

No. 09-7739

IN THE
Supreme Court of the United States

CORDELL LESTER SMITH,
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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of law professors who specialize in the research and teaching of evidence law. The qualifications of *Amici* are summarized in Appendix A.¹ *Amici* have no direct interest in the outcome of this case. However, *Amici* are concerned that the decision of the Fourth Circuit Court of Appeals is contrary to the explicit text of Federal Rule of Evidence 1002,² the so-called best evidence rule, and to the important policies that underlie that rule.

The sharp contrast between the Fourth Circuit's decision below and the text and policy of Rule 1002 creates a harmful split of authority among the circuits. Rule 1002 precludes lay witnesses from testifying as to the contents of a document that has not been introduced into evidence, even if the contents are facts that exist independently of the document, where the witness has no independent personal knowledge of those facts. *Amici* urge the Court to grant the petition so that it can resolve the split among the circuits as to the proper application of Rule 1002.

Amici have a long-standing interest in the proper interpretation and application of the Federal Rules of

¹ Pursuant to Rule 37.2, the parties were timely notified of the intent to file this brief. Copies of the consent letters have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* hereby affirm that this brief was not authored in whole or in part by counsel for any party. Moreover, no one other than *Amici* and their counsel made a monetary contribution to preparing or submitting this brief.

² FED. R. EVID. 1002 [hereinafter Rule 1002].

Evidence. This interest, which is evidenced by previously published scholarship in this area, predates the instant action. *Amici* include both the editor and the author of the pertinent section of the evidence law treatise cited by the Fourth Circuit in support of its conclusion that Rule 1002 did not require submission of documents whose contents the Government sought to prove. They believe that their treatise does not support the Fourth Circuit's decision and is in fact contrary to it. *Amici* also include several of the authors and/or editors of other evidence law treatises cited in this brief. *Amici* have a strong interest in promoting the correct understanding and application of their scholarship.

SUMMARY OF ARGUMENT

The Government relied exclusively on an ATF Special Agent's recollection of what he read in documents – that firearms bearing certain serial numbers were manufactured in Arizona, Connecticut, and Montana – to prove the firearms involved in this prosecution were indeed manufactured in those states and therefore must have travelled in interstate commerce because they were found in North Carolina – transportation in interstate commerce being an element of the unlawful possession conviction challenged below. The Fourth Circuit determined that the district court did not err in overruling Petitioner's Rule 1002 objection to the testimony regarding where the firearms were manufactured. The Fourth Circuit reasoned that Rule 1002 was not implicated because the operative facts (the places of manufacture) exist independently of the documents (published materials on the origins of firearms, a ref-

erence book, and an ATF computerized database). As a result, the Fourth Circuit found that the Government “never sought to prove the content of any writing or recording relating to the firearms or their places of manufacture”³ but rather only where the firearms were manufactured. The Fourth Circuit was mistaken.

Rule 1002 requires that the original (or, where appropriate, duplicate) documents be introduced into evidence to prove the contents of the documents. In this case, a correct application of the rule compelled exclusion of the evidence presented by the Government. The agent’s testimony about what he read cannot replace production of the actual documents because the agent had no independent personal knowledge of the facts he read in the documents.⁴

Rule 1002 furthers two interests that are at the heart of our adversarial system. First, the rule affords “substantial guarantees against inaccuracies”⁵ because rather than relying on a witness’s recollection of the contents of the document, the parties, and ultimately the trier of fact, will see the actual document. Second, Rule 1002, in conjunction with Rule 602, ensures that lay witnesses testify based on personal knowledge, not information derived from

³ *United States v. Smith*, 566 F.3d 410, 414 (4th Cir. 2009).

⁴ 4 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 1002:1 (6th ed. 2008) (noting that while the best evidence rule does not apply where a party attempts to prove a fact which has an existence independent of any writing, the rule applies when the happening is sought to be proved by the writing).

⁵ FED. R. EVID. 1001, advisory committee’s note.

documents that are not introduced into evidence. The Fourth Circuit’s decision ignores both of these interests.

ARGUMENT

I. Rule 1002 Safeguards Against Inaccurate Testimony

Rule 1002 is clear: “[t]o prove the content of a writing . . . the original writing . . . is required” Since as early as the mid-18th Century, commentators have recognized that guarding against inaccuracies is one of the main reasons for the common law best evidence rule and its modern iteration – Rule 1002. Wigmore expressly identified the preference for written documents over oral testimony because “[a]s between oral testimony, based on recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection”⁶ Modern commentators, including *Amici*, also recognize that when a document can speak for itself, it should, because this eliminates the risk that a witness’s recollection of what a document says will be inaccurate.⁷

⁶ 4 JOHN H. WIGMORE, EVIDENCE § 1179 (Chadbourn rev. 1972).

⁷ 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 232 (6th ed. 2006) (“The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for original documents.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 10.1 (3d ed. 2003) (“The burden on litigants of requiring them to introduce the writing if available is outweighed by the increased accuracy of the factfinding process.”).

This Court long ago recognized that “[t]he elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description [of it].” *Gordon v. United States*, 344 U.S. 414, 421 (1953).⁸ In short, Rule 1002 “is a mechanism to prevent . . . mistransmission of information, *i.e.*, to ensure accuracy.” *United States v. Holton*, 116 F.3d 1536, 1545 (D.C. Cir. 1997).

Witness testimony based on recollection rather than original documents increases the risk of inaccuracy in at least two ways. First, through no fault other than normal human fallibility, a witness may not recall precisely the contents of a document. The risk of imparting inaccurate information can be greatly reduced (if not eliminated entirely) by introducing the actual document.

Second, the information contained in the document may not be accurate. Where, as here, prosecutors are relying on the truth of facts that are set forth in documents to prove an element of a crime, the reliability-related concerns of the hearsay rule are implicated. For example, how was the document created? What steps, if any, did the author(s) take to ensure the accuracy of the information contained in

⁸ See also *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. 1987) (“[W]e observe that the importance of the precise terms of writings in the world of legal relations, *the fallibility of the human memory as reliable evidence of the terms*, and the hazards of inaccurate or incomplete duplication are the concerns addressed by the best evidence rule.”) (emphasis supplied).

the document? Relying on a witness's recollection of what a document may have said, instead of proffering the actual document, allows prosecutors to insulate their proof from legitimate hearsay and confrontation concerns.

II. Rule 1002 Applies Even if Facts Exist Independently of the Writing

Deeds, judgments, wills, contracts, and leases are the quintessential examples of the types of documents that fall within the ambit of Rule 1002.⁹ However, Rule 1002 is not limited to those types of operative legal documents. It applies to any document where the proponent seeks to prove the contents of a document, including graphical depictions of a voyage from a global positioning system device,¹⁰ the results of laboratory reports from crime labs,¹¹ or whether an applicant's educational background was included in a credit application.¹² The relevant ques-

⁹ 2 BROUN, *supra* note 7, § 234 (“The underlying transactions are viewed as *written* transactions, and writings embodying them, such as deeds, contracts, judgments, etc., are universally considered to be within the present rule when the legal effect of the writing is actually at issue in the litigation.”).

¹⁰ *United States v. Bennett*, 363 F.3d 947, 953-54 (9th Cir. 2004).

¹¹ *United States v. Ziesman*, 409 F.3d 941, 953 (8th Cir. 2005).

¹² *Mourning v. Brown Lincoln-Mercury, Inc.*, 125 F.3d 848, No. 96-1171, 1997 WL 626543, at *5 (4th Cir. Oct. 10, 1997).

tion is not what type of document it is, but rather, what it is being used to prove.¹³

In all of the above examples, Rule 1002 applies because the document is being used to prove the existence (or truth) of its contents – that is, of those facts memorialized in or recorded in that document.

The following hypothetical illustrates how Rule 1002 applies even if the facts exist independently of the document. Take, for example, a situation where a conversation has been recorded. A party seeking to prove what was said during the conversation does not need to produce the recording.¹⁴ They can call as a witness anyone that participated in or overheard the conversation to testify about what they heard. Rule 1002 is simply not implicated.¹⁵

¹³ See 31 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 7184 (2009) (“[E]ven where the substantive law does not make the contents of a writing, recording, or photograph a primary issue, evidence of those contents still can be relevant. This is true where pertinent events occurred independent of a writing, recording, or photograph but are nonetheless evidenced by the contents of such an item. Rule 1002 applies if evidence of those contents is offered.”).

¹⁴ See, e.g., *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 467 F.3d 641, 648-49 (7th Cir. 2006) (“If a witness’s testimony is based on his first hand knowledge of an event as opposed to his knowledge of the document, however, then Rule 1002 does not apply.”).

¹⁵ *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (“We, of course, are well aware of the fact that a tape recording cannot be said to be the best evidence of a conversation when a party seeks to call a participant in or observer of the conversation to testify to it. In that instance, the best evidence rule has no application at all.” (citing *United States v. Gonzales-Benitez*, 537 F.2d 1051, 1053-54 (9th Cir. 1976)).

Rule 1002, however, is applicable if the witness's knowledge was based solely on having heard the recording.¹⁶ In that case, the witness's personal knowledge is limited to what they heard on the recording. The fact that the conversation occurred does not obviate the need to produce the recording because the witness has no personal knowledge that is independent from what they heard on the recording. Permitting the witness to testify about the

¹⁶ *Id.* (“[I]f somebody wanted to know the content of that tape, it itself *was* the best evidence of that. A different rule would lead to transcripts being submitted with the admonition ‘Trust me, the transcript *does* reflect what was taped.’ Indeed, it would be like having the secretary come to court to testify, ‘I have listened to the tape, and here is what it says.’ *That cannot be right; it is precisely what the best evidence rule was designed to avoid.*”) (third emphasis supplied). *See also* 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1503 (4th ed. 2005) (“If the witness’s testimony is expressly or impliedly based on the certificate, the certificate’s terms come into issue” and thereby triggers the best evidence rule.); 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 1002.05[1] (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2009) (“The [best evidence] rule *does* apply when a witness seeks to testify about the contents of a writing, recording, or photograph without producing the physical item itself, particularly when the witness was not privy to the events described by those contents.”); GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER’S FEDERAL EVIDENCE § 1002.3 (5th ed. 2006) (“[I]f the testifying witness only knows of the contents of a writing, recording, or photograph due to having read, heard, or viewed the writing, recording, or photograph, then the original or duplicate is required to satisfy the best evidence rule.”); 31 WRIGHT, *supra* note 13, § 7184 (“[Federal Rule of Evidence] Rule 1002 may apply where the witness’s testimony concerning these facts is based on the writing’s contents, not on knowledge independent of those contents.”).

conversation, solely on the basis of the contents of the recording, would violate not only Rule 1002 but Rule 602 (requiring witnesses to testify from personal knowledge) and Rule 701 (requiring that a lay opinion be based on personal knowledge) as well. Moreover, if instead of hearing a recording the witness learned about what was said based on someone else's written notes, his or her testimony would violate the hearsay rule (requiring exclusion of out-of-court statements offered for their truth unless they satisfy a hearsay exception).

The Ninth Circuit's decision in *Bennett* further illustrates how Rule 1002 applies to facts that exist independently of the document in which they are memorialized. In *Bennett*, the Government sought to rely on testimony from a US Customs officer to establish that the defendant had imported a controlled substance into the United States from "any place outside thereof."¹⁷ The officer's testimony that the boat had entered US waters from Mexico was based entirely on the fact that the officer had looked at information contained in a global positioning system (GPS) that was discovered in a search of the defendant's boat. The officer had no independent knowledge of the boat's path.

The officer's testimony about what he saw in the GPS device was offered to show that the defendant had come from Mexico.¹⁸ The court reasoned that

¹⁷ *Bennett*, 363 F.3d at 952.

¹⁸ *Id.* at 954 ("[T]he government offered only [the officer's] GPS-based testimony about an event—namely, a border crossing—that he never actually saw.").

because the officer did not personally witness the voyage depicted in the GPS device, his testimony concerned the “contents” of the GPS, and thus Rule 1002 applied.¹⁹

The fact that the boat’s journey is an event that exists independently from its graphical representation in the GPS device did not make Rule 1002 inapplicable. To the contrary, the court acknowledged that “[t]his is precisely the kind of situation in which the best evidence rule [*i.e.*, Rule 1002] applies”²⁰ and held that the GPS-based testimony was inadmissible under Rule 1002.²¹

The Fourth Circuit’s decision below conflicts with *Bennett* (and numerous other circuit court decisions)²² as well as the well established understanding that Rule 1002 requires production of documents if the proponent is seeking to prove the contents of the document.

¹⁹ *Id.*

²⁰ *Id.* at 953.

²¹ *Id.* at 954.

²² *See, e.g., Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 222 (3d Cir. 2009); *United States v. Marshall*, 762 F.2d 419, 424-26 (5th Cir. 1985); *United States v. Ross*, 321 F.2d 61, 69-70 (2d Cir. 1963); *Allen v. W.H.O. Alfalfa Milling Co.*, 272 F.2d 98, 100 (10th Cir. 1959).

III. The Fourth Circuit Misapplied Rule 1002

The Fourth Circuit reasoned that Rule 1002 was not implicated because the operative facts exist independently of the documents, and thus, the Government was not seeking to prove the contents of the documents. The Fourth Circuit was mistaken. The Government did seek to prove the contents of the documents, *i.e.*, the place of manufacture of the firearms. If the witness had personal knowledge as to the place of manufacture, independent from the documents he read, the witness could have testified as to that fact without having to produce the documents.²³ Under this hypothetical, the Government could choose whether to produce the underlying documents (if they qualified for an exception to the hearsay rule) or to rely exclusively on the witness's testimony. The reality is that the witness had no independent knowledge about the place of manufacture.

As with the information contained in the GPS device at issue in *Bennett*, the documents in this case were the sole source of the witness's knowledge about where the firearms were manufactured.

²³ The court below unfairly characterizes Smith's argument as advocating production of the documents because they were the "best evidence." *Smith*, 566 F.3d at 413. *Amici* believe Smith was advocating for production of the documents because they were the *only* evidence, not the *best* evidence. As acknowledged in *Bennett*, in situations where a document is the sole source of information, Rule 1002 applies precisely because the proponent is seeking to prove the contents of the document. 363 F.3d at 954.

Therefore, the Government had no choice but to rely on the contents of the documents to establish the place of manufacture. Under these circumstances, Rule 1002 applies and requires the Government to introduce the documents into evidence as long as they satisfy the hearsay rule.

The witness's testimony was merely a presentation of the contents of the documents in a different, and thus forbidden, form of evidence. Under the Fourth Circuit's approach, all a prosecutor must do to avoid producing the documents is to carefully tailor the form of their questions to elicit testimony about the underlying facts (the out-of-state origin of the firearms or whatever other facts they are trying to prove) without disclosing the source of those facts (the documents that are not being offered into evidence).

There are important reasons why the Court should reject the Fourth Circuit's erroneous notion that Rule 1002 does not apply if the facts exist independently of the contents of the writing. First, as shown above, the Fourth Circuit's construction is inconsistent with both scholarly commentaries and nearly all other circuits that have addressed this issue.

Second, testimony based on personal knowledge is one of the foundations of United States evidence law.²⁴ The Fourth Circuit's construction would permit prosecutors (and parties in civil litigation) to

²⁴ 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 10 (6th ed. 2006) (“[T]he law prefers that a witness testify to facts, based on personal knowledge, rather than opinions inferred from such facts.”).

proffer lay witness testimony based solely on information derived from hearsay documents that are not introduced into evidence, rather than on personal knowledge. Such a strategy violates Rule 602, Rule 701, and the hearsay rule, as well as Rule 1002. In a criminal case, such as this one, it deprives criminal defendants of a meaningful opportunity to confront²⁵ and probe the accuracy of the proffered out-of-court testimonial statement in the document.

Finally, such a limitation on Rule 1002 would effectively limit the rule's application to situations involving operative legal documents, such as contracts, deeds, and wills. Nothing in the notes to the Federal Rules of Evidence or the sparse legislative history²⁶ supports that interpretation. After all, the common law best evidence rule was not limited to operative legal documents and nothing indicates that Rule 1002 was meant to impose such a limitation.²⁷

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to clarify that Rule 1002 precludes witnesses from testifying as to the contents of a document that has not been

²⁵ See *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

²⁶ See PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE app. I (3d ed. 2009) (noting the sparse legislative history because Congress enacted the Advisory Committee recommendations without debate).

²⁷ WEINSTEIN, *supra* note 16, § 1002.App.100 (“Rule 1002 is a restatement *somewhat expanded in scope* of the so-called best evidence rule.”) (emphasis supplied).

introduced into evidence, even if the contents are facts that exist independently of the document.

Respectfully submitted,

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APPENDIX A

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