No. _____

IN THE
# Supreme Court of the United States

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VICTOR D. VICKERS, JR., *Petitioner*,

*v.*

STATE OF MISSOURI, *Respondent.*

_____

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Western District

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

On the morning of his first-degree murder trial, Petitioner moved to endorse an alibi witness who would have testified Petitioner was home with her at the time of the shooting. Although Petitioner's public defender disclosed this witness as soon as she confirmed the information, and offered a continuance for Respondent to further investigate, the trial court excluded Petitioner's alibi witness as a sanction for late disclosure, citing unfairness to the State. The appellate court upheld this ruling, finding "no reasonable justification for the late endorsement."

The questions presented are:

- Whether the exclusion of alibi evidence that could prove a defendant's innocence, as a sanction for an uncalculated discovery violation, is permitted by the Sixth and Fourteenth Amendments if it was not a "willful" violation as in *Taylor v. Illinois*, 484 U.S. 400 (1988).

- Whether "bad faith" is a precondition for the exclusion of alibi evidence under *Taylor v. Illinois*, 484 U.S. 400 (1988), as held by the Second, Eighth and Ninth Circuits, or whether *Taylor* created a balancing test where bad faith is a factor, as held by the First, Eleventh, and DC Circuits?

## PARTIES TO THE PROCEEDING

Petitioner, Victor D. Vickers, Jr., was the appellant below. Respondent, the State of Missouri, was the respondent below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor D. Vickers respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Court of Appeals, Western District.

## OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, is published at *State v. Vickers*, 560 S.W.3d 3 (Mo. App. W.D. 2018) (Appendix A1-A24).

## JURISDICTION

The modified judgment of the Missouri Court of Appeals, Western District, was entered on August 28, 2018. The Missouri Supreme Court denied review on December 4, 2018. (Appendix A57). This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in relevant part: "[N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner was alleged to have been one of three people who forced their way into a home in the late evening of August 15, 2011, where Edward Ewing was shot and killed after a struggle, and Kristen Forbush was shot and injured. (App.A10-A11). Petitioner was charged and convicted of first degree murder, first degree assault and two counts of armed criminal action, under an accomplice liability theory. (App.A10-A11).

No forensic or other physical evidence tied Petitioner to the crimes; investigators collected evidence from the scene, including fingerprints, DNA, and bloody shoe prints (Tr.307-310, 319-20, 334-335, 345-50), but none of it matched Petitioner. (Tr.353-354, 364). He was not a contributor to the DNA found under Ewing's fingernails. (Tr.354).

Instead, the State's case against Petitioner relied upon an identification by the surviving victim, Kristen Forbush. When Forbush called 911 after the perpetrators had left, the operator asked if she knew who had shot her, and Forbush replied, "I don't f**king know." (Ex.2; Tr.278). When officers arrived, Forbush said there were three black males, identifying one of them as Garron Briggs, and that they were driving a silver Pontiac Grand Prix. (Tr.293, 300). When Officer Sanders relayed this information to dispatch, "Garron Briggs" was the only name provided. (Tr.299-300).

Later at the hospital, Forbush told officers that she recognized the vehicle driven by the suspects as belonging to Briggs' girlfriend. (Tr.255, 293, 368). Officers searched this car, but no blood, guns, bullets, or any other evidence was found in it. (Tr.400, 511). Forbush also stated she recognized two of the three individuals who had approached her outside; again, she named Briggs as a suspect, but added that she recognized a second

person she knew only by "V.V." (Tr.370). She later identified "V.V." as Victor Vickers, Petitioner. (Tr.242). Forbush could not identify the third male suspect. (Tr.260). She said the men were wearing hoodies, but she could not remember the color. (Tr.245, 270-71). She did not know if they had facial hair. (Tr.271). There were no lights on in the house and it was dark outside. (Tr.249, 309).

Petitioner called Forbush's neighbor, John Adams, whose testimony contradicted Forbush's description of the suspects. Adams told police he had heard a loud noise, and from his front door, he saw a "white" vehicle leaving the scene. (Tr.500, 518). Adams testified that the same vehicle was at Forbush's house earlier in the day. (Tr.500). Additionally, Adams said the subjects who walked to the white car were wearing white t-shirts, not hoodies. (Tr.499). This was consistent with Petitioner's defense that he was not at the scene, and that Forbush was filling in gaps in her memory by associating Petitioner with Briggs, who is Petitioner's cousin. (Tr.564-577).

Petitioner's case had been pending since August 19, 2011, but the public defender ultimately assigned to Petitioner's case did not enter her appearance until four years later, on August 26, 2015. (LF.1, 13). On the morning of trial, May 16, 2016, defense counsel moved to endorse an alibi witness, Emily DeMarea. (Tr.75). DeMarea was not investigated until two weeks before trial but defense counsel had not personally talked to DeMarea until the morning of trial, when she confirmed her memory of events (Tr.75-

76).[1] DeMarea would have testified that Petitioner was with her at his home from the evening of August 15 into the morning of August 16, 2011. (Tr.75).

The State objected to the endorsement of DeMarea arguing it was untimely. (Tr.75-76). Defense counsel offered a continuance to give the State additional time to investigate DeMarea to cure any prejudice from the late-endorsement. (Tr.75). The trial court denied the endorsement, and excluded DeMarea's potentially exonerating alibi testimony, finding it would be "fundamentally unfair to the State." (Tr.77-78).

Petitioner challenged the exclusion of his alibi witness on appeal, which was denied. (App.A1-A24). While recognizing "[t]he remedy of disallowing an alibi witness to the defendant is almost as drastic, if not as drastic, as declaring a mistrial," (App.A16), the court determined there was "no reasonable justification for the late endorsement," it "took the State by surprise and would have resulted in fundamental unfairness to the State." (App.A17). The Missouri Supreme Court denied review. (App.A57).

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[1] ACLU and ABA studies show that Missouri's Public Defenders suffer heavy workloads and cannot devote adequate time to defendants. In murder cases, they should spend 107 hours on each case, but they actually spend an average of 84.5 hours. *See* "Missouri Project: A Study of the Missouri Public Defender and Attorney Workload Standards," https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf

## REASONS FOR GRANTING THE WRIT

The drastic sanction of excluding a defendant's alibi evidence prevents him from establishing his innocence, and is not warranted for non-deliberate discovery violations. This Petition asks the Court to draw a clear distinction between a willful omission to provide timely notice of alibi for tactical advantage, *see Taylor v. Illinois*, *infra*, and an inadvertent violation due to mere inattention or limited investigative resources as occurred here. When the delay is not calculated, and the state is not prejudiced by either the late endorsement or a brief continuance, the wholesale exclusion of a defendant's exonerating alibi evidence impermissibly infringes upon his Sixth Amendment right to offer witnesses on his behalf, and his Fourteenth Amendment right to due process.

This Petition raises a recurring constitutional question that has remained unanswered for nearly half a century. See *Taliaferro v. Maryland,* 461 U.S. 948 (1983), wherein Justice White dissented from a denial of certiorari on this precise question, writing: "This Court has twice expressly reserved judgment on this Sixth Amendment question." *Id.* at 949 (citing, *Wardius v. Oregon*, 412 U.S. 470, 472, n.4 (1973); *Williams v. Florida*, 399 U.S. 78, 83, n.14 (1970)). Even more recently, the question has continued to arise, but has never been squarely addressed. See *Gray v. Netherland,* 518 U.S. 152, 169 (1996) ("exclusion of evidence is not the sole remedy for a violation of a conceded right to notice of an alibi witness"); *Taylor v. Illinois*, 484 U.S. 400, 413 (1988) (when a trial court is faced with imposing a sanction regarding an alibi witness, "a less drastic sanction is always available. Prejudice...could be minimized by granting a

continuance."); *Kenma v. Lee*, 534 U.S. 362 (2002) (remanding to allow petitioner to raise claim that exclusion of alibi witnesses violated right to due process).

This lack of clarity has resulted in a split among the lower courts as discussed herein, and this division must be resolved. Petitioner asks the Court to explicitly find, as it alluded to in *Taylor*, *supra*, that "willful omission, motivated by a desire to obtain a tactical advantage," is a prerequisite to excluding a criminal defendant's alibi evidence as a discovery sanction, and not simply an important factor in the analysis. Since the core "purpose of a criminal trial...is to determine the guilt or innocence of the defendant," *Allen v. McCurry*, 449 U.S. 90, 115 (1980), "[t]he right of an accused in a criminal trial is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), including the right "of an accused to present witnesses in his own defense." *Id*. at 301. Despite these commands, Petitioner was deprived of these rights when his exonerating alibi witness was excluded as a sanction for a non-deliberate late disclosure. Petitioner was denied a fair opportunity to defend himself against the State's accusations when his alibi witness was excluded.

This Court should grant this Petition to draw a distinction between purposeful, calculated discovery violations, as occurred in *Taylor*, *supra*, and innocent or negligent violations, as committed here, by an overworked public defender. Justice is ill-served, and fundamental unfairness results, when innocent defendants are condemned to die in prison, having been prevented from presenting exonerating alibi evidence to the jury because of a non-willful, uncalculated late disclosure.

## I. Excluding alibi evidence as a discovery sanction for non-willful, uncalculated late disclosure impermissibly infringes upon a defendant's Sixth and Fourteenth Amendment rights, allowing the conviction of an actually innocent person.

In Missouri, like the majority of states, courts have established discovery and disclosure rules "based on the proposition that the ends of justice will be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." *Wardius v. Oregon*, 412 U.S. 470, 473 (1973). Missouri Rule 25.05(A)(2) requires a defendant to disclose any witnesses he or she intends to call to testify as part of the discovery process. And Missouri Rule 25.18 provides that when a party fails to comply with a discovery rule, the trial court may order disclosure of material and information, grant a continuance, exclude evidence, or enter such orders it deems just given the situation. *State v. Massey*, 867 S.W.2d 266, 268 (Mo. App. E.D. 1993). "The imposition of sanctions provided for in Rule 25.18, including the exclusion of witnesses, remains within the trial court's discretion and will be reversed on appeal only when the sanction results in fundamental unfairness to the defendant." *Id.*

While Missouri recognizes that "[t]he fundamental purpose of a criminal trial is the fair ascertainment of the truth," *State v. Carter*, 641 S.W.2d 54, 58 (Mo. banc 1982), that due process therefore demands that a defendant be allowed to present witnesses in his defense so that the jury has his version of the facts as well as the State's, *Washington v. Texas*, 388 U.S. 14, 19 (1967), and that "[f]ew rights are more fundamental than that of

an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973), Missouri also allows the complete exclusion of exonerating alibi evidence as a discovery sanction, even where the late disclosure was non-willful and uncalculated. *State v. Vickers*, 560 S.W.3d 3, 19-20 (Mo. App. W.D. 2018). If counsel can give "no reasonable justification for failure to disclose the witness" timely, and the disclosure "took the State by surprise and would have resulted in fundamental unfairness to the State," then the defendant's alibi evidence may be completely excluded from the jury. *Id.* at 20.

This Petition asks the Court to affirm that the severe sanction of excluding an alibi witness results in fundamental unfairness to a defendant, and impermissibly infringes upon his Sixth Amendment rights to present to present a defense and to present witnesses in his favor, and to due process. Such a holding would be consistent with the Court's acknowledgement that "[t]he issue whether to exclude evidence is subsidiary to the purpose of a criminal trial, which is to determine the guilt or innocence of the defendant, and a trial court, at least subconsciously, must weigh the potential damage to the truth-seeking process caused by the exclusion of evidence." *Allen v. McCurry*, 449 U.S. 90, 115 (1980).

This Court has "acknowledged that exclusion of evidence is not the sole remedy for a violation of a conceded right to notice of an alibi witness." *Gray v. Netherland*, 518 U.S. 152, 169 (1996) (citing *Taylor v. Illinois*, 484 U.S. 400 (1988)). In *Taylor*, the Court noted that in this situation "a less drastic sanction is always available. Prejudice...could be minimized by granting a continuance." *Id.* at 413. Here, Petitioner offered a

continuance for Respondent to investigate his alibi defense, thus waiving any additional complaint about further delay to his speedy trial rights. Yet, the sanction imposed was complete exclusion of his alibi witness.

There is confusion about when such an extreme sanction can be imposed. In a case nearly identical to Petitioner's, a different Missouri court held that "when the defendant's alibi witness was not disclosed until the morning of trial and the defense's only 'good cause' was 'lack of time and manpower' in the public defender's office...disallowing an alibi witness was too drastic a remedy." *State v. Hopper,* 315 S.W.3d 361, 372 (Mo. App. S.D. 2010) (citing *State v. Gooch*, 659 S.W.2d 342, 343-44 (Mo. App. S.D. 1983)). Yet Petitioner's alibi witness was excluded under similar circumstances.

An appointed public defender represented Petitioner at his trial. She had several other trials in the months and weeks leading up to Petitioner's trial. Counsel explained to the trial court that she had just learned of Petitioner's alibi witness two weeks before trial, and she was still investigating the alibi information up until the morning of trial. Immediately upon learning the truth of the alibi witness's testimony, on the morning of trial before voir dire had begun, Petitioner's public defender moved to endorse the alibi witness, and further offered to agree to a continuance in order to alleviate any prejudice to the State caused by the late endorsement. The trial court denied this request and excluded the witness as a sanction for failure to disclose the witness sooner.

The Missouri State Public Defender's Office is one of the most overloaded and overworked in the country. Studies from the ACLU and the American Bar Association have shown that Missouri's Public Defenders have extremely heavy workloads and are

unable to devote an adequate amount of time to the cases of each defendant that they represent. See FN1. Yet, Petitioner's alibi witness, albeit discovered late in the process by his public defender, was essential to his defense, and more than likely would have resulted in his acquittal if she had been allowed to testify. If the jury believed this witness, Petitioner was not at the scene of the crimes. Her testimony would have been consistent with the lack of any forensic or physical evidence linking Petitioner to these crimes, and would further discredit witness Forbush's delayed identification of Petitioner.

When the State's sole eye witness, Forbush, called 911 to report the shooting, the operator asked her if she knew who had shot her and her boyfriend. She replied, "I don't f***ing know." When officers arrived at the scene and again asked Forbush for any suspect information, she provided the name of Garron Briggs, and stated that the suspects were driving a silver Pontiac Grand Prix. Forbush did not provide Petitioner's name as a suspect at that time. After being transported to the hospital, where she was surrounded by family and friends and susceptible to outside influences, Forbush added that a person whom she knew only by the name of "V.V." may have been another suspect. She could not identify the alleged third perpetrator. She further stated that the three suspects were wearing hoodies, and left the scene in the silver Pontiac Grand Prix.

A neighbor and retired Army veteran, who also witnessed the suspects leaving the crime scene, testified that they were wearing white t-shirts, not hoodies, and they left in a white vehicle, not a silver one. This contrary description suggests Forbush may have been mistaken in her identification. Therefore, Petitioner's alibi witness was essential to prove that Petitioner was not at the crime scene, but home with her more than 20 miles away.

The precedent of this Court has established that the core "purpose of a criminal trial...is to determine the guilt or innocence of the defendant." *Allen*, 449 U.S. at 115. Without the testimony from Petitioner's alibi witness, the jury could not make an accurate judgment of whether Petitioner was actually innocent or guilty. There can be no judicial interest in securing compliance with discovery rules that would outweigh the interest of ensuring that no innocent man is condemned to spend the rest of his life in prison when there is available evidence to exonerate him. As the Court has also recognized, "a trial court... must weigh the potential damage to the truth-seeking process caused by the exclusion of evidence." *Allen*, 449 U.S. at 115.

The "truth-seeking process" was severely damaged when, without any evidence of willful nondisclosure, Petitioner's alibi witness was wholly excluded from trial as a discovery sanction. He was deprived of a meaningful opportunity to prove his innocence, and instead, was sentenced to spend the rest of his life in prison. This type of sanction continues to occur, unfairly impacting criminal defendants, and this Court must delineate the proper standard for exclusion.

## II. *Taylor v. Illinois* addressed willful discovery violations, leaving open the question of whether excluding alibi evidence as a sanction for a non-willful, uncalculated discovery violation is constitutionally permissible, and this case is a good vehicle for resolving that open question.

### A. This Petition Presents an Important, Recurring, yet Unanswered Federal Question

In *Taylor v. Illinois*, the Court held that if the late disclosure of an alibi witness "reveals that the commission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to

adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause to simply exclude the witness' testimony." 484 U.S. at 415. But the Court also recognized that "[w]e cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness." *Id.* at 409. And it acknowledged that "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases." *Id*. at 413. "[A] less drastic sanction is always available. Prejudice to the prosecution could be minimized by granting a continuance or mistrial to provide time for further investigation." *Id*.

Unfortunately, the Court did not clarify the circumstances of "most cases" that would make the less severe sanctions "appropriate," and the severe sanction of exclusion inappropriate. This Petition respectfully asks the Court to draw that precise line and determine when exclusion of a defendant's most essential witness violates his constitutional right to present witnesses in his defense.

It is significant that the dissenting justices in *Taylor* suggested that exclusion of defense evidence as a sanction for a discovery violation almost *always* violates the defendant's right to compulsory process. Justice Brennan, with whom Justice Marshall and Justice Blackmun joined, concluded that "where a criminal defendant is not personally responsible for the discovery violation, alternative sanctions are not only adequate to correct and deter discovery violations but are far superior to the arbitrary and disproportionate penalty imposed by the preclusion sanction." *Id.* at 419. "Because of this, and because the Court's balancing test creates a conflict of interest in every case

involving a discovery violation, I would hold that, absent evidence of a defendant's personal involvement in a discovery violation, the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence." *Id*. Petitioner's case presents this dilemma where no bad faith exists, but his alibi evidence was nonetheless excluded. The question as to whether such evidence may be excluded under these circumstances was not answered by *Taylor*, yet the question has arisen continuously over the course of half a century. See *Taliaferro*, 461 U.S. at 949 (citing *Wardius v. Oregon*, 412 U.S. at 472, n.4, and *Williams v. Florida*, 399 U.S. at 83, n.14).

Petitioner's case presents the perfect vehicle for determining whether, absent bad faith, alibi evidence may be excluded as a discovery sanction. The facts of *Taylor* are distinguishable from the circumstances presented by the instant petition. In *Taylor*, the Court determined that the late disclosure of the alibi witness was "willful" and "calculated." Here, Petitioner's late disclosure was not willful, but due to trial counsel's discovery of the alibi witness just two weeks before trial, and an investigation of that witness which did not conclude until the morning of trial. Again, the constraints on, and the underfunding of the Missouri State Public Defender system are well-documented.

Petitioner asks the Court to confirm what Justice White suggested years ago in *Taliaferro, supra*. Dissenting from the denial of certiorari on this precise issue, he noted that the dissent in the case below had "vigorously protested that where, as here, the sanction of exclusion deprives a defendant of his only alibi witness, the violation of the discovery rule is not deliberate, and any prejudice to the prosecution can be cured by a short continuance, the exclusionary sanction violates the defendant's Sixth and Fourteenth

Amendment rights." *Id.* at 949. Justice White also noted that "[a]t least one Federal Court of Appeals has flatly held 'that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants.'" *Id.* (quoting *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981)).

B. *Taylor v. Illinois* Permits the Conviction of Innocent Defendants

An examination of Justice Brennan's thorough dissent shows a foreshadowing of the wrongs that *Taylor* has created over the years. One of his most important observations was that "exclusion of criminal defense evidence undermines the central truth-seeking aim of our criminal justice system...because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person." 484 U.S. at 423 (citing *United States v. Nixon,* 418 U.S. 683, 709 (1974)). "Surely the paramount value our criminal justice system places on acquitting the innocent...demands close scrutiny of any law preventing the jury from hearing evidence favorable to the defendant." *Id*. (citing *In re Winship*, 397 U.S. 358 (1970)).

"Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo,* 513 U.S. 298 (1995). "That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Id.* (quoting *Winship,* 397 U.S. at 377). Therefore, "[i]f sanctions other than excluding evidence can sufficiently correct and deter discovery violations, then there is no need to resort to a sanction that itself constitutes 'a conscious mandatory

distortion of the fact-finding process whenever applied.'" *Taylor*, 484 U.S. at 425-26 (quoting Weinstein, Some Difficulties in Devising Rules for Determining the Truth in Judicial Trials, 66 Colum. L. Rev. 223, 227 (1966)).

This Petition asks the Court to explicitly hold, as the *Taylor* dissent suggested, that "absent evidence that the defendant was responsible for the discovery violation, the exclusion of criminal defense evidence is arbitrary and disproportionate to the purposes of discovery and criminal justice and should be per se unconstitutional." *Taylor,* 484 U.S. at 436. Such a holding would not come without a system for deterring discovery violations and encouraging compliance with discovery and disclosure rules. Misconduct by an attorney regarding discovery rules "is amenable to direct punitive sanctions against attorneys as a deterrent that can prevent attorneys from systematically engaging in misconduct that would disrupt the trial process. There is no need to take steps to punish the defendant." *Id.* at 435.

Petitioner was prevented from presenting potentially exonerating alibi evidence, not because of any willful discovery violation, but because the Missouri Court held there was "no reasonable justification for the late endorsement," and that it "took the State by surprise and would have resulted in fundamental unfairness to the State." *Vickers*, 560 S.W.3d at 19-20. This Court must enunciate a constitutional standard for non-deliberate discovery violations and whether the complete exclusion of a defense alibi witness is ever justified under such circumstances.

## III. Lower courts are divided over whether "willful" nondisclosure or "bad faith" is a prerequisite to the drastic sanction of excluding the defendant's alibi evidence, or whether it is but one factor in the analysis.

The result in *Taylor v. Illinois* continues to create confusion among the lower courts as to whether a finding of bad faith or willful misconduct is required before alibi evidence may be excluded as a discovery sanction. In *Michigan v. Lucas*, 500 U.S. 145, 152 (1991), the Court described *Taylor* in this way:

> We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be "adequate and appropriate in most cases." *Id.*, at 413, 108 S.Ct., at 655. We stated explicitly, however, that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Ibid. Taylor,* we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." *Id.*, at 417, 108 S.Ct., at 657. Based on these findings, we determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate."

*Lucas*, however, did not resolve the confusion as to whether, in cases like Petitioners, where no "bad faith" or willful misconduct is involved in the late-disclosure of alibi evidence, the severest sanction of exclusion is nonetheless permissible.

The First Circuit has noted that most cases upholding preclusion of an alibi defense involve willful misconduct by the defense. *United States v. Portela*, 167 F.3d 687, 705 (1st Cir. 1999) (citing *Bowling v. Vose*, 3 F.3d 559, 561-62 (1st Cir. 1993) (collecting cases from various circuits). Indeed, many circuit court cases affirming exclusion in response to discovery violations do involve willful conduct. *See United*

*States v. Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992); *United States v. Mitan*, 966 F.2d 1165, 1175 (7th Cir. 1992); *Horton v. Zant*, 941 F.2d 1449, 1467 (11th Cir. 1991); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991); *Eckert v. Tansy*, 936 F.2d 444 (9th Cir. 1991); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988); *Chappee v. Vose*, 843 F.2d 25 (1st Cir. 1988). But these cases never addressed the question presented in Petitioner's case as to whether, in the *absence* of bad faith or willful misconduct, the sanction of exclusion is still available. See e.g., *Portela*, supra, where the First Circuit "[a]ssum[ed] without deciding that the court was wrong to exclude the alibi evidence in the absence of an explicit finding of willful misconduct by the defense." 167 F.3d at 705.

The Second, Eighth and Ninth Circuits read *Taylor* to mean that bad faith is a prerequisite to the exclusion of alibi evidence as a discovery sanction. *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (construing *Taylor* to require "bad faith" as a condition for exclusion, remanding the case to the district court for a hearing on whether the defense acted in bad faith, and stating the "absence of a good excuse is not necessarily commensurate with 'willful' conduct"), but see *United States v. Cervone*, 907 F.2d 332, 346 (2d Cir. 1990) (characterizing *Taylor* as a decision that "procedural rules for adversary process limit defendant's right to present exculpatory evidence" and emphasizing the inadequacy of the defendant's excuse); *Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997) (while the preclusion of an alibi witness testimony can violate the Sixth Amendment, it does not invariably do so. If the discovery violation was "willful and motivated by a desire to obtain a tactical advantage," it is "entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness'

testimony," citing *Taylor*); *Grooms v. Solem*, 923 F.2d 88, 90–91 (8th Cir. 1991) (exclusion is appropriate if the delay was result of willfulness); *United States v. Peters,* 937 F.2d at 1426 (where no willful and blatant discovery violations occurred, the application of the exclusionary sanction is impermissible.)

On the other hand, the D.C., First, Sixth and Eleventh Circuits have read *Taylor* as establishing a balancing test in which defense bad faith is a powerful factor. *United States v. Day*, 524 F.3d 1361, 1372 (D.C. Cir. 2008) (exclusion is not always unwarranted in the absence of bad faith or the presence of less drastic alternatives); *United States v. Johnson*, 970 F.2d at 911 (the trial judge need not find that the noncomplying counsel acted in "bad faith" in order to justify the exclusion of evidence as a sanction for failure to comply with a discovery rule); cf. *Horton v. Zant*, 941 F.2d 1449, 1466–67 (11th Cir. 1991) (applying *Taylor* to a case involving evidence discovered after trial, stating general balancing test but relying on likelihood that evidence was fabricated); *Williams v. Curtin*, 613 F. App'x 461, 468 (6th Cir. 2015) (*Taylor* allows for various factors to be potentially relevant in evaluating the appropriateness of the preclusion sanction; it does not prescribe a comprehensive standard, and it does not mandate interest-balancing).

The Fifth Circuit has acknowledged that in *Taylor*, the Court decided that "a complete evidentiary exclusion was an acceptable sanction in certain situations, though it declined to enumerate a definitive test." *Byrom v. Epps*, 518 F. App'x 243, 250 (5th Cir. 2013). Petitioner urges that it is time for this Court to "enumerate a definitive test" on the question of whether "willful misconduct" or "bad faith" is required before the drastic sanction of excluding a criminal defendant's exonerating alibi witness is justified. Until

it does, criminal defendants, like Petitioner, through no fault of their own or their overworked public defenders, will be subjected to this harsh sanction. No bad faith was involved in Petitioner's case, yet the Missouri Court upheld the severest sanction because it found that there was "no reasonable justification for the late endorsement," it "took the State by surprise and would have resulted in fundamental unfairness to the State." (App.A17). Alternative remedies short of exclusion, such as a continuance, were offered by the defense, but rejected. Petitioner's ability to definitively show the jury that he is actually innocent was extinguished when his alibi evidence was excluded without a showing of any willful discovery violation. This Court must determine whether this situation is warranted under *Taylor v. Illinois.*

## CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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