

NO. 16-6577

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL SCOTT, SR.,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether the district court violated Petitioner's Sixth Amendment rights by using an expert witness to introduce statements made by unavailable co-defendants for the truth of the matter asserted, and whether the district court additionally failed to ensure that the expert witness's testimony was based on "sufficient facts or data" and on "reliable principles and methods?"

(2) Whether the district court erred in denying Petitioner's Motion for New Trial due to the variance that occurred when the Government was allowed to introduce evidence of multiple conspiracies while claiming a single conspiracy and using insufficient evidence to implicate Petitioner in the alleged single conspiracy?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Daniel Scott, Sr., Petitioner

United States, Respondent

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	iv
TABLE OF AUTHORITIES.....	v
PRAYER.....	vii
OPINION BELOW.....	viii
JURISDICTION.....	ix
STATUTES, RULES, ORDINANCES AND REGULATIONS INVOLVED.....	x
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE PETITION.....	2
Review is necessary because the district court violated Petitioner’s Sixth Amendment rights under the Confrontation Clause by using an expert witness to introduce statements made by unavailable co-defendants for the truth of the matter asserted, and because the expert witness’s testimony was not based on “sufficient facts or data” and on “reliable principles and methods as required by the Federal Rules of Evidence. Review is additionally necessary because the district court erred in denying Petitioner’s Motion for New Trial due to the variance that occurred when the Government was allowed to introduce evidence of multiple conspiracies while claiming a single conspiracy and using insufficient evidence to implicate Petitioner in the alleged single conspiracy.	
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21
APPENDIX.....	23

INDEX TO APPENDICES

**DECISION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

DENIAL OF PETITION FOR REHEARING EN BANC

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	3,4,8
<i>Davis v. Washington</i> , 547 U.S. 813 (2006)	3
<i>Direct Sales Co. v. United States</i> , 319 U.S. 703 (1943).....	14,18
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997)	11,12
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946)	16
<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999).....	13
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009).....	8
<i>Michigan v. Bryant</i> , 562 U.S. 344 (2011).....	7,8

DISTRICT COURT AND COURT OF APPEALS CASES

<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 43 F.3d 1311 (9th Cir. 1995)	4,9
<i>United States v. Cole</i> , 59 F. Appx. 696 (6th Cir. 2003)	14
<i>United States v. Garcia</i> , 793 F.3d 1194 (10th Cir. 2015)	5,6,7
<i>United States v. Gibbs</i> , 199 U.S. App. LEXIS 36343 (6th Cir. 1999)	14
<i>United States v. Griffith</i> , 118 F.3d 318 (5th Cir. 1997)	12
<i>United States v. Hermanek</i> , 289 F.3d 1076 (9th Cir. 2002)	10
<i>United States v. Johnson</i> , 587 F.3d 625 (4th Cir. 2009)	4,7
<i>United States v. Mack</i> , 495 F. App'x 359 (4th Cir. 2012).....	12
<i>United States v. Martino</i> , 664 F.2d 860 (2d Cir. 1981)	14
<i>United States v. Pablo</i> , 696 F.3d 1280 (10th Cir. 2012).....	5
<i>United States v. Palacios</i> , 677 F.3d 234 (4th Cir. 2012)	5
<i>United States v. Parra</i> , 402 F.3d 752 (7th Cir. 2005)	10
<i>United States v. Rios</i> , 830 F.3d 403 (6th Cir. 2016).....	6,7

<i>United States v. Rivera</i> , No. CR-05-2075-1-EFS, 2006 U.S. Dist. LEXIS 100831 (E.D. Wash. Feb. 10, 2006)	10
<i>United States v. Swafford</i> , 512 F.3d 833 (6th Cir. 2008)	13,14
<i>United States v. Warner</i> , 690 F.2d 545 (6th Cir. 1982)	14
<i>Williams v. Illinois</i> , 567 U.S. 50 (2012)	6,7

STATUTORY AUTHORITY

Sixth Amendment to the Constitution of the United States	2,4
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FEDERAL RULES

USCS Fed. Rules Evid. R. 702	4,9,10
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IN THE

SUPREME COURT OF THE UNITED STATES

PEITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Scott, Sr., respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A and can be found at *United States v. Scott*, No. 16-6577, 2017 U.S. App. LEXIS 23925 (6th Cir. Nov. 27, 2017).

The United States Court of Appeals for the Sixth Circuit issued an order denying Petitioner's Petition for Rehearing En Banc on January 29, 2018 and appears at Appendix B to this petition.

JURISDICTION

On November 27, 2017, the United States Court of Appeals for the Sixth Circuit entered its ruling affirming the conviction of Petitioner. *United States v. Scott*, No. 16-6577, 2017 U.S. App. LEXIS 23925 (6th Cir. Nov. 27, 2017). Pursuant to Federal Rules of Appellate Procedure 35(b), Petitioner filed a Petition for Rehearing En Banc with the United States Court of Appeals for the Sixth Circuit on December 20, 2017. On January 29, 2018 the Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing En Banc, which was mandated on February 8, 2018. The jurisdiction of this Court is invoked under 28 USCS § 1254(a).

STATUTES, RULES, ORDINANCES, AND REGULATIONS INVOLVED

(1) USCS Const. Amend. 6:

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 defence [sic].

(2) USCS Fed. Rules Evid. R. 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

STATEMENT OF THE CASE

This case commenced on or about June 11, 2015, when this matter was originally indicted in the United States District Court for the Western District of Tennessee. At that time, Petitioner was indicted on narcotics and conspiracy charges pursuant to 21 U.S.C. § 846 and 21 U.S.C § 1956(h), and investigators attempted to use several recorded videos and phone calls, as well as statements of various alleged co-conspirators to link Petitioner to an alleged single conspiracy involving drug trafficking.¹

Based on a large amount of testimony by co-conspirators regarding drug activity that was unrelated to Petitioner, as well as statements entered through an expert witness for the Government concerning a co-conspirator who was apparently available, yet not present for trial, a jury found Petitioner guilty of conspiracy to possess with the intent to distribute cocaine, and conspiracy to commit money laundering. Specifically, a criminal investigator, Joe Hoing (hereinafter “Hoing”), was allowed to testify at Petitioner’s trial, over objection, as an expert witness. During his testimony, Hoing interpreted several alleged code words for the jury. However, Hoing had never heard the code words used in the context that he interpreted for the jury. Rather, his interpretation and, thus, his testimony, was solely informed by the inadmissible out-of-court statements of one of Petitioner’s co-defendants who did not testify at trial. Although Petitioner’s counsel objected to these statements during trial, the district court judge allowed the testimony to be admitted.

¹ Petitioner was also charged with, and subsequently pled guilty to an additional charge pursuant to 18 U.S.C. §§ 371 & 2.

Additionally, Petitioner further argued during trial that, due to an overall drug scheme introduced at trial that was not sufficiently tied to Petitioner, a fatal variance occurred as between the indictment and the evidence at trial. However, the district court disagreed, and found that there was sufficient evidence tying Petitioner to the alleged drug trafficking actions, creating only one conspiracy rather than several.

On appeal, the Sixth Circuit Court of Appeals affirmed the district court's decision, reasoning that, although "there is sparse evidence" tying Petitioner directly to a co-conspirator and the money and drugs seized by law enforcement, the Sixth Circuit could not say that the evidence could reasonably be construed *only* as supporting a finding of multiple conspiracies. *See United States v. Scott*, No. 16-6577, 2017 U.S. App. LEXIS 23925 (6th Cir. Nov. 27, 2017). Additionally, the Sixth Circuit Court of Appeals affirmed the district court's decision by finding the district court did not abuse its discretion in admitting Hoing's testimony because Hoing used independent judgment to support his findings as to the code words. *Id.* Petitioner's Petition for Rehearing En Banc was denied by the Sixth Circuit Court of Appeals on January 29, 2018.

REASONS FOR GRANTING THE PETITION

- I. AN EXPERT WITNESS WHO INTRODUCES STATEMENTS MADE BY CO-DEFENDANTS UNAVAILABLE FOR CROSS EXAMINATION FOR THE TRUTH OF THE MATTER ASSERTED VIOLATED PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE, AND THE EXPERT'S STATEMENTS WERE NOT BASED ON "SUFFICIENT FACTS OR DATA" AND "RELIABLE PRINCIPLES AND METHODS."

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” USCS Const. Amend. 6. The Supreme Court has long held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). An additional explanation was provided by this Court in *Davis v. Washington*, 547 U.S. 813 (2006), by finding the testimonial character of the statement is what brings it under the purview of the Confrontation Clause, and only testimonial statements will be barred admission into court. *Id.* Additionally, the *Davis* Court expounded that,

statements are (1) nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; and (2) testimonial when the circumstances objectively indicate that (a) there is no such ongoing emergency, and (b) the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. However, the Confrontation Clause does not bar the admission of statements that are not admitted for the truth of the matter asserted, even if the statements are testimonial in nature. *See Crawford v. Washington*, 541 U.S. 36 (2004).

While this Court has discussed the Confrontation Clause at length in various cases, here, a unique question is presented when an expert witness attempts to rely wholly upon prior testimony of an alleged co-conspirator when providing his or her expert opinion. This question is especially unique and important when the expert

witness then uses the testimonial statements of a co-conspirator verbatim during his or her testimony, when said co-conspirator does not take the stand and is unavailable for cross-examination at trial. Not only does this circumstance present a Confrontation Clause issue, but it also presents a significant question under the Federal Rules of Evidence because expert testimony must be based on “sufficient facts or data” and on “reliable principles and methods.” Fed. R. Evid. 702. *See also, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). Due to the importance of these questions in tandem, certiorari is warranted in this case.

A. *The Confrontation Clause is violated when opinion testimony is provided by an expert witness who has relied completely on prior testimony of a co-conspirator who is available yet does not appear at trial.*

The Supreme Court has held that the Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination, or if the testimony is not admitted to prove the truth of the matter asserted. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *See also* U.S. Const. amend. VI. Expanding on this holding and applying it to expert witness testimony, the Fourth Circuit has found that: “[a]n expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation.” *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). Therefore, “[i]f an expert simply parrots another individual's out-of-court statement, rather than

conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth.” *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012); *see also United States v. Palacios*, 677 F.3d 234, 243 (4th Cir. 2012) (gang expert's testimony did not violate *Crawford*, even though the expert's views were based in part on discussions with other officers and interviews with gang members and victims, because the expert's testimony “did not specifically reference any of these interviews”).

Significantly, case law instructs that “[a]n important consideration in distinguishing proper testimony from parroting is the generality or specificity of the expert testimony.” *United States v. Garcia*, 793 F.3d 1194, 1213 (10th Cir. 2015). In light of these holdings, the Sixth Circuit Court of Appeals in the current case has drastically departed from, and rendered a decision in conflict with, the findings of the Tenth Circuit and the Fourth Circuit regarding this issue, creating separation and disconnect among the circuits on the same important issue.

The current case involved an expert, Hoing, who was apparently retained for trial and incidentally had not actually worked on the case as an investigating officer. During his testimony, Hoing, offered as an expert witness, was asked to interpret several code words, as experts often do during drug cases. However, rather than using his independent judgement and prior knowledge to provide an interpretation for the jury, Hoing testified that he had never before heard the terms used in the manner in which he interpreted for the jury, but that he learned the meaning he

provided the jury simply by reading a co-defendant's interview. Yet, Hoing stated the co-defendant's interpretation of the code words for the jury, not to establish the basis of his opinion, but for the truth of the matter asserted. Similar to a previous Sixth Circuit case, this implied that Hoing received this information by reading the interview of a specific co-defendant, who was speaking about a specific event, and thus Hoing's interpretation of the code words was based on this co-defendant's statements. *United States v. Rios*, 830 F.3d 403, 419 (6th Cir. 2016) (finding that the expert's testimony violated the Confrontation Clause when it "implied directly that a specific individual told [the detective] about a specific event, and that [the detective's] account of what occurred was based upon this individual's statement").

Additionally, the present case is similar to a Tenth Circuit case involving an expert witness on gang activity. *United States v. Garcia*, 793 F.3d 1194 (10th Cir. 2015). In *Garcia*, the court found that, based on the expert witness' sole reliance on statements made by gang members to inform his opinion testimony:

[t]he government cannot plausibly argue that [the expert witness] applied his expertise to this statement. It involves no interpretation of gang culture or iconography, no deciphering of coded messages, no calibrated judgment based on years of experience and the synthesis of multiple sources of information. He simply relayed what DV gang members told him. Admission of the testimony violated the Confrontation Clause.

United States v. Garcia, 793 F.3d 1194, 1214 (10th Cir. 2015). Likewise, in this case Hoing simply relayed what he had read in the co-conspirator's testimonial statement and relayed the exact interpretation of the code word for its substantive truth. These circumstances create the same issue raised by the dissent in *Williams v. Illinois*, 567

U.S. 50 (2012), however, who found that:

It remains the case that the prosecution is attempting to introduce a testimonial statement that has no relevance to the proceedings apart from its truth--and that the defendant cannot cross-examine the person who made it. Allowing the admission of this evidence would end-run the Confrontation Clause, and make a parody of its strictures.

Williams v. Illinois, 567 U.S. 50, 128 (2012):

Under the Fourth Circuit, Tenth Circuit, and even previous Sixth Circuit Court of Appeals, the testimony in the present case plainly violated the Confrontation Clause, as an expert witness is not allowed to simply become a conduit for testimonial hearsay. *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009); *United States v. Garcia*, 793 F.3d 1194, 1214 (10th Cir. 2015); *United States v. Rios*, 830 F.3d 403, 419 (6th Cir. 2016). Yet, the Sixth Circuit ruled that the district court properly allowed Hoing's testimony to be admitted before the court.

The Supreme Court has previously held the following:

...the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination.

Michigan v. Bryant, 562 U.S. 344, 358 (2011). Even when resulting statements of the type described in *Michigan v. Bryant* are introduced into court by an expert witness, this occurrence clearly violates the Confrontation Clause, and *Crawford*, and the testimony must be held inadmissible. Accordingly, the Sixth Circuit erred by allowing Hoing to testify to the definition of words provided by Petitioner's co-defendant, which were clearly testimonial, as they were provided during a police

interview and Hoing made it clear to judge and jury that he was able to interpret the code words *only* due to reading the co-conspirator's interview, and not through any independent judgement or knowledge. Therefore, these were "testimonial statements that could not be introduced unless their authors were subjected to the 'crucible of cross-examination.'" *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

If the Sixth Circuit's decision in the present case is allowed to stand, it will provide precedent for future courts to find that an expert witness may, before a jury, directly repeat facts and statements from an unavailable co-defendant's testimonial statements to authorities after arrest. This stands in direct conflict with other Circuit Courts of Appeals, as well as the decision by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Michigan v. Bryant*, 562 U.S. 344 (2011), and gives prosecutors an underhanded way to enter inadmissible hearsay on the record without having an available co-defendant actually testify at trial and be submitted to cross-examination regarding their statements. In fact, allowing this type of testimony would essentially revert courtroom testimony to the times before this Honorable Court decided *Crawford*, permitting the safeguards of the Confrontation Clause to be trampled upon. Given the advent of shorthanded language, technology and various slang terms which are often used interchangeably, it is critical that expert testimony be vetted for reliability before an expert is simply allowed to repeat what one out of court witness allegedly said, versus what is the common knowledge or usage of said terminology.

Therefore, certiorari must be granted in this case to more specifically limit expert witnesses and clarify the requirement that expert witnesses cannot simply parrot an out-of-court statement, but must apply independent judgment and expert knowledge to their opinion before it is allowed to be heard by the jury. Accordingly, Petitioner respectfully requests that this Honorable Court consider the above issue by granting certiorari in this case. In the alternative, Petitioner requests that this Honorable Court reverse the judgment of the District Court for these aforementioned reasons.

B. Allowing expert testimony informed solely by testimonial statements of unavailable co-conspirators presents a question under the Federal Rules of Evidence because expert testimony must be based on “sufficient facts or data” and on “reliable principles and methods.”

Federal Rules of Evidence Rule 702 states that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods;
- and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

USCS Fed. Rules Evid. R. 702. Additionally, the Advisory Committee’s Notes for this federal rule notes that:

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply “taking the expert’s

word for it.”

Fed. R. Evid. 702 Advisory Committee's Note (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)) (“We’ve been presented with only the experts’ qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that’s not enough”). Notably, while Rule 702 has superseded the Supreme Court’s seminal decision in *Daubert* as far as governing the admissibility of expert testimony, the standard of review that was established for *Daubert* challenges is still appropriate. See *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005).

The Supreme Court has never squarely addressed the issue of an expert witness who testifies to code words that he has heard for the first time in the current investigation. However, under Federal Rule of Evidence 702, it is clear that the testimony must still be based on sufficient facts or data and be the product of reliable principles and methods. Additionally, any law enforcement officer who is acting as an expert witness due to his or her vast experience with code words used by drug operations must still explain how that experience leads to their conclusions, why that experience is a sufficient basis for their opinion, and how that experience is reliably applied to the facts, despite never having heard a code word used prior to the current investigation. Fed. R. Evid. 702 Advisory Committee's Note.

One court, in an unreported opinion, analyzed the opined code words that an officer heard for the first time during the investigation for which he was testifying by referring to the Ninth Circuit's decision in *United States v. Hermanek*, 289 F.3d 1076

(9th Cir. 2002). *United States v. Rivera*, No. CR-05-2075-1-EFS, 2006 U.S. Dist. LEXIS 100831 at *14-15 (E.D. Wash. Feb. 10, 2006). The Ninth Circuit in *Hermanek* ruled that an agent's general qualifications, such as experience and knowledge in drug terminology based on years of experience in the drug trade, do not by themselves adequately explain or establish the reliability of the agent's ability to interpret newly-encountered words and phrases; rather, the expert must explain the method used to arrive at his interpretation of the newly-encountered code word. *Id.* at 1094. The Ninth Circuit specifically stated:

[e]ven if [the expert] had explained in detail his knowledge of defendants-such as knowledge that they were involved in cocaine trafficking-he would have been required to establish how he applied that knowledge to interpret particular words and phrases used in particular conversations. Without a link between [the expert's] knowledge and the particular matter he interpreted, “there is simply too great an analytical gap between the data and the opinion proffered.”

Id. at 1094-95 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

In the present case, an expert witness, Investigator Joe Hoing (hereinafter “Hoing”), was called to the stand in order to interpret the meaning of the word “fish,” which was used by Petitioner in a phone call to an alleged co-conspirator. Prior to this expert opinion testimony, Hoing testified to his many years as an investigator and his expansive knowledge and understanding of code words used in drug transactions. Upon describing his ability to interpret code words, Hoing then testified that “fish” was code for money. However, on cross-examination, Hoing acknowledged that he had never once before heard of the word “fish” being used as code for money. Thus, despite Hoing’s expansive, independent knowledge of various code words used in drug

operations, he did not apply one bit of his prior experience or independent understanding of code words to interpret the word “fish” for the jury, which was a pivotal conversation that the Government relied on to argue for a conviction. In fact, according to his testimony, the only reason Hoing knew that the word “fish” was code for money in this situation was because he had read the transcript of a co-conspirator’s interview with authorities after being arrested, in which the co-conspirator stated that “fish” was code for money. Therefore, Hoing based the entirety of his “expert” opinion on untrustworthy statements provided by a co-conspirator upon arrest, rather than linking his personal knowledge to his interpretation of the word, representing an analytical gap between data and opinion that is simply too great to be accepted as expert opinion testimony before a jury. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

It is well accepted that investigators may testify as to the meaning of code words as expert witnesses based on their extensive experience with narcotics and drug trafficking. *See United States v. Griffith*, 118 F.3d 318, 321-22 (5th Cir. 1997); *United States v. Mack*, 495 F. App'x 359 (4th Cir. 2012). However, the Supreme Court has not provided the Circuits with a sufficient standard by which to determine whether or not an expert witness is testifying to matters based on their experience, or if an expert witness is simply testifying to inadmissible and unreliable data gathered from the investigation of the case, or even the testimony of unavailable co-defendants.

Under Federal Rule of Evidence 702, the expert opinion testimony must be

based on sufficient facts and be the product of reliable methods. Yet, it is well-settled that, although rebuttable, co-conspirator statements are typically viewed as inherently unreliable and must be viewed with skepticism. *See Lilly v. Virginia*, 527 U.S. 116, 137 (1999). Accordingly, it does not comport that the testimony of an expert witness is based on sufficient facts and is the product of reliable methods when said testimony is based wholly on the testimony of a co-conspirator. In order to bring harmony amongst the Circuits and understanding as to what will constitute reliable methods and sufficient facts for law enforcement officers testifying to code words, the Supreme Court should declare a standard addressing expert opinion testimony, and what amount of expert testimony can be informed by and based upon the testimony of a co-conspirator. Therefore, Petitioner respectfully requests that this Honorable Court grant certiorari to review the judgement in the present case regarding this specific issue, or in the alternative, reverse the judgment of the district court in this cause.

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL OR JUDGMENT FOR ACQUITTAL DUE TO VARIANCE THAT OCCURRED WHEN THE GOVERNMENT INTRODUCED EVIDENCE OF MULTIPLE CONSPIRACIES INVOLVING DANIEL SCOTT, JR., HORRIS CARPENTER, JUAN CARLOS FLORES AND CORDELL WUTHRICH

In the present case, Petitioner was indicted on a single conspiracy charge. However, at trial, the Government offered proof of multiple conspiracies that did not involve Petitioner nor sufficiently link Petitioner to the conspiracies through the evidence presented. "A variance to the indictment occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially

different from those alleged in the indictment....” *United States v. Swafford*, 512 F.3d 833 (6th Cir. 2008). When considering a variance relating to conspiracy charges, various circuits have held that: “a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy does not know every other member,” but rather it is necessary to show that each alleged member “agreed to participate in what he knew to be a collective venture directed toward a common goal.” *United States v. Warner*, 690 F.2d 545, 549 (6th Cir. 1982); *United States v. Martino*, 664 F.2d 860, 876 (2d Cir. 1981). However, courts must keep in mind that an individual’s “mere association with conspirators is not enough to establish participation in a conspiracy,” and “mere sales do not prove the existence of the agreement that must exist for there to be a conspiracy.” *United States v. Gibbs*, 199 U.S. App. LEXIS 36343 (6th Cir. 1999); *United States v. Cole*, 59 F. Appx. 696, 699 (6th Cir. 2003). Moreover, this Honorable Court has cautioned that “[c]harges of conspiracy are not to be made out by piling inference upon inference, thus fashioning a dragnet to draw in all substantive crimes.” *United States v. Swafford*, 512 F.3d 833, 843 (6th Cir. 2008) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)).

During trial, the Government put on proof of a conspiracy involving Cordell Wuthrich (hereinafter “Wuthrich”), Juan Carlos Flores (hereinafter “Flores”) and Horris Carpenter (hereinafter “Carpenter”) that included evidence of Wuthrich driving cross-country to Arkansas, Texas, and Memphis on drug related errands for Flores, which included picking up drug money from Carpenter’s home. The

Government attempted to draw Petitioner into this conspiracy to traffic drugs cross-country through Petitioner's association with Carpenter, and sparse pieces of mainly unrelated evidence presented by the Government. However, in their attempt to draw Petitioner into this conspiracy including Flores and Wuthrich, the Government improperly relied on piling inference upon inference in order to connect Petitioner to this separate conspiracy.

At best, it is arguable that, in considering the limited phone calls and polecam footage introduced, Petitioner had a buyer-seller relationship with Carpenter. However, this relationship began and ended with Carpenter. The Government provided extraneous testimony regarding Petitioner's son, Daniel Scott, Jr., who often received cocaine directly from Carpenter, and whose relationships extended to the conspiracy involving Wuthrich and Flores. Yet, Petitioner and his son are connected only by blood, and do not share the same actions. The fact that Petitioner's son was involved with Wuthrich and Flores is only an attempt to pile on the inference that Petitioner must be involved with these individuals as well since his son was, although no significant or competent proof supported this inference.

The Government also submitted evidence, by means of co-conspirator testimony, that Wuthrich met Petitioner one time when Petitioner crossed paths with him at Carpenter's house. Wuthrich testified that Petitioner brought money to Carpenter that was, in turn, given to Wuthrich and seized by the police. However, at best, Petitioner was associated with Carpenter through a buyer-seller relationship, and there was no proof submitted that Petitioner agreed to participate in the multi-

state drug trafficking conspiracy with which Wuthrich was involved, or even that Petitioner knew Wuthrich would be receiving money he was bringing to Carpenter. Yet, one chance meeting between Petitioner and Wuthrich at Carpenter's home was used to infer Petitioner's involvement with a multi-state drug operation.

Additionally, and even more egregiously, the Government relied on this chance meeting between Petitioner and Wuthrich to enter drugs seized from Wuthrich into evidence before the jury. These drugs, twenty-eight (28) kilograms of cocaine, were placed mere feet from Petitioner, and directly before the jury, for a large portion of Petitioner's trial. Through testimony by Wuthrich and another law enforcement officer, Agent Ross, it was clear that this contraband was unrelated to Petitioner. In fact, the Government never established a sufficient nexus between Petitioner and the drugs entered into evidence before the court, even though the dangers of placing drugs in front of a jury, especially in the quantity described in the current case, without first foundationally connecting said drugs to the defendant on trial cannot be overstated. *See Kotteakos v. United States*, 328 U.S. 750 (1946) (In which, this Honorable Court notes that the evidence relating to one defendant may be used to convict another, and the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are great). However, this is just one example of how strongly prejudicial the piling of inferences can become when allowed by a district court. Although lacking any sufficient nexus of proof between the drugs and Petitioner, the Government inferred Petitioner's connection to a separate conspiracy involving 28 kilograms of cocaine, leading to the presence of

this cocaine in the courtroom, before the jury, mere feet from Petitioner. In such a case where the proof is so scant, and the evidence is so highly prejudicial, such practices cannot be allowed to stand, and such piling of inferences must not be allowed to continue.

Moreover, the Government relied on the allegation that the conversation between Carpenter and Petitioner regarding “fish” implicated involvement with Wuthrich and the major drug trafficking operation with Flores. Yet, the subsequent interpretation of the word “fish,” along with the description of Petitioner meeting Wuthrich, was provided by a co-conspirator who has much to gain from helping the authorities take down another alleged co-conspirator, and little to gain by misleading authorities. Again, the Government was simply using sparse and tenuous testimonial evidence in an effort to create the inference that Petitioner was involved in a drug trafficking conspiracy beyond the transactional relationship he had with Carpenter.

By holding that this piling of inferences successfully supported a finding of a single conspiracy involving Petitioner, the Sixth Circuit ratified the fashioning of a dragnet to sweep those tenuously related to a conspiracy into the conspiracy. While knowledge of one’s participation in a conspiracy is often imputed to those involved in a chain conspiracy, which drug conspiracies often are, the Sixth Circuit applied this imputed knowledge improperly in Petitioner’s case. Although the Government could argue that Petitioner knew he was conspiring with Carpenter to buy illegal drugs, there was no evidence in the record that Petitioner knowingly participated or joined

in a conspiracy of a multi-state drug-trafficking organization. Additionally, this Honorable Court has long held that, knowledge of a conspiracy, and having the intent to join the conspiracy to aid in accomplishing its purpose are two essential pieces of a conspiracy. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (finding that “conspiratorial intent, when given effect by overt act, is the gist of conspiracy.” While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal). The Government submitted no evidence that Petitioner was involved with, or knew of a conspiracy relating to Wuthrich and Flores, nor that Petitioner intended, by associating with Carpenter, to aid this separate conspiracy in accomplishing its purpose.

The present case was undoubtedly a serious miscarriage of justice. The Government’s case rested on inadmissible hearsay, which was entered into the record under the guise of expert testimony. Moreover, the Government attempted to cobble together a single conspiracy out of several separate conspiracies, which dragged Petitioner into it through insufficient and unrelated evidence provided mainly by the testimony and untrustworthy information of several co-conspirators. However, the law of conspiracy was not designed to provide such a narrow passage of guilt by mere associations and inadmissible hearsay.

The Sixth Circuit’s decision in this case carries with it a weighty and dangerous precedent particularly in our society today, when many people fall victim to the evils

and addictions of illicit drugs and become entangled with people who are dealing these drugs and encouraging their dependency. Under this current decision, the dragnet that the Sixth Circuit has cast allows those people who are addicted to drugs and seeking them out from dangerous criminals to be swept into a conspiracy by mere sparse dust particles connecting them to these drug dealers. What was once a simple buyer-seller transaction has now become a conspiracy for which the buyer is held accountable as if he or she were a co-conspirator of those who are operating all over the nation, even when proof is insufficient to show that the buyer agreed in any way to be part of a major interstate drug trafficking conspiracy. Accordingly, this test created by the Sixth Circuit in the present decision is highly dangerous and holds far-reaching implications for persons who regularly or even irregularly enter into drug transactions as a buyer. Without a consistent standard as to what level of proof is sufficient to draw individuals into a conspiracy, the dragnet approved by the Sixth Circuit in the present decision finds every transaction between seller and buyer designates the buyer as part of a conspiracy. Moreover, the Government also introduced evidence that Petitioner and Carpenter were involved in a dogfighting conspiracy², which is further reason why the conflation of multiple conspiracies when coupled with the vague, untested definitions admitted through the expert of out of court references was highly prejudicial to Petitioner during this trial. Accordingly, Petitioner would respectfully request that this Honorable Court alter the precedent

² Petitioner plead guilty to count three which was a dogfighting count before the trial commenced. However, the Government was still allowed to introduce testimony concerning conversations of Petitioner related to dogfighting which further confounded the problem being discussed in this Section.

created by the Sixth Circuit in the present case by granting certiorari and using this opportunity to establish a consistent standard that will protect individuals from being swept into inter-state drug trafficking conspiracies through such insufficient, sparse evidence. In the alternative, Petitioner requests that this Honorable Court reverse the judgment of the District Court for these aforementioned reasons.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in his case or in the alternative, enter a judgment reversing the judgment of the District Court.

DATED: This 27th day of April 2018.

Respectfully Submitted,

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