

No. 17-6859

IN THE SUPREME COURT OF THE UNITED STATES

KHALED AL FAWWAZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the hearsay exception set forth in Federal Rule of Evidence 801(d)(2)(E), which permits admission against a party of a statement made by that party's co-conspirator in furtherance of the conspiracy, applies when the evidence indicates that the declarant was a co-conspirator but does not reveal the declarant's specific identity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported but is available at 694 Fed. Appx. 847.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2017. A petition for rehearing was denied on August 17, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed on November 15, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to murder United States nationals, in violation of 18 U.S.C. 2332(b); conspiracy to murder officers or employees of the United States, in violation of 18 U.S.C. 1114 (2000); conspiracy to damage or destroy United States property, in violation of 18 U.S.C. 844(n); and destruction of national defense material, in violation of 18 U.S.C. 2155(a). Judgment 1. He was sentenced to life imprisonment. Id. at 2. The court of appeals affirmed in an unpublished summary order. Pet. App. A1-A6.

1. Petitioner was a long-serving member and leader within the al Qaeda terrorist organization. Gov't C.A. Br. 8-13. He began his association with al Qaeda near its inception when he attended one of its military training camps. Id. at 8. By the early 1990s, petitioner had become the leader of another al Qaeda training camp that instructed members on how to use firearms, mines, and mortars. Id. at 8-9, 17. In 1993, petitioner led the Nairobi al Qaeda cell, which sent operatives to fight American troops in Somalia and to surveil the United States embassy in Nairobi. Id. at 9, 17, 27. Petitioner later helped prepare and distribute Osama bin Laden's 1996 Declaration of War against the United States and helped arrange television interviews for bin Laden to recruit al Qaeda members and to disseminate al Qaeda

propaganda. Id. at 9-12, 17. Petitioner also helped disseminate bin Laden's 1998 decree calling for Muslims to kill all Americans. Id. at 10, 17.

In August 1998, al Qaeda operatives simultaneously bombed the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 224 people and wounding thousands more. Gov't C.A. Br. 12. A grand jury indicted petitioner on one count each of conspiracy to murder United States nationals, in violation of 18 U.S.C. 2332(b); conspiracy to murder officers or employees of the United States, in violation of 18 U.S.C. 1114 (2000); conspiracy to damage or destroy United States property, in violation of 18 U.S.C. 844(n); and destruction of national defense material, in violation of 18 U.S.C. 2155(a). 5/8/00 Indictment 8, 53, 58, 61; see Pet. App. A2.

2. Before trial, petitioner moved to preclude the government from introducing a document that the parties referred to as the "Al Qaeda Member List" (List). See Pet. App. C1-C5.¹ The List, which was recovered from Afghanistan, identified petitioner and numerous other individuals as members of al Qaeda. See id. at A3-A4. The government sought to introduce the List under Federal Rule of Evidence 801's co-conspirator exception to

¹ Appendix C is unpaginated and contains multiple documents. For the convenience of the Court, this brief cites the page numbers C1-C10.

the rule against hearsay. Id. at A4. That exception provides that a statement may be offered if it "was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). Petitioner argued that the List was not admissible under Rule 801(d)(2)(E) because, as relevant here, the government did not prove the author's identity or prove that the List was made during or in furtherance of the conspiracy. D. Ct. Doc. 1820, at 5 (Jan. 2, 2015).

The district court denied the motion "without prejudice to renewal at trial when the [List] is offered." Pet. C.A. App. A450; id. at A446 ("I think I will wait and see what the evidence of foundation is and rule * * * at trial"). Three days later (and still before trial), petitioner moved the court to reconsider. The court denied the motion because petitioner "pointed to no facts or controlling authority that the Court is said to have overlooked." D. Ct. Doc. 1841 (Jan. 12, 2015).

The government introduced a variety of evidence at trial establishing the List as an al Qaeda document. Pet. App. A3. A military commander testified about recovering the trunk containing the List from "an area of Afghanistan in which Al Qaeda maintained its operations hub." Ibid. An FBI agent then testified about handling various seized documents, including the List, and sending them from Afghanistan to the United States. Ibid. And another FBI agent testified about receiving and reviewing the List and

other al Qaeda documents in a secure facility in the United States. Ibid. The testimony of two former al Qaeda members supported the inference that the List was an al Qaeda document authored by an al Qaeda member. Id. at A3-A4. The witnesses identified themselves on the List based on their aliases, identified petitioner on the List based on his alias, and identified many other names on the List based on their personal knowledge of the individuals and their aliases. Ibid. The district court admitted the List, over petitioner's objection, as a co-conspirator statement under Federal Rule of Evidence 801(d)(2)(E). Pet. C.A. App. A593.

After a five-week trial, the jury returned a guilty verdict on all four counts. Pet. App. A2. The district court sentenced petitioner to life imprisonment on the three conspiracy counts and 120 months' imprisonment on the destruction-of-materials count, to run concurrently. Judgment 2.

3. The court of appeals affirmed in an unpublished, non-precedential summary order. Pet. App. A1-A6. As relevant here, it applied clear-error review to the district court's decision to admit the list under Rule 801(d)(2)(E), finding "no clear error in the district court's finding that the List was a statement of a co-conspirator, making it admissible under Federal Rule of Evidence 801(d)(2)(E)." Id. at A4.

The court of appeals explained that Rule 801(d)(2)(E)'s hearsay exception applies if the district court finds "(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 a conspiracy.” Pet. App. A4 (quoting United States v. Al-Moayad, 545 F.3d 139, 173 (2d Cir. 2008)). It added that “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” Ibid. (quoting United States v. Gupta, 747 F.3d 111, 124 (2d Cir. 2014), cert. denied, 135 S. Ct. 1841 (2015)).

The court of appeals found the government’s proof sufficient to satisfy clear-error review. Pet. App. A4. First, the court determined that “the evidence at trial indicated the List was composed by an Al Qaeda co-conspirator.” Ibid. The court explained that, among other evidence, testimony from government witnesses who collected and analyzed the List established that the List “was an authentic Al Qaeda-drafted document.” Id. at A3. And the court found “further support for an inference that the List was accurate and was therefore more likely to have been authorized by an Al Qaeda member” in the testimony of the two former al Qaeda members who identified various names on the List as al Qaeda members -- including petitioner -- based on their knowledge of members and their aliases. Id. at A3-A4. Second, the court determined that “the type of information contained in the List, namely information regarding the current status of the

conspiracy and its membership, is sufficiently 'in furtherance of [a] conspiracy' for the co-conspirator exception to the hearsay rule to apply." Id. at A4 (brackets in original). Accordingly, the court concluded that the district court did not clearly err in admitting the List. Ibid.

ARGUMENT

Petitioner contends (Pet. 8-11) that the court of appeals erred in affirming the admission of the List and that the courts of appeals have divided over whether the hearsay exception for co-conspirator statements applies when the identity of the declarant is unknown but evidence indicates that the declarant was a member of the conspiracy. The court of appeals correctly stated the applicable standard, and its decision does not conflict with any decision of another court of appeals. This Court has denied certiorari in another case presenting the same issue and alleging the same circuit conflict. See Benavides v. United States, 568 U.S. 1164 (2013) (No. 12-6689). It should reach the same result here.

1. Federal Rule of Evidence 801(d) provides that "[a] statement * * * is not 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." In order to admit a statement under Rule 801(d)(2), a district court must find that "there was a conspiracy involving the declarant and

the nonoffering party" and that the statement was made "'during the course and in furtherance of the conspiracy.'" Bourjaily v. United States, 483 U.S. 171, 175 (1987) (citation omitted). In assessing whether that test has been satisfied, the court must apply a preponderance-of-the-evidence standard. Id. at 176. Moreover, "[t]he statement must be considered but does not by itself establish * * * the existence of the conspiracy or participation in it"; some corroborating evidence is needed. Fed. R. Evid. 801(d).

The court of appeals correctly applied Rule 801(d)(2) in this case, including by requiring proof that "the List was composed by an Al Qaeda co-conspirator," Pet. App. A4, rather than more specific proof of the declarant's identity. Rule 801(d)(2) expressly requires that the declarant be a member of the conspiracy; it says nothing about the name of the declarant. Although the declarant's identity will often be useful in determining whether he is a "co-conspirator," the evidence may establish a declarant's status vis-à-vis the conspiracy without revealing his name. In those circumstances, the lack of the name does not detract from the trustworthiness of the statement.²

² Once such evidence is admitted, a defendant "still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case." Bourjaily, 483 U.S. at 180. Knowledge of the declarant's specific identity is not essential to such an attack, which can focus on the content of

Indeed, the animating principle behind Rule 801(d)(2)(E), which is that a defendant is considered "responsib[le]" for statements made in the course of and in furtherance of a conspiracy of which he is also a part, remains fully applicable. Fed. R. Evid. 801 advisory committee's note (1972) (Proposed Rules).

For those reasons, the courts of appeals that have confronted a case involving evidence that an unidentified declarant was part of the relevant conspiracy have agreed that "absolute proof of authorship is not essential to the invocation of the coconspirator exception." United States v. McGlory, 968 F.2d 309, 335 (3d Cir. 1992), cert. denied, 507 U.S. 962 (1993). Rather, it is sufficient that circumstantial evidence permits a finding that the declarant was a co-conspirator (and that the statement at issue was made in the course of and in furtherance of the conspiracy). See ibid.; see also United States v. Ayala, 601 F.3d 256, 268 (4th Cir.) (citing United States v. Squillacote, 221 F.3d 542, 563-564 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001)), cert. denied, 562 U.S. 910 (2010); United States v. El-Mezain, 664 F.3d 467, 505-506 (5th Cir. 2011) (citing United States v. Fierro, 38 F.3d 761, 773 (5th Cir. 1994), cert. denied, 514 U.S. 1051 (1995)), cert. denied, 568 U.S. 977 (2012); United States v. Martinez, 430 F.3d 317, 326 (6th Cir. 2005) (citing United States v. Breitkreutz, 977

the statement or the government's inability to prove that it came from a source known to be credible.

F.2d 214, 218-219 (6th Cir. 1992)), cert. denied, 547 U.S. 1034 (2006); United States v. Smith, 223 F.3d 554, 570 (7th Cir. 2000) (citing United States v. De Gudino, 722 F.2d 1351, 1355 (7th Cir. 1984)); United States v. Helm, 769 F.2d 1306, 1313-1314 (8th Cir. 1985); United States v. Zuniga-Perez, 69 Fed. Appx. 906, 912-914 (10th Cir. 2003); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:59, at 496-497 (4th ed. 2013) ("[A]n inability to attribute the statement to any particular person does not necessarily get in the way" of admissibility under Rule 801(d)(2)(E) because "[c]ircumstantial proof that the person making the statement was involved in the conspiracy can suffice to support the use of the exception.").

2. Petitioner contends (Pet. i, 3, 9-10) that the decision below conflicts with the approach taken in the Ninth Circuit, citing United States v. Mouzin, 785 F.2d 682, cert. denied, 479 U.S. 985 (1986). No such conflict exists. In ruling that a purported drug ledger was erroneously admitted as a co-conspirator's statement, Mouzin stated that "[k]nowledge 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." Id. at 692-693; see id. at 692 (stating that "[i]n order to corroborate or refute this status [as a co-conspirator], the litigants must know the identity of the declarant"). In Mouzin, however, the court did not have before it

evidence showing that the unknown author of the drug ledger was likely a member of the same conspiracy as the defendant. Indeed, the court emphasized that the government presented virtually no evidence “even remotely connecting any co-conspirator to the ledger.” Id. at 692. It therefore had no occasion to consider whether Rule 801(d)(2)(E)’s requirements can be satisfied by a showing that a declarant whose name is unknown is nevertheless “the party’s coconspirator.” Fed. R. Evid. 801(d)(2)(E).

The Ninth Circuit has subsequently recognized that Mouzin did not resolve the issue raised here. In United States v. Schmit, 881 F.2d 608 (9th Cir. 1989), the court concluded that the evidence established the identity of the author of certain notations on desktop calendars. See id. at 613. In reaching that conclusion, the court explained that, “[s]ince in this case there was sufficient proof of the declarant’s identity, it is unnecessary to consider whether such proof would be necessary where[,] as here[,] other evidence establishes the requisite relationship of the declarant to the conspiracy.” Id. at 613 n.6. Although acknowledging the “stated reason for the holding in Mouzin,” the court suggested that whether Rule 801(d)(2)(E) could be satisfied by evidence other than identity remained an open question in the

Ninth Circuit. Ibid.; see McGlory, 968 F.2d at 335 (stating that Mouzin did not resolve the question and citing Schmit).

Petitioner tries to avoid (Pet. 10) the import of Schmit by citing United States v. Gil, 58 F.3d 1414, cert. denied, 516 U.S. 969 (1995), a later Ninth Circuit decision he suggests reaffirmed Mouzin's statement that the government must establish the declarant's identity. But Gil no more decided the issue at hand than Mouzin had. Because the evidence in Gil established the identity of the declarant, see id. at 1420, the court of appeals did not address whether evidence that does not establish identity can nevertheless prove a declarant to be a co-conspirator. Thus, until the Ninth Circuit has the opportunity to confront the question raised here, no conflict between the circuits exists. And even if such a conflict existed, the non-precedential decision below would not deepen it.

3. To the extent petitioner separately contends (Pet. 8-9) that the evidence presented at trial was insufficient to establish that the author of the List was an al Qaeda member, that contention is incorrect. The government did not "sole[ly]" rely on the fact "that about 15% of the entries corresponded to names of alleged Al Qaeda members," as petitioner asserts (Pet. 8). Rather, the court of appeals pointed to significant evidence from which it was reasonable to infer that "the List was composed by an Al Qaeda co-conspirator." Pet. App. A4. For example, the court summarized

evidence about the List's location and storage, including its discovery among other al Qaeda documents in "an area of Afghanistan in which Al Qaeda maintained its operations hub." Id. at A3; see Gov't C.A. Br. 24-25. The court also explained that the individuals who had identified other entries on the List were former al Qaeda members who recognized names, including their own and petitioner's, based on "personal knowledge of their private aliases." Pet. App. A3. Under all the circumstances, the court of appeals correctly concluded that the district court did not clearly err in admitting the List. Id. at A4. And that factbound determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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