

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KHALID AL FAWWAZ – PETITIONER

vs.

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

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QUESTIONS PRESENTED

1. Is a document admissible under Rule 802(d)(2)(E) as co-conspirator hearsay when the government cannot prove the identity of its author, the provenance of the information contained therein or even exactly where the document was found, and no conspirator-witness can identify the document as having seen it before, identify the author or connect the author of the document to the conspiracy?
2. Should this Court review the parameters of the co-conspirator hearsay exception as applied by the lower courts when the decision of the Second Circuit in this case conflicts with decisions of the Ninth Circuit in such cases as *United States v. Gil*, 58 F.3d 1414 (1995) and *United States v. Mouzin*, 785 F.2d 682 (1986), requiring at least that the identity of the document's author be proven, and when the decision is unsupported by any other Circuit decision?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PROOF OF SERVICE

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Second Circuit's Summary Order in this case can be found at 694 Fed.Appx. 847, 2017 WL 2399329. The Order is included as Appendix A.

JURISDICTION

This is a criminal case in which Mr. Al Fawwaz was convicted after a jury trial and sentenced to life without the possibility of parole. The Second Circuit affirmed Mr. Al Fawwaz's conviction in an unpublished Summary Order filed on June 2, 2017. Mr. Al Fawwaz's petition for rehearing on the issue presented herein was denied on August 17, 2017. A copy of that order is included as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Rule 801. Definitions That Apply to This Article; Exclusions From Hearsay

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * *

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The 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).

Federal Rules of Evidence, Rule 801(d)(2)(E).

STATEMENT OF THE CASE

Introduction—The Circuit Conflict

Two circuits have conflicting requirements for the admission of co-conspirator hearsay under Rule 801(d)(2)(E), Fed.R.Evid. The Ninth Circuit requires that the government establish the identity of the author of a document before the document can be admitted as co-conspirator hearsay. *See, e.g., United States v. Gil*, 58 F.3d 1414 (1995) and *United States v. Mouzin*, 785 F.2d 682 (1986). The Second Circuit, in the present case, abandoned that showing. Its decision is a radical departure from prior case law concerning admission of co-conspirator statements, not only with regard to proof of authorship, but also with regard to the quantum of proof required to support admission.

Introduction—The Issue

This petition concerns the introduction as co-conspirator hearsay under Rule 802(d)(2)(E), Fed.R.Evid., of a document that the government knew **nothing about** other than that it was alleged to be found by someone in or working with the United States Army somewhere in the Kandahar region of Afghanistan in 2001. It was apparently simply a document scooped up by the Army during its entry into Afghanistan. The government did not know who found it, where it was found, what other documents it was found with or when it was found. The government did not know who wrote the document or for what purpose, or the provenance of the

information contained therein. No witness had seen the document prior to the Army finding it nor did any witness recognize it.

The document, written in Arabic, appeared to list 170 names and, in some instances, a short summary of the person's whereabouts. See, Translation of "the list," as introduced at trial as Exhibit 2201A-T, included as Appendix C. The list began with Osama Bin Laden as number one and listed the names of his alleged primary deputies as numbers two and three. The government asserted that Mr. Al Fawwaz was the ninth person listed.

The government, over objection, offered the document for the truth of the matters asserted—that this was a "list of Al Qaeda Members" created and kept by Al Qaeda and that Mr. Al Fawwaz was named on the list as a high-ranking member of Al Qaeda. The government based its admission solely on the facts that the list was found in or around Kandahar, Afghanistan and that a small percentage (less than 15%) of the 170 names listed and a few corresponding entries¹ were consistent with names of and information about known or alleged Al Qaeda members. It could provide no information about the document's creation or its author or where the

¹ Government witnesses identified 24 names on the list as names used by Al Qaeda members and identified only nine corresponding descriptors.

information came from that comprised the document. The trial court admitted the document as co-conspirator hearsay under Rule 801(d)(2)(E).²

The Case

Mr. Al Fawwaz was convicted of various terrorism related conspiracy charges after a jury trial in the Southern District of New York (Kaplan, S.J.). The indictment charged Mr. Al Fawwaz with being a member of and conspiring with Al Qaeda to commit various violent offenses against the United States, essentially related to the two bombings of the U.S. Embassies in Africa in 1998. Judge Kaplan sentenced him to life imprisonment on May 15, 2016. The District Court had jurisdiction over the matter pursuant to 18 U.S.C. §3231.

The government case. The government presented Mr. Al Fawwaz to the jury as Al Qaeda's London media representative. In its opening statement, the government admitted that the jury would not hear about Fawwaz committing any violent acts:

The defendant's job was a critical one, but it was not to plan terrorist attacks. The defendant did not plan the embassy bombings. And it was not to carry out terrorist attacks. The defendant obviously did not carry out the embassy bombings. The defendant's job for year after year was to lay the critical groundwork for Al Qaeda.

² As this Court can imagine, the document was devastating to Mr. Al Fawwaz's case. The government referred to it almost every day of the trial, and it took pride of place in the government's opening statement and closing argument. The government did not even attempt to argue on appeal that its admission was harmless.

T. 30 (emphasis added). The “Al Qaeda Membership List” was the key to the government’s case that allegedly tied Mr. Al Fawwaz to the conspiracies.

The defense case. The defense presented Mr. Al Fawwaz, as a peaceful, Saudi dissident, who ran the London Office of the Advice and Reformation Committee (ARC), a peaceful dissident group committed to reforming the Saudi government. He knew Osama Bin Laden and had contact with him through that organization, of which Bin Laden was a member, but he did not support Bin Laden’s violent policies.

The decision of the Second Circuit. The Second Circuit decided that the “list” must have been a list of Al Qaeda members and therefore written by an Al Qaeda member simply because two cooperating witnesses identified 24 people on the list as Al Qaeda members (less than 15% of the names on the list). No witness had ever seen the list or knew anything about its creation:

Testimony from former Al Qaeda members offered further support [other than the list having been found in Afghanistan] for an *inference that the List was accurate and therefore more likely to have been authored by an Al Qaeda member*. L’Houssaine Kherchtou, a former Al Qaeda member turned government witness, identified the List as being a list of Al Qaeda members just by looking at it.³ Kherchtou identified himself on the List, at number 104, based on one of his aliases. Kherchtou further identified Fawwaz on the List—as Hamad al Kuwaiti at position number 9—based on one of Fawwaz’s aliases. Throughout his extensive testimony, Kherchtou identified over

³ Kherchtou “identified” the list only because he saw some names he recognized on the list. **He did not “recognize” the list from having seen it before.** His testimony adds nothing to the provenance of the list besides the fact that he could identify 20 Al Qaeda members’ names on the list.

twenty names on the List as sworn members of Al Qaeda, many based almost entirely on his personal knowledge of their private aliases. Ihab Ali, another former Al Qaeda member turned government witness, similarly stated that he recognized names on the List as names of Al Qaeda members. Ali identified himself by his alias, as number 66 on the List. Ali also identified more than ten other names on the List as Al Qaeda members based on his personal knowledge of the individuals and their aliases, including names different from those identified by Kherchtou.

Summary Order at 3-4. (emphasis added)

15% is not a high mark to determine something is “accurate,” nor should an “inference” be sufficient. And this questionable conclusion on accuracy says nothing about the identity of the document’s author. Even if it was an accurate list, it could have been written by a non-member of Al Qaeda.

The Circuit concluded “As explained above, the evidence at trial indicated the List was composed by an Al Qaeda co-conspirator.” *Id.* at 4. The Circuit, thus, allowed an anonymous writer of a document not recognized by ANY witness to identify Mr. Al Fawwaz as an Al Qaeda member at trial, and seal his fate. Further, the Circuit ignored the last phrase of Rule 801(d)(2)(E): “The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it under (E).” Here, the document alone established, in the Second Circuit’s view, that the writer was a member of the conspiracy and no doubt colored the jury’s conclusion.

REASONS FOR GRANTING THE WRIT

This Court has not considered the parameters of the co-conspirator exception to the hearsay rule since *Bourjaily v. United States*, 483 U.S. 171 (1987). This case, an extreme outlier in allowing admission of the “list”, provides a perfect case for such an examination and will result in erasing a conflict in the circuits about the application of the rule. Here, the Second Circuit allowed admission of a document as co-conspirator hearsay about which the government could prove nothing; not who wrote it, not where it was found⁴, not the provenance of the information contained in it. The document was an orphan to the conspiracy.

The sole method of connection of the document to “Al Qaeda” was that about 15% of the entries corresponded to names of alleged Al Qaeda members and that Bin Laden and his two apparent deputies headed the “list.” This is a meager showing to conclude that the “list” was a list of Al Qaeda members. It easily could have been a list of radical Arabs who had at one point or another been in or visited Afghanistan kept by the Taliban. It could have been a list kept by the Saudi intelligence services of people dangerous to its interests. Certainly, Bin Laden and his deputies would have topped such a list.

⁴ Saying that the document was found in the Kandahar region of Afghanistan is like saying a document was found in Connecticut. It provides no information about the document. The fact that a document was found in a conspirator’s apartment or a business related to the conspiracy would provide a substantial connection of the document to the conspiracy. Here, nothing of the sort can be said or proved.

Even if one were to reach the difficult conclusion that the “list” was of Al Qaeda members, nothing showed that it was written by and for Al Qaeda. Certainly, the Taliban or Saudi intelligence services would want to keep such a list. The CIA just as easily could have compiled such a list in Arabic for its agents or informants in Afghanistan. An informed journalist could have compiled the list.

The holding of the Second Circuit would allow a list in Spanish of 170 names seized in Colombia and headed by the Medellin Cartel’s chief and his two deputies to be admitted as a list of the Medellin Cartel members kept by the Cartel if the government could prove that 15% of the entries were names of Cartel members. Such a list, according to the Second Circuit decision, could be used to prove that a person whose name appears on the list is a member of the Cartel. And yet, as we know, such a list could as easily be a list of Colombia’s top drug dealers created and kept by the Colombian Police or the DEA or an investigative journalist fighting the Cartels. Nothing establishes that such a list would be a list created and kept by the Cartel. Nor could one cavalierly conclude that every person on the list was a Medellin Cartel member just because 15% of the names were.

The Ninth Circuit’s decisions conflict with the decision below. In a line of cases from *United States v. Ordonez*, 737 F.2d 793 (1983) (rejecting the government contention that “the statement of an unidentified person is admissible under the co-conspirator exception to the hearsay rule.”); through *United States v. Mouzin*, 785

F.2d 682 (1986) (reaffirming *Ordonez* holding); and *United States v. Gil*, 58 F.3d 1414 (1995) (“It is essential that there be evidence regarding who made the statement, because ‘[i]n order to corroborate or refute [whether the declarant and the defendant were co-conspirators], the litigants must know the identity of the declarant.’ *Mouzin*, 785 F.2d at 692.”), the Ninth Circuit has held that the identity of the declarant of a co-conspirator statement must be known. As the *Mouzin* Court laid out:

A necessary corollary to the above three preconditions for admission [under Rule 801(d)(2)(E)] is that there must also be independent proof “of the connection of the declarant and the defendant to” the conspiracy. [*United States v.*] *Snow*, 521 F.2d [730] at 733 [9th Cir. 1975]. Again, this is merely a restatement of the requirement that before a statement is that of a “co-conspirator” there must be independent proof of the defendant’s and the declarant’s status as members of the same ongoing conspiracy. In order to corroborate or refute this status, the litigants must *know the identity of the declarant*.

Emphasis added. See also, *United States v. Joyce*, 2017 WL 895563 (NDCA 2017) (applying the *Mouzin/Gil* line of cases this year to refuse admission of documents: “With respect to anonymous round sheets and ledgers proffered as coconspirator statements, in the absence of a proper foundation for admissibility required by *Mouzin* and for authentication under FRE 901(a), the proffered statements by an ‘unidentified’ author will not be admitted under FRE 801(d)(2)(E).”)

The present case would not pass muster in the Ninth Circuit. Indeed, we find no cases in other circuits that would support the Second Circuit’s radical holding in

this case. The “list” is simply hearsay—an anonymous document that bootstrapped its way into admission because a very small percentage of its contents equated to matters know about Al Qaeda. The Second Circuit’s decision should be reviewed by this Court to clarify the requirements for admission of statements under the co-conspirator exception to the hearsay rule and should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to review this case.

Dated: November 15, 2017
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