No. 18-7599

IN THE SUPREME COURT OF THE UNITED STATES

JESUS E. MORENO-ORNELAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment requires a district court to permit a defendant to call an expert witness whose testimony the defendant only disclosed on the eve of trial, in violation of a court order governing the pretrial disclosure of expert testimony under Federal Rule of Criminal Procedure 16.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 906 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2018. A petition for rehearing was denied on November 30, 2018 (Pet. App. 35-36). The petition for a writ of certiorari was filed on January 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on one count of assault on a federal officer, in violation of 18 U.S.C. 111; one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2012); two counts of attempted robbery of United States property, in violation of 18 U.S.C. 2112; one count of possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g)(1); one count of possessing a firearm as an alien unlawfully present in the United States, in violation of 18 U.S.C. 922(g)(5); and one count of illegal reentry after removal, in violation of 8 U.S.C. 1326. Judgment 1. The district court sentenced petitioner to 520 months of imprisonment, to be followed by five years of supervised release. Judgment 1-2. The court of appeals vacated petitioner's attempted robbery convictions and otherwise affirmed. Pet. App. 1-34.

1. In August 2014, U.S. Forest Service Officer Devin Linde responded to a report of several suspicious people walking in the vicinity of Coronado National Forest in Arizona, near the southern border. Pet. App. 4-5; see Gov't C.A. Br. 4-6. Officer Linde was in uniform at the time, and his truck was clearly marked as a law enforcement vehicle. Pet. App. 5; Gov't C.A. Br. 4, 6. Officer Linde spotted two men, including petitioner. Pet. App. 5. Officer Linde offered the men water and then ordered them to place their

hands on the hood of his vehicle. Ibid. Petitioner's companion complied, but petitioner did not. Ibid. After petitioner refused several more commands, Officer Linde drew his gun and ordered petitioner to place his hands on his head. Ibid. Petitioner did so, and Officer Linde holstered his gun and began to handcuff petitioner. Id. at 5-6. As Officer Linde was securing the handcuffs, petitioner pulled away and attacked him; both fell to the ground. See id. at 6; Gov't C.A. Br. 8.

According to Officer Linde, during the ensuing struggle, petitioner punched Officer Linde in the face repeatedly, grabbed the officer's gun from its holster, and fired two shots. Pet. App. 6. Officer Linde believed he was going to die and began flailing his arms to find the gun. Gov't C.A. Br. 8. The officer felt the gun being pushed into his chest and pushed petitioner's hand to the side as a shot discharged near the officer's head. Id. at 8-9. Officer Linde managed to wrestle his leg around petitioner's neck, and petitioner "fired several [more] shots skyward before dropping the gun," which had jammed, and running for the officer's truck. Pet. App. 6. Officer Linde recovered the gun, cleared the jam, and trained the gun on petitioner, forcing him to surrender. Id. at 6-7.

Petitioner offered a very different version of the encounter. In a recorded post-arrest interview, petitioner admitted that he had understood the officer's commands and that, rather than complying, he had pushed the officer to the ground, grabbed his

gun, and attempted to steal his truck. See Pet. App. 7; Gov't C.A. Br. 12. Petitioner claimed, however, to have grabbed the gun because he feared for his life and to have deliberately fired the gun into the air rather than at Officer Linde. Pet. App. 7.

2. In September 2014, a federal grand jury indicted petitioner on various charges related to his assault of Officer Linde. Indictment 1-4. Trial was initially set for November 2014, but petitioner requested and received several continuances. See D. Ct. Doc. 22 (Oct. 22, 2014); D. Ct. Doc. 24 (Dec. 22, 2014).

On February 3, 2015, the district court granted petitioner's third motion for a continuance, delaying the trial from February to April. Pet. App. 22. In the same order, the court "set a clear deadline for the parties to request disclosures mandated by Federal Rule of Criminal Procedure 16." Ibid.; see id. at 54-57. In relevant part, Rule 16 establishes a regime of reciprocal pretrial disclosures for expert testimony. If the defendant opts into the regime by requesting expert discovery from the government, then the defendant "must, at the government's request, give to the government a written summary of any [expert] testimony that the defendant intends to use" at trial. Fed. R. Crim. P. 16(b)(1)(C). The "summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Ibid. In its February 3 order, the court required that any requests for Rule 16 disclosures be made within 14 days of the

order and that any disclosures be made within seven days of such a request. Pet. App. 22, 55-56.

Petitioner opted into the reciprocal disclosure regime within the 14-day period. Pet. App. 22. The government accordingly made a timely disclosure of its expert witnesses within seven days of his request and, on February 13, requested reciprocal disclosures from petitioner. Id. at 22-23; see D. Ct. Doc. 29 (Feb. 13, 2015). Petitioner neither provided the requested disclosures within seven days of the government's request nor asked the government or the district court for an extension of the deadline. Pet. App. 23, 51.

At an April status conference, after the trial date was again delayed, petitioner informed the government that a witness named Weaver Barkman might be assisting the defense. Pet. App. 23. On June 1, petitioner filed a notice proposing to call Barkman as an expert and identifying him as a former law enforcement officer but providing no other information about the substance of his testimony. Ibid.; see id. at 60-62.[1]

On June 18 -- "four months after [petitioner]'s expert disclosures were due and a mere five days before trial" -- petitioner provided the government with Barkman's resume and a

[1] On June 9, petitioner requested another continuance of the trial (scheduled to begin June 23), arguing in part that Barkman needed more time to "finish his report and findings." Pet. App. 63. The government opposed that request, see id. at 64, 74-75, and the district court denied it at a pretrial conference on June 10, see id. at 80.

report Barkman had prepared, dated June 16. Pet. App. 23; see id. at 84-95. According to the report, Barkman "visited the scene" with personnel from the federal public defender's office, examined "items held by the FBI," and tested Officer Linde's gun. Id. at 86. He opined in the report that the first shot fired in the incident "was an unintentional discharge (UID), fired by Officer Linde," and that "[a]ny rounds fired while the men were grappling on the ground may well have been the result of, and are consistent with [sympathetic squeeze response]." Ibid. He also claimed to have found "no evidence of gunshot residue" on Officer Linde's clothing and opined that the absence of such residue (or any reported hearing loss) was inconsistent with Officer Linde's recollection that petitioner fired the weapon close to Officer Linde's head. Id. at 87-90.

The government moved to exclude Barkman's testimony because of petitioner's untimely disclosure and, in the alternative, because Barkman lacked relevant expertise. Pet. App. 81-83; see Fed. R. Evid. 702. The district court heard argument on that motion at a hearing between the first and second days of trial. Pet. App. 38-53. At the hearing, petitioner "concede[d] that [his] disclosure of [Barkman's] opinions was very late in the case." Id. at 39. Petitioner stated that he had retained Barkman "sometime in February" but claimed that Barkman had been "very, very busy" with another matter and ascribed some of the delay to difficulties in coordinating schedules for Barkman to review the

government's evidence (which petitioner did request until May 1 that Barkman be allowed to do). Id. at 41-42; see id. at 49.

The district court granted the government's motion. Pet. App. 52. The court explained that the "whole idea" of a pretrial disclosure deadline "is to disclose expert opinions early enough * * * so the other side can have an opportunity to evaluate those opinions and hire his or her own expert prior to trial." Id. at 53. Because the disclosure here came on the eve of trial, the government had "virtually no opportunity to digest, evaluate, or prepare for the opinions." Ibid. The court was also skeptical of Barkman's putative expertise, noting that "we would need a Daubert hearing on some of these opinions." Id. at 52. The court did, however, allow that petitioner might be able to call Barkman as a fact witness in light of his visit to the crime scene. Id. at 53.

Petitioner did not seek to call Barkman as a fact witness and did not put on a defense case. See 6/30/15 Trial Tr. 54-55.[2] The jury found petitioner guilty of one count of assaulting a federal officer, in violation of 18 U.S.C. 111; one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2012); two counts of attempted robbery of United States property, in violation of 18 U.S.C. 2112; one count of possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g)(1); one count of possessing a firearm as an alien

[2] Petitioner's version of events was presented to the jury through his videotaped post-arrest statement, which the government introduced in its case-in-chief. See 6/29/15 Trial Tr. 80-82.

unlawfully present in the United States, in violation of 18 U.S.C. 922(g)(5); and one count of illegal reentry after removal, in violation of 8 U.S.C. 1326. Judgment 1. The court declared a mistrial on one count for which the jury was unable to reach a verdict -- attempted murder of a federal officer, in violation of 18 U.S.C. 1111, 1113, and 1114 -- and the government dismissed that count after trial. Pet. App. 8; D. Ct. Doc. 105 (July 23, 2015).

The district court sentenced petitioner to 520 months of imprisonment, to be followed by five years of supervised release. Judgment 1-2.

3. The court of appeals vacated petitioner's attempted robbery convictions due to instructional error but otherwise affirmed. Pet. App. 1-34. As relevant here, petitioner contended that, in light of his "constitutional right to present witnesses in his own defense," the district court erred in imposing the "sanction" of excluding Barkman's proposed expert testimony without finding that petitioner's discovery violation was "willful and blatant." Id. at 24. The court of appeals rejected that contention. It disagreed with petitioner's characterization of the district court's order "as an exclusionary sanction," because the district court was "simply enforc[ing]" its "earlier pretrial order" establishing disclosure deadlines. Ibid. (quoting United States v. W.R. Grace, 526 F.3d 499, 514 (9th Cir. 2008) (en banc)) (internal quotation marks omitted). The court of appeals further

observed that petitioner "did not object" to those pretrial deadlines, so the district court's order enforcing them "could hardly have been a surprise." Ibid. (quoting W.R. Grace, 526 F.3d at 514). And the court of appeals found "nothing unreasonable about the deadline[s]." Id. at 25.

The court of appeals also rejected petitioner's alternative argument that the district court's pretrial order did not apply at all. Petitioner argued that the order had only required the disclosure of expert witnesses each party "'intended' to use at trial" and that he had not intended to use Barkman at the time "the disclosure deadline came and went." Pet. App. 26 (brackets omitted). As the court of appeals explained, however, that argument "would render [the] deadlines meaningless." Ibid. "By requiring the parties to disclose by a certain date expert witnesses whom they intended to call at trial," the court continued, "the district court required the parties to figure out before that date whom they wanted to call." Ibid.

Judge Zilly, sitting by designation, dissented on this point. Pet. App. 31-34. He would have reversed petitioner's convictions on all counts (except one that petitioner declined to challenge on appeal) because, in his view, petitioner's proposed expert "was excluded in violation of [petitioner's] constitutional rights." Id. at 34.

ARGUMENT

Petitioner contends (Pet. 11-23) that the federal and state courts are divided on the question whether a trial court may, consistent with the Sixth Amendment, exclude a defense witness as a sanction for the defendant's violation of a discovery order without first finding that the violation was "willful and motivated by a desire to obtain a tactical advantage." That contention does not warrant this Court's review. The district court did not abuse its discretion in excluding petitioner's proposed expert witness after petitioner violated the court's order regarding expert disclosures. Petitioner fails to demonstrate that another court of appeals or state court of last resort would have recognized a constitutional right to present that testimony in these circumstances, and this case would, in any event, be an unsuitable vehicle to address the question he seeks to present. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the district court did not violate petitioner's Sixth Amendment right to present witnesses when the district court enforced its pretrial deadlines for Rule 16 expert disclosures.

a. "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted), including through the Sixth Amendment right "to have compulsory process for obtaining witnesses," U.S.

Const. Amend VI. But a "defendant's right to present relevant evidence is not unlimited." United States v. Scheffer, 523 U.S. 303, 308 (1998). Rather, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and "[s]uch 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.'" Ibid. (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)); see Holmes, 547 U.S. at 326-327.

The specific rule at issue here is Federal Rule of Criminal Procedure 16. Under Rule 16(a)(1)(G), the government "must give to the defendant a written summary of any [expert] testimony that the government intends to use * * * during its case-in-chief at trial," but only if the defendant requests such a summary. If the defendant makes such a request, then the government is entitled to receive, upon request, a similar summary from the defendant of "any [expert] testimony that the defendant intends to use * * * as evidence at trial." Fed. R. Crim. P. 16(b)(1)(C). In either case, the summary "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C).[3] Rule 16 also specifies that, "[i]f a party fails to comply with this rule, the court may

[3] Rule 16 establishes different disclosure obligations -- not at issue here -- for proposed expert testimony concerning the defendant's mental condition. Fed. R. Crim. P. 16(b)(1)(C)(ii).

* * * prohibit that party from introducing the undisclosed evidence." Fed. R. Crim. P. 16(d)(2)(C).

Although this Court has not previously considered a Sixth Amendment challenge to the application of Rule 16(b)(1)(C) itself, its decision in Taylor v. Illinois, 484 U.S. 400 (1988), found the enforcement of an analogous pretrial disclosure requirement to be consistent with the Sixth Amendment. In particular, the Court in Taylor upheld a state court's order precluding the defendant from calling a witness as a sanction for the defendant's failure to comply with a state rule requiring defendants to produce a list of potential witnesses to the government upon request. 484 U.S. at 401-403 & n.2. The Court explained that "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments," id. at 410-411, and that rules "provid[ing] for pretrial discovery of an opponent's witnesses" serve the "broad[] public interest in a full and truthful disclosure of critical facts" at a criminal trial, id. at 411-412. And the Court emphasized that precluding the defendant from presenting evidence may be "an entirely proper method of assuring compliance" with such rules. Id. at 412 (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)).

The Court has also recognized that, for the adversarial system to function properly, criminal discovery cannot be "a one-way street." Nobles, 422 U.S. at 233 (upholding the exclusion of a

defense investigator after the defendant refused to disclose the investigator's report) (citation and internal quotation marks omitted). Accordingly, this Court has affirmed the application of rules requiring defendants to disclose a witness's prior statements before trial, ibid., to notice an alibi defense, Williams v. Florida, 399 U.S. 78, 84-86 (1970), and to comply with rape-shield rules, Michigan v. Lucas, 500 U.S. 145, 149 (1991).

b. The district court reasonably exercised its authority under Rule 16 to exclude petitioner's proposed expert testimony, which petitioner belatedly disclosed five days before trial. See Pet. App. 21-22; pp. 4-7, supra. In February 2015, petitioner had affirmatively opted into Rule 16's expert-disclosure regime by requesting (and receiving) a summary of the government's proposed expert testimony. Pet. App. 22. Under the court's scheduling order, petitioner had seven days to respond to the government's February 13 request for reciprocal disclosure of any proposed defense expert testimony. Id. at 22-23, 56. Petitioner later acknowledged that he had retained his proposed expert "sometime in February." Id. at 41. Yet he waited until April 16 to inform the government of the witness's existence, until June 1 to provide formal notice of his intent to call the witness as an expert, and until June 18 -- five days before trial -- to provide the disclosures required by Rule 16. Id. at 23. His principal explanation for his violation of the court's scheduling order was

that his proposed expert was "busy." Id. at 41; see pp. 6-7, supra.

The court of appeals correctly found no abuse of discretion in the district court's exclusion of the late-proffered testimony in those circumstances. As the court of appeals observed, there was "nothing unreasonable about the deadline" for disclosure set by the district court, and petitioner never objected to or sought to extend those deadlines. Pet. App. 24-25. Enforcing reasonable deadlines is an integral part of a district court's management of the trial process -- particularly for complex matters like expert testimony. See id. at 24. As the district court explained, "[t]he whole idea" behind Rule 16 "is to disclose expert opinions early enough * * * so the other side can have an opportunity to evaluate those opinions and hire his or her own expert prior to trial." Id. at 53. The late disclosure here flouted the court's order and left the government with "virtually no opportunity to digest, evaluate, or prepare for the [proposed expert] opinions." Ibid.

c. Petitioner contends (Pet. 19-23) that the district court erred in excluding his proposed expert without first finding that his discovery violation was "'willful.'" As petitioner acknowledges, however (Pet. 11-12), this Court's decisions do not impose such a requirement. In advocating such a narrow rule, petitioner attempts to convert the particular facts of Taylor into a general constitutional limitation on the application of

procedural rules to criminal defendants -- a limitation that Taylor itself expressly declined to impose.

The state court in Taylor had found that the particular discovery violation at issue there was "both willful and blatant." 484 U.S. at 416; see id. at 405. Addressing the facts before it, this Court observed that a "willful" violation of a pretrial obligation to disclose a witness, or a violation "motivated by a desire to obtain a tactical advantage," would "entirely" justify a trial judge in "exclud[ing] the witness' testimony." Id. at 415. But the Court declined to "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." Id. at 414.

Here, Rule 16 authorizes a district court to "prohibit [a] party from introducing * * * undisclosed evidence" as a means of addressing the party's failure to comply with Rule 16 disclosure obligations. Fed. R. Crim. P. 16(d)(2)(C). And it permissibly leaves the selection of an appropriate sanction in a particular case to the sound discretion of the district court, without limiting the exercise of that discretion to "willful" violations of discovery orders. See ibid. The district court's exercise of its discretion on the facts of this case was appropriate and, in any event, is the sort of factbound determination that does not merit this Court's review.

2. Petitioner contends (Pet. 13-18) that federal and state courts are divided about whether a trial court may preclude a

defense witness from testifying as a sanction for the defendant's violation of a pretrial disclosure obligation, without first finding that the violation was "willful [or] motivated by a desire to obtain a tactical advantage," Taylor, 484 U.S. at 415. But the existence or extent of any actual conflict that would suggest different results in similar cases is far from clear.

The courts of appeals routinely recognize that district courts have discretion to exclude expert testimony as a sanction for a defendant's failure to provide the disclosures required by Rule 16(b)(1)(C) -- including in cases in which the district court did not first find that the failure was willful. See United States v. Lundy, 676 F.3d 444, 451 (5th Cir. 2012); United States v. Hoffecker, 530 F.3d 137, 185-188 (3d Cir.), cert. denied, 555 U.S. 1049 (2008); United States v. Petrie, 302 F.3d 1280, 1288-1289 (11th Cir. 2002), cert. denied, 538 U.S. 971 (2003); cf. United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) (explaining, in a case involving the exclusion of an undisclosed alibi, that Taylor does not "establish[] 'bad faith' as an absolute condition for exclusion"); Short v. Sirmons, 472 F.3d 1177, 1188 (10th Cir. 2006) (similar; exclusion of an undisclosed fact witness), cert. denied, 552 U.S. 848 (2007). As the D.C. Circuit has explained, "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the Taylor Court's reference to trial court discretion and its extended discussion of the relevant factors." Johnson, 970 F.2d at 911; cf. Tyson v. Trigg, 50 F.3d

436, 445 (7th Cir. 1995) ("The rules are empty if they cannot be enforced, and weak if they can be enforced only against willful violators."), cert. denied, 516 U.S. 1041 (1996).

Petitioner incorrectly argues (Pet. 13-14) that three other circuits have adopted a contrary rule. Although language in Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988) (per curiam), suggests that the validity of a district court's preclusion order might turn on whether the defendant had willfully sought a tactical advantage, the Second Circuit has since made clear that it "do[es] not believe * * * that the Sixth Amendment is encroached upon by a discretionary, if strict, enforcement of the Federal Rules of Criminal Procedure." United States v. Cervone, 907 F.2d 332, 346 (1990), cert. denied, 498 U.S. 1028 (1991). The other decisions petitioner cites recognized that exclusion should be ordered sparingly, but they did not adopt the bright-line rule that petitioner advocates. See Ferensic v. Birkett, 501 F.3d 469, 476-477 (6th Cir. 2007) (stating that exclusion should be reserved for "egregious [discovery] violations involving, for example, 'willful misconduct'") (emphasis added; citation omitted); Noble v. Kelly, 246 F.3d 93, 100 n.3 (2d Cir.) (per curiam) (declining to decide "whether, and to what extent, a finding of willfulness is required in every case"), cert. denied, 534 U.S. 886 (2001); Bowling v. Vose, 3 F.3d 559, 562 (1st Cir. 1993) (concluding that exclusion was not warranted given "the nonwillful character of the" discovery violation in combination with other factors, including that "the

prosecution itself was willing to have the evidence admitted"), cert. denied, 510 U.S. 1185 (1994); cf. United States v. Portela, 167 F.3d 687, 705 n.16 (1st Cir.) ("We * * * have never held that willfulness is the sole predicate of an exclusionary sanction."), cert. denied, 528 U.S. 917 (1999).

The state cases petitioner identifies (Pet. 16-18) also do not provide a sound basis for this Court's review. Some of those decisions rely on state procedural or statutory rules. See Ross v. State, 954 So. 2d 968, 1000 (Miss. 2007) (en banc) (trial court failed to follow state rule regulating discovery violations); People v. Edwards, 22 Cal. Rptr. 2d 3, 13 (Cal. Ct. App. 1993) (trial court failed to comply with "statutory duty to exhaust all other sanctions" before excluding witness testimony). Many of the other decisions stress the discretion of the trial judge even while observing that exclusion should be rare, and none squarely holds that the Sixth Amendment always requires a finding of willful misconduct before a trial court may exclude a defense witness for discovery violations. See, e.g., State v. Killean, 915 P.2d 1225, 1226 (Ariz. 1996) (en banc) (stating that "[e]ven if" a finding of misconduct is required, the trial court made such a finding) (emphasis added); People v. Flores, 522 N.E.2d 708, 714 (Ill. App. Ct. 1988) (observing that "the decision regarding whether a sanction is appropriate for a discovery violation rests within the discretion of the trial court," but finding error on the facts of the case, where the defendant's discovery violation was not

"deliberate" and did not "demonstrate[] unwarranted disregard for the trial court's authority"); see also People v. Pronovost, 773 P.2d 555, 558 (Colo. 1989) (en banc); State v. Ramos, 553 A.2d 1059, 1069 (R.I. 1989); McCarty v. State, 763 P.2d 360, 362 (N.M. 1988); cf. White v. State, 973 P.2d 306, 311 (Okla. Crim. App. 1998). Petitioner has not demonstrated that the result in this case would have been any different under the approaches employed in those States, or that those approaches are necessarily predicated on the state courts' understanding of the Sixth Amendment rather than state discovery rules.

3. Even if the question presented warranted this Court's review in an appropriate case, this case would present an unsuitable vehicle to consider it, for three reasons.

First, although the district court did not expressly find that petitioner's violation of the court's order was willful, the court could have done so on these facts. See pp. 6-7, supra. Petitioner represented that he had retained his proposed expert in February 2015, yet he did not disclose a summary of the proposed expert's testimony until June, days before the start of trial. See ibid. Petitioner contrasts willfulness with "defense attorney negligence, defense attorney inattention to deadlines, and/or logistical expert problems." Pet. 22. But petitioner never claimed to be unaware of the deadlines for expert disclosure or to have overlooked them accidentally, and he never sought to modify or continue those deadlines. Moreover, petitioner incurred an

obligation to disclose his own proposed expert witnesses before trial only because he voluntarily chose to request and receive disclosure of the government's proposed expert witnesses. See Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C)(i). The court could have considered it unfair for petitioner to invoke that procedure, obtain advantage from the government's compliance, yet fail to reciprocate as the rule required.

Second, the proposed expert testimony would have been inadmissible under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), so any error in excluding the witness as a sanction for petitioner's discovery violation was harmless. The proposed expert was a retired police officer who worked as a private investigator and who had never been a firearms instructor or firearms investigator, nor had he held any other position or designation with a specific emphasis in firearms. He had no specialized education, training, certification, or specialty courses related to firearms. Although he claimed "[i]nvoluntary [f]irearms [d]ischarge" as one of his areas of purported expertise, his resume was devoid of any support for that claim. See Pet. App. 92-95. He therefore lacked the requisite qualifications to testify as an expert witness on firearms or the accidental discharge of firearms. Fed. R. Evid. 702(a) (requiring "scientific, technical, or other specialized knowledge"); see Daubert, 509 U.S. at 589 (expert testimony must be "reliable"); cf. Pet. App. 52 (district court stating that a

Daubert hearing would have been required had the proposed expert testimony not been excluded because of petitioner's untimely disclosure).

Third, the proposed expert was proffered as a defense to the charge of attempted murder, which the government dismissed after trial when the jury failed to reach a verdict. See p. 8, supra. The proposed expert's findings focused primarily on whether petitioner intentionally pulled the trigger and whether the evidence was consistent with the gun being fired near Officer Linde's head, see Pet. App. 86-88 -- issues relevant to whether petitioner intended to kill Officer Linde, but not to the counts for which petitioner was ultimately convicted and which were at issue on appeal. By petitioner's own admissions, he is a felon and an unauthorized alien and he possessed the gun. See Pet. App. 7-8; 6/30/15 Trial Tr. 110. Nothing the putative expert could have said would have aided petitioner's defense to those charges. Petitioner also admitted that he assaulted Officer Linde, "tackl[ing]" him and "slam[ing his] hand onto the ground." Pet. App. 7. And the proposed expert testimony had nothing to do with the two robbery counts, which were predicated on events that transpired after the struggle and which have, in any event, been vacated and remanded for a new trial, in advance of which petitioner could presumably notice his proposed expert in a timely fashion. See id. at 8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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