No. 24-

IN THE

Supreme Court of the United States

KAREEM SWINTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

SARAH KUNSTLER
LAW OFFICE OF SARAH KUNSTLER
Counsel of Record
315 Flatbush Avenue #103
Brooklyn, NY 11217
(718) 783-3682
sarah@kunstlerlaw.net

Counsel for Petitioner
Kareem Swinton
CJA Appointed

332890

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. Whether, in the absence of knowledge of the identity of the declarants, the admission of hearsay testimony of alleged co-conspirators is unconstitutional.

PARTIES TO THE PROCEEDING

1. Kareem Swinton, Petitioner, was the defendant-appellant in the court below.

2. United States of America, Respondent, was the appellee in the court below.

RELATED CASES

· *United States v Swinton*, No. 19-CR-65, United States District Court for the District of Connecticut. Judgment entered February 2, 2023.

· *United States v. Swinton*, No. 23-6118, U.S. Court of Appeals for the Second Circuit. Judgment entered April 11, 2024.

TABLE OF CONTENTS

INDEX TO THE APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Kareem Swinton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (1a-11a) has not been published, but is reported at 2024 WL 1564487. The District Court's opinion dated January 28, 2023 (17Aa-21a) has not been published, but is reported at 2023 WL 831388. The District Court's opinion dated August 23, 2022 (22a-33a) is neither reported nor published.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 11, 2024. (1a-11a). A petition for rehearing was denied on June 28, 2024. (34a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner files this Petition for a writ of certiorari following the Second Circuit's affirmance of the judgment of District Court, which followed a jury trial, convicting him of two counts: one count of conspiracy to distribute and possess with intent to distribute less than 500 grams of cocaine and a detectible amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846 (Count One); and one count of possession with intent to distribute and distribution of a controlled substance, in violation of 21 U.S.C. §§ 841 and 841(b)(1)(C) (Count Two).

No cooperating witnesses testified at Mr. Swinton's trial about his involvement with heroin, cocaine, or cocaine base. At trial, the government's entire case with respect to these substances was based on intercepted recordings containing statements made by Mr. Swinton and his alleged co-conspirators in Connecticut. Mr. Swinton maintains that the statements of the alleged co-conspirators were improperly admitted, requiring reversal of his conviction.

In the courts below, Petitioner argued that the district court violated Rule 801(d)(2)(E) of the Federal Rules of Evidence in admitting the allege the admission of the statements of alleged unidentified co-conspirators in the absence of knowledge of the identity of the declarants, a view held by at least two Circuits. *See United States v. Christopher*, 923 F.2d 1545, 1550-51, (11th Cir. 1991), and *United States v. Mouzin*, 785 F.2d 682, 692-93 (9th Cir. 1986).

This case presents a worthy vehicle for further review of whether a district court may admit statements of unidentified or unknown declarants under Rule 801(d)(2)(E), or whether the admission of such testimony,

A. Factual Background and Procedural History

Kareem Swinton was arrested on February 19, 2019. He was indicted on March 5, 2019, and charged with a narcotics conspiracy involving heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 841(a)(1). (Dist. Dkt ## 1 and 21.)[1] The indictment was superseded three times. In the final indictment, Mr. Swinton was charged in Count One with a conspiracy involving (1) 400 grams or more of fentanyl; (2) 100 grams or more of heroin; (3) 500 grams or more of cocaine; and (4) a detectable amount of cocaine base. (Dist. Dkt # 789.) .Count Two charged Mr. Swinton with possession with intent to distribute and distribution of an unidentified controlled substance on December 8, 2018.

Much of the evidence against Mr. Swinton consisted of statements recorded through court-authorized wiretaps on cellular telephones utilized by Harold Butler, Robert Grant Hall, and Kareem Swinton. (Tr. 61-78.) The government argued that it would prove that these recordings were admissible pursuant to Rule 801(d)(2)(E) as "made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). (Dist. Dkt. # 355, at p. 65.) In pre-trial motion practice,

[1] Citations to the Appellant's Appendix are to "#-a," to the Trial Transcript are to "Tr.", to the District Court Docket are "Dist. Dkt. #" and to the Circuit Court Docket are "Cir. Dkt. #".

Mr. Swinton requested a *Geaney* hearing on the admissibility of these statements, which was denied. (Dist. Dkt. # 877.)

At trial, the government introduced 66 telephone calls and text messages captured on three telephone lines allegedly used by Harold Butler, Robert Grant Hall, and Kareem Swinton. In total, 63 of the 66 calls introduced included Mr. Swinton as an alleged participant. (Tr. 61-78.)

No cooperating witnesses testified about Mr. Swinton's participation in a conspiracy involving crack or powder cocaine. Other than the recorded telephone calls, the only arguable evidence of a crack or powder cocaine conspiracy that involved Mr. Swinton was: (1) two trips that Swinton made to Connecticut (on October 7, 2018 and December 8, 2018), during which he was observed meeting with Butler (at Hat Boyz, Butler's store, in Norwich, Connecticut, and at the Mohegan Sun Casino) and spending a short period of time in Sullivan's residence in Norwich, Connecticut (*e.g.*, Tr. 581-594; Tr. 624-651); and (2) the February 4, 2019 sighting of a parked vehicle of the same make and model as a vehicle associated with Mr. Swinton (but no testimony concerning the parked vehicle's license plate) outside of the home of Lorenzo Grier in New Haven, Connecticut (Tr. 373; 375-377; 378-389; and 384-386.). While law enforcement witnesses testified that Mr. Swinton left a backpack at Sullivan's residence and a plastic bag at Butler's store on December 7, 2018 (*e.g.*, Tr. 624-630 and 690-700), these witnesses saw no money – and no drugs – change hands. In fact, *no* witnesses testified about Mr. Swinton's participation in any crack or powder cocaine transactions.

The only drug sales introduced at trial were seven controlled buys of crack cocaine made from Harold Butler, by an informant, between April 2018 and February 2019. (Tr. 658-667.) While the wiretap began in September of 2018, and the first wiretapped conversation introduced by the government between Butler and Swinton took place on October 1, 2018, at that point, the majority of the controlled buys from Butler had already taken place. No connection was made between Mr. Swinton – who lived over 300 miles and six states away in Maryland – and these controlled purchases, and no connection was made between Swinton and the powder cocaine seized from Butler's residence and place of business.[2]

Further, no one testified about the contents of the recorded telephone calls and their meanings. In fact, Special Agent Dan Heether, one of two case agents in charge of the investigation, conceded that while law enforcement could guess at what the calls about, no one had any actual knowledge as to the meanings of the calls:

> Q. Okay. And as part of this investigation, right, is it fair to say that there was no evidence of Mr. Swinton having a tremendous amount of wealth?
> A. There was talk. I mean, we listened to phone calls about it.
> Q. But talk is talk, right?
> A. Yes, sir.
> Q. Talk is cheap, right? And these guys are huffing and puffing on the phone all the time, right?
> A. Yes, sir.

[2] The government introduced evidence of powder cocaine seized incident to Butler's arrest. 49.8 grams of powder cocaine were seized from Hat Boyz, and 17.042 grams of powder cocaine were seized from Butler's residence, as well as cutting agents and digital scales.

Q. They're making up stuff and they're talking to each other, they're in slang. We have no idea, really, what they're talking about. We can guess, right?
A. That's correct, sir.
Q. And they make stuff up, they want to brag to one guy and brag to another guy I'm a tough guy, I do this, I do that. Who knows what they're doing, right?
A. Correct.
Q. So you never seized any large amounts of cash in this investigation, right?
A. No, sir.
Q. No. $1400 is the extent of it, right? Yes?
A. Yes, sir.

(Tr. 325-326.) The government called DEA Agent Frank Castiglione, who was not involved in the investigation – and did not review the recorded calls, as an expert witness, to testify about his general familiarity with the language and terminology used to discuss powder cocaine, crack cocaine, heroin, fentanyl, marijuana, and their quantities and prices. (Tr. 120; 158-192.)

The government also introduced evidence, obtained from the Maryland apartment of Swinton's girlfriend, including (1) a kilogram press and bottle jack for compacting powder-consistency narcotics into a solid brick form for distribution purposes; (2) heroin residue on the kilogram press; (3) cutting agents commonly used to dilute narcotics prior to their sale; and (4) many hundreds of empty wax folds of the kind used to distribute narcotics. Beyond the heroin residue, no narcotics were found at the apartment. No quantity of narcotics was seized from Swinton. Nor did Swinton have any narcotics on him at the time of his arrest. Further, no connection was established between Butler, Hall, Sullivan and Grier and the Maryland apartment or any of its contents.

On July 29, 2022, after the presentation of most of the government's evidence, and at the request of the district court (Tr. 731), the government submitted an additional filing on the admissibility of the intercepted co-conspirator communications. (Dist. Dkt. # 899.) The government attached a chart of the sixty-six (66) communications, all of which took place during the timeframe of the alleged conspiracy, with a summary of the government's interpretation of their content. (Dist. Dkt. # 899-1.) These included: one (1) communication between Butler and Hall; sixteen (16) communications between Swinton and Butler; four (4) communications between Swinton and Hall; two (2) communications between Swinton and Sullivan; two (2) communications between Sullivan and Hall; and one (1) communication between Swinton and Grier. The remaining forty communications included: twenty-six (26) communications between Swinton with eight (8) unidentified individuals; and fourteen (14) conversations between Swinton and six (6) named, but unindicted, individuals about whom no testimony or independent evidence was presented. (*Id*.)

In a responsive filing, Swinton continued to oppose the admission of the alleged co-conspirator statements. (Dist. Dkt. # 900.) With respect to the statements of the unidentified and unindicted individuals, Swinton argued that the government had offered no independent corroborating evidence of the identities of these speakers and the context in which their statements occurred, falling far short of establishing by a preponderance of the evidence that these individuals were co-conspirators of Mr. Swinton's. *(Id*.)

On August 3, 2022, the district court issued its ruling, finding that "all statements made by Swinton in the intercepted communications were properly admitted as nonhearsay" as statements of a party opponent under Rule 801(d)(2)(A). (24a.)

The court held that Swinton's non-hearsay statements could "be used to corroborate the existence of a conspiracy between Swinton and the indicted coconspirators." (26a.) The court then found that "the patently drug-related nature" of Swinton's collective statements established "that during the period of the alleged conspiracy Swinton was a supplier of narcotics to Butler, Hall, and Sullivan for street-level redistribution." (*Id.*) The court found that the "temporal fit" between the communications and "and the surveillance footage and testimony by law enforcement officers presents strong circumstantial evidence that Swinton was specifically providing Butler and Sullivan with narcotics when he traveled to Norwich in December 2018." (*Id.*) The court further found that the calls between Butler, Hall, and Sullivan in which Swinton was not a participant were made in furtherance of the conspiracy. (27a.)

With respect to the conversations between Swinton and individuals who were identified, but uncharged, the court found that "these individuals were Swinton's coconspirators in light of the otherwise robust evidence of an ongoing narcotics conspiracy and Swinton's demonstrated role as the conspiracy's primary narcotics supplier, as well as the content and timing of these intercepted conversations and the drug-related nature of the statements made by both Swinton and these

individuals during the calls." (27a.) With respect to the statements by unidentified individuals, the court found, based on the content of the communications, that their statements were made in furtherance of the conspiracy. (27a-30a.)

During its deliberations, the jury submitted several notes indicating it had questions about a defendant's responsibility for the acts of others. (Tr. 933; 940-941; 951-952.)

After three days of deliberations, the jury found Kareem Swinton guilty of both the conspiracy and substantive counts. (Dist. Dkt. # 915.) With respect to the conspiracy charged in Count 1, the jury checked the box for "none" for both fentanyl and heroin. It found that the conspiracy involved less than 500 grams of powder cocaine and a detectable amount of crack cocaine. (*Id*.)

Mr. Swinton appealed his conviction arguing, among other things, that the district court improperly admitted statements made by alleged co-conspirators pursuant to F.R.E. 801(d)(2)(E).

On April 11, 2024, the Second Circuit issued its opinion. The Circuit found that in deciding to admit the statements made by alleged co-conspirators, "the district court properly considered the further independent evidence of controlled drug purchases from Butler, Swinton's meeting with Butler and Sullivan, and Swinton's own recorded statements" on the intercepted telephone calls and that "[t]independent evidence, in concert with the other parts of the phone calls, supported a finding that there was a drug trafficking conspiracy and that Swinton engaged in that conspiracy." (5a.) The Circuit further found that the district court

"acted well within its discretion in finding by a preponderance of the evidence that the calls—in which individuals discussed the quality of the product, arranged transactions, and warned Swinton of his danger with law enforcement—were made in furtherance of the charged conspiracy and not mere buyer-seller relationships." (5a.)

With respect to the calls with unidentified co-conspirators, the Circuit found that the District Court "did not abuse its discretion in admitting calls between Swinton and unidentified co-conspirators" (5a), citing *United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993) for the proposition that a declarant need not be identified for statement to be admitted under Rule 801(d)(2)(E)).

Petitioner filed a petition for rehearing/rehearing *en banc* which was denied. (34a.)

REASONS FOR GRANTING THE PETITION

I. IN THE ABSENCE OF KNOWLEDGE OF THE IDENTITY OF THE DECLARANTS, THE HEARSAY TESTIMONY OF UNKNOWN OR UNIDENTIFIED DECLARANTS IS UNCONSTITUTIONAL

A. The Admission of the Statements of Unknown Declarants Under Federal Rule of Evidence 801(d)(2)(E) Violates the Fifth and Sixth Amendments

The Fifth Amendment to the United States constitution provides that "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him." U.S. Const. amend. VI. This Court has been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. 805, 814, (1990) (citations omitted). Nonetheless, the Court has consistently sought to "stee[r] a middle course," *Ohio v. Roberts*, 448 U.S. 56, 68, n. 9 (1980), that recognizes that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," California v. Green, 399 U.S. 149, 155 (1970), and "stem from the same roots," *Dutton v. Evans*, 400 U.S. 74 (1970).

In *United States v. Inadi*, 475 U.S. 387 (1986), while observing that the Confrontation Clause usually required the production of a declarant or a showing of his unavailability so that his out-of-court statement could be admitted against a defendant, this Court concluded that this requirement was not constitutionally mandated in the case of a non-testifying co-conspirator's statement admitted under Rule 801(d)(2)(E). 475 U.S., at 400.

Federal Rule of Evidence 801(d)(2)(E) states, "A statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Steeped in principles of agency law, the exception was rooted in the proposition that:

> When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a "partnership in crime". What one does pursuant to

> their common purpose, all do, and as declarations may be such acts, they are competent against all.

Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926) (L.Hand, J.), *quoted in* J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(E)[01], at 801–233 (1988). *See also United States v. Trowery*, 542 F.2d 623, 626–27 (3d Cir.1976) (*per curiam*), *cert. denied*, 429 U.S. 1104 (1977).

Prior to the enactment of the Federal Rules of Evidence in 1975, this coconspirator declaration exception to the hearsay rule required proof *aliunde*, or independent evidence apart from the hearsay statement itself, sufficient to establish that both the declarant and the defendant were members of the alleged conspiracy and that the statement was made in its course and in furtherance of its goals. *See Glasser v. United States*, 315 U.S. 60, 74 (1942). The requirement of independent proof stood guard against the unbridled use of vicarious admissions in conspiracy cases, lest the hearsay "lift itself by its own bootstraps to the level of competent evidence." *Glasser*, 315 U.S. at 75. *See also United States v. Nixon*, 418 U.S. 683 (1974).

In *Bourjaily v. United States*, 483 U.S. 171, (1987) this Court found that the enactment of the Federal Rules of Evidence fundamentally changed the law in this area. After establishing that it is the province of the court to determine by a preponderance of the evidence whether the defendant and the declarant were members of the alleged conspiracy and whether the hearsay statement was made during its course and in furtherance of its goals, Chief Justice Rehnquist's opinion for the Court went on to hold that Federal Rules of Evidence 104(a)5 and 1101(d)(1)

overruled *Glasser's* requirement of proof aliunde as a strict condition of admissibility. 483 U.S. at 177-179. The Court stated that "Rule 104 ... allow[s] the court to make the preliminary factual determinations relevant to Rule 801(d)(2)(E) by considering *any* evidence it wishes, unhindered by considerations of admissibility." 483 U.S. at 178 (emphasis added).

The important question left unanswered by *Bourjaily* was the extent to which hearsay statements may provide the sole basis of their own admissibility under 801(d)(2)(E). *Bourjaily,* 107 S.Ct. at 2781–82 ("We need not decide in this case whether the courts below could have relied solely upon [ ] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence.").

In response to *Bourjaily*, Congress amended Rule 801(d)(2)(E) to state that the alleged co-conspirator statement "must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)." Circuit courts considering the issue have consistently held that some independent evidence is necessary for the statement properly to fall within the purview of the co-conspirator exception. *See, e.g., United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir.1989); *United States v. Clark*, 18 F.3d 1337, 1341–42 (6th Cir.1994); *United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir.1993); United *States v. Byrom*, 910 F.2d 725, 736 (11th Cir.1990); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Zambrana*,

841 F.2d 1320, 1343–46 (7th Cir.1988); *United States v. Silverman*, 861 F.2d 571, 577–78 (9th Cir.1988); *United States v. Martinez*, 825 F.2d 1451, 1453 (10th Cir.1987). *See also United States v. Gambino*, 926 F.2d 1355, 1361 n. 5 (3d Cir. 1990) (although not reaching the issue, the court recognized that every court of appeals that has decided the question has required some independent evidence), *cert. denied*, 501 U.S. 1206 (1991).

Such a conclusion was certainly envisioned by the *Bourjaily* court itself. As explained by Justice Stevens in his concurrence:

> An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility-it cannot lift itself into admissibility entirely by tugging on its own bootstraps. It may, however, use its own bootstraps, together with other support, to overcome the objection.... This interpretation of Glasser as requiring some but not complete proof "aliunde," is fully consistent with the plain language of Rule 104(a).

107 S.Ct. at 2783–84 (footnotes omitted).

Critical to this case, and not resolved by either *Bourjaily*, the amendment to Rule 801(d)(2)(E), or the apparent consensus of the district courts requiring independence evidence, is whether the identity of the hearsay declarant must be known for the statements to be trustworthy and admissible pursuant to Rule 801(d)(2)(E).

At least two circuits have held that in the absence of knowledge of the identity of the declarants, that the hearsay testimony of alleged co-conspirators is inadmissible. In *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), the government introduced a ledger seized from a codefendant's residence, which the

government contended, through the testimony of a DEA agent, who admitted that he had no knowledge of the identity of the ledger's author. The Ninth Circuit reversed, finding that the requirement that the government establish some independent proof of the existence of a conspiracy in order to meet the co-conspirator exception under Rule 801(d)(2)(E) also required "independent proof of the defendant's and the declarant's status as members of the same ongoing conspiracy." *Mouzin*, 785 F.2d at 692. The Ninth Circuit reasoned that "Knowledge of the identity of the declarant is essential to a determination that the declarant is a conspirator whose statements are integral to the activities of the alleged conspiracy."785 F.2d at 692-693. Following *Mouzin*, the Eleventh Circuit, in *United States v. Christopher*, 923 F.2d 1545 (11th Cir. 1991), a case that was decided after *Bourjaily* and the amendment to Rule 801(d)(2)(E), reached the same result.

The reasoning of *Mouzin* and *Christopher* is clear. Given that under Rule 801(d)(2)(E), as amended, the proffered statement is not enough to establish the existence of the conspiracy, or the membership of the declarant in that conspiracy, the statement of an unidentified or unknown declarant, on its own, is not enough to establish that the declarant is a member of the conspiracy. There must be some independent evidence of the declarant's involvement. And here, because their identity is unknown, no independent evidence exists. As such, the statements of unknown declarants do not fall within the Rule 801(d)(2)(E) hearsay exception, and the admission of these statements violates Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution.

B. The "Discriminatory Taint" at the Heart of Agency Liability

Beyond the inherent dangers of permitting the government to introduce the statements of unknown declarants through a hearsay exception, there is a another, perhaps more fundamental concern surrounding the Rule 801(d)(2)(E) hearsay exception, regardless of whether or not the declarant is known or unknown, and that is the "discriminatory taint" surrounding using agency liability to create exceptions that provide an end-run against the Fifth and Sixth Amendment protections afforded to criminal defendants.

Because Rule 801(d)(2)(E) is based on a set of suppositions arising from agency liability, it perpetuates a theory developed to assign liability for the actions of enslaved people, who were considered property, and not legal persons, under the law, it perpetuates the stain of slavery, which persists, not just in policies that were intended to disadvantage African Americans in this country, but when new, facially neutral laws share commonalities with old, discriminatory policies. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 Harv. L. Rev. 1203–04 (2022). ("The persistence of an older policy's operative core can manifest a 'discriminatory taint' that alone should impugn an otherwise facially legitimate policy.")

Agency law was developed in England to account for the conduct of slaves, contractually hired servants, and apprentices, and was focused on the perceived practical economic necessities of its time. *See* Blackstone, William*, 1723-1780. Commentaries on the Laws of England*, at * 411-420. *See also* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to*

an Old Problem, 37 Hastings L.J. 91 (1985). In "The Common Law," by Oliver Wendell Holmes, Jr., Justice Holmes describes the concept, "eadem est persona domini et procuratoris", latin for "the person of the master and the agent is the same" as peculiar, anomalous, and limited to its historical context: "This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work….as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves." O.W. Holmes, *The Common Law* 232 (1881).

When Justice Holmes referenced a "darkening of counsel," he was alluding to the Bible, specifically, the Book of Job, where "the Lord answered Job out of the whirlwind and said, who is this that darkens counsel by words without knowledge?" Job 38:1-2. While the expression is not as common as it once was, it means that when we separate ideas from their origins, we speak "without knowledge." What is left, Justice Holmes cautioned, is a theory of liability that persists, despite a collective lack of understanding of the circumstances that brought it into being. The concept of civil agency bears a discriminatory taint. Its genesis is rooted in slavery, in the idea that a slave is "absorbed into the family which his master represents before the law." Holmes, at 232.

That Rule 801(d)(2)(E) of the Federal Rules of Evidence extends a concept of fictitious personhood, created to account for the existence of a class of human beings in bondage who had no legal standing before the courts, in order to bypass Fifth and

Sixth Amendment protections, creates exactly the sort of problem that Justice Holmes cautioned against. What we are left with, is a "turtles all the way down"[3] approach to legal reasoning in which legal theories are imported from one historical moment to the next without consideration for the rationale underpinning those theories.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Second Circuit Court of Appeals.

Dated this 26th day of September, 2024, in Brooklyn, New York.

Respectfully submitted,

SARAH KUNSTLER
Counsel of Record
LAW OFFICE OF SARAH KUNSTLER
315 Flatbush Avenue #103
Brooklyn, NY 11217
(718) 783-3682
sarah@kunstlerlaw.net

Counsel for Petitioner
Kareem Swinton
CJA Appointed

[3] "[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.' " *Rapanos v. United States*, 547 U.S. 715, 754 n. 14 (2006).

APPENDIX

TABLE OF APPENDICES

Page

23-6118
United States v. Swinton

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of April, two thousand twenty-four.

Present:

REENA RAGGI,
EUNICE C. LEE,
BETH ROBINSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 23-6118

KAREEM SWINTON,

Defendant-Appellant.*

---

* The Clerk of Court is respectfully directed to amend the caption on the docket consistent with this order.

For Appellee: CONOR M. REARDON (Natasha M. Freismuth, *on the brief*), Assistant United States Attorneys, *for* Vanessa Roberts Avery, United States Attorney for the District of Connecticut, New Haven, CT.

For Defendant-Appellant: SARAH KUNSTLER, Law Offices of Sarah Kunstler, Brooklyn, NY.

Appeal from a February 3, 2023 amended judgment of the United States District Court for the District of Connecticut (Jeffrey A. Meyer, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Kareem Swinton ("Swinton") appeals from an amended judgment of conviction following a jury trial at which he was convicted of two counts: one count of conspiracy to distribute and possess with intent to distribute less than 500 grams of cocaine and a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846; and one count of possession with intent to distribute and distribution of a controlled substance, in violation of 21 U.S.C. §§ 841 and 841(b)(1)(C). He was sentenced to 120 months' imprisonment on each count, to run concurrently, followed by a total of six years' supervised release.

Swinton argues that the district court (1) improperly admitted statements made by alleged co-conspirators pursuant to Federal Rule of Evidence 801(d)(2)(E); (2) erred in denying Swinton's Rule 29 motion for acquittal on both counts; (3) failed to follow the correct procedures for imposing an enhanced sentence under 21 U.S.C. § 851; and (4) committed plain error in its calculation of Swinton's Sentencing Guidelines range, making his sentence procedurally and

substantively unreasonable. We assume the parties' familiarity with the underlying facts and procedural history, to which we refer only as necessary to explain our decision to affirm.

* * *

Because Swinton challenges the sufficiency of the evidence supporting both counts of conviction, at the outset, we summarize relevant evidence. At trial, the government argued that Swinton was part of a drug trafficking conspiracy with co-defendants Harold Butler, Robert Hall, David Sullivan, and Lorenzo Grier. To prove this, the government presented evidence of multiple controlled buys of cocaine base from Butler between 2018 and 2019, narcotics cutting agents and digital scales seized from Butler's residence, as well as a kilogram press for compacting narcotics, more cutting agents, and empty wax folds for distributing narcotics seized from Swinton's girlfriend's residence, where Swinton's photo identification card, travel receipts, and financial records were found.

Additionally, the jury heard evidence that Swinton was surveilled with coconspirators. Specifically, on October 7, 2018, Swinton was observed meeting with Butler at the Mohegan Sun casino, where they entered a restroom together, stayed for several minutes, and then left in a vehicle together. Swinton was also observed on multiple occasions entering coconspirators' properties with various bags and leaving empty-handed, consistent with drug transactions.

That conclusion was reinforced by calls between Swinton, Butler, Sullivan, and other indicted and unindicted coconspirators, which employed coded terminology that an expert witness testified referenced drug trafficking. For example, in one call, Swinton tells Butler the amount of product he would give him, and later that same day, the two were observed meeting at the Mohegan

Sun casino. In other cases, Swinton and Hall argue about the quality of a product supplied by Swinton, and Grier warns Swinton not to talk on the phone after a number of arrests in Connecticut.

In still other calls with unindicted or unidentified coconspirators, Swinton is heard discussing the quality of the product, the need for a buyer who did not pay for a large quantity of drugs to face consequences, the popularity and strength of different narcotics, a potential supplier who could work with Swinton, and when Swinton could resupply another drug dealer.

I. Coconspirator Statements

This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 87 (2d Cir. 1999). Swinton argues that the district court erred in admitting the aforementioned recorded conversations under Federal Rule of Evidence 801(d)(2)(E) because no evidence, other than the communications themselves, established a conspiracy or his membership therein.

Rule 801(d)(2)(E) provides that an out-of-court statement offered to prove the truth of the matter asserted does not constitute hearsay if "[t]he statement is offered against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). In order to admit a statement under this exception to the hearsay rule, a district court must find, by a preponderance of the evidence, that (1) there was a conspiracy, (2) its members included the declarant and the party against whom the statement is offered, and (3) the statement was made both (a) during the course of and (b) in furtherance of the conspiracy." *United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993); *see Bourjaily v. United States*, 483 U.S. 171, 176 (1987); *United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008). In considering these requirements, the "contents of the alleged coconspirator's statement itself" not only can be, but

"must [be,] consider[ed]." *United States v. Gupta*, 747 F.3d 111, 123 (2d Cir. 2014). There must, however, also "be some independent corroborating evidence of the defendant's participation in the conspiracy." *United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999) (quoting *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996)).

Swinton argues that the only independent evidence of the conspiracy involved him meeting with Butler and Sullivan and the physical evidence seized in the searches, which is not sufficient to establish a conspiracy or Swinton's involvement in it. In fact, the district court properly considered the further independent evidence of controlled drug purchases from Butler, Swinton's meeting with Butler and Sullivan, and Swinton's own recorded statements—which were not hearsay, *see* Fed. R. Evid. 801(d)(2)(A)—indicating an ongoing drug trafficking scheme. This independent evidence, in concert with the other parts of the phone calls, supported a finding that there was a drug trafficking conspiracy and that Swinton engaged in that conspiracy.

Additionally, the district court acted well within its discretion in finding by a preponderance of the evidence that the calls—in which individuals discussed the quality of the product, arranged transactions, and warned Swinton of his danger with law enforcement—were made in furtherance of the charged conspiracy and not mere buyer-seller relationships. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 958–59 (2d Cir. 1990) (finding that statements which "foster trust and cohesiveness," report on the "progress or status of the conspiracy," and "induce a coconspirator's assistance," may be found to be in furtherance of a conspiracy).

Nor did the district court abuse its discretion in admitting the calls between Swinton and unidentified coconspirators. *See United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993) (noting that declarant need not be identified for statement to be admitted under Rule 801(d)(2)(E)).

In sum, we reject Swinton's evidentiary challenge to his conviction as without merit.

II. Sufficiency of the Evidence

Although we review *de novo* the denial of a Rule 29 motion for acquittal, *see United States v. Alston*, 899 F.3d 135, 143 (2d Cir. 2018), a defendant urging error bears a "heavy burden," *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002) (quoting *United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994)), because we will not overturn a conviction unless, "after viewing the evidence in the light most favorable to the [g]overnment and drawing all reasonable inferences in its favor, we determine that no rational trier of fact could have concluded that the [g]overnment met its burden of proof." *Id*. (internal quotation marks omitted).

a. *Conspiracy*

Like the district court, we conclude that, when viewed in the light most favorable to the government, the evidence was sufficient for a rational trier of fact to have found "that Swinton joined a conspiracy with others including but not limited to Harold Butler, Robert Hall, and David Sullivan to distribute controlled substances in Connecticut." *United States v. Swinton*, No. 3:19-CR-65 (JAM), 2023 WL 831388, at *1 (D. Conn. Jan. 28, 2023). The totality of the evidence, including the recorded conversations described earlier, tended to show that Swinton not only provided narcotics for redistribution but also that he had continuing relationships with the members of the conspiracy, with whom there was mutual trust. This is at odds with Swinton's argument that the evidence necessarily showed only buyer-seller relationships rather than a conspiracy. *See United States v. Parker*, 554 F.3d 230, 234–35 (2d Cir. 2008). It is true, as Swinton contends, that "[a]t no point was he caught participating [in] a controlled drug buy. And no drugs were seized from his person or residence." Appellant Br. at 46. However, the jury was provided with evidence

of controlled buys from Butler, an ongoing relationship between Swinton and Butler, and dozens of intercepted communications between Swinton, Butler, and other coconspirators indicative of drug trafficking that did not make the jury finding of the charged narcotics conspiracy mere speculation, as Swinton contends.

b. *Possession with Intent to Distribute*

The evidence was also sufficient for the jury to find Swinton guilty of possession with intent to distribute a controlled substance. On December 8, 2018, Swinton was surveilled walking into Sullivan's apartment with a backpack and leaving without it. That same day, Swinton was seen walking into Butler's shop below Butler's apartment and leaving a bag there after Butler was intercepted telling Swinton that he had "four of them s**ts left" and Swinton replied that he would "hit [Butler] when [he] get[s] up that way," to which Butler noted "it's grams out here, bro." App'x at 561.

While it is true that this is circumstantial rather than direct evidence of Swinton's possession and distribution of narcotics on December 8, 2018, "the government is entitled to prove its case solely through circumstantial evidence." *United States v. Landesman*, 17 F.4th 298, 320 (2d Cir. 2021) (quoting *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008)). A rational trier of fact could have concluded, by viewing these communications and meetings in the context of the totality of the evidence, that Swinton did indeed possess a controlled substance with an intent to distribute on December 8, 2018.

III. The Sentence Enhancement

Swinton argues that his case should be remanded for resentencing because the district court failed to follow the procedures delineated in 21 U.S.C. § 851 in imposing an enhanced sentence

based on a prior "serious drug felony," as defined by 21 U.S.C. § 802(57). Under § 851, before sentencing a defendant alleged to have a prior serious drug felony conviction, the court must ask the defendant if he affirms or denies the previous conviction and, if he denies it, the court shall hold a hearing to resolve any issues. *See* 21 U.S.C. § 851(b)–(c).

Swinton faults the court for not posing this inquiry to him but, rather, submitting the prior conviction question to the jury. Even assuming § 851(b) error, that "does not automatically invalidate the resulting sentence." *United States v. Espinal*, 634 F.3d 655, 665 (2d Cir. 2011). "[N]on-prejudicial errors in complying with the procedural requirements of § 851 should [not] require reversal."[1] *Id*. Here, the record makes clear that any purported error was harmless.

First, while the court may not have conducted a § 851 inquiry of Swinton, because Swinton had previously objected to the enhancement, the court still held a hearing—before the jury. Swinton does not argue that this was a less effective hearing than that which would have been required if Swinton had denied the allegations in response to a § 851 inquiry. Thus, he cannot show prejudice.

Second, while Swinton argues that he was denied due process because the court proceeded to the § 851 hearing under the assumption that a conspiracy conviction could qualify as a serious drug felony without addressing his pre-trial motion, he does not actually argue on appeal that a § 846 conspiracy conviction cannot qualify as a "serious drug felony" under the statute. Because he does not advance said argument on appeal, we consider it abandoned. *See United States v. Quiroz*,

[1] This Court has reserved decision on whether unpreserved challenges to § 851 procedural deficiencies should be reviewed for harmless error or plain error. *See Espinal*, 634 F.3d at 665 n.7. We need not resolve that question here, as Swinton's claim fails under both standards.

22 F.3d 489, 490 (2d Cir. 1994) (finding an argument not advanced on appeal to be abandoned). As a result, Swinton has failed to show the district court's procedures prejudiced him.

IV. The District Court's Sentence Was Not Procedurally Unreasonable.

A district court commits procedural error where it improperly calculates the Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc); *accord United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012). This Court reviews claims of procedural error *de novo* for questions of law and "clear error [for] questions of fact." *United States v. Yilmaz*, 910 F.3d 686, 688 (2d Cir. 2018). Additionally, "factual findings at sentencing need be supported only by a preponderance of the evidence." *United States v. Norman*, 776 F.3d 67, 76 (2d Cir. 2015).

Swinton argues that the district court committed procedural error at sentencing by relying on acquitted conduct in calculating his Guidelines range. Notwithstanding that the Supreme Court has held it permissible for a court to consider acquitted conduct in calculating a defendant's appropriate Guidelines range, *see United States v. Watts*, 519 U.S. 148, 157 (1997); *United States v. Daugerdas*, 837 F.3d 212, 231 (2d Cir. 2016), the district court in fact went out of its way *not* to consider Swinton's acquitted conduct.

In calculating the drug quantity for which Swinton was responsible, the district court considered the multiple phone calls between Swinton and his coconspirators and found, by a preponderance of the evidence, that he transacted 735 grams of powder cocaine and 35 grams of crack cocaine. However, because the jury found that he had distributed less than 500 grams of powder cocaine, the court lowered the amount to 499 grams of powder cocaine so as not to "conflict with the jury's verdict." App'x at 444. The court also acknowledged the disparity between crack cocaine and powder cocaine in the Guidelines and declined to adopt it, treating the

crack cocaine as if it were powder. This gave the court a final calculation of 534 grams of powder cocaine, creating a base offense level of 24. *See* U.S.S.G. § 2D1.1(c).

Swinton argues that the weight calculated should have been lower, as there was no "basis for an assumption that the jury found the government had proven 499" grams of powder cocaine. Appellant Br. at 57. The court, however, was not required to ascertain the exact amount for which the jury found Swinton responsible. Rather, the court independently made its own calculation that a preponderance of the evidence demonstrated at least 735 grams—a calculation with which we identify no clear error—and used its discretion to reduce that number even further.

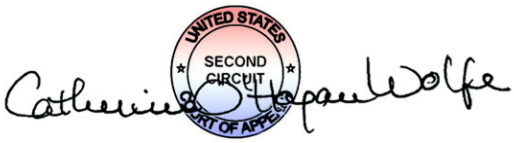
Swinton also argues that because the jury only convicted him for a "detectable amount" of crack cocaine, the court's finding that he was responsible for 35 grams was erroneous. Appellant Br. at 58. The court made this weight determination based on an intercepted communication between Swinton and Butler where Swinton says that he has "mixed" it and "it's . . . like about 35." App'x at 437, 575. We see no error with this finding.

Even if we did find error, Swinton himself acknowledges in his briefing that the "detectable amount" the jury arrived at was likely 23.6298 grams of crack cocaine. Appellant Br. at 59. Because the Guidelines level of 24 begins at 500 grams of cocaine, any error would be harmless, as the court would have needed to find only one gram of crack cocaine for Swinton to fall within the same Guidelines level, given its permissible attribution of 499 grams of powder cocaine to Swinton.

* * *

We have considered Swinton's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
District of Connecticut

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

v.

KAREEM SWINTON

Case No.: 3:19-cr-00065-JAM-1

USM No.: 17221-014

Natasha Freismuth, Marc Harris Silverman, Assistant U.S. Attorneys

Justin C. Pugh, Francis L.O'Reilly, Defendant's Attorneys

Defendant was found guilty of Counts 1 and 2 of the third superseding indictment by a jury.

Accordingly, the defendant is adjudicated guilty of the following offense:

Title & Section	Nature of Offense	Offense Concluded	Count
Title 21, United States Code, §§ 841(a)(1) and 841(b)(1)(C)	Conspiracy to Distribute and to Possess With Intent to Distribute Heroin, Fentanyl, Cocaine, and Cocaine Base	February 20, 2019	1sss
Title 21, United States Code, §§ 841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute and Distribution of a Controlled Substance	December 8, 2018	2sss

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the jury's finding of a sentencing enhancement pursuant to 21 U.S.C. § 851.

IMPRISONMENT
Defendant is ordered committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of 10 years on Count 1 of the third superseding indictment and 10 years on Count 2 of the third superseding indictment to run concurrently with the sentence imposed on Count 1 for a **total effective sentence of 10 years (120 months).**

SUPERVISED RELEASE
Upon release from imprisonment, Defendant shall be on Supervised Release for a total term of 6 years for each count to be served concurrently..

The Mandatory and Standard Conditions of Supervised Release as attached are imposed. In addition, the following Special Conditions are imposed:

1. You must participate in a program recommended by the Probation Office and approved by the Court for mental health treatment, with cognitive behavioral therapy. You must follow the

rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must pay all or a portion of costs associated with treatment based on your ability to pay as recommended by the probation officer and approved by the Court.

2. You must submit your person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; you must inform any other residents that the premises or vehicle may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES
Defendant must pay the total criminal monetary penalties under the schedule of payments as follows:

Special Assessment:	$200.00 to be paid to the Clerk of the Court
Fine:	Waived
Restitution:	N/A

It is further ordered that Defendant will notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are paid.

The following Counts as to Kareem Swinton have been dismissed: all remaining counts

JUDICIAL RECOMMENDATION TO THE BUREAU OF PRISONS: None

Date of Imposition of Sentence: January 30, 2023

__/s/Jeffrey A. Meyer _____
Jeffrey A. Meyer, United States District Judge

Date: February 2, 2023

CONDITIONS OF SUPERVISION

In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:

MANDATORY CONDITIONS

1. You shall not commit another federal, state or local crime.
2. You shall not unlawfully possess a controlled substance.
3. You shall refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C.§§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ■ You must cooperate in the collection of DNA as directed by the Bureau of Prisons or probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

STANDARD CONDITIONS

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

CERTIFIED AS A TRUE COPY ON THIS DATE: _____

By: _____
Deputy Clerk

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
Lawrence Bobnick
Acting United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA v. KAREEM SWINTON, *Defendant*.	No. 3:19-cr-65 (JAM)

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

The defendant Kareem Swinton has moved for a judgment of acquittal or a new trial. For the reasons set forth below, I will deny the motion.

BACKGROUND

Following several days of trial, a federal jury returned verdicts of guilty against Swinton on one charge of conspiracy to distribute controlled substances from approximately April 2018 to February 20, 2019 (Count One) and on one charge of possession with intent to distribute and to distribute a controlled substance on December 8, 2018 (Count Two).[1] The jury concluded by special interrogatories that the government had proven Swinton's involvement in the conspiracy with powder cocaine and crack cocaine but not with fentanyl or heroin.[2]

Swinton has now moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 and/or for a new trial pursuant to Fed. R. Crim. P. 33.[3] The government opposes the motion.[4]

DISCUSSION

Rule 29 of the Federal Rules of Criminal Procedure provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is

[1] Doc. #915.
[2] *Ibid.*
[3] Doc. #961.
[4] Doc. #967.

insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In considering such a challenge, I must review the evidence in the light most favorable to the government, and I must give full play to the right of the jury to determine credibility, to weigh the evidence, and to draw justifiable inferences of fact. *See United States v. Landesman*, 17 F.4th 298, 319-20 (2d Cir. 2021). The evidence must be viewed in its totality, and the government need not negate every theory of innocence. *Id.* at 319. All in all, the jury's verdict must be upheld if any rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt. *Ibid.*[5]

Rule 33 of the Federal Rules of Criminal Procedure allows a court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). The "ultimate test" for a Rule 33 motion is "whether letting a guilty verdict stand would be a manifest injustice." *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018).

I have previously issued a lengthy ruling with respect to the admissibility of co-conspirator statements, and my ruling reviews much of the evidence that the government introduced at trial.[6] In this ruling I explained how the evidence showed that Swinton joined a conspiracy with others including but not limited to Harold Butler, Robert Hall, and David Sullivan to distribute controlled substances in Connecticut.[7] The evidence included a large

[5] Unless otherwise indicated, this ruling omits internal quotation marks, alterations, citations, and footnotes in text quoted from court decisions.
[6] Doc. #913; *United States v. Swinton*, 2022 WL 3053767 (D. Conn. 2022).
[7] Doc. #913 at 11-12.

number of clearly drug-related wiretap conversations between Swinton and these individuals demonstrating Swinton's role as a supplier of some form of controlled substances and his intentions to distribute some form of controlled substances to them.[8]

The trial evidence also showed that Swinton came to Connecticut on December 8, 2018 where he was observed by law enforcement officers carrying either a knapsack or a plastic bag into locations associated with Sullivan and Butler and then leaving empty-handed a short time later.[9] This surveillance evidence was paired with contemporaneous wiretap communications reflecting Swinton's intent to distribute controlled substances to Sullivan and Butler.[10]

Although my ruling with respect to the admissibility of co-conspirator statements required me to make findings only by a preponderance-of-evidence standard, I conclude that the same evidence—largely involving Swinton's own statements—would equally have allowed a reasonable jury applying a beyond-a reasonable-doubt standard to conclude that Swinton was guilty of both the conspiracy charged in Count One and the unlawful distribution as charged in Count Two.

The evidence was also enough to show beyond a reasonable doubt that at least one of the controlled substances distributed by Swinton was cocaine. This was apparent from wiretap conversations involving Swinton in which he discussed quantities and prices that are consistent with cocaine and in which there was also discussion of the cooking of a substance such as is done to convert powder cocaine to crack cocaine.[11] In addition, there were multiple controlled purchase transactions of cocaine from Butler during the timeframe of the conspiracy, as well as

[8] *Ibid.*
[9] *Id.* at 4-5.
[10] *Id.* at 11-12; Doc. #967 at 5-6 (summarizing surveillance and wiretap evidence of December 8 with respect to Swinton's dealings with Butler and Sullivan).
[11] *Id.* at 3-4 (citing exhibits).

cocaine and cocaine base that was recovered from Butler's residence and his "Hat Boyz" business when he was arrested at the end of the conspiracy.[12]

Swinton argues that the government never engaged in controlled purchases of drugs from him or seized any drug evidence from his person.[13] But the fact that the government's evidence could have been stronger does not mean that it was not strong enough to support a jury's verdict. The jury was entitled to base its verdict on circumstantial evidence as described above to show that Swinton joined a conspiracy to distribute cocaine and that he also distributed a controlled substance on December 8, 2018. *See Landesman*, 17 F.4th at 320.

Accordingly, I will deny Swinton's Rule 29 motion for a judgment of acquittal. The evidence was enough to prove beyond a reasonable doubt both the conspiracy charge and the distribution charge as alleged in Counts One and Two.

As for Swinton's Rule 33 motion for a new trial, Swinton's motion does nothing but challenge the sufficiency of the evidence. Because this challenge lacks merit for the reasons I have reviewed above and because Swinton does not identify any procedural, instructional, or evidentiary error that might warrant a new trial, I will deny Swinton's Rule 33 motion for a new trial.

[12] *Id.* at 5 (citing exhibits); Doc. #961 at 5.
[13] *Id.* at 9.

CONCLUSION

For the reasons explained above, the Court DENIES the motion for judgment of acquittal and/or new trial (Doc. #961).

It is so ordered.

Dated at New Haven, Connecticut this 28th day of January 2023.

/s/ ***Jeffrey Alker Meyer***
Jeffrey Alker Meyer
United States District Judge

Ahmad, Beena 8/14/2024
For Educational Use Only

2022 WL 3053767
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

UNITED STATES of America
v.
Kareem SWINTON, Defendant.

No. 3:19-cr-65 (JAM)
|
Signed August 3, 2022

Attorneys and Law Firms

Natasha Freismuth, Anthony E. Kaplan, Marc Harris Silverman, U.S. Attorney's Office, New Haven, CT, for United States of America.

Cheryl E. Heffernan, Farver & Heffernan, Hamden, CT, David A. Moraghan, Smith, Keefe, Moraghan & Waterfall, LLC, Torrington, CT, Francis L. O'Reilly, Law Office of Francis L. O'Reilly, Fairfield, CT, Kevin Murray Smith, Cameron Lee Atkinson, Pattis & Smith, LLC, New Haven, CT, Justin C. Pugh, Justin C. Pugh & Associates, Westport, CT, for Defendant.

RULING ON THE ADMISSIBILITY OF STATEMENTS BY ALLEGED COCONSPIRATORS

Jeffrey Alker Meyer, United States District Judge

***1** Defendant Kareem Swinton is on trial for drug trafficking offenses arising from his alleged participation in a conspiracy to distribute fentanyl, heroin, powder cocaine, and cocaine base between April 2018 and February 2019. Before trial, Swinton requested a hearing pursuant to *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), on the admissibility of certain statements by unidentified individuals alleged to be his coconspirators during the time period of the charged conspiracy. I indicated that I would admit these statements on a conditional basis, but I instructed Swinton to renew his objection if he had particular concerns about statements admitted at trial and further permitted him to request that I make *Geaney* findings at the close of the Government's case-in-chief.

The Government has since presented all of its evidence, consisting in large part of numerous intercepted telephone conversations between various individuals including in most cases Swinton himself. Swinton now renews his hearsay objection to the admissibility of the intercepted statements on these calls made by unidentified individuals, and for the first time raises a further objection to statements made on the calls by alleged coconspirators whom the Government has identified and, in some cases, indicted. The Government argues that almost all of these statements are admissible nonhearsay pursuant to Fed. R. Evid. 801(d)(2)(E) as coconspirator statements made during and in furtherance of a criminal conspiracy. For the reasons below, subject to certain exceptions, I conclude that the statements offered are admissible as coconspirator statements.

BACKGROUND

Kareem Swinton is on trial for two alleged drug trafficking offenses: conspiracy to possess with intent to distribute and to distribute fentanyl, heroin, powder cocaine, and cocaine base between April 2018 and February 2019, and possession with intent to distribute and distribution of a controlled substance on or about December 8, 2018. [1] The Government has now rested after presenting its case over five days of trial, and the jury is deliberating. What follows is a summary of the Government's evidence showing Swinton's participation as the primary supplier of narcotics for a drug trafficking organization involving several drug dealers in southeastern Connecticut. [2]

To prove that Swinton was a supplier of distribution quantities of narcotics, the Government introduced various items of physical evidence recovered from a Maryland residence belonging to Swinton's girlfriend. These items included (1) a kilogram press and bottle jack for compacting powder-consistency narcotics into a solid brick form for distribution purposes; (2) heroin residue on the kilogram press; (3) cutting

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

agents commonly used to dilute narcotics prior to their sale; and (4) many hundreds of empty wax folds of the kind used to distribute narcotics. The Government established through the expert testimony of a DEA agent that these items were commonly used to prepare narcotics for distribution. In addition to his ties to the apartment through his girlfriend, the Government linked Swinton to the apartment through his personal effects recovered there, including a photo identification card, mail, financial records, travel receipts, photographs of him, boxing gloves, and a boxing stand. [3]

***2** But the Government did not seize drugs of any actual weight from Swinton. Other than the heroin residue on the kilogram press, no narcotics were found at his girlfriend's apartment. Nor did Swinton have any narcotics on him at the time of his arrest.

The only live-witness testimony about Swinton's purchasing of narcotics came from John Ellingson, a cooperating witness who claimed to have met Swinton at a hotel in Baltimore, Maryland in January 2019 and to have provided him with seven kilograms of packaged narcotics. But the defense mounted a significant challenge to Ellingson's credibility during cross-examination. [4] The Government sought to corroborate Ellingson's account with bank records showing that he had traveled from North Carolina to Baltimore in late January 2019 and with a recording of a single intercepted call from January 27, 2019, in which Swinton can be heard telling someone on another line to meet him at a hotel in twenty minutes. [5] It also offered evidence that Ellingson was involved with narcotics on a number of occasions later in 2019, and that some of these drugs were lab-tested and found to contain fentanyl. [6] But the Government did not seize any of the narcotics Ellingson allegedly provided to Swinton; nor did it offer any particularized evidence that Swinton subsequently redistributed those narcotics received from Ellingson to Connecticut or anywhere else.

Instead, the Government offered the testimony of law enforcement witnesses regarding surveillance of narcotics distribution activities in Norwich, Connecticut. The most direct evidence of these activities was surveillance of hand-to-hand sales of narcotics by charged coconspirator Harold Butler as well as a controlled purchase from Butler on August 16, 2018. According to the Government, Butler's activities were linked to Swinton as the primary supplier of narcotics for the drug trafficking organization involving Butler and three other charged coconspirators—Robert Hall, David Sullivan, and Lorenzo Grier—that distributed cocaine, crack cocaine, and heroin in the Norwich-New London area. [7] The Government presented two kinds of evidence in support of this theory.

First, the Government offered the testimony of law enforcement witnesses and corroborating video evidence of three meetings between Swinton and the alleged coconspirators in Connecticut. The first meeting took place between Swinton and Butler at the Mohegan Sun casino on October 7, 2018. FBI Task Force Officer Richard Avdevich, who was performing undercover surveillance, observed Butler meet Swinton (wearing a sweater with distinctive white stripes on the shoulders) and his girlfriend in the hallway, then saw Butler and Swinton enter the restroom together and remain inside for several minutes. [8] Afterwards, he followed Butler and Swinton to the parking lot, where they got into a vehicle and drove off together.

***3** The other two meetings took place on December 8, 2018. At around 6:00 pm, Swinton was observed getting out of a Honda hatchback wearing a sweater with white shoulder stripes and entering an apartment associated with David Sullivan. He was carrying a backpack and left several minutes later without the backpack. Approximately half an hour later, FBI Task Force Officer Jason Calouro saw Swinton get out of the Honda hatchback and walk to the entrance of Butler's store ("Hat Boyz") carrying a white plastic bag. Other evidence showed that Butler stored drugs and drug paraphernalia at his store and sold narcotics in the apartment above the store where he lived. [9] Video captured by a pole camera across the street from the store shows someone letting Swinton into the store. [10] A few minutes later, Butler came down from

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

the upstairs apartment and was let into the store. [11] Approximately five minutes later, Swinton left the store without the white plastic bag and returned in the direction of his car. [12] This evidence showed that Swinton had dealings with at least Sullivan and Butler during the timeframe of the charged conspiracy.

To prove that Swinton was specifically supplying the alleged coconspirators with narcotics for redistribution, the Government relied on a second type of evidence: a large number of communications intercepted from the telephones of Swinton, Butler, and Hall during the timeframe of the charged conspiracy. [13] The most obviously relevant of these conversations are those between Swinton and the Connecticut drug dealers. In these calls, Swinton arranges meetings with the dealers, checks on their inventory levels, defends the quality of the product he is selling, indicates specific weights and quantities of product he has sold or intends to sell, offers to sell "old" product he personally "cooked," expresses his desire to receive prompt payment upon delivery, demands more responsive communication, settles past debts, and insists on doing business with these individuals directly. [14] The Government also introduced calls between Swinton and various other identified and unidentified individuals showing more of what the Government contended to be narcotics activity in furtherance of the charged conspiracy. [15]

Before trial, Swinton moved to exclude communications involving "several unidentified unknown speakers" on the ground that these statements "[b]y their very nature ... cannot be admitted as coconspirator statements." [16] Swinton continues to object to the admission of these statements, and now further seeks to strike all statements by parties other than himself in the intercepted communications. [17]

By oral ruling just prior to the Government's resting its case, I denied Swinton's motion except with respect to ten of the audio recordings. This written ruling setting forth my reasons now follows.

DISCUSSION

The Federal Rules of Evidence prohibit the introduction of hearsay, which is defined as an out-of-court statement that is offered for the truth of the matter asserted. *See* Fed. R. Evid. 801(c) and 802. But the hearsay rule does not apply to statements of a party opponent, such as when the Government introduces statements by the defendant in a criminal trial. *See* Fed. R. Evid. 801(d)(2)(A). For that reason, all statements made by Swinton in the intercepted communications were properly admitted as nonhearsay.

But how about intercepted statements made by other individuals? Rule 801(d)(2)(E) recognizes another nonhearsay exclusion for "statements offered against an opposing party" and that were "made by the party's coconspirator during and in furtherance of the conspiracy." In other words, "an out-of-court statement offered for the truth of its contents is not hearsay if the statement is offered against an opposing party and it was made by the party's coconspirator during and in furtherance of the conspiracy." *United States v. Gupta*, 747 F.3d 111, 123 (2d Cir. 2014). [18]

***4** When a court is asked to determine whether a statement qualifies for admission under Rule 801(d)(2)(E), it must find that the proponent has carried its burden to show by a preponderance of the evidence the following three factors: "(a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *Id.* at 123–24.

Because Swinton raises a blanket objection to the admission of third-party statements from the audio recordings and does not flag or object to any particular third-party statement in any particular recording, the focus of my review is to conduct a one-by-one review of each audio recording exhibit and to decide whether as a whole the third-party statements that appear on each recording satisfy the requisites for admissibility under the coconspirator rule. *See United States v. Coplan*, 703 F.3d 46, 83 (2d Cir. 2012) (noting that

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Ahmad, Beena 8/14/2024
For Educational Use Only

"we have never required a district court to make particularized rulings or conduct separable analyses with respect to each coconspirator, much less each coconspirator statement"). [19]

As to the first factor (existence of a conspiracy), I must consider whether a preponderance of the evidence shows that a conspiracy existed. Here, the Government claims that the relevant conspiracy is the charged conspiracy as alleged in Count One.

As to the second factor (membership of declarant in conspiracy), I must consider whether for each conversation the evidence shows that Mr. Swinton and any declarant whose statements are offered for their truth were members of the conspiracy, although there is no need to show that the person to whom a statement is made is also a member of the conspiracy. *See United States v. James*, 712 F.3d 79, 106 (2d Cir. 2013). As the Second Circuit has noted, "once a conspiracy has been proved to exist, the evidence needed to link another defendant with it (for purposes of a *Geaney* finding) need not be overwhelming," and "all that is required to meet the *Geaney* threshold is a showing of a likelihood of an illicit association between the declarant and the defendant." *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982).

Rule 801(d)(2)(E) does not require proof of a declarant's identity or precise role in the conspiracy. As the Second Circuit has observed, a "statement may be non-hearsay within [the] meaning of Rule 801(d)(2)(E) even though [the] declarant is unidentified." *United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993) (citing *United States v. Cruz*, 910 F.2d 1072, 1081 n.10 (3d Cir. 1990)). What matters is proof of the declarant's membership in the conspiracy rather than proof of the declarant's name and true identity.

***5** As to the third factor (statements in furtherance of the conspiracy), I must consider whether the declarant's statements served some purpose to advance the goals of the conspiracy. This requirement is obviously shown if the declarant urges a defendant or coconspirator to "respond in a way that facilitates the carrying out of criminal activity" related to the object of the conspiracy. *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989). But less overt statements by coconspirators may also further a conspiracy; for example, they can "provide reassurance, serve to maintain trust and cohesiveness[,] ... or inform each other of the current status of the conspiracy." *Gupta*, 747 F.3d at 123–24. Even "vague and rambling" conversations that serve one of these purposes can further a conspiracy, *United States v. Farhane*, 634 F.3d 127, 162 (2d Cir. 2011), although mere "idle chatter" or "narrative description" do not, *Beech-Nut Nutrition Corp.*, 871 F.2d at 1199. The in-furtherance requirement presupposes of course that the statements occurred during the timeframe of the conspiracy. *See Gupta*, 747 F.3d at 123.

In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court clarified that courts making these predicate factual determinations are not barred from considering the contents of the declarant's statement in question. After all, "there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy." *Id.* at 180.

Nonetheless, the Second Circuit has continued to require some "independent corroborating evidence" to support the conclusion that the offered statements were in fact made by a coconspirator during and in furtherance of a conspiracy. *See United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988). Indeed, Rule 810(d)(2)(E) itself was amended following *Bourjaily* to require that the hearsay statement itself "must be considered but does not by itself establish ... the existence of the conspiracy or participation in it." *See United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008). [20] And the Advisory Committee note indicates that, in addition to the statement itself, a court should consider the circumstances surrounding the statement including factors such as "the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement." *United States v. Schlesinger*, 372 F. Supp. 2d 711, 720 (E.D.N.Y. 2005) (quoting Fed. R. Evid. 801 advisory committee's note (1997 Amendment)).

I will now consider how these standards apply to each tranche of intercepted statements by alleged coconspirators. All of my findings are based on the preponderance of the evidence standard.

At the outset, I note that Swinton did not raise a timely objection to the admission of statements by identified parties. That alone is sufficient grounds to overrule his objection to such statements, for it is only "when the preliminary facts relevant to Rule 801(d)(2)(E) are *disputed*, [that] the offering party must prove them by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 176 (emphasis added). Nonetheless, I will explain why each conversation involving these statements is admissible under Rule 801(d)(2)(E) before turning to the conversations involving unidentified speakers. To the extent that any particular call includes additional statements that I do not conclude independently furthered the conspiracy in the same manner as the examples I highlight, I conclude that these statements are nonetheless admissible because they have not been the basis of any particularized objection from Swinton and they provide necessary context for the relevant statements by a coconspirator.

Indicted coconspirators

***6** I begin with the statements made to Swinton by his indicted coconspirators Butler, Hall, Sullivan, and Grier. This category includes no fewer than seventeen calls with Butler (Government Exhibits 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 132, 134, 136, 140, 167, 168, 178). It also includes four calls with Hall (Government Exhibits 111, 116, 117, 169), two calls with Sullivan (Government Exhibits 135 and 141), and one call with Grier (Government Exhibit 187).

Swinton challenges the admissibility of these communications *in toto* rather than specifying any particular communications that contain problematic hearsay evidence. His argument for the general inadmissibility of these calls is that they lack sufficient independent corroborating evidence. But Swinton ignores the fact that his own statements on the calls are not hearsay under Rule 801(d)(2)(A) and may therefore be used to corroborate the existence of a conspiracy between Swinton and the indicted coconspirators.

I find by a preponderance of the evidence that a narcotics distribution conspiracy existed between these defendants and Swinton. First and foremost, the patently drug-related nature of the nonhearsay statements by Swinton himself in these calls, when taken collectively, establishes that during the period of the alleged conspiracy Swinton was a supplier of narcotics to Butler, Hall, and Sullivan for street-level redistribution. Moreover, the temporal fit between these calls and the surveillance footage and testimony by law enforcement officers presents strong circumstantial evidence that Swinton was specifically providing Butler and Sullivan with narcotics when he traveled to Norwich in December 2018.

In addition, each call contains a high proportion of statements made by a coconspirator and in furtherance of the conspiracy. For example, Butler repeatedly tells Swinton that he is "hungry" and needs "food" or alternatively that he still has drugs to sell, while offering to pay Swinton "C.O.D." (cash on delivery) and to provide him with the "chicken" kept in his shop.[21] In other calls Butler updates Swinton on the amount of cash he has on hand to cover past debts and purchase new drugs, whereupon the two men arrange a time and place to meet.[22] As for Hall, he argues at length with Swinton over whether he is to blame for a customer refusing to pay for half a kilogram of allegedly "touched" narcotics supplied and stamped by Swinton, with Hall volunteering that he personally cooked the substance in a pot for hours and knew how it turned out.[23] As for Sullivan, he tells Swinton he is home on December 8, 2018—the day law enforcement observed Swinton deliver a backpack to Sullivan's apartment—and then contacts Swinton two days later for a resupply because he needs to redistribute to other street-level dealers.[24]

Finally, as to Grier, Swinton called him on February 20, 2019—the date on which law enforcement made a number of arrests in Connecticut and the day before Swinton's own arrest in Baltimore.[25] In the call,

Swinton states that he heard something about the arrests and was seeking more information about Grier's status and his own exposure. Grier warns Swinton not to talk on the phone but then proceeds to discuss what he knows about the federal investigation and suggests that Swinton "get lost" and "stay out this shit." [26] Considering the contents of Grier's statements alongside the independent corroborating evidence of the law enforcement "takedown" executed on that date and Swinton's attempt to flee early the next morning, I conclude by a preponderance that Grier was a member of the conspiracy and sought to further that conspiracy's criminal ends by warning Swinton of law enforcement activity and helping him avoid being arrested.

***7** Only three calls among the indicted coconspirators did not involve Swinton: one between Hall and Butler and two between Hall and Sullivan. *See* Gov't Ex. 100, 191, 192. I conclude without difficulty that the statements in these calls were also made in furtherance of the conspiracy. In Government Exhibit 100, Butler seeks to obtain fifty grams of narcotics from Hall because Swinton is not answering his phone. And in Government Exhibits 191 and 192, Sullivan encourages Hall to return Swinton's calls regarding his failure to pay for the half kilogram of allegedly "touched" narcotics. I find that each of these statements was made by a member of the conspiracy with the goal of furthering its criminal object by purchasing narcotics for redistribution or facilitating payments to Swinton as the group's narcotics supplier.

Uncharged, identified individuals

The next set of statements involve identified but uncharged individuals with whom Swinton spoke during the time period of the charged conspiracy. This category includes six calls with Shariff Turner (Government Exhibits 124, 130, 183, 229, 231, 232). It also includes three calls with Theodore Jones (Government Exhibits 179, 182, 185), two calls with Herbert Qion Cooper (Government Exhibits 127, 133), and one call each with Christina Green and Carlos Rodriguez (Government Exhibits 143, 172).

Swinton contends that there is "no independent corroborating evidence whatsoever to establish that these individuals were engaged in a conspiracy with [him]." [27] Although it is true that the Government did not present any physical evidence or testimony implicating these individuals in the conspiracy, I nonetheless find that these individuals were Swinton's coconspirators in light of the otherwise robust evidence of an ongoing narcotics conspiracy and Swinton's demonstrated role as the conspiracy's primary narcotics supplier, as well as the content and timing of these intercepted conversations and the drug-related nature of the statements made by both Swinton and these individuals during the calls.

Consider first the calls between Swinton and Turner. In one conversation on December 4, 2018, Swinton says he made "$160,000 profit in two days." [28] Turner then advises Swinton to be careful dealing with a particular individual given that "officials would love to be on somebody like you," *i.e.*, a "big fish," because "if they stop you they could stop a lot of shit so they would love to." [29] In another call on December 8, 2018, Swinton complains that his product is "fire" and "a monster" but that a customer is claiming that it's "garbage," to which Turner responds that Swinton should stop selling to redistributors and should instead put his product on the street through a mutual acquaintance. [30] In a third call on January 29, 2019, Swinton complains about a buyer who failed to pay for $50,000 worth of narcotics. [31] Turner tells Swinton that "you supposed to whoop his ass right there" and that Swinton should have "kept tappin' his chin, put him down seven or eight times." [32] But Swinton explains that he left the drugs there without getting paid because he was afraid of being betrayed by the buyer and pulled over by police on his drive home, and he was "not 'bout to go to the fucking can." [33] Turner praises Swinton for this thinking, and the two agree that the buyer should be made to pay a steep price, with Swinton ultimately stating that he is going to kill him. [34] Taking these conversations together and in light of their nonhearsay elements, I conclude by a preponderance that Turner was an active member of the conspiracy and that his statements were made in furtherance of

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

the conspiracy's illegal object of distributing narcotics for profit and collecting payment from buyers without running afoul of law enforcement.

***8** Swinton's conversations with Jones were also in furtherance of the conspiracy. In one call, Jones asks Swinton where his compression jack is and then reports that the "shit" on the block is "cheese" and "strong as hell."[35] After telling Swinton more about these drugs, Jones offers to negotiate a high quantity buy at a low price from a third party, to which Swinton responds: "He give it to you for a nice number, I'll take it."[36] In another call, Swinton complains about Butler and Sullivan owing him money for past drug sales and Jones sympathizes with the view that Swinton should not extend them further credit.[37] In a third call on the day of the arrests in Connecticut, February 20, 2019, Jones warns Swinton that Sullivan and "your man" have been "knocked off."[38] Swinton asks "For what?" Jones then answers: "You know for what," prompting Swinton to ask, "Some federal shit?"[39] Considering these conversations cumulatively, in light of the nonhearsay drug-related statements by Swinton and the timing of the calls as well as the content of the statements by Jones, I conclude by a preponderance that Jones was a member of the narcotics distribution conspiracy and that these statements regarding narcotics purchases and law enforcement activities were made in furtherance of the conspiracy.

The remaining calls in this category also furthered the conspiracy in various ways. Swinton negotiates a drug price and then discusses the quality of his product with Cooper.[40] He similarly discusses customer reviews of his product with Green and the current market rate for narcotics with Rodriguez.[41] Each of these calls, including the statements by uncharged coconspirators, helped to establish Swinton as a successful large-scale supplier of narcotics.

Unidentified speakers

The last category of intercepted calls involves eight unidentified and uncharged individuals. Nine of the calls involve UM8017 a.k.a. "Noodles" (Government Exhibits 138, 147, 148, 150, 151, 152, 153, 157, 159), nine involve UM 1176 (Government Exhibits 125, 128, 148, 154, 158, 162, 164, 165, 188), and four involve UM 8947 (Government Exhibits 173, 174, 176, 177). There are also single calls involving UM6598 (Government Exhibit 123), UF9180 (Government Exhibit 146), UM5264 (Government Exhibit 228), UF6193 (Government Exhibit 233), and UM8883 (Government Exhibit 378).

I conclude by a preponderance of the evidence that these statements were made by coconspirators during and in furtherance of the conspiracy. For starters, Swinton's conversations with Noodles indicate that Swinton was comparing the popularity of different batches of narcotics, with Noodles reporting back to him on how well the "green" brand did against the "red" brand and discussing whether it would be helpful to "smash" the drug or change its label.[42] In one call with UM1176, Swinton is looking for certain narcotics when Noodles calls him to ask where he is, to which Swinton responds "I'm coming right now."[43] Swinton then asks UM1176, "You put the shit in the box?" UM1176 answers "Yeah," and Swinton responds, "So where the fuck is the dope at?"[44]

Similarly, Swinton's conversation with UM6598 concerns the strength of different batches of narcotics and the importance of ensuring that UM6598 receive prompt and adequate payment when selling products from the stronger line.[45] And Swinton's conversation with UF9180 involves a report from a user who claimed that Swinton's narcotics had a "soapy taste" and "ain't really doing too much," which Swinton disbelieved because "everybody in, in the city said it's a ten."[46] These were clearly conversations about selling drugs, a process in which the unidentified individuals Swinton spoke with were active contributors including via these calls.

As for UM8947, he told Swinton in January 2019 that he "found a dude over there in Mexico who has what you need."[47] Swinton then negotiates on price while complaining about the quality of another source for

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Ahmad, Beena 8/14/2024
For Educational Use Only

narcotics. After UM8947 sends him a picture of the drugs, Swinton asks whether they are "the F thing," and UM8947 confirms, calling the drug "the doggy dog."[48] Swinton then agrees to have an in-person meeting to decide on quantity with a supplier from Laredo, Texas.[49] Again, based on timing, context, and the admissible nonhearsay statements of Swinton himself, these are very clearly conversations between coconspirators about the purchase of narcotics for redistribution through the charged conspiracy.

***9** As for UF6193, Swinton asks her in a call on February 15, 2019, whether she would "sell weed," to which she replies "Yeah. Hell yeah."[50] Swinton explains that he needs to "diversify his portfolio."[51] Even when UF6193 explains that she is not in a position to be selling "bud" because she has been "working home ... for some months now," Swinton says that he knew this but still "always knew you was a hustler ... always looking for more money," to which UF 6193 replies "Hell yeah."[52] I conclude from the content and timing of this conversation and the nonhearsay statements by Swinton that UF6193 effectively adopts by admission that Swinton was trying to recruit her to distribute for him and that she was communicating her interest in that proposal despite certain practical challenges.

Finally, with regard to UM8883, he repeatedly texts Swinton in early February 2019 seeking "boots."[53] He explains that he has "alots people waiting on me" and that he "need[s] to see [Swinton] bad."[54] After Swinton fails to respond, UM8883 becomes upset, insulting and threatening Swinton before resuming his plea for the delivery of "boots tomorrow 30."[55] Swinton at last replies. "My bad bro I am still on the highway," and then a day later, "Just getting up on my way to you."[56] I conclude from the content of these conversations and the broader evidence that Swinton distributed narcotics while traveling in various locations between Maryland and Connecticut that UM8883 was another drug dealer seeking a resupply of narcotics from Swinton in furtherance of the conspiracy to distribute narcotics for profit.

Statements containing admissions

The Government has identified one exhibit, Government Exhibit 227, which it seeks to admit under Fed. R. Evid. 801(d)(2)(B) as an adopted admission. In this conversation on January 18, 2019, Swinton secures Frank Vitolo's assistance in buying a pickup truck on credit with a down payment of $10,000 in cash. He seals this deal by means of a side agreement to supply narcotics to Vitolo, but only after Vitolo agrees to prove to Swinton in person that he actually intends to use the drug. This conversation is relevant in two respects. First, it shows that Swinton was seeking to build credit by financing a new vehicle and that he did not want to be reported for having $10,000 in unexplained assets, which tends to show that he had an illicit source of income and was hoping to acquire property with funds from his narcotics activities. Second, it shows that although Swinton used his access to narcotics to facilitate this transaction, he remained concerned that Vitolo might be acting as an undercover agent and therefore required proof that Vitolo was actually a user. I agree with the Government that this does not suffice to show by a preponderance that Vitolo was a coconspirator of Swinton's. But Swinton's adoption by admission of Vitolo's statements, which were essential to their agreement on the deal, makes those statements admissible under Rule 801(d)(2)(B).

Additionally, I conclude that Swinton's conversation with Aneesha Richardson in Government Exhibit 230 is admissible only for the truth of the statements made by Swinton. In this call on January 18, 2019—the same date as the call with Vitolo—Swinton discusses with Richardson how he is planning to buy a new vehicle that she will like. Later in the call, Swinton complains to Richardson about the same buyer who failed to pay for $50,000 worth of narcotics that he tells Turner about in Government Exhibit 183. Swinton tells Richardson that the buyer's debt "ain't sliding" and that Swinton's people will be "on his ass." Swinton says that it will take him "no longer than 15 seconds to make that fucking 50 thousand dollars" back, but that he is concerned about "the principle of this shit." Unlike Turner, however, Richardson does not endorse making an example out of the buyer and in fact

encourages Swinton to simply "do no more business with him" and otherwise let "karma" take its course. Swinton's statements in this call are relevant to the extent that they corroborate that he purchased a new truck on credit through the arrangement with Vitolo and that he was distributing narcotics for money and considering ways to punish a buyer who failed to pay him. But at least in this conversation Richardson does not conspire with Swinton to further his narcotics trafficking activities, and therefore her statements are admissible only insofar as they provide necessary context to understand Swinton's statements on the call.

CONCLUSION

***10** For the reasons explained above, the Court FINDS that, with the exception of the exhibits listed below, the intercepted communications introduced at trial contain statements that were made by coconspirators of the defendant during and in furtherance of the charged conspiracy which were therefore admissible pursuant to Fed. R. Evid. 801(d)(2)(E).

The Court does not find the requirements of Rule 801(d)(2)(E) met with respect to: Government Exhibits 122, 166, 175, 180, 181, 184, 190, and 371, which were admissible because they contain only nonhearsay statements made by the defendant; Government Exhibit 227, which was admissible because the statements of Frank Vitolo were adopted admissions of the defendant; and Government Exhibit 230, which was admissible only for the truth of the nonhearsay statements made by the defendant and not for the truth of any statements made by Aneesha Richardson. The Court has therefore provided the jury with an appropriate limiting instruction with respect to these exhibits.

It is so ordered.

All Citations

Not Reported in Fed. Supp., 2022 WL 3053767

Footnotes

1 Doc. #789 (operative indictment).

2 The recitation below is based on the Court's notes of trial and without the benefit of trial transcripts. If either party believes there is a material misstatement of the evidence in this ruling, they are welcome to promptly file a motion for reconsideration or amendment.

3 This evidence persuasively established that Swinton had access to the apartment and the items found inside it even in the absence of fingerprints, DNA evidence, or witness testimony to that effect.

4 The defense highlighted Ellingson's overwhelming incentive to satisfy the Government, inability to present a chronological timeline of the key events in his testimony, selective memory of drug transactions involving Swinton despite claimed lack of memory about other drug-dealing, and his dubious self-portrait as a naive courier who simply happened to be recruited by a major drug cartel.

5 Gov't Ex. 181 (recorded call), 302 (bank records).

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

6 Doc. #881 (ruling admitting this evidence subject to a limiting instruction).

7 All of these indicted coconspirators pleaded guilty and were sentenced by Judge Bryant. *See* Doc. #261 (Butler sentenced to 77 months of imprisonment for conspiracy); Doc. #474 (Sullivan sentenced to 36 months of imprisonment for conspiracy); Doc. #788 (Hall sentenced to 60 months of imprisonment for conspiracy); Doc. #595 (Grier sentenced to time served in March 2021 for use of a telephone to facilitate a drug trafficking offense). The Government did not present any evidence at trial of these guilty pleas or sentences.

8 Officer Avdevich could not identify Swinton, but he took video of the encounter which allowed another Task Force Officer—Jason Calouro—to make the identification on the stand.

9 Gov't Ex. 327, 329, 355.

10 Gov't Ex. 300 at 0:08-0:50.

11 *Id.* at 3:35-4:25.

12 *Id.* at 7:57-8:18.

13 *See* Doc. #1-1 at 8-10 (affidavit of FBI Special Agent Scott Dugas describing court-authorized wiretap).

14 Doc. #899-1 at 1-2 (Government chart of intercepted communications between alleged coconspirators).

15 *Id.* at 2-5.

16 Doc. #836 (adopting prior motion, *see* Doc. #655 at 2).

17 Doc. #900.

18 Unless otherwise indicated, this ruling omits internal quotation marks, alterations, citations, and footnotes in text quoted from court decisions.

19 Several weeks ago, I invited defense counsel to raise "particular concerns about specific statements that [the defense] believes are problematic." Doc. #877. Counsel has not done so, and therefore I deem waived any argument that a particular statement does not meet the requirement of Rule 801(d)(2)(E) as distinct from an argument that declarants' statements for each conversation as a whole do not meet the requirements. Of course, because many of the particular third-party statements on the recordings do not make any assertions of fact that could be accepted for their truth, there can be no hearsay objection to admission of these statements. It is otherwise unclear to me that Swinton can point to any prejudice from the introduction of any particular third-party statement to the extent that the statement is offered for its truth rather than merely as background context for the jury's understanding of Swinton's own wiretap statements—which are indisputably admissible over any hearsay objection as statements of a party opponent under Rule 801(d)(2)(A).

20 This aversion to having a hearsay statement "lift itself by its own bootstraps to the level of competent evidence," *Glasser v. United States,* 315 U.S. 60, 75 (1942), stems from the concern

that such statements are "presumptively unreliable," *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996). On the other hand, it follows that where sufficient indicia of reliability are present such statements may be admitted under the established exceptions to the hearsay rule. *See United States v. DeJesus*, 806 F.2d 31, 35 (2d Cir. 1986).

21 Gov't Ex. 101, 102, 103, 105, 167.

22 Gov't Ex. 104, 106, 107, 108, 109, 110, 132, 134, 136, 140, 168, 178.

23 Gov't Ex. 116, 117.

24 Gov't Ex. 135, 141.

25 Gov't Ex. 187.

26 *Ibid.*

27 Doc. #900 at 9.

28 Gov't Ex. 124.

29 *Ibid.*

30 Gov't Ex. 130.

31 Gov't Ex. 183.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 Gov't Ex. 182.

36 *Ibid.*

37 Gov't Ex. 179.

38 Gov't Ex. 185.

39 *Ibid.*

40 Gov't Ex. 127, 133.

41 Gov't Ex. 143, 172.

42 Gov't Ex. 138, 147, 150, 151, 152.

43 Gov't Ex. 148.

44 *Ibid.*

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Ahmad, Beena 8/14/2024
For Educational Use Only

45 Gov't Ex. 123.

46 Gov't Ex. 146.

47 Gov't Ex. 173.

48 Gov't Ex. 176.

49 Gov't Ex. 177.

50 Gov't Ex. 233.

51 *Ibid.*

52 *Ibid.*

53 Gov't Ex. 378.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of June, two thousand twenty-four.

United States of America,

Appellee,

v.

ORDER

Docket No: 23-6118

Kareem Swinton,

Defendant - Appellant.

Appellant, Kareem Swinton, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk