrected itself before the jury on its instruction to the jury and told the jury that the entire Davis testimony was "Smith only" and not just the portion where he supposedly referred to Sherman. (R 1024).

On redirect of Davis, there was this:

Q. Did Mr. Smith tell you that he killed Susan Cooper?
A. He told me he was involved in it.
Q. He was involved in it?
A. Yes, ma'am.
Q. Did he tell you why he was involved in it?
A. Because she was a snitch.
MR. MORLEDGE: Your Honor.
THE COURT: Smith only, ladies and gentlemen. Smith only. (R 1030)

Another iteration of the Smith only instruction vis-a-vis Frazier occurred at R 1283-1284 when Frazier was called back to the stand.

There was a further discussion about the "damned if you do, damned if you don't situation" that arose from cross-examining Frazier about his proffer that characterized Smith's implication of Sherman as Frazier's "assumption of mine." (R 1329-1333). Frazier adopted that assumption on cross examination. (R 1339-1340) and the Court again gave the limiting instruction.

The government rested and the Court eventually granted Sherman's motion for judgment of acquittal on Counts 3, 4 and 5. The Court held there was sufficient evidence on Count 1. (R 1403-1405). The holding was affirmed when the motion was renewed at the end of the testimony. (R 1586-1587).

At the end of the government's case, Smith argued that "I understand Ali Ahmad (the-then AUSA on the Sherman case) to say Sherman's case was going to be resolved September 23rd, negating motive." (R 1370) Sherman, going second, adverted to that claim by saying "And, of course, the Court also heard testimony with regard—that the strength of the case against Mr. Sherman, that Mr. Keathley was, in fact, a percipient witness to the transactions and that there was–there was nothing that really could be done in that regard." (R 1389). Sherman's motions were renewed with the additional invocation of his revocation defense attorney Latrece Gray's testimony that Sherman had decided to plead guilty. (R 1587)

REASON TO GRANT THE WRIT AND ARGUMENT

THE LOWER COURTS MISAPPLIED THIS COURT'S HOLDING IN ZAFIRO V. UNITED STATES AND RULE 14 F.R.Crim.P IN A WAY THAT PREJUDICIALLY VIOLATED SHERMAN'S SIXTH AMENDMENT RIGHT OF CONFRONTATION

This case will provide this Court with the opportunity to clarify the interrelationship of Zafiro v. United States , 506 U.S. 534, 113 S.Ct. 933 (1993), and Rule 14, F.R.Crim.P in a way that will protect, rather than violate, the defendant's right of confrontation and due process. The District Court and the Court of Appeals apparently regarded this case as standard instruction to ignore evidence case, when it is not or should not be. Sherman's trial should have been severed from that of Smith.

The Confrontation Clause of the Sixth Amendment provides that "(i)n all criminal prosecutions, the accused shall enjoy the right .... to be confronted with the witnesses against him." Various work-arounds have been devised to mitigate a literal interpretation of those words: "Firmly rooted" hearsay exceptions, statements made in the course and furtherance of a conspiracy, admonitions to the jury et cetera. These work-arounds do not always work. This is one such case. Although federal severance doctrine is heavily tilted to trying alleged co-actors

together, it is not absolute. This case demonstrates — both factually and legally— that there are circumstances where severance is not only appropriate but necessary in order to preserve the defendant's constitutional rights of due process and confrontation and the rule-based right to avoid prejudice, as set forth in Rule 14.

In this case, the issue before this Court may be summarized thus: How many times can the district court say "Smith only" to a lay jury and not grant a severance of Sherman's case from Smith? Sherman here argues that the repeated invocation of the "Smith only" instruction to a lay jury when repeatedly exposed to quotations of Smith— particularly those implicating Sherman — whom even the government conceded was nowhere around the Cooper killing, exceeded the doctrinal tolerance of joinder under Rule 8, F.R.Crim.P. The repeated "Smith only" instructions asked too much of a jury. The District Court thought that repeated instructions were sufficient and the Eighth Circuit affirmed the trial court on that. This Court should grant certiorari to clarify that repeated quotations of a non-testifying co-defendant inculpating the petitioner here cannot be sufficiently ameliorated by admonitions.

To reiterate, the superseding indictment (Doc. 103) alleged:

- ❑ Count 1: That Smith and Sherman conspired to kill Susan Cooper.
- ❑ Count 2: That Smith killed Susan Cooper
- ❑ Count 3: That for about a decade, Smith and Sherman were in the methamphetamine business.
- ❑ Count 4: That Smith and Sherman conspired for Smith to use a gun in relation to a drug trafficking offense. The count specifically refers to the participation of "Individual # 1" and "Individual #2" but not Sherman.
- ❑ Count 5: That Smith and Sherman "aiding and abetting each other" used a gun to kill Cooper.
- ❑ Special Findings. This makes clear that the Smith is accused of actually perpetrating the homicide and that there is no allegation of Sherman's physical participation.

The District Court granted Sherman judgments of acquittal in Counts 3, 4 and 5. He was convicted only of Count 1. The government's theory was that Smith killed Cooper from testifying against Sherman. Not only did the government not allege that Sherman actually killed

Cooper— only Smith was charged in Count 2— there was no dispute of the fact that Sherman was some 140 miles away at the time Cooper was killed.

Entitlement to severance is governed by the Fifth Amendment right of due process and the Sixth Amendment right to fair trial and confrontation, mediated by Rule 14. It provides:

> Rule 14. Relief from Prejudicial Joinder
> (a) Relief.
> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
> (b) Defendant's Statements.
> Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

Zafiro, supra, is the governing Supreme Court law on the issue of severance. The Zafiro analysis is stated thus:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would

> compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See Kotteakos v. United States, 328 U.S. 750, 774-775, 66 S.Ct. 1239, 1252-1253, 90 L.Ed. 1557 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. [emphasis added by Sherman] See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, e.g., Tifford v. Wainwright, 588 F.2d 954 (CA5 1979) (per curiam). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in Richardson v. Marsh, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S., at 211, 107 S.Ct., at 1709.

Zafiro notes supra that "limiting instructions often will suffice."

The operating word in that sentence is "often." But "often" is certainly not always. Zafiro also notes that evidence "probative of a defendant's guilt but technically admissible only against a codefendant" presents that risk of prejudice. This is such a case.

The Supreme Court's decision in Richardson v. Marsh, 481 U.S. 200, 206-208, 107 S.Ct. 1702, 1707 (1987), describes the problem of prejudice when a jury is told to consider evidence against only the defendant being quoted, and invokes Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968),

> Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness "against" a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions, Francis v. Franklin, 471 U.S. 307, 325, n. 9, 105 S.Ct. 1965, 1976, n. 9, 85 L.Ed.2d 344 (1985), which we have applied in many varying contexts. For example, in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), we held that statements elicited from a defendant in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), can be introduced to impeach that defendant's credibility, even though they are inadmissible as evidence of his guilt, so long as the jury is instructed accordingly. Similarly, in Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606

(1967), we held that evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt. Accord, Marshall v. Lonberger, 459 U.S. 422, 438–439, n. 6, 103 S.Ct. 843, 853, n. 6, 74 L.Ed.2d 646 (1983). See also Tennessee v. Street, 471 U.S. 409, 414–416, 105 S.Ct. 2078, 2081–2083, 85 L.Ed.2d 425 (1985) (instruction to consider accomplice's incriminating confession only for purpose of assessing truthfulness of defendant's claim that his own confession was coerced); Watkins v. Sowders, 449 U.S. 341, 347, 101 S.Ct. 654, 658, 66 L.Ed.2d 549 (1981) (instruction not to consider erroneously admitted eyewitness identification evidence); Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (instruction to consider unlawfully seized physical evidence only in assessing defendant's credibility). In Bruton, however, we recognized a narrow exception to this principle: We held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. We 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 of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side

> with the defendant, are deliberately spread before the jury in a joint trial..”..[emphasis added by Sherman] ” 391 U.S., at 135–136, 88 S.Ct., at 1627–1628 (citations omitted).

This case presents the circumstance of witnesses repeatedly quoting Smith as claiming he had done the murder for Sherman or to benefit Sherman. This was testimony clearly inadmissible against Sherman—as the court and government agreed. They were not alleged to have been co-conspirator statements. Considering that Sherman was nowhere near the scene of the murder and that Sherman was powerless to call his co-defendant to the stand to refute this, the repeated “Smith only” instruction was not sufficient to alleviate the prejudice coming from this testimony. This is not a case of one defendant being charged with a set of offenses with which the other was not charged, the question there being mere compartmentalization of offenses. Rather, this case involves repeated inadmissible evidence being placed before this jury of lay persons who are told to compartmentalize statement after statement about an offense in which both were charged.

This case presents this Court with an opportunity to explain to the lower courts that there are circumstances, such as in this case, where it

is necessary to grant separate trials in order to vindicate the right of confrontation.

CONCLUSION

Sherman prays that this Court grant the petition for writ of certiorari and, upon plenary consideration, order that Sherman's conviction be vacated and any further proceedings be consistent with the Court's holding.

SAMUEL SHERMAN

/s/ Jeffrey M. Rosenzweig

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served the Solicitor General of the United States at the address of Rm. 5616, Dept. Of Justice, 950 Pennsylvania Ave NW, Washington DC by Federal Express this 5th day of January, 2024

/s/ Jeff Rosenzweig

JEFF ROSENZWEIG

CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitation of Rule 33 because it contains 3630 words countable under the rules. Because it is submittted under 8 ½ x 11 paper, it complies because it is under 40 pages.

2. This motion complies with the typeface requirements of Rule 33 because it has been prepared in a proportionally spaced typeface using WordPerfect X-6 in 14 point Century Type.

/s/ Jeff Rosenzweig

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JEFF ROSENZWEIG

APPENDIX

Opinion of the Eighth Circuit

Order Denying Rehearing and Rehearing En Banc