No. 17-1607

In The
Supreme Court of the United States

KENNETH E. FAIRLEY,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BY PETITIONER KENNETH E. FAIRLEY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In criminal trials, this Court has limited the evidence admitted pursuant to the "co-conspirator exception" to the hearsay rule (FRE 801(d)(2)(E)) to statements made during and in furtherance of *criminal* conspiracies. The limitation results from the Court's understanding of the common-law history of this exception to the hearsay rule, the plain language of the rule, and its legislative history.

The Fifth Circuit, however, along with the Second, Ninth, and D.C. Circuits, have expanded the co-conspirator exception to the hearsay rule, and now admit, in *criminal* trials, hearsay statements made when there is only a *non-criminal* relationship between the "coventurers." This is in contrast to the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, all of which continue to require that the conspiracy described in FRE 801(d)(2)(E) be a *criminal* one.

In Fairley's case, the crux of the Government's evidence consisted of three tape recordings made by the co-conspirator over a year after any criminal conspiracy had ended. Nevertheless, the Fifth Circuit, relying on its earlier holdings that "a conspiracy [for purpose of hearsay exclusion] may be shown 'merely by engaging in a joint plan [] . . . that was non-criminal in

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[1] The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

QUESTION PRESENTED FOR REVIEW –
Continued

nature," deemed the recordings admissible, because they evidenced an ongoing, non-criminal "joint venture."

Thus, the issue presented is:

> Whether FRE 801(d)(2)(E) permits the admission, at a criminal trial, of out-of-court statements that were not made during and in furtherance of a *criminal* conspiracy, but were instead made during a non-criminal "coventure."

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INTRODUCTION

The United States is simply on the wrong side of the one legal issue presented by Fairley's petition for a writ of certiorari. The "co-conspirator exception" to the hearsay rule, embodied in FRE 801(d)(2)(E), does *not* extend to out-of-court statements made in furtherance of *lawful* ventures. The common-law roots and development of the exception, its legislative history, and the very language of the Rule defeat any such contention.[2]

Recognizing, if only implicitly, that its substantive position has no merit, the United States attempts to manufacture other obstacles between this Court and the issue. It raises the shopworn argument that the issue is "not squarely presented."[3] This is followed by a contention that the Fifth Circuit's holding is actually correct, simply because it is "consistent with the decisions of every court of appeals to have specifically addressed the question."[4] Finally, it argues that even if the FRE 801(d)(2)(E) does not encompass lawful joint ventures, any error in the case was harmless, because the "challenged statements are admissible on alternative grounds."[5]

These arguments create no real impediment for this Court. The issue was "squarely presented." The

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[2] These matters are thoroughly addressed by the *Brief of Amici Curiae Professors of Evidence in Support of Petitioner*, at pp. 4-10, and thus will not be repeated here.

[3] Brief for the United States in Opposition, p. 8.

[4] *Id.*

[5] *Id.*

facts of the case *compelled* the Fifth Circuit to invoke and rely upon the "non-criminal venture exception" to justify the admission of the recordings that were the cornerstones of the Government's case at trial.

The argument that the Fifth Circuit's holding is consistent with other courts of appeals that have considered the question is one part circular, and one part irrelevant. The Fifth Circuit was the first court to expand FRE 801(d)(2)(E) to include lawful co-ventures, and many of the other courts of appeals have relied upon it – as did the two treatises cited by the United States. Given the errors in the Fifth Circuit's seminal decision, this entire body of law is little more than one flawed opinion piled on top of another.

And finally, there is no alternative basis under the Federal Rules of Evidence for admitting these statements as substantive evidence – which is precisely what the Government needed and needs them to be. Fairley's petition should be granted.

ARGUMENT

1. The issue is "squarely presented."

The four recordings the Government introduced at Fairley's trial[6] contained three separate conversations

[6] The recordings were made surreptitiously by Fletcher on December 9, 2012, or three days before the conspiracy alleged in Count 1 "ended" – according to the indictment itself. However, there was no evidence at trial that *anything* occurred on December 12, 2012.

between Fletcher and Fairley, lasting over three hours. At the time the district judge ruled on the admissibility of these recordings*, he had neither heard the tapes, nor read a transcript of the conversations*. Instead, the district judge relied exclusively on the Government's (mis)characterization of these conversations as being in furtherance of the conspiracy described in Count 1, and thus admissible under FRE 801(d)(2)(E) and the law of the Fifth Circuit.[7]

Plainly, admitting over three hours of critical conversation without actually hearing, or reading its contents is not just an abuse of judicial discretion – it is the complete abdication of judicial discretion. Had the district court listened to the tapes,[8] it would have learned what the Fifth Circuit learned during the appeal: these conversations were not held *during* the

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[7] In the Fifth Circuit, the proponent of evidence offered under Rule 801(d)(2)(E) must show, by a preponderance of the evidence: (1) the existence of the conspiracy; (2) the statement was made by a co-conspirator of the party; (3) the statement was made during the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy. *See United States v. Ebron*, 683 F.3d 105, 135 (5th Cir. 2012), quoting *United States v. Cornett*, 195 F.3d 776, 782 (5th Cir. 1999).

[8] The various quotes used by the Government, presented as the district court's findings regarding the recordings, (Opposition, pp. 4, 6) are taken from a *post*-trial order of the district court denying Fairley's motion for a new trial, or judgment of acquittal. But the Government fails to mention that the district court's finding was an alternative one: "Even if the defendant is correct in that the exhibits [recordings] were not in the course and furtherance of the conspiracy, they are significant direct evidence of the conspiracy." Record on Appeal, p. 662. Perhaps, but that does not make them admissible.

conspiracy, because it was over, both legally and factually. And the conversations were certainly not in furtherance of any conspiracy between Fletcher and Fairley: as was shown at trial, the recordings were made surreptitiously by Fletcher to gather evidence for a civil suit against Fairley.[9]

In *Krulewitch v. United States*,[10] this Court held that a conspiracy ceases to exist when its objectives "either had failed or had been achieved." The conspiracy to "embezzle, steal purloin or knowingly convert . . . money . . . of the United States" charged in Count 1 ended in August 2011, when the crime was complete: all the funds had been obtained from the Government, and all the proceeds from the crime distributed. In fact, the last overt act alleged in Count 1 of the indictment is July 12, *2011*. This is some 15 months before the recordings were made.

Faced with an abdication of judicial discretion by the district court, a *criminal* conspiracy that was legally complete, and conversations that could not and did not further this completed *criminal* conspiracy, the Fifth Circuit invoked the theory of admissibility that Fairley challenges here: it found that the conversations were evidence of a non-criminal "joint venture," one that continued past the charged *criminal* venture.

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[9] The portions of the conversations relied upon by the Fifth Circuit actually undermine its factual conclusion that there was "joint" conduct. Fairley is the only person quoted by the Fifth Circuit, and the only one talking about "working together in the future" is Fairley. Fletcher makes no such proposal.

[10] *Krulewitch v. United States*, 336 U.S. 440 (1949).

Tellingly, in its descriptions of this alleged "joint venture," the Fifth Circuit does not describe it as criminal: "the continuing nature of the venture";[11] "the on-going nature of the venture";[12] "the two men had not yet concluded their joint venture."[13]

If there is any oblique quality to the framing of the issue, it was created by the Fifth Circuit's opinion, which disregards *Krulewitch*, and relaxes the showing required *by this Court* for the admission of co-conspirator testimony, a point discussed below. Review by this Court is appropriate.

2. The Fifth Circuit's holding is incorrect, as are similar holdings in the other courts of appeals.

The Government next argues that FRE 801(d)(2)(E) permits the introduction of out-of-court statements made in furtherance of legal ventures, because some courts have held that it does, and the Government agrees with those courts. Nowhere in its brief does the Government address head-on the arguments made by Fairley regarding the Fifth Circuit's incorrect reading of the legislative history of the Rule. Nor does the Government so much as mention any of the arguments made by the *amicus* brief. The Government simply ignores that very thorough historical analysis, one that shows that at common law, the exception was

[11] App. 29.

[12] App. 29-30.

[13] App. 30.

limited to unlawful schemes. Moreover, the drafters of the Federal Rules of Evidence intended to codify this traditional meaning, not expand it.

This is precisely the point made by the Advisory Committee, in its Notes to the 1972 Proposed Rules (which the Government ignores in favor of the Senate Advisory Committee Note misread by the Fifth Circuit in *United States v. Postal*):[14]

> The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. **While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established.** See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). **The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved.** *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California

[14] *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

> Evidence Code § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

Advisory Committee Notes, 1972 Proposed Rules, Federal Rule of Evidence 801, Note to 801(d)(2)(E) (emphasis added).

The Government's contention that "every court to have addressed the issue has determined that the term 'conspiracy' in Rule 801(d)(2)(E) also includes non-criminal joint undertakings"[15] also provides no real basis to deny review, because the statement is inaccurate, and because it pretermits the possibility that the courts of appeals expanding the Rule are in error.[16]

Try as it may, the Government cannot argue away the "split" in the circuits on this question. *See, e.g.*, *United States v. Stein*,[17] noting that "[t]here is a conflict among the circuits on this point." It remains a stubborn fact that some circuits have never expanded Rule

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[15] Opposition, p. 10.

[16] The "leading treatises" cited by the Government at p.10, n. 3 of its Opposition do nothing more than refer to the decisions of the circuit courts of appeal. *See* 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 8:59, at 497-498, citing *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006); *United States v. Russo*, 302 F.3d 37 (2d Cir. 2002); *United States v. Nelson*, 732 F.3d 504 (5th Cir. 2013); and *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988); and 30B Fed. Prac. & Proc. Evid. § 6778 (Wright), at footnote 4, citing only *United States v. El-Mezain*, 664 F.3d 647 (5th Cir. 2011), the case relied upon by the Fifth Circuit in Fairley's appeal.

[17] *United States v. Stein*, 2007 WL 3009650 (S.D.N.Y., Oct. 15, 2007).

801(d)(2)(E) to include non-criminal ventures, and some have.

The Government's absolutist reading of what the various circuit courts of appeals have actually held is, in some instances, well off the mark. The Government's description of the status of the issue in the Second Circuit, as expressed in *United States v. Russo*,[18] is but one example. The Government cites *Russo* as proof that the Second Circuit has considered, and accepted the "expanded" version of Rule 801(d)(2)(E). But the truth is far more complex.

Unquestionably, in *Russo* the Second Circuit held that "the objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all."[19] But subsequent cases in the Second Circuit, both at the district court level, and at the appellate level, indicate great uncertainty regarding the Circuit's willingness to extend FRE 801(d)(2)(E) to *lawful* associations. *See United States v. Stein*, *supra*. *See also United States v. Stewart*,[20] – finding the "agency theory" underlying the co-conspirator exception applies to a "partnership for some *criminal* objective") (citing *Russo*, 302 F.3d at 45); and *United States v. Carneglia*,[21] – "the [co-conspirator] exception applies if the statement was made in furtherance of *a*

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[18] *United States v. Russo,* 302 F.3d 37 (2d Cir. 2002).

[19] *Id.* at 45.

[20] *United States v. Stewart*, 433 F.3d 273, 293 (2d Cir. 2006).

[21] *United States v. Carneglia,* 47 F. App'x 27, 34 (2d Cir. 2002).

particular criminal conspiracy among organized crime members") (citing *Russo*, 302 F.3d at 44).

The Government also reads far too much into the Seventh Circuit's holding in *United States v. Kelley.*[22] The court, in *Kelley*, noted that "Rule 801(d)(2)(E) applies not only to conspiracies but also to joint ventures, and that a charge of criminal conspiracy is not required to invoke the evidentiary rule."[23] Nowhere in the opinion does the court state that the rule applies to *lawful* joint ventures.

In sum, the "united front" of the courts of appeals the Government would have this Court believe does not exist. Review is appropriate.

3. There are no "alternative grounds" for admitting the evidence.

The Government's final argument – that "this case is an unsuitable vehicle for addressing the proper interpretation of Rule 801(d)(2)(E) because the conversations at issue in this case would still be admissible on other grounds"[24] – is as flawed as its first two. The case upon which the Government rests this speculative line of argument, *United States v. Flores*,[25] describes a theory of admissibility for recorded out-of-court

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[22] *United States v. Kelley*, 864 F.2d 569, cert. denied, 493 U.S. 811 (1989).

[23] *Kelley*, 864 F.2d at 574.

[24] Government's Brief in Opposition, p. 16.

[25] *United States v. Flores*, 63 F.3d 1342, 1358-1359 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996).

statements that is wholly a creation of the circuit courts of appeals, one that has never been adopted by this Court. But even if accepted by this Court, the alternative theory proposed by the Government is actually prohibited by the Federal Rules of Evidence.

Under *Flores,* and similar decisions in other circuits,[26] the Government is allowed to introduce the entirety of recordings of conversations between defendants and third-parties, including the portions that are arguably hearsay, because: (1) the defendant's statements are admissible as the admissions of a party opponent (FRE 801(d)(2)(A)); and (2) the statements of the third party are "reciprocal and integrated utterances and . . . admissible to put [the defendant's] own statements in context."[27]

The admission of such "reciprocal and integrated utterances" is predicated on the idea that the other party's statements are *not* introduced for their truth, but "rather to prove only that they were uttered. They are to this extent, not hearsay, as defined by Federal Rule of Evidence 801(c)."[28] Consequently, when such statements are admitted, the jury should be instructed of the limited purpose for which the third-party statements are being offered.[29]

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[26] *See, e.g.*, *United States v. Gutierrez-Chavez*, 842 F.2d 77, 78 (5th Cir. 1988), and cases cited therein.

[27] *United States v. Flores,* at 1358-1359.

[28] *United States v. Gutierrez-Chavez*, 842 F.2d 77, 78 (5th Cir. 1988).

[29] *United States v. Jordan*, 810 F.2d 262, 264 (D.C. Cir. 1987).

At Fairley's trial, however, the Government explicitly relied on the truth of Fletcher's statements.[30] More importantly, *the Fifth Circuit* also relied on the truth of Fletcher's statements in the recordings to reach its conclusion that a non-criminal venture between Fairley and Fletcher still existed after the date of the last overt act in the indictment: "Fairley and Fletcher's recorded conversations themselves confirm the continuing nature of the venture."[31]

And so the Government's third argument against granting Fairley's petition collapses in the face of its own superficial, contradictory logic. If Fletcher's statements cannot be considered for the truth of the matters asserted therein, then the evidentiary foundation for Fairley's conviction, the "prominently featured tape recorded conversations,"[32] disappears. So does the primary evidentiary basis for the Fifth Circuit's finding that there was an on-going venture between Fairley and Fletcher. And this, of course, was the Fifth Circuit's rationale for finding these post-conspiracy statements admissible in the first place.

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[30] *See Government's closing argument*, Record on Appeal, pp. 4148, 4153: "There was an agreement. It's clear. You've seen it. Not only did you see it, but you heard it, ladies and gentlemen. You heard via the recordings that, that took place;" and "All of this was done with the hope that Fairley and Fletcher would be able to conceal the nature, the scope and the existence of this conspiracy and to shield each and every one of them, both of them, from prosecution. And you heard that on the recordings[.]"

[31] Pet. App. p. 29.

[32] Pet. App. p. 27.

In the vernacular, the Government seeks to have its evidentiary cake and eat it too: it relied on the truth of Fletcher's statements in the district court and in the court of appeals, but it now argues for an alternative theory of admissibility that expressly disavows that truth, in order to defeat further review. The Court should disregard the Government's intellectual gymnastics, and grant review in this case.

CONCLUSION

In *Wong Sun v. United States*,[33] this Court said: "We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking." More recently, the Court wrote: "The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has 'scrupulously observed.'"[34]

It is hard to "square" this language with that of the Fifth Circuit in this case: "We have repeatedly cautioned 'that the "in furtherance" requirement is not to be construed too strictly lest the purpose of the exception be defeated.'"[35] However neither the history of the exception, nor the language of FRE 801(d)(2)(E)

[33] *Wong Sun v. United States*, 371 U.S. 471, 490 (1963).

[34] *Anderson v. United States*, 417 U.S. 211, 218-219 (1974).

[35] App. 31, citing *United States v. Cornett*, 195 F.3d 776, 782 (5th Cir. 1999).

changed in the intervening years. The current status of the exception is nothing more than the result of incessant prosecutorial efforts to expand it, and undermine the ancient bar against hearsay. The Court should decide whether it wants to stop that expansion here, and now.

Wherefore, this Court is respectfully urged to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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