No. _____

In The

Supreme Court of the United States

RENAIRE ROSHIQUE LEWIS, JR.,

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

W. Rob Heroy
Counsel of Record
GOODMAN CARR PLLC
301 South McDowell Street
Suite 602
Charlotte, NC 28204
(704) 372-2770
rheroy@goodmancarr.net

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

Questions Presented

I. Whether the presence of counsel obviates the need for Miranda warnings; and

II. Whether *Bourjaily v. United States* permits the affirmance of the admission of coconspirator hearsay under F.R.E. 801(d)(2)(E) where no evidence indicates that the other party to the conversation was a coconspirator or that the conversation furthered the conspiracy?

Table of Contents

Page:

TABLE OF CONTENTS
Appendix

Page:

Table of Authorities

Page(s):

Cases:

Statutes:

Constitutional Provisions:

Rules:

Other Authorities:

Renaire Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Introduction

The Fourth Circuit Court of Appeals erred in two respects:

First, the circuit court should not have allowed the Government to admit Mr. Lewis's in-custody statements when he had not been provided *Miranda* warnings. The presence of his state court attorney did not remedy the violation because FBI agents did not inform Lewis of his right to remain silent, and that the statements could, and would, be used against him. The circuit court's conclusion requires an unsupported presumption that the defendant had otherwise been advised of his Fifth Amendment Rights by counsel.

Second, the circuit court's ruling undercut the protections of the coconspirator hearsay rule where it upheld the admission of a hearsay statement was not made by a coconspirator or in furtherance of the charged conspiracy. The district court and the Government both acknowledged that they did not know the identity of the other party to the conversation, or that he was a coconspirator. Yet, the district court allowed the admission of the statement, and the Fourth Circuit upheld the decision based on an abuse of discretion standard. The Fourth Circuit's interpretation waters down the preponderance standard for coconspirator hearsay set forth in *Bourjaily v. United States*, 483 U.S. 171 (1987). The interpretation permits the Government to circumvent the requirements of F.R.E. 801(d)(2)(E) through speculation.

This Court should take up the petition because it provides an opportunity to reinforce protections against hearsay and to ensure that lower courts continue to guard the protections set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966).

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 90 F.4th 651 (4th Cir. 2024). App. 45a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 9, 2024.[1] (App. 2a). Following a jury verdict, District Court Judge Frank Whitney signed Lewis's Judgment on November 9, 2020. Dist. Ct. Dkt. 3102.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court possessed jurisdiction based on 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction to review Lewis's appeal based on 28 U.S.C. § 1291.

Relevant Statutory and Constitutional Provisions

> The Fifth Amendment to the Constitution states, "No person . . . 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[.]"
>
> F.R.E. 801(d)(2)(E) provides a hearsay exception for a statement "made by the party's coconspirator during and in furtherance of the conspiracy."

[1] The circuit court decided the case on January 8, 2023, and issued an amended opinion on January 9, 2023.

[2] "Dist. Ct. Dkt." Refers to the docket in *United States v. Addison* (N.C.W.D., No. 3:17CR134-FDW). "ROA" refers to the record on appeal in the Fourth Circuit.

Statement of the Case

A. Factual Background

Petitioner Renaire Lewis was one of 83 defendants named in an indictment charging RICO conspiracy and other related crimes. ROA p. 6-7. The Government alleged that Lewis was a United Blood Nation (UBN) gangster, and that he conspired to participate in the affairs of the UBN through a pattern of racketeering activity consisting of murder, narcotics trafficking, and other acts, in violation of 18 U.S.C. § 1962(d). ROA pp. 155-183. Lewis was also charged with murder of Malik Brown in aid of racketeering under 18 U.S.C. § 1959(a)(1), and other related offenses. *Id.*

1. Background relating to Miranda violations.

The Government proved its case, in part, through an interview conducted by FBI Special Agent David Dawson. Dawson testified that he interviewed Lewis at the local jail on March 31, 2017 while Lewis was in custody on related state charges. App. 140a-141a. He testified that Lewis admitted to being a gang member and to participation in the alleged murder. App. 144a-145a.

Lewis filed a pretrial motion to suppress based on a violation of Lewis's *Miranda* rights. Following a suppression hearing, District Court Judge Frank Whitney denied the motion. App.109a; ROA 3579-3589.

At that time of the interrogation, Lewis was in custody for related state murder charges for the murder of Malik Brown. App. 78a. FBI agents, along with Lewis's state court attorney, were present for the interrogation. App. 77a. FBI agents did not

advise Lewis of his *Miranda* rights prior to or during the interview, nor did they otherwise advise Lewis of his rights under the Fifth or Sixth Amendments. App. 80a.

The FBI agents met with Lewis with the purpose to interview him regarding "VICAR racketeering and 924(c)" charges. App. 74a. Dawson testified at trial as to a variety of statements made by Lewis during the interrogation, including the following:

- That his nickname within the organization was "Banz." App. 140a.
- That he admitted his association with the Nine Trey subset of the UBN. App. 140a-141a.
- That he used gang terminology, including terms like "OLA," "DOA," and "Food." App. 144a.
- That Nine Trey members paid dues to the UBN once a month. App. 142a.
- That he explained where he and others were in the hierarchy of the Nine Trey set. App. 143a.
- That he knew that the four persons arrested with him on July 26, 2016, for the murder of Malik Brown were UBN gang members. App. 144a.
- That he and the four others were present during the shooting of Malik Brown. App. 145a.
- That he was given two guns that were used in the shooting of Brown. App. 146a.
- That he placed the guns in the trunk of the car. App. 146a.

In summary, FBI agents interrogated Lewis without providing *Miranda* advisals. Lewis's answers were incriminating, and those answers were used against him during the Government's case-in-chief to prove racketeering charges.

B. Background relating to Evidence admitted as Coconspirator Hearsay.

During trial, the Government introduced a short but significant text message thread between Lewis and an unknown individual to bolster its case against Lewis for the murder of Brown. App. 190a. The thread was admitted under F.R.E. 801(d)(2)(E).

The Defense objected to the admission of the text message thread orally and in writing because the Government failed to demonstrate by a preponderance of the evidence that the conversation took place with a coconspirator or that it furthered the conspiracy. ROA 2643, Dist. Ct. Dkt. 2734. The district court overruled the objection and permitted the Government to introduce the thread. The Government used the thread to show Lewis's propensity to commit robbery, his knowledge of the robbery plan, and a gang motive. App. 191a.

The thread appeared as follows:

Read	yoooo
Read	another lick even sweeter
Sent	What's goodie
Read	remember that nigga that pulled up at my crib with the Beamer
Sent	Yea
Read	gotta get that nigga
Read	he got the trees and bread
Sent	Gz

Lewis is the reader, and the sender is unknown. No evidence indicated that the other individual on the text thread was a gang member or otherwise part of the

RICO conspiracy. Under questioning from the district court, the Government conceded that it did not know the identity of the other individual who was on the text thread or that he was a fellow gang member. App. 170a. The district court inquired of the Government as to whether there was "any evidence of him being a conspirator." *Id.* The Government responded, "we don't have additional evidence of who he is." *Id.*

Nonetheless, despite its reservations, and its acknowledgement that the evidence only showed that "the declarant, *might* be a Blood,"[3] the district court allowed the Government to admit the exhibit under the coconspirator hearsay exception.[4]

C. Procedural History

Lewis was convicted of all charges following a jury trial in the Western District of North Carolina. ROA 3572-3574. The district court judge sentenced him to a term of life plus 240 months. ROA 3771-3773.

Lewis appealed his conviction on multiple grounds, including the *Miranda* and Confrontation Clause issues discussed above.

The Fourth Circuit rejected both arguments. On *Miranda,* it ruled that, "[i]t is generally accepted that if [an] attorney was actually present during the interrogation, then this obviates the need for the warnings." *Huskey* at 666 (citing 2 Wayne R. LaFave, *et al.*, Crim. Proc. § 6.8(a) (4th ed. 2023) (LaFave)).

---

[3] App. 187a (emphasis added).

[4] The district court alternatively allowed the admission of the thread as a party admission under F.R.E. 801(d)(2)(B) (App. 150a), however, the circuit court did not address this argument. *Huskey* at 668.

On coconspirator hearsay, the court ruled that, "it was reasonable for the district court to conclude the unknown declarant was 'more likely than not a conspirator.'" *Id.* at 668 (citing *United States v. Ayala,* 601 F.3d 256, 268 (4th Cir. 2010)).

Reasons for Granting the Petition

I. *The Miranda issue denied by the Fourth Circuit is an important question of federal law that has not been, but should be, settled by this Court. The circuit court decision likely conflicts with the Seventh Circuit's holding in Sweeney v. Carter*, 361 F.3d 327 (7th Cir. 2004).

In *Miranda,* the Court set forth two advisals that law enforcement must provide: (1) "the right to remain silent," and (2) "the right to consult with a lawyer." *Miranda v. Arizona,* 384 U.S. 436, 471 (1966). While the right to counsel was not at issue here, agents failed to advise Lewis of his Fifth Amendment rights. In *Miranda,* this Court first held that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." *Id.* at 467-68. As a result of this bright-line rule, Lewis's confession should not have been used against him in his criminal prosecution. A contrary conclusion requires an unwarranted presumption that the defendant had otherwise been advised of his Fifth Amendment Rights by counsel.

The advisal is particularly important where, "laypersons sometimes do not realize that the federal government and the state governments are separate sovereigns for purposes of criminal prosecutions." *Sweeney v. Carter*, 361 F.3d 327, 328 (7th Cir. 2004). The same applies to lawyers, who should, but sometimes do not, recognize the same. *Id.*

Here, FBI agents met with Lewis with the purpose to interview him regarding "VICAR racketeering and 924(c)." App. 74a. The statements elicited included gang association and involvement with murder that underlaid the VICAR charge.

At the time, Lewis was being held in county jail on the related state murder charge. App 78a. For his interrogation, agents removed Lewis was removed from the regular population at the jail and placed him in an administrative conference room. *Id.* Lewis, his state attorney, and two FBI agents were present. App. 77a. At the conclusion of the interview, he returned to state custody.

In denying Lewis's appeal, the Fourth Circuit reasoned that "[i]t is generally accepted that if [an] attorney was actually present during the interrogation, then this obviates the need for the warnings." *Huskey* at 666. (citing 2 Wayne R. LaFave, *et al.*, Crim. Proc. § 6.8(a) (4th ed. 2023)).

While the presence of the Lewis' attorney negated the requirement of law enforcement to warn Lewis regarding his right to an attorney, it did not negate the need for law enforcement to inform him of his right to remain silent. In *Miranda,* this Court discussed each protection separately as "an absolute prerequisite" to custodial interrogation. 384 U.S. at 468. Here, that right is at issue where Lewis, in state custody on related charges, was questioned by federal agents and his answers were used against him in a subsequent federal prosecution. The agents did not inform him of his right to remain silent, or that "anything said can and will be used against the individual in court." *Miranda* at 469. The violation is apparent as those statements were used against him at trial.

Support for Lewis's position can be found in *Sweeney v. Carter*, 361 F.3d 327 (7th Cir. 2004). In discussing the "missteps" that the lower courts made in determining the *Miranda* warning requirements, it stated:

> No authority of which we are aware holds that a suspect's discussions with defense counsel can double for the usual warnings given by law enforcement officers; indeed, the contrary position—that whatever warnings are otherwise required by *Miranda* must be administered by the public authorities—is quite well-established.

Id. at 331.

Sweeney is consistent with the requirements of *Miranda*. This Court should adopt the same position, and find that presence of his attorney during a custodial interrogation did not negate the prerequisite that law enforcement warn a suspect of his right to remain silent. The Seventh Circuit opinion in *Sweeney* would have been fully unnecessary if the answer were simple.

In denying Lewis's appeal, the circuit court quoted *Miranda* for the proposition that the presence of counsel provided a complete substitute. It stated, "'[t]he presence of counsel ... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege' against compulsory self-incrimination." *Huskey* at 667 (quoting *Miranda* at 466). The Defense contends that the quoted language refers to the right to counsel under the Sixth Amendment, not the Right to remain silent under the Fifth Amendment. While the opinion shutters between discussions of both those amendments, the quote refers to the Sixth Amendment because it immediately follows a discussion of *Escobedo v. State of*

Illinois, 378 U.S. 478 (1964), which addresses the right to counsel under the Sixth Amendment. Additionally, the referenced quote is not central to the holding.

The Court should decline to relieve the Government of its duty to advise suspects of their constitutional rights based on an unwarranted presumption that someone else has adequately advised them.

II. *The Fourth Circuit holding erodes Rule 801(d)(2)(E)'s protections against inadmissible hearsay evidence and should be reversed.*

The Fourth Circuit dropped the evidentiary bar far too low in upholding the district court's decision to allow the admission of coconspirator hearsay with no evidence that the other individual was a coconspirator. *Huskey* at 667. The district court abdicated its gatekeeping function to the prosecution and consequently abused its discretion. The ruling is inconsistent with the procedural requirements set forth in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Those requirements should be cemented to ensure that defendants are protected from unreliable and unconfronted hearsay.

F.R.E. 801(d)(2)(E) provides a hearsay exception for a statement "made by the party's coconspirator during and in furtherance of the conspiracy." Here, the Government was permitted to shove hearsay evidence through with no evidence to support the conclusion that the statements were made by a coconspirator or that they furthered the conspiracy.

The Fourth Circuit gave unwarranted deference to the district court. It found the evidence was sufficient to meet a lenient abuse of discretion standard where:

1) The text message thread contained the terminology "bread," "gz," "lick," and "trees."[5] While these statements are common vernacular, the circuit court found that because gang members use that terminology, the conversation was likely between gang members; and

2) because the text discussed a robbery, and because UBN members committed robberies, the robbery discussed in the message could have been related to gang business. *Huskey* at 667.

First, the circuit court gave undue weight to the use of common terminology. While gang members use terms such as "the bread," "geez," and the other terms, so does the rest of the world. This was not 'secret gang language,' it was common parlance. Its usage within the text message, like any other slang, is no indication of gang activity. At best, it is evidence of teenagers exchanging text messages.

Second, the circuit court provided far too much leeway in concluding that the district court's decision was otherwise supported where the text message referenced a robbery, and UBN members committed robberies. *Id.* Under questioning from the district court, the Government conceded it did not know who the other party was, that it did not know if that party was involved in the robbery for which Lewis was prosecuted, and it argued that the identity of the other party was "for [the defense] to investigate." App. 175a. The district court pressed the Government for something:

[5] In this context, "bread" meant money, "gz" meant "geez," "a lick" meant a robbery, and "trees" meant cannabis. *Huskey* at 667.

THE COURT: Okay.
Do we know who drove the Beamer?
MR. WARREN: No, Your Honor.
THE COURT: Because that would help us identify maybe somebody.
MR. WARREN: Your Honor, we would argue that's highly probative for this case, not only as kind of a general co-conspirator statement or party admission regarding to racketeering acts, such as robbery, that we could generally have admissible as predicate acts that he agrees to. It's part of the RICO conspiracy.

App. 171a. However, the Government was not able to point to any evidence that the other party was a co-conspirator or that the text related to the robbery that was charge. *Id.*

After failed attempts to prod the Government, the district court acknowledged the speculation at play, that "the declarant, *might* be a Blood." App. 187a (emphasis added). Yet it still admitted the statement. Following admission, the Government ran with its slack and argued to the jury that the thread demonstrated Defendant's knowledge of the robbery that was charged. App. 190a.

While *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) did no favors for the defense, it affirmed procedural protections to ensure protection against rampant admission of coconspirator hearsay. The Court emphasized the importance of the preponderance standard, noting, "the preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have

been afforded due consideration." The standard was applied far too loosely in this case, watering down the rule and its protections.

The loosey-goosey admission of the thread here provided the Government with undue propensity evidence and unreliable and misplaced evidence implying advance knowledge of the robbery. The thread did not fall under the co-conspirator exception because the preponderance standard was not met.

This Court should review the decision of the Fourth Circuit to ensure fair application of the coconspirator hearsay exception. This Court should take up the petition, hold that speculation is insufficient to meet a preponderance standard, and reverse the decision of the circuit court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted, this the 19th day of March, 2024.

/s/ Rob Heroy
Counsel of Record
W. Rob Heroy
Supreme Court Bar No. 307792
Goodman Carr, PLLC
301 S. McDowell St., #602
Charlotte, NC 28204
RHeroy@GoodmanCarr.net
(704) 372-2770

Counsel for Petitioner