No. 24A623

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE ALEXANDER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Carlyle Parish LLC
Kathryn B. Parish*
3407 Jefferson, #128
Saint Louis, MO 63118
*Counsel of Record
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

In 2024, FRE 804(b)(3), the rule governing the statement against interest exception to the hearsay rule was amended. Prior to 2024, FRE 804(b)(3)(B) allowed for an exception to the hearsay rule where the statement of an unavailable declarant was against his/her interest, and "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." In 2024, that subsection was amended and now reads as follows: "if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it."

Mr. Alexander's case was tried, in 2022, prior to the enactment of the 2024 amendments. This case thus presents the following Question:

Whether FRE 804(b)(3)(B)'s requirement that a court find "corroborating circumstances" that "clearly indicate [a statement's] trustworthiness" required a court to consider "the totality of circumstances" in which a statement was made and "any evidence that supports or undermines it" prior to the 2024 amendments explicitly requiring consideration of those factors.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Bruce Alexander is the Petitioner in this case and was represented in the Court below by Kathryn B. Parish.

The United States of America is the Respondent and was represented in the Court below by AUSA David Wagner.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States District Court (W.D. Missouri):

United States v. *Bruce Alexander*, No. 4:20-CR-00181-DGK (Judgment Imposed on May 24, 2023)

United States Court of Appeals (8th Cir.):

United States v. *Bruce Alexander*, No. 23-2280 (Judgment on August 3, 2024, Rehearing Denied on September 30, 2022)

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Petitioner Bruce Alexander prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on August 23, 2024

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 111 F.4th 967.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2024. App. 1a. A timely filed petition for rehearing or rehearing en banc was denied on September 30, 2024.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Evidence, Rule 804 (2022) (see appendix)

Federal Rule of Evidence, Rule 804 (2024) (see appendix)

STATEMENT OF THE CASE

Factual Background:

Mr. Alexander and his codefendant, Mr. Gay, were charged by indictment conspiracy to distribute more than 400 grams of fentanyl and possession to distribute more than 400 grams of fentanyl (R.Doc. 1) after a traffic stop in which a search of the panels of the car with an X-ray machine and subsequent dismantling seat-backs of the second-row bench seats of a vehicle Mr. Alexander was driving and in which Mr. Gay was a passenger revealed more than five kilograms of fentanyl. PSR, p.4. At the time the fentanyl was found, Mr. Gay made a spontaneous statement to a trooper indicating that Mr. Alexander knew nothing about the fentanyl police had discovered. TRIAL.TR:124.

At the time of his arrest, Mr. Gay was found with close to $8000 cash on his person as well as additional marijuana. PSR, p. 5. In a mirandized interview conducted with DEA agents after his arrest, Mr. Gay admitted to taking four different trips to California for the purpose of retrieving and transporting controlled substances, and that this was the first and only trip that Mr. Alexander had taken with him. TRIAL.TR:124, PSR, p.6. He again reiterated that Mr. Alexander did not know anything about the fentanyl that police had found hidden in the compartments behind the seats in the rental vehicle. TRIAL.TR:124. He also proceeded to give detailed information about locations travelled to when retrieving the fentanyl and provided names of other persons that had been involved in the conspiracy. TRIAL.TR:124; R.Doc.51, p.2. At some point a DEA agent investigated

the places that Mr. Gay claimed he had been and determined that his physical descriptions of the scenes where things occurred were accurate. TRIAL.TR:124.

According to Government pleadings filed before the trial court, at one meeting with DEA agents, Mr. Gay and Mr. Alexander were both present. Mr. Gay had communicated that he was willing to participate in a controlled buy, but Agents told him that they would only arrange it if Mr. Alexander would participate along with Mr. Gay. Mr. Gay told Mr. Alexander in the presence of DEA agents that he had told DEA agents everything and solicited Mr. Alexander's participation in a controlled buy. Mr. Alexander declined, at which point Mr. Gay expressed frustration toward him. R.Doc. 68 at 8.

Mr. Gay plead guilty to the two counts in the indictment in open plea conducted via Zoom before the honorable Judge Howard Sachs. R.Doc. 38. During the plea colloquy when questioning Mr. Gay as to the facts of the case, he stated only that he had worked with "at least one other person" and did not mention Mr. Alexander's name. R.Doc. 38 (Transcript of Gay Plea), p. 12. The Government (represented at the time by the same AUSA who later represented the United States at Mr. Alexander's trial) agreed that this was a sufficient factual basis for Mr. Gay's plea. At the end of the plea, Judge Sachs ordered that Mr. Gay surrender himself to custody of the United States marshals within two days. R.Doc. 38, p.17. Mr. Gay failed to do so, and at the time of Mr. Alexander's trial was a fugitive from justice subject to an active warrant.

In a motion in limine, the Government sought to exclude statements by Mr. Gay exculpating Mr. Alexander, which Mr. Alexander's counsel argued were admissible under Federal Rule of Evidence 804(b)(3). R.Docs. 49, 51, 68, The evidence was not admitted and Mr. Alexander's lawyer made an offer of proof as to this issue. Mr. Alexander was convicted of both counts.

In addressing the admissibility of the codefendant's statements, the Court of Appeals assumed, without deciding that the statements made by Mr. Gay were against his penal interest but adopted the reasoning of the trial court that there were insufficient corroborating circumstances, finding that the close friendship between Mr. Gay and Mr. Alexander, Mr. Gay's failure to surrender himself to marshals as required counseled against a finding that the statement was trustworthy. It further incorrectly found that "Gay's statement was not corroborated by physical evidence" ignoring both evidence presented at trial and the offer of proof presented by defense counsel. As to the question of whether the trial Court's action infringed on Mr. Alexander's right to present a complete defense the court of appeals found only that because Mr. Alexander had not argued that 804(b)(3) was not "arbitrary or disproportionate to the purposes it is designed to serve", there was no violation of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

I. The Meaning Of "Corroborating Circumstances" Prior To The 2024 Amendments Needs Clarification By This Court.

At the time of Mr. Alexander's trial, Rule 804(b(3)(B) allowed for the admission of evidence regarding the statements of unavailable witnesses that were against person's interests where the statement was "supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." This was the version of the rule in effect beginning in 2011, and that was in effect at the time of Mr. Alexander's trial. In 2024, the rule was amended and 804(b)(3)(B) now provides for the admissibility of such statements: "if offered in a criminal case as one that tends to expose the declarant to criminal liability, [where the statement] is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it." (emphasis added)

Prior to the 2024 Amendment, and in this case, the 8th Circuit applied a five-factor test under *United States v. Rasmussen*, 790 F.2d 55, 56 (8th Cir. 1986) in order to determine if corroborating circumstances existed supporting the trustworthiness of the statement:

> (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, [and] (5) the timing of the declaration and the relationship between the speaker and the witness.

Other circuits at that time had different tests. Under the prior rule, the Fourth Circuit had a similar list of factors to those the Eighth Circuit considered, but added a sixth factor, namely, "(6) the nature and strength of independent evidence relevant to the conduct in question." *United States v. Dargan*, 738 F.3d 643, 650 (4th Cir. 2013).

The purpose of the 2024 amendment seemed to be to clarify the rule that Courts were indeed required to consider the independent evidence surrounding the statement, as the Fourth Circuit apparently did. As the committee's advisory notes stated:

> Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness," the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. The court must also consider information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that undermines the declarant's account.

Advisory Committee Notes on 2024 Amendment.

However, it appears that the Fourth Circuit is the only Circuit that specifically required consideration of the independent evidence supporting or undermining the statement prior to the 2014 amendment. Though other Courts, including the Eighth Circuit at times, would consider independent evidence corroborating the statement, this was not something that the law in those circuits specifically or universally required. *See United States v. Pelletier*, 666 F.3d 1, 8-9 (1st Cir. 2011)(Not listing specific factors to evaluate, but finding that there was no requirement that the corroboration consist of "independent evidence supporting the truth of the matter asserted by the hearsay statements," but instead required, "evidence that clearly indicates that the statements were worthy of belief, based upon the circumstances in which the statements were made."); *United States v. Miller,* 954 F.3d 551, 564 (2d Cir. 2020)(not citing to specific required factors but finding because unavailable codefendant's statements were corroborated by his own plea agreement and by testimony of other witnesses, they were admissible); *United States v. McClinton*, 432 F. App'x 166, 169, n.8 (3d Cir. 2011)(Specifically rejecting the multi-factor test set out by the Fourth Circuit and analyzing the corroborating circumstances question based largely on the alleged circumstances surrounding the making of the statement, and the actions and character of the third-party declarant); *United States v. Hale*, 685 F.3d 522, 540 (5th Cir. 2012)(finding no "corroborating circumstances" but lacking significant analysis of the meaning of the term); *United States v. McKinney*, No. 18-3015, 2019 WL 2897504, at *2 (6th Cir. Apr. 16, 2019)(unpublished)(finding a lack of corroborating circumstances based on

the Government's presentation other statements of the declarant contradicting those statements, but with little analysis of what "corroborating circumstances" meant); *United States v. Hawkins*, 803 F.3d 900, 903 (7th Cir. 2015)(Suggesting a significant amount of discretion of district court in evaluating corroborating circumstances, and finding "It makes no difference whether those circumstances are instead called 'context,' or whether they are drawn from evidence that happens to be anticipated at trial. Nothing in Rule 804(b)(3) confines the judge's consideration of relevant circumstances in this way."); *United States v. Caballero*, 745 F. App'x 32, 33 (9th Cir. 2018)(Upholding a finding of "no corroborating circumstances" absent any analysis of what "corroborating circumstances would be); *United States v. Berry*, 496 F. App'x 938, 942 (11th Cir. 2012)(upholding a finding of no "corroborating circumstances" based on finding that declarant had made inconsistent statements at times, but offering no further analysis of what "corroborating circumstances" were).

In a number of these cases, the courts of appeals have simply cited to one or two facts (or largely to the district court's discretion) and it is unclear what additional evidence may have been presented as to "the totality of the circumstances" in which the statement was made or "any evidence tending to support or undermine it," as is now required by the rule.

In this case both the trial court and the appellate court, in their findings, focused on the facts that Mr. Gay had a close relationship to Mr. Alexander and that Mr. Gay had fled despite an order that he surrender himself, which, they urged,

significantly undermined his character. Both courts ignored the fact that statements made by Mr. Gay were corroborated by agents' own investigation into the physical scenes described by Mr. Gay, that Mr. Gay was found present at the scene of the crime with almost $8000 cash on him, while Mr. Alexander had nothing on him, and that Detectives themselves had to use Xray machines to locate the contraband, establishing that they were not visible to the driver.[1] The analysis of both the district Court and the 8th Circuit court of appeals therefore would have not been in accordance with the text of rule §804(b)(3)(B) today. The question this case places before this Court is whether or not it was in accordance with the text of the rule prior to the 2024 amendments. This Court should grant certiorari lack of clarity on the meaning of the necessary "corroborating circumstances" prior to the 2024 amendments.

II. The Lack of Uniform Interpretation Of The Pre-2024 Meaning Of "Corroborating Circumstances" Has Led To Arbitrary Enforcement, And Thus A Deprival Of The Fifth Amendment Right To Present A Defense For Mr. Alexander And Many Other Similarly Situated Defendants.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (further citation omitted); *United States v. Brandon*, 64 F.4th 1009, 1016 (8th Cir. 2023). The right to introduce relevant evidence is one dimension of the Constitution's "guarantee[ ]" that "criminal defendants [receive] 'a meaningful

[1] In distinguishing this case the Court of Appeals claimed that "Gay's statements were not corroborated by physical evidence. But the Court made no mention of this evidence in its opinion.

opportunity to present a complete defense.' " *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The Constitution does not, however, guarantee that criminal defendants may call every witness they choose. *United States v. Scheffer*, 523 U.S. 303, 308, (1998). "[S]tate and federal rule-makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Id.*, at 308. "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Id.*

The Eighth Circuit's application of this rule to Mr. Alexander was clearly arbitrary when considered in light of other cases decided by the Eighth Circuit with similar corroborating circumstances. In *United States v. One Star*, 979 F.2d 1319, 1322–23 (8th Cir. 1992), the Eighth Circuit admitted as a statement against penal interest the grand jury testimony of declarant's brother which implicated both himself and the defendant for various crimes. In analyzing the issue of corroborating circumstances, that court found that the statements were admissible where they were made under oath by the Defendant's brother, were "clearly against" the witness's penal interest, "consistent with spontaneous statements he made to officers at the inception of the investigation" and "corroborated by physical evidence." 979 F.2d at1322. Here, as in *One-Star*, the statements spontaneously made by Mr. Gay to officers at the scene of the traffic stop when he learned that the contraband had been found was consistent with statements later made to the DEA when being questioned more extensively. And when he made the statement at the

scene of the traffic stop after the contraband had been found in the car he had inhabited with Mr. Gay, it was clearly against Mr. Gay's interest when Mr. Gay was the only other person who could possibly be responsible for that contraband. The Court of Appeal's decision in this case dismissed the comparison to *One-Star* in two sentences as follows: "In *One-Star*, the physical evidence corroborated the statements made by the defendant's brother. But here, Gay's statement is not corroborated by any physical evidence." Opinion at 8. But that was not true. In *One-Star*, the only specific physical evidence cited was the fact that, "The investigating officers found the knife in the location, and the condition, which would be consistent with [the brother's] testimony." 979 F.2d at 323, n. 7. In this case, the uncontested offer of proof established that an agent had gone to the scene of the crime where Mr. Gay had said the drugs were distributed and it matched the description of what Mr. Gay had described. TRIAL.TR. 124. This corroboration is indistinguishable from the corroboration offered in *One-Star*. Moreover, there were a number of other very significant ways in which they physical evidence corroborated the statements of Mr. Gay. Once the drugs were found, Gay was consistent in exculpating the Defendant, and he plead guilty under oath, establishing that he had knowledge of the crimes. Moreover, the circumstances in which the drugs were found corroborated his story that Alexander knew nothing about them. The officer himself had to use an x-ray machine to see the drugs and they were hidden inside the seat-backs, suggesting that it was more than plausible that the driver of the vehicle also could not see them and did not know they were there. TRIAL.TR:80-87, PSR, p.2. Moreover, Gay

was found on the scene with $7900 on his person, while, according to police, Alexander was found with nothing. TRIAL.TR:101. Additionally, Gay made his initial statement spontaneously to police when the contraband was found, without solicitation, then again when he made a full confession and cooperated with authorities, naming the names of others involved in the conspiracy but indicating that Alexander was not involved. The statements were also corroborated by the factual basis for Mr. Gay's guilty plea in which Mr. Gay admitted to having worked with others but refused to name Mr. Alexander as one of the other people involved in the conspiracy.

There is one major distinction between *One-Star* and Mr. Alexander's case: specifically, in this case, a Defendant sought to introduce the prior statement which exculpated him, whereas in *One-Star*, the Government sought to introduce the statement as an inculpatory one. Which party seeks to introduce the statement is not a factor in *Rasmussen* (790 F.2d 55) and the party whose case will be aided by the statement is not a factor that the plain language of Rule 804(b)(3) considered at the time of Mr. Alexander's trial.

The Eighth Circuit is not the only circuit that seems to struggle with applying the law differently depending on which party seeks to enter the statements. In fact, throughout the case-law, the most consistent predictor of whether or not a statement will be admitted is which party is seeking admission of a statement. *See e.g. United States v. Barone*, 114 F.3d 1284, 1296 (1st Cir. 1997) (inculpatory statements of codefendant to a third party implicating both himself

and Mr. Barone were admissible as against Mr. Barone); *Pelletier*, 666 F.3d at 8–9 (1st Cir. 2011)(inculpatory statements by coconspirator admissible despite potential motive to lie on the part of statement's declarant); *Miller*, 954 F.3d at 563–64 (2d Cir. 2020)(Codefendant's prior statement inculpating the Defendant admissible, despite the fact that codefendant had plead guilty to involvement in a murder, and that his plea agreement had not specified facts in the prior admitted statements); *United States v. Volpendesto*, 746 F.3d 273, 288 (7th Cir. 2014)(Inculpatory statements of a third party the prosecutor sought to introduce were admissible where consistent with other testimony and physical evidence in the case); ***But see*** *McClinton*, 432 F. App'x at 169 (3d Cir. 2011) (Statement of third party to Defendant's girlfriend that he and not the Defendant had committed the crime were **inadmissible**); *United States v. Caldwell*, 760 F.3d 267, 289–90 (3d Cir. 2014)(No corroborating circumstances where exculpatory statement as to Defendant was made to defense team, not prosecution); *United States v. Arthur,* No. 22-4268, 2023 WL 8295927, at *4 (4th Cir. Dec. 1, 2023)(unpublished) (Codefendant's prior statements exculpating the Defendant were **inadmissible** when there were other statements made that tended to inculpate him.); *United States v. Sanchez*, 633 F. App'x 271, 272 (5th Cir. 2016)(unpublished)(Statement by defendant that her husband had admitted responsibility for the drugs she was accused of possessing were inadmissible); *United States v. Jackson*, 454 F. App'x 435, 448 (6th Cir. 2011)(unpublished)(Statement exculpating defendant made by codefendant during a proffer session ***inadmissible*** as statement against interest); *Hale*, 685 F.3d at 540

(5th Cir. 2012)(statement by witness's father implicating witness as opposed to defendant **inadmissible**); *McKinney*, No. 18-3015, 2019 WL 2897504, at *2 (6th Cir. Apr. 16, 2019)(unpublished)(sworn statements by a third party taking responsibility for the crime **inadmissible** based on corroborating circumstances where the government had presented other statements contradicting those statements); *Hawkins*, 803 F.3d at 903 (7th Cir. 2015)(Statements during a proffer session of a codefendant exculpating the defendant were ***inadmissible***); *United States v. Henderson*, 736 F.3d 1128, 1131 (7th Cir. 2013)(Excluding under the rule a statement by a third party taking responsibility for the gun which Defendant was convicted of possession); *Caballero,* 745 F. App'x at 33 (9th Cir. 2018)(***No sufficient corroborating circumstances*** supporting introduction of exculpatory letter Defendant sought to introduce); *United States v. Tipton*, 572 F. App'x 743, 747 (11th Cir. 2014)(unpublished)(admitting portions of the prior statement that inculpated defendant on the basis of coconspirator hearsay rule, but ***excluding portions the defendant sought to admit*** based on a finding that the statement of the third-party declarant was "completely unbelievable at this point"); *Berry*, 496 F. App'x at 942 (11th Cir. 2012)(unpublished)(No corroborating circumstances and statement ***inadmissible*** which Defendant sought to introduce statement by codefendant exculpating him, based on a finding that there were other inconsistent statements of codefendant)); *United States v. Slatten*, 865 F.3d 767, 805 (D.C. Cir. 2017)(Codefendant's statements inadmissible as exculpatory of codefendant because self-defense claim could not be considered statement against interest).

As recently as 2015, the seventh circuit has explicitly endorsed treating exculpatory statements that a defendant seeks to admit differently than inculpatory statements that a prosecutor seeks to admit:

> Rule 804(b)(3) "expressly requires the exclusion of out-of-court statements offered to exculpate the accused unless there are corroborating circumstances that 'clearly indicate' the trustworthiness of the statement." . . . This is because the "corroboration requirement reflects 'a long-standing concern ... that a criminal defendant might get a pal to confess to the crime the defendant was accused of, the pal figuring that the probability of his actually being prosecuted either for the crime or for perjury was slight.' "

United States v. Ferrell, 816 F.3d 433, 441 (7th Cir. 2015)(further citations omitted. In truth, prior to 2010[2], the plain language of the rule only applied the corroborating circumstances requirement to exculpatory statements against interest that a Defendant sought to admit. See FRE 804(b)(3) (2010)("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."). However, this changed in 2011 when the rule was amended to reflect the same language that was effect at the time of Mr. Alexander's trial, and finding that, "supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability." 804(b)(3)(2011).

Notably, all of the above-cited cases occurred after the 2011 amendment to the rules, suggesting that the amendment's purpose of creating a "unitary approach" to statements against interest has been frustrated by the lack of clarity

[2] Mr. Ferrel's trial took place in 2013.

in the pre-2024 rule as to what a court may or should consider in considering "corroborating circumstances." This Court should grant certiorari, in order to clarify this issue, and assure that the most sacred right of a defendant to present a complete defense is not inhibited by an arbitrary application against criminal defendants of a rule, which, by its plain language and intent, is clearly meant to be equally applied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Kathryn B. Parish
Carlyle Parish LLC
Kathryn B. Parish*
3407 Jefferson, #128
St. Louis, MO 63118
*Counsel of Record
ATTORNEY FOR PETITIONER

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3407 Jefferson, #128
Saint Louis, MO 63118
*Counsel of Record
ATTORNEY FOR PETITIONER

United States Court of Appeals
For the Eighth Circuit

No. 23-2280

United States of America

Plaintiff - Appellee

v.

Bruce E. Alexander

Defendant - Appellant

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: April 10, 2024
Filed: August 23, 2024

Before SMITH, WOLLMAN, and SHEPHERD, Circuit Judges.

SMITH, Circuit Judge.

Bruce Alexander and Terrence Gay were charged in a two-count indictment. The first charge was conspiracy to distribute 400 grams or more of a mixture or substance containing fentanyl, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). The second charge was possession with intent to distribute 400 grams or more of a mixture or substance containing fentanyl, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). Gay pleaded guilty to both charges. Alexander pleaded

not guilty and proceeded to trial. A jury found Alexander guilty on both counts. Alexander appeals the district court's[1] decision to exclude an exculpatory statement from Gay, the court's handling of three government witnesses, and the court's comments made during the trial. Finding no reversible error, we affirm the district court.

I. *Background*

In June 2021, Alexander and Gay were traveling in a rental SUV from California to Ohio. In Missouri, State Highway Patrol Trooper Beau Ryun pulled over the SUV for following another vehicle too closely. When stopped, Alexander was driving the SUV while Gay occupied the front passenger seat. Trooper Ryun asked Alexander to sit in the patrol car and provide answers for a report. While seated next to Alexander, Trooper Ryun began asking questions about their trip, including their place of origin. Alexander said that he was returning to Ohio from Los Angeles, California. He also mentioned that he traveled to California to buy a motorcycle but that the seller's price was too high. Trooper Ryun asked for consent to search the SUV. Alexander directed the trooper to Gay. Trooper Ryun spoke with Gay, and while conversing with Trooper Ryun, Gay voluntarily handed the trooper a bundle of marijuana cigarettes. After receiving the cigarettes, Trooper Ryun ordered Gay out of the SUV. Trooper Ryun searched the SUV while the backup officer, Trooper Brooks McGinnis, watched Gay and Alexander.

During the search, Trooper Ryun found contraband. While searching the trunk area, he found upholstery tools and packages of edibles containing THC. Those discoveries led the trooper to conduct an X-ray scan of the SUV. The scan revealed brick-shaped packages. Trooper Ryun recovered the packages, which contained over 400 grams of fentanyl. Trooper McGinnis arrested Gay, and Trooper Ryun arrested Alexander. During his arrest, Gay told Trooper McGinnis that Alexander did not have anything to do with the drugs. Trooper McGinnis found about $8,000 in cash

[1]The Honorable David Gregory Kays, United States District Judge for the Western District of Missouri.

in Gay's pocket. Alexander had about $2,000 in cash on his person and said that he was unaware of the $8,000 in Gay's pocket.

Soon after their arrest, Alexander and Gay were transported to a weigh station where DEA officers interviewed them. DEA Officer Greg Primm interviewed Alexander, and DEA Officer Martin Dye interviewed Gay. Gay told Officer Dye that he made three prior trips to Los Angeles to pick up fentanyl and heroin for a drug trafficking organization. Gay also said that Alexander had made no prior trips with him and that Alexander did not know that Gay was transporting drugs. Alexander told Officer Primm that he went to California to buy a motorcycle. When Officer Primm further questioned Alexander about his time in Los Angeles, Alexander could not remember where he stayed, what shops he went to, or how he came to drive the SUV. Alexander also denied having any affiliation with the SUV.

After the indictment, Gay was released on bond and pleaded guilty without a plea agreement to both counts via video conference. Gay never surrendered to the U.S. Marshals and remains a fugitive from justice. Alexander pleaded not guilty and proceeded to trial.

Alexander intended to introduce Gay's exculpatory statements into evidence. But before trial, the government moved to exclude Gay's statements on hearsay grounds in a motion in limine. The district court granted the government's motion and excluded Gay's exculpatory statements from evidence under Federal Rule of Evidence 804(b)(3).

The district court held a three-day jury trial. During witness examination, the district court occasionally interjected. The government's case included testimony from Trooper Ryun, Trooper McGinnis, and Officer Primm who testified as expert and fact witnesses. Alexander testified during his defense. He said that Gay planned the entire trip and bought one-way plane tickets to Los Angeles for the two of them about a week before the trip. Alexander also testified that he was surprised when he discovered that they would have to drive back to Ohio. As for the motorcycle,

Alexander testified that he made no prior arrangements for its transport to Ohio before he flew to Los Angeles. Alexander reasoned that he would have secured transport for the motorcycle following the purchase. The selling price of the type of motorcycle he was looking at on Facebook and Craigslist was "about $1,500." R. Doc. 123, at 58. Officer Primm testified that when he looked at Alexander's driver's license at the weigh station, it lacked a motorcycle endorsement. He also commented that Silver Wing Scooters—the type of motorcycle Alexander sought to purchase—are popular models and widely available.

The jury returned guilty verdicts on both counts. At sentencing, the court calculated Alexander's Guidelines range as 188 to 235 months' imprisonment, and it sentenced him to 216 months. Alexander appeals the district court's evidentiary findings and trial-management decisions.

II. *Discussion*

A. *Gay's Exculpatory Statements*

Alexander first contends that the district court's ruling that excluded Gay's exculpatory statements from evidence violated Rule 804(b)(3) and his Fifth Amendment right to present a complete defense.

"Generally, preserved evidentiary challenges are reviewed under the [deferential] abuse of discretion standard. If the challenge implicates a constitutional right, our review is *de novo*." *United States v. Arias*, 74 F.4th 544, 550 (8th Cir. 2023) (citation omitted). Therefore, we review the district court's decision to exclude Gay's statement for an abuse of discretion, but we review that decision's effect on Alexander's constitutional right de novo. *See United States v. Wadena*, 152 F.3d 831, 854 (8th Cir. 1998). "We will reverse, however, only if the error is more than harmless. Thus, even when an evidentiary ruling is improper, we will reverse a conviction on this basis only when the ruling affected substantial rights or had more than a slight influence on the verdict." *United States v. White*, 557 F.3d 855, 857–58 (8th Cir. 2009) (cleaned up). Under Rule 804(b)(3),

> a statement is not excluded as hearsay if the declarant is unavailable as a witness and the statement was against the declarant's penal interest. To be admissible as a statement against penal interest, a three-prong test must be satisfied: (1) the declarant must be unavailable as a witness, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

United States v. Honken, 541 F.3d 1146, 1161 (8th Cir. 2008) (cleaned up). The parties agree that Gay was unavailable but disagree on the other two prongs.

As a preliminary matter, we reject Alexander's tardy argument that the corroboration prong of Rule 804(b)(3) is "required primarily to establish whether the statement was actually made, not whether there is some possibility . . . that it might not be true." Appellant's Reply Br. at 11. "As a general rule, we will not consider arguments raised for the first time in a reply brief." *Barham v. Reliance Standard Life Ins. Co.*, 441 F.3d 581, 584 (8th Cir. 2006). The two primary cases Alexander relies on, *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976), and *United States v. Goodlow*, 500 F.2d 954 (8th Cir. 1974), are not referenced in his opening brief. But even if we view this argument as a supplementation of one in his opening brief, we reject it. *See Barham*, 441 F.3d at 584 ("We are not precluded from [addressing] . . . the argument raised in the reply brief [when it] supplements an argument raised in a party's initial brief.").

Bagley is unpersuasive. In *Bagley*, the Fifth Circuit said that trustworthiness has two elements: "the statement must actually have been made by the declarant, and it must afford a basis for believing the truth of the matter asserted." 537 F.2d at 167. Even if we adopt those two requirements here, it does not support Alexander's interpretation of Rule 804(b)(3)'s corroboration prong. Neither party contests whether Gay's statement was made. Rather, the focus is on its truthfulness. Thus, even under *Bagley*, we would need to be sure that "the proffered statement here . . .

affords a basis for belief in its truthfulness [because] it was, in fact, made." *Id.*; *see also Honken*, 541 F.3d at 1161 (third prong).

Alexander's reliance on our decision in *Goodlow* is also unhelpful. He points to *Goodlow* and argues that there "this Court correctly applied the [*Bagley* test by] looking to the corroborating circumstances to determine not whether a statement against interest was true, but rather whether it was made." Appellant's Reply Br. at 10 (internal quotation marks omitted). But *Goodlow* was decided before Rule 804(b)(3) was enacted. *Goodlow*, 500 F.2d at 957 ("[Rule 804(b)(3) was] not controlling at the time of the defendants' trial nor [is it] yet in effect."); *see also* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. *Goodlow*'s discussion of the not-yet-effective Rule 804(b)(3)'s corroborating circumstances prong misses its mark. We have not cited *Goodlow* as having a clarifying effect on the corroborating circumstances prong in Rule 804(b)(3), and we decline to read that into the opinion now.[2]

Moreover, *Goodlow* concerned whether the district court correctly excluded a declarant's statement under "the common law" "exception[] to the [hearsay] rule . . . of declarations of third parties, made contrary to their own interest." *Donnelly v. United States*, 228 U.S. 243, 273 (1913); *Goodlow*, 500 F.2d at 957 (citing *Donnelly*). In answering whether the district court correctly applied the common-law hearsay exception, we used proposed Rule 804(b)(3) as a *tool* for understanding the common-law rule because "the proposed rule which recognizes the admissibility of declarations against penal interest simply reflects the overwhelming weight of authority on that question." *Goodlow*, 500 F.2d at 957. Put simply, *Goodlow*

[2]We have only cited *Goodlow* twice, and neither of those times did we cite it for its interpretation of Rule 804. *United States v. Hadley*, 671 F.2d 1112, 1115 (8th Cir. 1982) (citing *Goodlow* to show that "show-ups are inherently suggestive and ordinarily cannot be condoned when a line-up procedure is readily available"); *United States v. Riley*, 657 F.2d 1377, 1381 n.5 (8th Cir. 1981) (citing *Goodlow* because its text contained the "proposed rules").

concerned the district court's application of the common-law hearsay exception, not Rule 804.

For this case, we rely on the text of Rule 804. Rule 804(b)(3) states that the statement in question must be "supported by corroborating circumstances that clearly indicate its *trustworthiness*." Fed. R. Evid. 804(b)(3)(B) (emphasis added). Assuming without deciding that Gay's exculpatory statement opened him to criminal liability, *see Honken*, 541 F.3d at 1161 (second prong), it nonetheless lacks sufficient corroborating circumstances to indicate its trustworthiness.

In *United States v. Rasmussen*, we laid out the five factors we use to determine "[t]he trustworthiness of a statement against the declarant's penal interest." 790 F.2d 55, 56 (8th Cir. 1986). Those factors are:

> (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, [and] (5) the timing of the declaration and the relationship between the speaker and the witness.

Id.

Here, the district court analyzed the corroborating circumstances under the *Rasmussen* factors. The district court explained:

> Defendant and Gay are relatives, and thus Gay had motive to misrepresent that Defendant was unaware of the fentanyl and not involved in the drug trafficking organization. Further, Gay's decision to flee from justice after he pled guilty does not speak well of his character. Finally, Gay's statements exculpating Defendant do not appear to have been made spontaneously. Gay changed his story three times, stating first that he and Defendant had been on vacation, then stating that Defendant was not involved, and finally attempting to persuade Defendant to cooperate with law enforcement.

R. Doc. 71, at 4.

The district court did not abuse its discretion. Gay's close relationship with Alexander supports the district court's decision that Gay's statement lacks sufficient trustworthiness. Despite Gay and Alexander not being related, they were close friends who called each other cousin. Their close friendship reduces the trustworthiness of Gay's statement. *See United States v. Bobo*, 994 F.2d 524, 528 (8th Cir. 1993) ("[C]lose relationships, such as the sibling relationship, have long been recognized to diminish the trustworthiness of hearsay statements against the declarant's penal interest."). But in addition to their close friendship, Gay's failure to surrender himself to the U.S. Marshals—and status as a fugitive from justice—reflects poorly on his character and further reduces the trustworthiness of his statement. Combining Gay and Alexander's close friendship with Gay's subsequent absconder from the U.S. Marshals diminishes the trustworthiness of Gay's statement about Alexander's involvement to such a degree that the district court did not err excluding it from trial.

Alexander argues that two cases support his argument: *United States v. One Star*, 979 F.2d 1319 (8th Cir. 1992), and *United States v. Garcia*, 986 F.2d 1135 (7th Cir. 1993). In *One Star*, the defendant's brother made inculpatory statements that were against the brother's penal interest, the statements were consistent with other statements made spontaneously to officers, and the information in the inculpatory statements was corroborated by the physical evidence. 979 F.2d at 1322–23. In *Garcia*, the declarant and the defendant were not friends, the declarant made the exculpatory statement voluntarily, the statement was not made to curry favor with police, and the declarant repeated the exculpatory statements several times. 986 F.2d at 1140.

This case differs from *One Star* and *Garcia*. In *One Star*, the physical evidence corroborated the statements made by the defendant's brother. But here, Gay's statement is not corroborated by any physical evidence. In *Garcia*, the

declarant and defendant were not friends. But here, Alexander and Gay were close friends and called each other cousin.

B. *Alexander's Fifth Amendment Right*

Alexander also argues that not admitting Gay's exculpatory statement violated his Fifth Amendment right to present a complete defense. We have said:

> The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. The Constitution does not, however, guarantee that criminal defendants may call every witness they choose. An accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.

Khaalid v. Bowersox, 259 F.3d 975, 978 (8th Cir. 2001) (cleaned up). Alexander does not argue that Rule 804(b)(3) is "arbitrary or disproportionate to the purposes [it is] designed to serve." *Id.* (internal quotation marks omitted). Thus, Alexander's Fifth Amendment right to present a complete defense was not violated when the district court excluded Gay's statement from evidence.[3]

[3]Alexander also mentions, in a footnote, that Rule 807 would allow Gay's statements into evidence. We will not address this argument because "[a]llegations of error not accompanied by convincing argument and citation to authority need not be addressed on appeal." *Heuton v. Ford Motor Co.*, 930 F.3d 1015, 1023 (8th Cir. 2019) (internal quotation marks omitted); *see also Ritchie Cap. Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.4 (8th Cir. 2011) ("We likewise refuse to address the merits of [the parties'] . . . argument mentioned in their brief only by way of a footnote.").

C. *Witness Testimony*

Next, Alexander argues that the district court erred in its handling of three government witnesses. First, he contends that Trooper Ryun exceeded his expertise by testifying that staring and abdominal movements may indicate that criminal activity is afoot. Second, Alexander argues that both Officer Primm and Trooper Ryun crossed a line when they testified that they found Alexander to be deceptive and evasive when they spoke with him. And finally, Alexander argues that the district court did not mitigate the risks of having Trooper Ryun, Trooper McGinnis, and Officer Primm testify as dual witnesses.

Because Alexander did not raise these arguments in the district court, we review for plain error. "For plain error, [Alexander] must show there was an error, the error is clear or obvious under current law, the error affected [his] substantial rights, and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Abarca*, 61 F.4th 578, 580 (8th Cir. 2023) (internal quotation marks omitted). "To establish [that] the error affected [his] substantial rights, [Alexander] must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Patterson*, 68 F.4th 402, 421 (8th Cir. 2023) (internal quotation marks omitted).

1. *Trooper Ryun*

Alexander argues that Trooper Ryun went outside of his area of expertise when he opined that actions like staring or a person's abdominal movements may indicate criminal activity. We have said that "Federal Rule of Evidence 702 permits a district court to allow the testimony of a witness whose knowledge, skill, training, experience or education will assist a trier of fact in understanding an area involving specialized subject matter." *United States v. Spotted Elk*, 548 F.3d 641, 663 (8th Cir. 2008) (quoting *United States v. Solorio–Tafolla*, 324 F.3d 964, 966 (8th Cir. 2003)).

The district court did not plainly err by allowing Trooper Ryun to answer the government's question about what actions indicated criminal activity. Part of the government's notice of expert witnesses said that Trooper "Ryun can offer expert

testimony related to . . . behaviors commonly encountered during traffic stops where criminal activity is present." R. Doc. 65, at 3. During trial, the government asked Trooper Ryun: "What about the defendant's appearance or expression or behavior caused you to describe him as fearful?" R. Doc. 121, at 68. Trooper Ryun responded: "The expression that he was displaying on his face was a very blank stare. . . . [J]ust like a panicked, fearful expression of a very blank stare as we're engaging with each other." *Id.* Later in the direct examination, the government asked: "During your conversation with the defendant and your interaction with him, did you observe anything noteworthy or significant about his demeanor?" *Id.* at 72. Trooper Ryun responded: "I just noted he still had a blank stare and his abdomen was quivering as we spoke." *Id.* When asked to explain what he meant by saying Alexander's abdomen was quivering, Trooper Ryun said: "As I'm sitting in my driver's seat and I'm speaking with people, I oftentimes look at the abdomen around the belly-button area; and oftentimes when people are under an extreme amount of stress, that area of the stomach will move in and out, in like a quivering motion." *Id.* This testimony reasonably fell within his experience with "behaviors commonly encountered during traffic stops where criminal activity is present." R. Doc. 65, at 3; *see United States v. Nungaray*, No. 96-50424, 1998 WL 339668, at *1 (9th Cir. Apr. 24, 1998) ("It is permissible for an expert, however, to testify that a defendant's innocent-appearing behavior is consistent with or indicates illegal activity." (citing *United States v. Alonso*, 48 F.3d 1536, 1541 (9th Cir. 1995))).

2. *Trooper Ryun and Officer Primm*

Second, Alexander argues that the district court erred when it allowed Officer Primm and Trooper Ryun to testify that they found Alexander deceptive and evasive when they spoke with him. "To establish [that] the error affected [his] substantial rights, [Alexander] must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Patterson*, 68 F.4th at 421 (internal quotation marks omitted).

Assuming without deciding that Trooper Ryun's and Officer Primm's testimony about finding Alexander to be untrustworthy was erroneous, such error

did not affect Alexander's substantial rights. If Trooper Ryun's and Officer Primm's statements were omitted, the remaining evidence would support the proceeding's outcome. This evidence showed that Alexander was driving the SUV, Alexander and Gay were close friends, Gay admitted to trafficking drugs, Alexander and Gay carried thousands of dollars in cash, Alexander said that he never noticed that Gay had almost $8,000 in his pocket, and Alexander gave police an unusual story about going to California to buy a $1,500 motorcycle. Given these facts, the removal of Trooper Ryun's and Officer Primm's testimony would not have changed the outcome of the proceeding.

Alexander argues that his case is like *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986), and *United States v. Hill*, 749 F.3d 1250 (10th Cir. 2014). In *Azure*, a pediatrician testified that a child's story was believable. 801 F.2d at 339. We held that the pediatrician's testimony improperly "bolstered" the child's credibility. *Id.* at 341. We also held that the pediatrician's testimony was not a harmless error because the child "was a key government witness in this case, and her credibility was a very important issue." *Id.* In *Hill*, an FBI special agent testified in a bank robbery case. 749 F.3d at 1255. The agent's testimony included statements regarding the credibility of the defendant. *Id.* 1255–56. The Tenth Circuit held that the agent's testimony was not admissible under Rule 702 and that the error affected the defendant's substantial rights because there was "a reasonable probability that but for [the improper testimony], the result of [the defendant's] trial would have been different." *Id.* at 1265.

This case is unlike *Azure*. Here, the testimony by Officer Primm and Trooper Ryun did not have a "substantial influence" on the proceeding. *See Azure*, 801 F.2d at 341. Officer Primm's comment, for example, came in response to the government's question that asked: "[B]ased on your training and experience, when [Alexander] had made statements to you like 'I'm not affiliated to that vehicle,' what did that make you believe?" R. Doc. 122, at 203. Officer Primm responded: "I believed he was attempting to conceal the information that he had and he was omitting the truth." *Id.* Before Officer Primm made that statement, he testified that

he has been an officer with the Missouri State Highway Patrol for "[t]wenty-one years" and received training in criminal interdiction. *Id.* at 170. He explained what criminal interdiction is to the jury:

> Criminal interdiction is the enforcement efforts that we take . . . during the course of our traffic enforcement duties as a Missouri state trooper. We attempt to identify people who may be using the highways to further their criminal activity. And it really varies from human trafficking to drug trafficking and all things in between.

Id. at 172. He further explained that his role as a task force officer with the DEA provided him the opportunity to work on "large-scale drug trafficking organization investigations, as well as conducting controlled deliveries of contraband, as well as performing undercover work." *Id.* at 173. Officer Primm's testimony about Alexander "was not elaborate and there was no evidence of any training or education giving [Officer Primm] some *great advantage* over the jurors in divining truth." *United States v. Roy*, 843 F.2d 305, 309 (8th Cir. 1988) (emphasis added). Officer Primm's testimony "was not likely to sweep the jurors off their feet" and thus did not have a substantial influence on the proceeding. *Id.*

This case is also unlike *Hill*. As discussed, there is not "a reasonable probability that . . . the result of [Alexander]'s trial would have been different" if Officer Primm's comment is omitted from the trial record. *Hill*, 749 F.3d at 1265. A jury trial is an engine for determining facts; we are satisfied that the jury decided whom to believe.

3. *Dual-Witness Testimony*

Alexander also argues that the district court did not mitigate the effects of having Trooper Ryun, Trooper McGinnis, and Officer Primm give dual-witness testimony.

> Investigating officers are sometimes in a position to provide [two] forms of permissible opinion testimony. As lay witnesses, they may

> offer testimony that is rationally based on their perceptions during the investigation. And as expert witnesses, they may offer opinion testimony that is based on specialized knowledge gained from training and experience. We have not categorically prohibited dual-role testimony by case agents when the prosecution needs to make use of the expertise of a case agent providing lay testimony. . . .
>
> [But] district courts and counsel should take appropriate measures to minimize the problems that may arise from dual-role testimony by a case agent. One measure that is often appropriate is bifurcating the questioning, but other measures may also be appropriate so long as the questioning and jury instructions sufficiently guard against the risks associated with dual-role testimony.

United States v. Overton, 971 F.3d 756, 762–63 (8th Cir. 2020) (cleaned up).[4]

Having reviewed the record, we conclude that the district court did not plainly err permitting dual-witness testimony. Here, when Trooper Ryun, Trooper McGinnis, and Officer Primm gave expert testimony it was often preceded by

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[4]We identified the risks associated with dual-witness testimony in *United States v. Moralez*, 808 F.3d 362 (8th Cir. 2015). Those risks are that

> (1) the witness's aura of credibility as an expert may inflate the credibility of her perception as a fact witness in the eyes of the jury; (2) opposing counsel is limited in cross-examining the witness due to the risk that an unsuccessful attempt to impeach her expertise will collaterally bolster the credibility of her fact testimony; (3) the witness may stray between roles, moving from the application of reliable methodologies into sweeping conclusions, thus violating the strictures of *Daubert* and Federal Rule of Evidence 702; (4) jurors may find it difficult to segregate these roles when weighing testimony and assessing the witness's credibility; and (5) because experts may rely on and disclose hearsay for the purpose of explaining the basis of an expert opinion, there is a risk the witness may relay hearsay when switching to fact testimony.

Id. at 365 (footnote omitted).

phrases indicating that their opinion was based on their training and experience. *See, e.g.*, R. Doc. 121, at 64 ("[Trooper Ryun:] *Through my training and experience*, when a passenger is overly concerned about getting stopped by law enforcement, it's been a good indicator that there may be other things going on inside the vehicle than a simple traffic violation . . . ." (emphasis added)); R. Doc. 122, at 77 ("[Trooper Ryun:] *It's my opinion* that if you were going to purchase a motorcycle to drive it back, you would come with the items that you already possessed to make that trip, such as a motorcycle helmet or leather for riding in cold or inclement conditions." (emphasis added)); *id.* at 203 ("[Question to Officer Primm:] Q. Now, *based on your training and experience*, when the defendant had made statements to you like 'I'm not affiliated to that vehicle,' what did that make you believe? [Officer Primm:] A. I believed he was attempting to conceal the information that he had and he was omitting the truth." (emphasis added) (spacing altered)); *id.* at 160 ("[Question to Trooper McGinnis:] Q. And *based on your training and experience*, could you explain to the jury where you've seen these markings before? [Trooper McGinnis:] A. That is branding that cartels will often put on packaging to signify either who it was coming from or where it's going when it's being shipped out." (emphasis added) (spacing altered)). Moreover, the court's jury instructions told jurors that "[i]n deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it." R. Doc. 88, at 19. The prefatory phrases indicating whether the testimony was based on the witness's training and experience and the court's jury instructions "sufficiently guard[ed] against the risks associated with dual-role testimony." *Overton*, 971 F.3d 756, 763 (8th Cir. 2020) (internal quotation marks omitted). Thus, the district court did not plainly err allowing the law enforcement officers to give dual-witness testimony.

D. *The Court's Comments*

Alexander's last argument is that the district court made improper comments during the trial. "This [c]ourt reviews the district court's trial management for an abuse of discretion." *United States v. Williams*, 720 F.3d 674, 692 (8th Cir. 2013). "Trial judges have wide latitude in conducting their trials . . . ." *Harrington v. Iowa*,

109 F.3d 1275, 1280 (8th Cir. 1997). "Reversal is warranted where 'the court's comments throughout a trial are one-sided and interfere with a defendant's case to such an extent that the defendant is deprived of the right to a fair trial.'" *Williams*, 720 F.3d at 694 (quoting *United States v. Warfield*, 97 F.3d 1014, 1027 (8th Cir. 1996)).

The court did interject at multiple points in the trial, but those interjections were aimed at improving the trial's pace, clarifying witnesses' answers, and stopping redundant questions. *See, e.g.*, R. Doc. 122, at 54–55 ("[District Court:] I think he just said it was the totality of the circumstances. [Alexander's counsel:] That he thought it was implausible. [District Court:] Yeah. [Alexander's counsel:] The question I'm asking is whether or not he determined that it was false. [Witness answers clarified question]." (spacing altered)); R. Doc. 123, at 31 ("[District Court to Alexander:] Was that your testimony? That he was going to use tools to dismantle an ATV? [Alexander answers question]"); *id.* at 44 ("[District Court to Alexander:] Hold on. Listen closely to the questions. If you answer those questions, your attorney will give you a chance to redirect or ask you follow-up questions. . . . Counsel, I'm sorry, you were standing. Is there something else you'd like to say?"). The district court did not abuse its "broad discretion to conduct the trial in an orderly and efficient manner." *United States v. Webber*, 255 F.3d 523, 526 (8th Cir. 2001).

Further, the court's comments were not "one-sided" because some of the comments helped Alexander. *Williams*, 720 F.3d at 694. First, the court allowed Alexander to elaborate his answer to a question posed by the government during cross-examination. R. Doc. 123, at 80 ("[District Court:] Hold on, hold on, hold on. Stop. [Alexander] does get to answer—as your co-counsel has pointed out in my rules of trial, he does get an answer beyond 'yes.'"). Second, the court cut short the government's question about Alexander's knowledge of the plane tickets to California and who bought them. Alexander had already answered the question and the court jumped in saying "[h]old on, hold on. Stop, stop. [Alexander] is speculating . . . . Is that fair? [Gay] could have used miles; is that what you're saying? . . .

[Alexander:] Correct . . . . [Gay] purchased the tickets. [District Court:] Let's move on. We're kind of getting in a rabbit hole here." *Id.* at 34.

At one point during the trial, the court spoke extensively with Alexander's counsel about why it kept interjecting. In the discussion, Alexander's counsel expressed concern that "to the extent that you ask [Trooper Ryun], 'Is this what you said,' what the jury is doing is they're hearing you talking to him during my cross-examination and I'm concerned that it's giving them the impression that you aren't buying what I'm selling." R. Doc. 122, at 61. The court responded, "Use appropriate questions. If they're eliciting information from this witness, you're not going to hear from me; if they misstate or tend to confuse anybody, you're going to hear from me. That's our deal. That's the best I can do. I hope I don't have to interrupt you again." *Id.* at 62. Some of the district court's interruptions cut in Alexander's favor, and others cut against him. We find no error in the district court's interjections that were aimed at improving the trial's pace, clarifying the witnesses' answers, and stopping redundant questions.

Contrary to Alexander's arguments, this case is unlike *United States v. Singer*, 710 F.2d 431 (8th Cir. 1983) (en banc), or *United States v. Bland*, 697 F.2d 262 (8th Cir. 1983). In *Singer*, the district court's comments were mostly helpful to the government. *Singer*, 710 F.2d at 436. As discussed, here the district court's comments equally cut both ways. And in *Bland*, the court engaged in lengthy questioning of the defendant. *Bland*, 697 F.2d at 264–65. But here, the district court did not engage in lengthy questioning of Alexander. When the district court asked questions, it did so "to clarify ambiguities" and not to "assume the mantle of an advocate and take over [examination of a witness] for the government." *Id.* at 265. Here, the district court did not "assume a prosecutorial role in the trial, a role which destroyed fair process for the accused." *Id.* at 266.

Finally, the district court and Alexander's counsel had another prolonged discussion during which the court threatened to bar Alexander's lead attorney from giving the closing argument. This would have required Alexander's other attorney

to give it instead. Before this discussion, Alexander's lead counsel tried to ask a witness a question about Gay's exculpatory statement. The district court had already decided that Gay's statement could not be discussed during the trial in a ruling on a motion in limine and in an earlier sidebar. During the discussion the court said:

> That's the exact question that we dealt with at a sidebar, and I thought you said you were done with that question . . . then you came back and asked the same exact question. I'm concerned about that . . . . There's been times when lawyers, I don't feel like they're following my direction . . . . If you don't follow the rules and you don't live to what you agreed to, [your co-counsel may be giving the closing argument].

R. Doc. 122, at 96–97. The district court did not err explaining the potential consequences of counsel's disregard for the court's rulings.

III. *Conclusion*

The district court did not err in its evidentiary rulings nor in its trial management. Accordingly, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Case No.: 4:20-cr-00181-HFS-02
v.	)	
	)	
BRUCE E. ALEXANDER,	)	
	)	
Defendant.	)	

ORDER RULING ON MOTION *IN LIMINE*

Defendant Bruce E. Alexander was charged—along with his co-defendant—in a two-count indictment with conspiracy to distribute 400 grams or more of a mixture or substance containing a detectable amount of fentanyl in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) and with possession with intent to distribute 400 grams or more of a mixture or substance containing a detectable amount of fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Indictment, ECF No. 1. Co-Defendant Terrence D. Gay ("Gay") previously pled guilty to both counts. Now before the Court is the Government's motion in limine to exclude statements Gay made to law enforcement and in his guilty plea, Mot., ECF No. 49. The motion is GRANTED.

On or about June 30, 2021, Defendant and Gay were both traveling in a rental car from California to Ohio via I-70. Missouri State Highway Patrol Trooper B.M. Ryun pulled over Defendant and Gay in Missouri. Trooper Ryun performed a search of the vehicle and recovered over 400 grams of fentanyl concealed in the vehicle. Trooper Ryun arrested both Defendant and Gay and transported them to a weigh station, where DEA Task Force Officer Martin Dye ("TFO Dye") mirandized them. Gay then agreed to speak with TFO Dye. Gay told Dye that he had made three prior trips to Los Angeles to pick up fentanyl and heroin for a drug trafficking organization.

Gay also stated that Defendant had never made the trip with him before and that Defendant did not know that Gay was transporting drugs. Resp. at 1–2, ECF No. 51; Reply at 2–3, ECF No. 68.

Gay was released on bond, and ultimately pled guilty—via video conference—to both counts without an agreement. Ex. 1, ECF No. 68-1. However, Gay did not surrender himself to the United States Marshal's Service and remains a fugitive from justice.

Defendant seeks to introduce Gay's statements to law enforcement and Gay's admission of the factual basis of his guilty plea for the purpose of a general denial. The Government seeks to exclude the statements made to Dye on hearsay grounds, and to exclude Gay's guilty plea under Rule 403.

Regarding Gay's statements during his guilty plea, the statements' probative nature is substantially outweighed by the guilty plea's tendency to mislead the jury or confuse the issues. *See* Fed. R. Evid. 403. In reciting the factual basis for his guilty plea, Gay merely affirmed the leading questions asked of him by his counsel. These were questions designed to establish a factual basis for each element of the crimes to which Gay pled guilty, not to give a detailed account of the crimes and of each participant thereof. *See* Gov. Ex. 1, ECF No. 68-1. The fact that Gay did not mention Defendant in the plea colloquy is of little probative value to whether Defendant participated in the conspiracy or possessed the fentanyl with intent to distribute. Further, introduction of Gay's plea to the same charges as Defendant has the potential to both mislead the jury that Defendant's guilt has already been determined or that certain elements of the crimes have already been established. *See also United States v. Morris*, 327 F.3d 760, 762 (8th Cir. 2003) (noting that exclusion of a plea agreement under Rule 403 is a matter of discretion for the trial court). The Government's motion is GRANTED in regard to Gay's guilty plea. The fact of Gay's guilty plea, as well as Gay's statements made during the course of his plea are not admissible.

Regarding Gay's statement to law enforcement that Defendant did not know what was in the vehicle and that Defendant did not know that Gay was transporting drugs, this statement may not be asserted for its truth. *See* Fed. R. Evid. 802. "For a statement to qualify under the Rule 804(b)(3) hearsay exception, [1] the declarant must be unavailable, [2] the statement must so far tend to subject the declarant to criminal liability that a reasonable person would not have made the statement unless he or she believed it to be true, and [3] corroborating circumstances must clearly indicate the trustworthiness of the statement." *United States v. Halk*, 634 F.3d 482, 489 (8th Cir. 2011). While the first requirement is met: Gay is a fugitive from justice and therefore is unavailable to testify at trial, *United States v. Chapman*, 345 F.3d 630, 632 (8th Cir. 2003), the statement regarding Defendant's culpability does not tend to subject Gay to criminal liability and lacks corroborating circumstances. It therefore does not meet the requirements for admission under Rule 804(b)(3).

The entirety of an unavailable declarant's narrative is not admissible under 804(b)(3) merely because "some portion of the narrative subjects the declarant to criminal liability." *United States v. Hazelett*, 32 F.3d 1313, 1317 (8th Cir. 1994) (citing *Williamson v. United States*, 512 U.S. 594 (1994)). Only the portions "which are not in and of themselves against the declarant's penal interest" are admissible under 804(b)(3). *Id.* While Gay's statements admitting to his role as a drug distributor and giving details of the drug trafficking organization are against his interest, his statements exculpating Defendant were not against Gay's own penal interest.

In addition, corroborating circumstances do not indicate the trustworthiness of Gay's statement. In determining the trustworthiness of a statement under Rule 804(b)(3), the Court considers

> (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether

> other people heard the out-of-court statement, (4) whether the statement was made spontaneously, (5) the timing of the declaration and the relationship between the speaker and the witness.

United States v. Rasmussen, 790 F.2d 55, 56 (8th Cir. 1986). Defendant and Gay are relatives, and thus Gay had motive to misrepresent that Defendant was unaware of the fentanyl and not involved in the drug trafficking organization. Further, Gay's decision to flee from justice after he pled guilty does not speak well of his character. Finally, Gay's statements exculpating Defendant do not appear to have been made spontaneously. Gay changed his story three times, stating first that he and Defendant had been on vacation, then stating that Defendant was not involved, and finally attempting to persuade Defendant to cooperate with law enforcement.

The Government's motion is GRANTED.

IT IS SO ORDERED.

Date: May 4, 2022

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2280

United States of America

Appellee

v.

Bruce E. Alexander

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cr-00181-DGK-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

This section has been updated. Click here for the updated version.

Federal Rules of Evidence Rule 804, 28 U.S.C.A.

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

Effective: [See Text Amendments] to November 30, 2024

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1942; Pub.L. 94-149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806; Mar. 2, 1987, eff. Oct. 1, 1987; Pub.L. 100-690, Title VII, § 7075(b), Nov. 18, 1988, 102 Stat. 4405; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

Federal Rules of Evidence Rule 804, 28 U.S.C.A.

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

Effective: December 1, 2024
Currentness

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1972 Proposed Rules

