

Case No. 17-6859

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF THE PETITION FOR CERTIORARI

This case presents a Circuit conflict and an important issue likely to occur in future cases. Thus, it is ripe for this Court's consideration. Of course, the most important cases before this Court often arise out of the prosecution of unpopular defendants. And our system is judged by the way it treats these most heinous of offenses and the least popular of defendants. The importance of ensuring fair prosecution based on reliable evidence and not "fake news" or false evidence against unpopular defendants is why this Court reviews these cases so carefully. The case below shows just why it is critical that this Court accept review.

Here, the government's Opposition to the Petition for Certiorari points out the very reason why this Court should grant Certiorari in this case. The lower courts are radically misapplying the co-conspirator hearsay doctrine under Fed.R.Evid. 802(d)(2)(E) to admit grossly inadmissible hearsay. As the Opposition notes, this Court denied certiorari in a case raising the same issue, *Benavides v. United States*, 568 U.S. 1164 (2013), an Eleventh Circuit case that allowed two notations on adding-machine tapes to be admitted as non-hearsay under the co-conspirator doctrine, even though the identity of the author of the notations was not known. While the Eleventh Circuit acknowledged that "the unknown identity of the author is troublesome," *United States v. Benavides*, unpublished opinion, Doc. No. No. 10-12363, slip at 14 (April 24, 2012), it held, nonetheless, that circumstantial evidence

of the notations provided some indication that “suggests that the author, although unknown, had an intimate connection with the conspiracy—or at least a close enough connection for the trial court to admit the evidence.” *Id.* at 15. While the Eleventh quoted the test for admission of non-hearsay correctly—“To admit evidence under this rule, there ‘must be evidence 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 (1991) (citing Fed. R. Evid. 801(d)(2)(E))”—it then went on to hold that the declarant only had to have a “close enough” connection to the conspiracy, *Benavides*, at 13-15. And that made sense to the holding of that case because the evidence in the case did not support a finding that the declarant—the author of the notations on the adding machine tape found at a place of business connected to the conspiracy—was a conspirator. Those notations could as easily have been made by a secretary for the company, knowing nothing of its illegal purposes, who noted that these men called or stopped by.¹ The secretary would have a “close connection” with the conspiracy, but would not be a conspirator. Rule

¹ One of the obvious reasons why this Court may not have granted certiorari in *Benavides* was that, as the Circuit noted in a footnote, “even if we assume the district court erred, *Benavides* failed to brief whether such an error would amount to a reversible one.” *Id.* at 15, n. 5. In the present case, unlike *Benavides*, admission of the “List” was devastating to the defendant, and we briefed it as such. Indeed, the government below never suggested that admission of the “List” was harmless.

801(d)(2)(E), however, simply does not allow for admission of statements of someone “close enough” to the conspiracy to be treated as non-hearsay; it requires that the declarant be a co-conspirator. And at least in *Benavides*, the adding machine tape itself was a known item found at a business related to the conspiracy. Here, the “List” was not found at a particular location related to the conspiracy. It was simply found “somewhere in Afghanistan.”

Particularly in this era of “fake news” allegations, the importance of the introduction of reliable evidence to support a conviction for terrorism cannot be overstated. The present case presents facts sufficient to justify and even compel review by this Court to avoid conviction in future cases based on unreliable hearsay. The facts here are far worse than those in *Benavides*. “The List” literally could have been written by anyone and could have been a list maintained by any number of groups. The government made no effort to identify the author or provide a link between the unknown author and Khalid al Fawwaz because it simply could not. Because the witnesses at trial could identify less than 15% of the names on it, it may well have been a list kept by the Taliban of radical Arabs who were or had been in Afghanistan. Certainly, Bin Laden would have topped that list. Even if we assume that it was a list of Al Qaeda members, there was simply no proof that it was written by a member of the conspiracy. It could have been written by anyone—the Taliban intelligence service to keep track of the members of Al Qaeda; an interested reporter;

an informant for a foreign intelligence service.² And, even if we assume that the writer was an Al Qaeda member, there was no proof that that author was a member of the particular conspiracies charged in the indictment—that the writer had knowledge of and supported the goals of the conspiracy. Without knowing in some fashion who the writer was, the trial court could not and did not properly find that the writer was a co-conspirator.

The government failed to meet its burden to establish the admissibility of the “List” because it completely failed to establish authorship and, thus, the document is truly unreliable. There was simply no proof of who wrote this “List,” and yet it was used over and over again at trial to support the government’s theory. It was mere speculation that it was written by a co-conspirator in furtherance of the conspiracy.

The government raises a straw-man when it suggests that we argue that the “name” of the declarant must be known. We have never suggested that identifying the declarant requires knowing the exact person’s name. It does, however, require

² Indeed, the author could have been a member of Al Qaeda who turned informant for some intelligence service and listed all the people he or she believed to be members of Al Qaeda and their status—or just anyone he or she knew who had been in Afghanistan, knew Bin Laden, worked in Somalia or Kenya or any number of other possibilities. As such, the “List”, even if a list of Al Qaeda members, would not have been written by a “co-conspirator” and would not have been written to further the conspiracy, but quite the opposite.

knowing enough about the declarant to show clearly that he or she is a member of the conspiracy, and, in this case, the proof of identity is “zero.”

This case is not the only case in which the list will surely be used. There are named defendants in the indictment who remain at large, and there are unindicted co-conspirators whose status could change. Certainly, there are other persons on the “List” who will be labeled as members of Al Qaeda simply by being on the “List.”

The government misleads the Court when it suggests that the “List” was found “*among other al Qaeda documents* in ‘an area of Afghanistan in which Al Qaeda maintained its operations hub.’” Opposition at 13 (emphasis added). *This is simply not true.* The “List” was found by members of the Army somewhere in the Kandahar region of Afghanistan. That is all the government could prove. The Army seized the document along with thousands of other documents and objects, threw them all in any containers that could be found—trunks, duffle bags, boxes—and sent the seized items to U.S. agents in Pakistan. The Army did not keep track of where these documents were found. No one testified that the “List” was found “among other Al Qaeda documents.” Indeed, *no one could testify as to where it was found or whether it was found with other documents or alone.*³ It landed in Pakistan stuffed in a trunk with numerous other documents, but that did not say anything about where (other

³ Indeed, it could have been found in a Taliban army base or political center. It surely would then not have been an Al Qaeda document.

than in Afghanistan) it was found or whether it was found with other documents or not. Further, the claim that the “List” was found in an area “in which Al Qaeda maintained an operations hub” says nothing. It is like saying that, in prosecuting an MS-13 or other gang case in a New York, a document was found in Queens—a known operations hub for MS-13—and drawing the conclusion that the document must be related to MS-13.

The decision below represents another Court of Appeals misapplying Rule 801(d)(2)(E). And, importantly for this Court, the decision below does conflict with the Ninth Circuit decisions, as discussed in our Petition for a Writ of Certiorari. *See*, Petition for a Writ of Certiorari at i, 3, 9-10, citing *United States v. Mouzin*, 785 F.2d 682, cert. denied, 479 U.S. 985 (1986). The Ninth Circuit clearly does, quite rightly, require some identification of the co-conspirator before introduction of that person’s statements. That just makes sense. Both the present case and the *Benavides* case out of the Eleventh Circuit do not. This Court should grant certiorari to rectify the conflict, to rein in the Circuits’ radical readings of Rule 801(d)(2)(E), and to prevent this “List” from being used again without proper foundation.

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CONCLUSION

For the foregoing reasons, we ask the Court to grant certiorari and review this case.

Dated: March 12, 2018
Burlington, VT

Respectfully Submitted,

David V. Kirby

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PROOF OF SERVICE

I, David V. Kirby, do swear or declare that on this date, March 12, 2018 as required by Supreme Court Rule 29, I have served the enclosed REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2018

David V. Kirby

David V. Kirby