

No. 18-1482

IN THE
Supreme Court of the United States

SEMYYA CUNNINGHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

REPLY BRIEF FOR THE PETITIONER

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This is the rare case in which the government concedes the existence of a circuit conflict but nevertheless takes the position that the conflict need not be resolved. The government correctly recognizes that the courts of appeals are divided on the question whether the truth of a hearsay statement and the credibility of its relating witnesses are appropriate considerations when assessing the statement's circumstantial trustworthiness under the residual hearsay exception. The government does not argue that further percolation in the lower courts is necessary, nor does it argue that the conflict is likely to resolve itself.

Instead, the government argues that the conflict does not warrant the Court's intervention here because

the decision below is not part of that conflict. According to the government, even if the Eleventh and Third Circuits are split on the question presented, that question was not presented below, and the Fourth Circuit did not do what it says it did. To make this argument, the government goes to great length to explain away the actual analysis in the decisions under review, and curiously avoids any mention of the most compelling facts in the record. In fact, this case is an ideal vehicle for this Court to decide whether credibility plays a role in trustworthiness under the residual exception, as it presents the rare case in which a court discounted circumstances belying trustworthiness specifically *because* it found the hearsay more credible than the petitioner's countervailing contention. This express basis for the decision below places it squarely within the confines of the pre-existing circuit conflict—a conflict which will never be resolved if the government simply avoids the issue in order to preserve its trial victory.

1. Denying the Fourth Circuit's participation in the acknowledged conflict over the question presented, the government addresses head-on petitioner's contention regarding the basis for the decisions below:

Petitioner's objections to the court of appeals' decision rest on a misreading of that court's and the district court's opinions. According to petitioner . . . the courts below admitted Green's hearsay statements because they believed those statements to be true. That is incorrect.

Br. in Opp. 11. According to the government, the courts below did not weigh credibility when applying the residual exception, but merely assessed Kourtnee Green's circumstances and concluded that a person in

those circumstances “would be likely to tell the truth.” *Id.* at 12. That is a groundless characterization of the opinions under review, and one which depends on omission of critical facts and disregard of the actual language of the opinions.

The key characteristics and circumstances of Green’s hearsay, which feature prominently in the decisions below but are nowhere discussed by the government, bear repeating: Green withheld the existence of her life insurance policy for months after becoming terminally ill, and did not make her statements denying giving the policy proceeds to petitioner until her mother happened to discover both the policy *and* the payment to petitioner entirely by accident. *Pets. C.A. Br.* 5-7. Once informed, Green’s mother claimed fraud and forgery to the insurer—while impersonating Green on a recorded line—and then threatened to evict Green from her home, despite her terminal cancer, if she contradicted that claim. *Id.* at 7-8. After that threat, Green again denied having gifted the proceeds to petitioner. *Id.* at 8.

Because these relevant circumstantial facts were undisputed, the courts below could not simply ignore them (as the government does), and instead reconciled them with trustworthiness by concluding that Green’s denials were more likely truthful than coerced. That is what the district court said:

The Court is unpersuaded by the Defendant’s suggestion that Green’s will was overborne by [her mother] [T]he Defendant has presented no evidence that Green was actually persuaded to lie because of that “threat.”

Pet. App. 21a. That was good enough for the court of appeals:

Cunningham points out that Green did not deny having given Cunningham the proceeds until Rogers [Green's mother] discovered the policy and the proceeds by accident. At that point, according to Cunningham, it would have been difficult for Green to tell Rogers that she decided to give the proceeds not to her, but to someone outside her immediate family. . . . Cunningham contends that Rogers pressured Green to maintain this narrative in conversations with [the insurer] and threatened to evict Green if she contradicted Rogers. As summarized above, however, the district court considered and rejected each of these arguments, determining that Cunningham's account [that Green had given her the insurance proceeds] was not as credible as [the witnesses'].

Pet. App. 10a.

The government deflects these statements by asserting that the court of appeals was not discussing the trustworthiness of Green's hearsay but rather "another of petitioner's arguments," namely "that the district court should have accepted her version of events,' under which Green gave her insurance proceeds to petitioner but lied to her mother and the investigator." Br. in Opp. 15. That is true, but that is not "another" point distinct from trustworthiness, which (as the government concedes) was the only issue on appeal. *Id.* at 7. More precisely expressed, petitioner's argument was that the district court could not simply credit Green's denials, and instead had to consider whether, if the facts were as petitioner said, Green would have been incentivized to say the same thing. Pet. C.A. Reply Br. 9. As noted above, however, the

court of appeals rejected this argument, holding that the district court had properly found trustworthiness by “discounting,” as “not . . . credible,” the idea that Green had actually given the proceeds to petitioner and then lied about it.

2.a. The Fourth Circuit’s conclusion below that trustworthiness could be premised on “discounting [petitioner’s] version of the events,” is in direct conflict with the Eleventh Circuit’s decision in *Rivers v. United States*, 777 F.3d 1306, 1315 (11th Cir. 2015), which held that trustworthiness had to consider the declarant’s incentives under all factual scenarios and could not be premised on crediting a particular witness or account of events. Only one of these two approaches can be correct.

In attempting to reconcile the two approaches here, the government focuses principally on the decision below, contending that it is not in conflict with *Rivers* because (as discussed above) it does not actually rest on “discounting” or “credib[ility]” despite what the court below said. The government spends far less time on *Rivers* itself, and tellingly does not contend that the case was wrongly decided. In fact, the government’s discussion of *Rivers* is generally accurate. It is incomplete in only one respect that merits comment.

In *Rivers*, the district court admitted a deceased declarant’s hearsay under the residual exception based in part on its belief that the relating witness, a lawyer, would not testify falsely. 777 F.3d at 1310. As the Eleventh Circuit held (and the government observes), this was error because it placed the focus of the trustworthiness inquiry on the witness, who could be cross-examined, rather than on the declarant, who could not. *Id.* at 1313. But it was *also* error, the Eleventh Circuit noted, because crediting a particular

account of events—i.e., deciding what actually happened with respect to the subject matter of the hearsay—would fail to consider all potential incentives facing the declarant. Hence, the Eleventh Circuit reasoned, the district court could not properly premise trustworthiness on a finding that the hearsay was true:

If [Rivers' lawyer] was providing constitutionally effective assistance of counsel, we agree with the district court that he would have had every incentive to tell the truth to [witness]. But if he was failing as completely as Rivers alleges, he would have had every incentive to dissimulate.

Id. at 1315.

The passage is critical to the holding in *Rivers* and features prominently in the Petition in this case yet is nowhere mentioned by the government. Its analogue in the decision below is the statement, “the [district] court considered [petitioner’s] counter-narrative and explained its reasoning for discounting her version of events.” Pet. App. 13a. These two passages reflect diametrically opposing approaches to the identical issue. *Rivers* and the decision below therefore cannot be reconciled.

b. The government acknowledges the conflict between the Eleventh and Third Circuits over the role of credibility in the trustworthiness of residual hearsay, but contends that petitioner “overstates the conflict” because the Third Circuit’s decision in *United States v. Bailey*, 581 F.2d 341 (3d Cir. 1978), and the district court decisions following it, treat credibility as one of several factors bearing on trustworthiness rather than as singularly decisive. Br. in Opp. 15-16. Were that logic

compelling, legal tests involving multiple factors would be effectively immune from review, as it is the rare case in which a court applying a multi-factor test holds that one, and only one, prong of the test points toward the correct outcome.

But more importantly, the government's emphasis on outcome-determinativeness points persuasively in favor of granting certiorari in *this* case. Whether or not the Third Circuit (or any lower court therein) has ever applied the residual hearsay exception specifically *because* it believed the relating witness(es), the district court here did exactly that, with the approval of the court of appeals. Absent the district court's belief that Green had likely not given her insurance proceeds to petitioner, and hence that her hearsay denials of the same were true, the district court could never have found trustworthiness in hearsay given by a terminal cancer patient under threat of eviction.

3. Setting aside the particulars of this case, the government denies that the question presented is of broader import because of the forthcoming amendments to Federal Rule of Evidence Rule 807, which it contends "may assist in resolving any confusion" presently found in the case law. Br. in Opp. 17. But the government's arguments in support of this claim are self-contradictory. On one hand, the government cites the fact that the new Rule 807 will expressly allow courts to consider corroborating evidence when evaluating the trustworthiness of hearsay, which (as the government notes) strongly suggests that the objective truth of the hearsay is a relevant consideration. *Id.* But the government also points to the forthcoming Advisory Committee Notes rejecting the idea that "credibility"—at least insofar as it pertains to relating witnesses—is a relevant consideration, which of course

points in the opposite direction. *Id.* Nothing about these forthcoming changes suggests that they will resolve the question presented here, namely whether a court may hold hearsay to be trustworthy despite compromised circumstances so long as the court believes it.

4. Lastly, the government cites harmless error as a basis to decline review, contending that even if the courts below incorrectly applied the residual hearsay exception, there was “overwhelming evidence of petitioner’s guilt, separate and apart from Green’s statements, leaving no doubt about the fraud.” But any issue of harmless error does not diminish the value of this case as a vehicle to address the circuit split over credibility’s role under Rule 807. The Fourth Circuit below did not address harmless error, and this Court’s practice is not to address that issue in the first instance. *See, e.g., Skilling v. United States*, 561 U.S. 358, 414 (2010). Because this Court could readily leave any harmless-error inquiry for the court of appeals on remand in the event of a reversal—as the Court has indicated it prefers to do, *see, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986)—the government’s arguments about harmless error pose no obstacle to resolving the question presented.

On the substance, moreover, the government’s contentions about the relative import of Green’s hearsay are markedly at odds with those it originally made when seeking to introduce the hearsay in the first place. As the government notes, one of the prerequisites for application of the residual exception is that the hearsay at issue be “more probative on the point for which it is offered than any other evidence” Br. in Opp. 5. The government did not flinch from this standard when moving to admit Green’s hearsay,

telling the district court that it was the “[m]ost [p]robative [e]vidence” of fraud, Pets. C.A. Br. 10, 27, and indeed the only *direct* evidence at all on the only disputed issue in the case, namely Green’s intent and actions with respect to her policy proceeds. The government reinforced this message at the trial itself, making the hearsay the centerpiece of its argument in closing. Absent a good-faith attempt to explain away those statements—and the government makes none—the government’s current claim that the same evidence was instead unimportant to its case rings hollow.

Moreover, all of the substitute evidence cited by the government was fully consistent with petitioner’s argument that Green wanted to give the proceeds of her insurance policy to petitioner, her lifelong best friend, but did *not* want the relatives upon whom she depended to know that she was making such a generous gift to someone outside her immediate family. Exactly as the government contended at trial—and contrary to its current contentions—Green’s hearsay was the only evidence at all that directly contradicted that entirely plausible argument. In light of the centrality of the issue and the *sui generis* character of the hearsay as evidence, it is certainly not clear beyond a reasonable doubt that petitioner would have been convicted on the basis of the much more circumstantial evidence on which the government relies.

* * *

Kourtnee Green’s hearsay was admitted based on the district court’s mistaken view of the trustworthiness requirement, and the court of appeals’ mistaken view of the judicial role in applying that requirement. As a result, Semyya Cunningham was wrongly convicted. The government’s exertions to construe an opinion that the court below did not write strongly

suggest that it believes that petitioner is guilty of the crimes of which she was convicted. But nothing suggests that it believes that the Fourth Circuit's decision can be squared with the case law of the Eleventh Circuit, or with what Rule 807 requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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