

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PIPER, JR. - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
No. 17-10913

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I.

Whether Petitioner was deprived of compulsory process under the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution where Petitioner filed applications for writ of habeas corpus ad testificandum to compel the production of defense witnesses Castle and Ely at Petitioner's trial; where, in response to the applications, the district court sua sponte ordered the government to issue Attorney Special Requests ("ASRs") to the U. S. Marshal to produce defense witnesses Castle and Ely at Petitioner's trial; where defense witness Ely was not produced at Petitioner's trial; where mistake of fact and/or mistake of law provided the basis for Ely's non production; where the district court failed to enforce its order to produce defense witness Ely at Petitioner's trial; and whether review should be de novo under Rule 51(b) of the Federal Rules of Criminal Procedure; or whether the district court plainly erred under Rule 52(b) of the Federal Rules of Criminal Procedure?

II.

Whether the district court abused its discretion in denying Petitioner's motion to continue trial to secure the production of Petitioner's only favorable and material witness?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

David Piper, Jr. also known as "D", Carlos Cortinas, Defendants-Appellants, and United States of America, Plaintiff-Appellee.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner David Piper, Jr. respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

[X] reported at 912 F.3d 847 (5th Cir. 2019).

The judgment and sentence of the United States district court appears at Appendix B to the petition.

JURISDICTION

On January 10, 2019, the United States Court of Appeals for the Fifth Circuit entered its opinion in No. 17-10913, *United States of America, Plaintiff-Appellee v. David Piper, Jr. also known as "D"; Carlos Cortinas, Defendants-Appellants*, 912 F. 3d. 847 (5th Cir. 2010), affirming the judgment of conviction and sentence in No. 4:16-CR-00278-O, *United States of America v. David Piper, Jr.*, in the United States District Court for the Northern District of Texas, Fort Worth Division. No petition for rehearing was filed. This petition is filed within 90 days of that date and is therefore timely. See Sup Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The United States District Court, Northern District of Texas, Fort Worth Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

No person shall be deprived of life, liberty, or property, without due process of law[.]

U. S. Const. amend V.

The Compulsory Process Clause of the Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to ... to have compulsory process for obtaining witnesses in his favor[.]

U. S. Const. amend VI.

Federal Rule of Evidence 601 provides in pertinent part:

Every person is competent to be a witness unless these rules provide otherwise.

Fed. R. Evid. 601.

Federal Rule of Criminal Procedure 51(b). Preserving Claimed Error Provides:

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Fed. R. Crim. Pro. 51(b)

Federal Rule of Criminal Procedure 52(b). Plain Error provides:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. Pro. 52(b).

STATEMENT OF THE CASE

I. Course of Proceedings.

September 19, 2016: Alexander Munoz, Anthony Munoz, Kiriakis Castle, Chadwick Hernandez, David Piper, Jr. ("Petitioner"), and Carlos Cortinas ("Cortinas"), were charged by Criminal Complaint in No. 4:16-MJ-00628-BJ, in the United States Magistrate Court for the Northern District of Texas, for Conspiracy to Possess with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 846 (21 U.S.C. § 841(a)(1) & (b)(1)(B)).

December 14, 2016: Chadwick Hernandez, David Piper, Jr. and Carlos Cortinas were charged by a one-count indictment in No. 4:16-CR-00278-O, in the United States District Court for the Northern District of Texas, Fort Worth Division, for Conspiracy to Possess with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 846 (21 U.S.C. § 841(a)(1) & (b)(1)(B)).

February 15, 2017: Chadwick Hernandez, David Piper, Jr., and Carlos Cortinas were charged by a one-count superseding indictment in No. 4:16-CR-00278-O, in the United States District Court for the Northern District of Texas, Fort Worth Division, for Conspiracy to Possess with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. § 846 (21 U.S.C. § 841(a)(1) & (b)(1)(A)).

March 20, 2017: David Piper, Jr.'s and Carlos Cortinas' jury trial began.

March 21, 2017: David Piper, Jr. and Carlos Cortinas were found guilty.

August 14, 2017: Petitioner was sentenced to serve a term of imprisonment of two hundred thirty-five (235) months, a term of supervised release of five years.

August 15, 2017: Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On January 10, 2019, the Fifth Circuit affirmed the lower court's judgment of conviction and sentence. See *United States v. David Piper, Jr. also known as "D"; Carlos Cortinas*; No. 17-10913, (5th Cir. January 10, 2019) (Appendix A).

II. Cast, Chronology, Relevant Facts.

A. Cast:

Government Witnesses Rosales and Garza:

Roberto Rosales ("Rosales") and Jose Albino Garza ("Garza"): government's only two witnesses at Petitioner's trial who inculpated Petitioner in the conspiracy by identifying Petitioner as Rosales's drug customer in Missouri.

Petitioner's Defense Witness Codefendant Castle:

Kiriakis Castle ("Castle"): Petitioner's codefendant in No. 4:16-MJ-00628. Garza provided information to the government that led to Castle's arrest and prosecution in the instant case. Castle pleaded guilty sometime before March 9, 2017.

Petitioner's Defense Witness Ely:

Spencer Glen Ely ("Ely"): Defendant in unrelated criminal case No. 7:17-CR-00023-OLG pending in the Western District of Texas, Midland-Odessa Division.

B. Chronology and Relevant Facts:

Prosecution of Rosales and Garza:

January 22, 2016: Rosales agreed to cooperate with the government.

February 10, 2016: Roberto Rosales and Jose Garza were indicted in No. 4:16-CR-00030, the Northern District of Texas, Fort Worth Division for Conspiracy to Possess with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 846 ("Rosales' conspiracy").

February 19, 2016: Garza agreed to cooperate with the government.

June 27, 2016: Rosales was sentenced to 360 months.

August 10, 2016: Garza was sentenced to 240 months.

Petitioner arrested:

November 1, 2016: Petitioner was arrested in the Western District of Missouri, Springfield Division for the instant case.

November 10, 2016: Petitioner was released pending trial.

February 21, 2017: Petitioner was arrested in the Western District of Missouri for violations of conditions of pretrial release.

***No. 7:17-CR-00023, The Western District of Texas:
Magistrate Order for psychiatric or psychological examination of Ely:***

February 13, 2017: The magistrate court presiding over Ely's pending unrelated criminal case in the Western District of Texas, found "there is reasonable cause to believe that Defendant SPENCER GLEN ELY may suffer from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of future proceedings against him or to assist properly in his defense[,"] and ordered:

that Defendant SPENCER GLEN ELY is committed to the custody for the Attorney General for placement in a suitable facility closest to the Court for a period not to exceed thirty (30) days from the date of arrival

at such facility[;] ... "that a psychiatric or psychological examination of Defendant SPENCER GLEN ELY shall be conducted pursuant to 18 U.S.C. § 4247(b)[;] ... that a report in the form and manner prescribed by 18 U.S.C. § 4247(b) shall be prepared by the examiner designated to conduct the psychiatric or psychological examination and that said report shall be filed with the Court ...[;] ... that, upon the filing of said report, Defendant SPENCER GLEN ELY shall be returned at a date and time to be set by this Court for further proceedings provided by 18 U.S.C. § 4241(c) and (d).

Bureau of Prisons FMC/FCI Fort Worth, Texas Jail Facility:

- Sometime after February 13, 2017: Ely was transported to the Bureau of Prisons FMC/FCI Fort Worth, Texas jail facility ("FCI Fort Worth") for the Ely's psychiatric or psychological examination.
- Sometime on or after February 21, 2017: Petitioner was transported to the FCI Fort Worth pending trial.
- Sometime before March 9, 2017: Castle was transported to the FCI Fort Worth to await sentencing.
- Sometime before March 9, 2017: Garza was transported to the FCI Fort Worth in preparation for Petitioner's trial.
- Sometime before March 9, 2017: Castle and Garza had a conversation about Rosales' drug conspiracy.
- Sometime after Castle and Garza's conversation and before March 9, 2017: Castle initiated a conversation with Petitioner at the FCI Fort Worth. Ely overheard the conversation, which he memorialized in writing and gave to Petitioner.¹

¹ Ely's handwritten statement is reproduced in the Court Opinion. See Appx. A at 7-8.

Castle's Statements:

Castle's statements, as told by Ely, contradicted relevant and material facts that Rosales and Garza were expected to testify to at Petitioner's trial, and provided motive and opportunity for Garza and Rosales to falsely inculpate Petitioner in the conspiracy. Castle told Petitioner that Rosales and Garza had falsely identified Petitioner as Rosales' high-volume drug customer because after Rosales went to jail, Rosales' brother took over Rosales' drug business including the Missouri drug customer, and Rosales and Garza didn't want to give Rosales' Missouri drug customer up. Castle also told Petitioner that Rosales' Missouri drug customer sold Rosales a truck and trailer and that Rosales paid for the truck with methamphetamine.

Ely's Handwritten Statement:

- March 9, 2017: Petitioner was transported to the magistrate court in Fort Worth, Texas for his detention hearing. At the conclusion of the hearing Petitioner gave Ely's written statement to his attorney.

- March 14, 2017: Petitioner's attorney asked Ely and Castle's attorneys for permission to interview their respective clients.

- March 16, 2017: Petitioner's attorney met with Ely at the FCI Fort Worth. Ely confirmed that he had witnessed Castle initiate a conversation with Petitioner, that he had overheard the conversation and voluntarily written the statement. Petitioner's counsel found Ely credible.

***Writs of habeas corpus ad testificandum
for defense witnesses Castle and Ely:***

- March 16, 2017: Petitioner filed applications for writs of habeas corpus ad testificandum for Castle and Ely.

District Court Order to Government to produce Castle and Ely at Petitioner's Trial:

- March 17, 2017: In response to Petitioner's applications, the district court, sua sponte, ordered the Government to issue Attorney Special Requests ("ASR's")² to the U.S. Marshal to produce Castle and Ely for Petitioner's trial set to begin on March 20, 2017.

Government Notice to Court:

- March 17, 2017: The government filed a Notice to the Court:

The government has since learned from the U.S. Marshal Service, Deputy Daryl Wieland, that Spencer Ely cannot be produced in court because he is in Fort Worth FCI for the completion of a medical study. Specifically, the government notes that documents were filed in Ely's pending case, which was filed in the Western District of Texas, Midland-Odessa Division, that indicate Ely's counsel requested a psychological evaluation of Ely. That request was granted on February [13], 2017.³ As a result of that order, Ely was brought to the FCI-Fort Worth. According to the U.S. Marshal Service, Ely is under the care of a physician who has advised that he cannot be released to Court until his medical study is complete. Deputy Wieland stated that the medical study is not yet complete. Deputy Wieland also stated that the only other way for Ely to be released is if the judge who ordered the study communicates directly with the doctor and orders Ely released. The

² 18 U.S.C. § 3621(d) provides: "[t]he United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government. The U. S. Marshal Service's policy manual states "[t]he United States Attorney may direct that prisoners in USMS custody be produced through the issuance of form USA-475," also known as an Attorney Special Request. United States Marshal Service, *Policy Directives* § 9.13(G), available at

https://www.usmarshals.gov/foia/directives/prisoner_operations.pdf.

³ The government's Notice states the date of the magistrate's order for Ely's evaluation was February 17, 2017, however, the date shown by file stamp on the order is February 13, 2017.

government has advised defense counsel of this information. Counsel has stated that he is in the process of contacting Ely's attorney to obtain assistance regarding the use of this witness.⁴

Petitioner's Motion to Continue Trial:

- March 17, 2017: Petitioner, through counsel, filed a motion to continue trial until April 17, 2017, or a later date that allows time for Ely's medical evaluation to conclude. In his motion, Petitioner asserted Ely "is a material and relevant witness that has potentially exculpatory testimony to provide regarding Defendant Piper's involvement in this case." The motion chronicled the recent events that led to the filing of the motion just three days before trial. Petitioner explained that Ely had overheard Castle make statements to Petitioner that were exculpatory as to Petitioner; that Castle was expected to invoke privilege against compelled self-incrimination when called to testify for Piper; that such invocation would render Castle unavailable under Federal Rules of Evidence 804(a)(1) and *United States v. Thomas*, 571 F. 2d 285 (5th Cir. 1978); that Castle's out of court statements would then be admissible through Ely as statements against penal interest under Rule 804(b)(3) of the Federal Rules of Evidence, rendering Ely, who was willing to testify, Petitioner's only material and relevant witness; and that one agent's anticipated trial testimony would corroborate relevant portions of Castle's statements. Petitioner further explained that counsel's attempts to contact Ely's attorney had been unsuccessful. Petitioner asserted that the motion was brought so that the defense

⁴ The government's Notice states the date of the magistrate's order for Ely's evaluation was February 17, 2017, however, the date shown by file stamp on the order is February 13, 2017.

can present evidence through the testimony of a material witness. A copy of Ely's statement was attached to Petitioner's motion.

Government's response to Petitioner's Motion to Continue Trial:

- March 18, 2017: The government filed a response opposing Petitioner's motion to continue trial "to procure the hearsay testimony of a likely incompetent witness." The government asserted that cooperating defendants Rosales and Garza had provided information that led to the arrest and prosecution of Castle, therefore Castle's statements about the credibility of Rosales and Garza were not against Castle's penal interest, rather were self-serving, therefore Ely's testimony would be inadmissible hearsay. The government further argued if Ely is in fact deemed incompetent, the Court cannot be expected to delay trial indefinitely until he regains competency.

Trial:

- March 20, 2017: Petitioner's trial began with jury selection.⁵ After the venire panel was sworn, the district court directed Petitioner's attorney ("counsel") to identify Petitioner's witnesses. Counsel asked to approach the bench. The district court did not permit counsel to approach, rather instructed counsel to "just go ahead and identify anyone. It doesn't matter at this point."

After voir dire, the district court recessed. After recess the district court addressed Petitioner's counsel, "Okay. You filed a motion to continue?" Counsel restated the basis for the written motion to continue and the reason for its late filing;

⁵ The Record reflects that no pretrial matters were heard prior to jury selection.

that Castle made statements to Petitioner about his knowledge of the conspiracy and Garza and Rosales, that Castle's statements were exculpatory as to Petitioner; that Castle was Petitioner's only material and relevant witness; that Ely overheard Castle's statements; that, when called to testify for Petitioner; Castle was expected to invoke Fifth Amendment privilege against self-incrimination; that Castle would then be unavailable under Rule 804(a)(1) of the Federal Rules of Evidence; that Castle's out-of-court statements would become admissible through Ely as statements against Castle's penal interest under Rule 804(b)(3) and *United States v. Thomas*, 571 F.2d. 285 (5th Cir. 1978); rendering Ely Petitioner's only material and relevant defense witness. Petitioner informed the district court of his wish to make an offer of proof of Ely's testimony if Ely were not permitted to testify. The government opposed continuance of trial. The government asserted:

... It's just a question of whether or not it's admissible hearsay due to some type of an exception. I would submit to you that it's not for the reasons I've already stated in my response and I would also submit to you that there is an inherent concern as to the reliability or trustworthiness of these statements that the Defense wants to introduce because we are dealing with a witness who has already been deemed by his attorney to be incompetent or having had competency issues, so there is no element of reliability to the Defendant Ely -- or, excuse me, to witness Ely's statements because the lack any kind of trustworthiness. I would submit that in and of itself should preclude the admissibility of it. ... It is not appropriate to impeach with a witness who is simply hearing hearsay and his testimony would be unreliable.

The district court denied Petitioner's motion to continue trial "for the reasons you have stated and stated in your Response."

At trial, only Rosales and Garza inculpated Petitioner ("Piper") in the conspiracy by identifying Petitioner as Rosales' drug customer in Missouri.

Codefendant Hernandez didn't testify at trial and Codefendant Munoz testified he had never met Piper. Garza and Rosales testified that they had delivered 3 pounds of methamphetamine to Piper on September 5, 2017; that Piper had called complaining about the quality of the drugs; that Garza and Hernandez were stopped and arrested after exchanging 3 pounds of methamphetamine with Piper; that Piper was originally Cortinas' drug customer; that Cortinas called Piper from Rosales's phone; after which Rosales cut Cortinas out; that Garza made additional drug deliveries to Piper in Missouri; and that Piper had picked up kilos of drugs from Rosales' and Cortinas' houses in Texas.

Ely's testimony would have impeached Garza's and Rosales' testimony and exculpated Piper, i.e., that Garza and Hernandez were not coming back from Piper's house with the three pounds of methamphetamine the day they were arrested; that they were coming back from another dude's that lives in Missouri; a high roller who goes through several keys a week; that Rosales was buying a truck from that dude and making payments in dope; that since Rosales has been in jail his brother had taken over Rosales drug business; that Rosales didn't want to give up his main buyer; that Garza had agreed to "throw Piper under the bus" in exchange for Rosales' brother's taking care of Garza's family; that Garza had gotten Piper's name and address when Cortinas was dropped off at Piper's house to meet his girlfriend's friend; that Piper was just a casualty because they had to come up with someone to blame for the three pounds of methamphetamine that law enforcement found when Garza and Hernandez were stopped in Oklahoma.

March 21, 2017: The government called its remaining witnesses. After the government rested, defense witness was brought into the courtroom outside the presence of the jury. After being sworn, Castle invoked privilege against compelled self-incrimination. As a result of Castle's invocation of privilege and Ely's non-production, Petitioner was prevented from calling any witnesses in his defense at his trial.

- March 21, 2017: The jury found Petitioner guilty.

Posttrial:

- April 4, 2017: Petitioner filed a Motion to Vacate and Order a New Trial. In his motion, Petitioner argued "[d]enying Piper a new trial would be a miscarriage of justice. He had a right to call available and material witnesses in his defense. Spencer Ely overheard exculpatory statements that could have raised reasonable doubt in the minds of the jurors. The moment Castle refused to testify, Ely's testimony because admissible and relevant."

- April 11, 2017: The government filed a response to Petitioner's Motion. In its Response, the government argued "Piper's witness may be incompetent, Ely's testimony would have constituted inadmissible hearsay, Piper had an opportunity to present his theory before the jury, and despite insinuations that this person name Turner was involved in drug activity, the traffic stops and the phone records failed to lend any credibility to Piper's theory that the government arrested the wrong man from Missouri. Instead the weight of the evidence presented at trial supports the verdict reached by the jury."

- August 14, 2017: Petitioner's sentencing hearing. During his sentencing hearing, Petitioner, through counsel, informed the district court of his previously filed motion for new trial. Without hearing argument or providing basis, the district court denied Petitioner's motion.

- August 15, 2017: Petitioner filed Notice of Appeal.

III. Direct Appeal:

A. Petitioner's issues on appeal.

On appeal Petitioner argued (1) he was denied compulsory process under the Sixth Amendment's Compulsory Process Clause and the Fifth Amendment's Due Process Clause to the United States Constitution, and (2) the district court abused its discretion in denying his motion to continue trial.⁶

1. Whether Piper was deprived of compulsory process?

Petitioner argued, *inter alia*, that he was denied compulsory process when the district court did not enforce its order to produce defense witness Ely at Petitioner's trial. Petitioner requested Ely's attendance because Castle, Petitioner's only favorable, material, relevant, and sufficiently probative witness, was expected to invoke privilege against self-incrimination if called to testify for Petitioner, rendering Ely Petitioner's only favorable and material witness under Rule 804(b)(3) of the Federal Rules of Evidence. Petitioner argued the basis for Ely's non-production, i.e., that Ely could not be released to court until his medical study was complete unless the court that ordered Ely's evaluation ordered Ely's release, was arbitrary and

⁶ Piper presented four issues and adopted Codefendant Cortinas' sole issue on appeal, however, only two are presented in this Petition for Certiorari.

unreasonable because, under Rule 601 of the Federal Rules of Evidence "[e]very person is competent to be a witness unless these rules provide otherwise. ... ". Fed. R. Evid. 601.

2. Whether the district court abused its discretion by denying Petitioner's motion to continue trial?

Petitioner argued the district court abused its' discretion in denying Petitioner's motion to continue trial, the sole basis of which motion was to secure the attendance of Ely, his only favorable and material witness, where Petitioner had no influence over the timing of his discovery of Castle; of Castle's unavailability; or over the government's failure to produce Ely at Petitioner's trial per the district court's order. Petitioner argued the denial of his motion to continue trial was arbitrary and unreasonable because Ely was had not been determined Ely had not been found incompetent, and that Ely's pending psychological examination to determine whether Ely was able to assist in his own defense did not render Ely per se incompetent to testify as a defense witness for Petitioner. Petitioner argued that Ely's hearsay statements were admissible and plausible in light of the record, therefore the denial of his motion to continue trial prejudiced Petitioner. In support, Petitioner demonstrated that Ely's statements were credible and could have affected the trier of fact where Ely's statements had been corroborated by the trial testimony of government witnesses Rosales, Munoz, TFO Kasterke, and DEA SA Martinez, and how the trial testimony of Garza and Rosales, had conflicted with their own testimony, one another's testimony, with other witnesses testimony, and with objective evidence presented at trial.

IV. Court of Appeals for the Fifth Circuit Opinion:

1. Whether Piper was deprived of compulsory process?

The Court of Appeals for the Fifth Circuit ("Court") affirmed the district court as to all issues presented. The Court applied plain error review whether Petitioner was deprived of compulsory process because Petitioner did not raise a compulsory-process objection in the district court See Appx. A at 5.

The Court analyzed the admissibility of Ely's hearsay testimony. Applying the requirement of Fed. R. Evid. 804(b)(3), that the declarant be unavailable, the Court found that Castle was unavailable to testify under Fed. R. Evid. 804(a)(1) upon his invocation of his Fifth Amendment privilege against self-incrimination. See Appx. A at 9-10.

Applying the next requirement of Fed. R. Evid. 804(b)(3) that the statement must subject the declarant to criminal liability such that a person would not have made the statement unless he believed it to be true, the Court opined that the Rule "is not limited to direct confessions of guilt. Rather, by referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that could have probative value in a trial against the declarant." Appx. A. at 10. The Court concluded that Castle's statements could be subject to multiple interpretations.

If Castle's statements were interpreted as an attempt to disclaim all participation in the conspiracy, and to relay knowledge of the conspiracy to Piper that he later learned through criminal proceedings against him and by confronting Garza in prison about the alleged set up. Such statements would serve Castle's penal interests rather than subject him to criminal liability, as Castle would be portrayed as the innocent victim

of a set up. Under this interpretation, Castle's statements would be inadmissible under [Fed. R. Evid. 804(b)(3)]. Alternatively, Castle's statement about confronting Garza could be construed narrowly as the source of his knowledge only as to certain aspects of the conspiracy, such as Garza's and Rosales's plan to set up Piper. Under this interpretation, some of Castle's statements reflecting knowledge of the conspiracy could still be considered statements against his penal interest and would therefore be admissible.

Appx. A at 10-11.

Applying the last requirement of Fed. R. Evid. 804(b)(3,) that the statement must be corroborated by circumstances clearly indicating trustworthiness, the Court found "[t]he record substantiates some of Castle's statements and indicates some level of trustworthiness. However, the fact that some of Castle's statements direct criminal liability toward others cuts against their trustworthiness." Appx. A at 11-12. The Court did not conclude that the circumstances under which the statements were made entitled them to additional credibility where Castle made the statements to Piper while the two were incarcerated in the same facility, where it would have been possible to devise a plan to make a mutually beneficial statement casting them as the innocent victims of a set up.

The Court concluded "[b]ecause it is not clear or obvious that Castle's hearsay statements were admissible, Piper cannot make the necessary showing that his due process and compulsory process rights were clearly violated." Appx. A at 12.

2. Whether the district court abused its discretion in denying Piper's motion to continue trial?

The Court reviewed the district court's denial of Petitioner's motion to continue trial for abuse of discretion, "[a] district court has broad discretion in deciding

whether to grant a request for a continuance, and this court reviews 'only for an abuse of that discretion resulting in serious prejudice.' Appx. A. at 13. The Court concluded "[b]ecause Ely's testimony was not clearly admissible, Piper cannot show that denying the motion would have resulted in serious prejudice, and the district court did not abuse its discretion by denying the motion." Appx. A at 13.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and contrary to Rule 601 of the Federal Rules of Evidence.

I. Federal Question.

Whether Petitioner was deprived of compulsory process under the Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution where Petitioner filed applications for writ of habeas corpus ad testificandum to compel the production of defense witnesses Castle and Ely at Petitioner's trial; where, in response to the applications, the district court sua sponte ordered the government to issue Attorney Special Requests ("ASRs") to the U. S. Marshal to produce defense witnesses Castle and Ely at Petitioner's trial; where defense witness Ely was not produced at Petitioner's trial; where mistake of fact and/or mistake of law provided the basis for Ely's non production; where the district court failed to enforce its order to produce defense witness Ely at Petitioner's trial; whether review should be de novo under Rule 51(b) of the Federal Rules of Criminal Procedure; and whether the district court plainly erred under Rule 52(b) of the Federal Rules of Criminal Procedure?

A. Relevant Decisions and Rules.

Federal Rule of Evidence 601 in pertinent part:

Rule 601 of the Federal Rules of Evidence, in pertinent part: "[e]very person is competent to be a witness unless these rules provide otherwise."

Fed. R. Evid. 601.

United States Constitution Fifth Amendment Due Process Clause:

No person shall ... be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend V.

United States Constitution Sixth Amendment Compulsory Process Clause:

In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor[.]

U.S. Const. amend VI.

Compulsory Process:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense a right to his day in court are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S., at 273 (footnote omitted).

Washington v. Texas, 388 U. S. 14, 19 (1967).

Federal Rule of Criminal Procedure 51(b). Preserving Claimed Error:

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Fed. R. Crim. Pro. 51(b).

B. Discussion

Attorney Special Requests for Defense Witnesses Castle and Ely

The district court was aware of the action Petitioner wanted the district court to take when, prior to trial, Petitioner filed applications for writs of habeas corpus ad testificandum for defense witnesses Castle and Ely and when in response to the applications, the district court, without inquiry whether or to what extent,

Petitioner's defense witnesses would be favorable, material, and cumulative to Petitioner's defense, *sua sponte*, ordered the government to issue Attorney Special Requests ("ASR's") to the U. S. Marshal to produce Castle and Ely at Petitioner's trial. Castle was produced at Petitioner's trial however, Ely was not.

Government Notice to the Court defense witness Ely cannot be produced until medical study complete:

The government's Notice to the Court, set forth *supra*, made clear the government would take no further action to comply with the district court's order to produce Ely at Petitioner's trial.

[C]ompetency of a witness is within the sound discretion of the trial court, and its determination will only be reviewed for abuse of discretion. Federal Rule of Evidence 601 states that [e]very person is competent to be a witness unless [the Federal Rules of Evidence] provide otherwise. Despite this presumption, the district court must still determine whether a witness is capable of communicating relevant material and understands she has an obligation to do so.

United States v. Barnes, 803 F.3d 209, 219 (5th Cir. 2015) (internal citations omitted).

The wording in the Notice "cannot be released to Court until his medical study is complete," indicate the doctor, and in turn the deputy, mistook the ASR to be an order to produce Ely for further proceedings in the criminal case pending against Ely in his role of defendant, rather than to produce Ely in court as a defense witness at Petitioner's trial; or that the doctor, the deputy, the government, and the district court, erroneously determined that that Ely could not be compelled to testify as a defense witness at Petitioner's trial until Ely's psychiatric or psychological examination to determine whether Ely suffered from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand

the nature and consequences of future proceedings against him or to assist properly in his defense was complete.

Rule 601 of the Federal Rules of Evidence provides "[e]very person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601. Accordingly, the basis for Ely's non-production at Petitioner's trial, i.e., because Ely's psychiatric or psychological examination was not complete, was contrary to Rule 601 of the Federal Rules of Evidence.

The government's failure to comply with the district court's unconditional and non-discretionary order, and the district court's failure to enforce its order to produce defense witness Ely at Petitioner's trial due to an uncorrected mistake of fact that the ASR was issued to produce Ely for further proceedings in the criminal case pending against Ely, or a mistaken interpretation of the law that Ely was a priori incompetent to testify as a defense witness for Petitioner because his psychiatric or psychological examination was not complete, arbitrarily deprived Petitioner of compulsory process. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) ("our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses and the right to put before a jury evidence that might influence the determination of guilt."); *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006) (collecting cases: "[t]his Court's cases contain several illustrations of "arbitrary" rules, i.e., rules that excluded important defense evidence but that did not serve any legitimate interests).

Federal Rule of Criminal Procedure 51(b)

The Court's review should be de novo under Rule 51(b) of the Federal Rules of Criminal Procedure. "A party may preserve a claim of error by informing the court – when the ruling or order is made or sought of the action the party wishes the court to take." ... "If a party does not have an opportunity to object to a ruling or order, the absence of that objection does not later prejudice that party." Fed. R. Crim P. 51(b). "Generally, if a party fails to raise an issue in district court, we will review it for plain error unless the party made its position clear to the district court and to have objected would have been futile." *United States v. Castillo*, 430 F.3d 230, 242 (5th Cir. 2005). "The general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance." *Id.* at 243 (internal citations omitted).

Petitioner informed the district court of the action he wished the court to take, i.e., to compel the attendance of defense witnesses Castle and Ely at Petitioner's trial when he filed the applications for writs of habeas corpus ad testificandum. The district court's order to produce Castle and Ely at Petitioner's trial indicates the district court intended to compel both Castle's and Ely's attendance at Petitioner's trial.

***Basis of Petitioner's motion to continue trial
to compel the attendance of defense witness Ely.***

After receiving the government's Notice that Ely could not be produced in court, Petitioner filed an opposed motion to continue trial" until April 17, 2017, or a later date that allows time for Ely's medical evaluation to conclude." The sole basis for Petitioner's motion to continue trial was to compel the attendance of defense witness at his trial, i.e., to exercise his right to compulsory process, therefore also served to re- inform the district court of the action Petitioner wished the district court to take, i.e., to compel the attendance of defense witness Ely at Petitioner's trial.

In its written response opposing Petitioner's motion to continue trial "*to procure the hearsay testimony of a likely incompetent witness.*" The government argued that Ely's prospective testimony, i.e., Castle's out-of-court statements, would be inadmissible hearsay because Castle's statements were not be against Castle's penal interest, and "*if Ely is in fact deemed incompetent, the Court cannot be expected to delay trial indefinitely until he regains competency.*"

The district court didn't hear argument or otherwise consider Petitioner's motion prior to trial. At trial, when directed by the district court to identify his witnesses to the venire panel, Petitioner asked to approach the bench. The district court directed counsel to identify his witnesses. Not until after voir dire did the district court consider Petitioner's motion to continue trial: "Okay. You filed a motion to continue?" Counsel restated the basis for the written motion to continue and the reason for its late filing: that Castle had made statements to Petitioner about his knowledge of the conspiracy and Garza and Rosales that were exculpatory as to

Petitioner; that Castle was Petitioner's only material and relevant witness; that Ely overheard Castle's statements; that Castle was expected to invoke Fifth Amendment privilege against self-incrimination when called to testify as a defense witness at Petitioner's trial; that upon such invocation, Castle would become unavailable under Federal Rule of Evidence 804(a)(1); that Castle's out-of-court statements would then become admissible through Ely as statements against Castle's penal interest under Rule 804(b)(3) and *United States v. Thomas*, 571 F.2d. 285 (5th Cir. 1978); thus rendering Ely Petitioner's only material and relevant defense witness. Petitioner informed the district court of his desire to make an offer of proof if Ely were not permitted to testify. The government opposed continuance of trial:

... It's just a question of whether or not it's admissible hearsay due to some type of an exception. I would submit to you that it's not for the reasons I've already stated in my response and I would also submit to you that there is an inherent concern as to the reliability or trustworthiness of these statements that the Defense wants to introduce because we are dealing with a witness who has already been deemed by his attorney to be incompetent or having had competency issues, so there is no element of reliability to the Defendant Ely -- or, excuse me, to witness Ely's statements because the lack any kind of trustworthiness. I would submit that in and of itself should preclude the admissibility of it. ... It is not appropriate to impeach with a witness who is simply hearing hearsay and his testimony would be unreliable.

The district court denied Petitioner's motion for continuance "for the reasons you have stated and stated in your Response."

At trial, after the government rested, the district court questioned defense witness Castle outside the presence of the jury:

THE COURT: All right, Mr. Castle. Your attorney is here in the courtroom. Do you see him?

CASTLE: Yes, I do, Your Honor.

THE COURT: And we are in the middle of this trial and counsel for one of the parties would like to call you as a witness. Have you been told that?

CASTLE: Yes, I have Your Honor.

THE COURT: And he would like to ask you some questions he thinks are relevant and pertinent to the case. Do you understand that?

CASTLE: Yes, sir.

THE COURT: You have a right not to incriminate yourself. Do you understand that?

CASTLE: Yes, sir. I ...

THE COURT: So you can invoke your Fifth Amendment right, your right against self-incrimination, if you choose but you can also answer questions and not invoke your rights. Do you understand that?

CASTLE: Yes, I do, Your Honor.

THE COURT: Have you talked about this with your lawyer?

CASTLE: Yes, I have, Your Honor.

THE COURT: Do you feel like your lawyer has fully explained to you the pros and cons of testifying or not testifying?

CASTLE: Yes, sir. Yes, Your Honor, he has.

THE COURT: And what is your intention if he lawyers ask you some questions about the drug activity related to this case?

CASTLE: I plead the Fifth on everything, Your Honor.

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked." *Hoffman v. United States*, 341 U.S. 479,

486-87 (1951). According to Petitioner's motion to continue trial, a copy of Ely's statement was disclosed to Castle's attorney on March 16, 2017. The colloquy between the district court and Castle evinces that Castle was aware he had been compelled to testify as a defense witness for Petitioner; that he was aware Ely's statement recounted statements he told to Petitioner about Garza and Rosales' drug activity; and that he would be questioned about those statements; and that, after fully discussing with his attorney whether to testify as a defense witness for Petitioner or invoke his privilege against self-incrimination, he had decided to invoke his privilege against self-incrimination. The district court did not further question Castle. The government did not challenge the validity of Castle's invocation of privilege against self-incrimination; i.e., whether statements made by Castle, as heard by Ely, were statements against Castle's penal interest, self-serving statements, or simply hearsay.

By filing applications for writs for Castle and Ely and by his motion to continue trial for the sole purpose of exercising his right to compulsory process, Petitioner made clear to the district court of the action he wished the court to take. By failing to enforce its order to produce Ely at Petitioner's trial, and by not allowing Petitioner, through counsel to approach the bench when asked to identify his witnesses, and by denying Petitioner's motion to continue trial for the reasons stated by the government, the district court indicated its position in no uncertain terms and to have objected would have been futile. Therefore, review whether Petitioner was deprived of compulsory process should be de novo. See Fed. R. Crim. P. 51(b).

Plain Error

Federal Rule of Criminal Procedure 52(b) provides that '[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention.' the Court established three conditions that must be met before a court may consider exercising its discretion to correct the error. 'First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant's substantial rights. 'To satisfy this third condition, the defendant ordinarily must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different. 'Once those three conditions have been met, 'the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'

Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-05 (2018) (Internal citations and quotations omitted).

The Court of Appeals for the Fifth Circuit reviewed whether Petitioner was deprived of compulsory process for plain error and concluded "[b]ecause it is not clear or obvious that Castle's hearsay statements were admissible, Piper cannot make the necessary showing that his due process and compulsory process rights were clearly violated." Appx. A at 12.

The Court's holding conflicts with relevant decisions of this Court and contrary to Rule 601 of the Federal Rules of Evidence. In *Washington v. Texas*, the State arbitrarily denied petitioner the right to have material testimony of a defense witness concerning events which the witness had observed and thus denied him the right to have compulsory process for obtaining witnesses in his favor. See *Washington v. Texas*, 388 U. S. 14, 19-23 (1967).

Under Rule 601 of the Federal Rule of Evidence "[e]very person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601.

In light of common law, and in view of the recognition in the Reid case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.

Washington v. Texas, 388 U.S. 14, 22 (1967).

The district court erred when it failed to enforce its order to produce defense witness Ely at Petitioner's trial in reliance of the government's argument that Ely's testimony would be a priori inherently unreliable and untrustworthy because Ely's examination to determine whether Ely suffered from a mental disease of defect rendering Ely mentally incompetent to the extent that Ely is unable to understand the nature and consequences of future proceedings against Ely or to assist properly in Ely's defense had not concluded. See *Washington v. Texas*, 388 U.S. 14, 22 (1967). Such error was arbitrary, therefore clear and obvious, and affected Petitioner's substantial rights where Ely's arbitrary non production deprived Petitioner of his constitutional right to compulsory process to secure the attendance of his only favorable and material defense witness; and such arbitrary deprivation of such substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings where Ely's testimony would have impeached the only two government witnesses who could inculpate Petitioner in the conspiracy as Rosales'

drug customer in Missouri, whose testimony had whose testimony conflicted with their own testimony and one another's testimony at trial. See *United States v. Olano*, 507 U.S. 725 (1993).

II. Federal Question

Whether the district court abused its discretion in denying Petitioner's motion to continue trial to secure the production of Petitioner's only favorable and material witness?

A. Relevant Decisions and Rules.

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996), superseded by statute on other grounds as noted in *United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir. 2004). Credibility of witnesses is normally a question for the jury to determine. See *United States v. Jackson*, 576 F2d. 46 (5th Cir. 1978).

Rule 601 of the Federal Rules of Evidence, in pertinent part: "[e]very person is competent to be a witness unless these rules provide otherwise."

Fed. R. Evid. 601.

[C]ompetency of a witness is within the sound discretion of the trial court, and its determination will only be reviewed for abuse of discretion. Federal Rule of Evidence 601 states that [e]very person is competent to be a witness unless [the Federal Rules of Evidence] provide otherwise. Despite this presumption, the district court must still determine whether a witness is capable of communicating relevant material and understands she has an obligation to do so.

United States v. Barnes, 803 F.3d 209, 219 (5th Cir. 2015) (internal citations omitted).

Rule 601 of the Federal Rules of Evidence, in pertinent part: "[e]very person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601.

B. Discussion

The Court of Appeals for the Fifth Circuit concluded "[b]ecause Ely's testimony was not clearly admissible, Piper cannot show that denying the motion would have resulted in serious prejudice, and the district court did not abuse its discretion by denying the motion." Appx. A at 13.

The district court abused its discretion because its denial of Petitioner's motion to continue was based on an erroneous interpretation of law. As discussed *supra*, and incorporated by reference herein the district court denied Petitioner's motion to continue trial for the reasons stated in its written response to the motion and at trial:

- (1) Castle's statements where themselves hearsay; Castle's statements were self-serving; Castle's statements were not against Castle's penal interest;
- (2) Ely was likely incompetent and was therefore inherently unreliable and untrustworthy, therefore no element of reliability to Ely's statements because they lack any kind of trustworthiness, already deemed incompetent or having competency issues; that in itself should preclude the admissibility of it.

Hearsay and self-serving statements are not against penal interest and would therefore be invalid bases to invoke privilege against self-incrimination. That the district court permitted Castle to invoke privilege against self-incrimination indicates it was satisfied that Castle's statements, as told by Ely, were against Castle's penal interest. Furthermore, the colloquy between Castle and the district court and Castle's invocation of privilege against self-incrimination, and the government's failure to challenge Castle's invocation evince that Castle's hearsay statements, in part if not

in whole, were against Castle's penal interest rendering Castle unavailable to testify for Petitioner. See Fed. R. Evid. 804(a)(1). The very nature of the privilege asserted by Castle when called to testify as a defense witness for Petitioner, indicates Castle would not have made the statements unless he believed them to be true; that the statements were, in part if not in whole, made from personal knowledge subjecting Castle to criminal liability; and made under circumstances clearly indicating trustworthiness. Thus, Castle's hearsay statements were admissible through Ely. See Fed. Rule Evid. 804(b)(3).

Petitioner asked to continue trial for only until after Ely's psychiatric or psychological examination was concluded. Ely's written statement evinces Ely was capable of communicating relevant material and was aware of his obligation to testify at Petitioner's trial. See *United States v. Barnes*, 803 F.3d 209, 219 (5th Cir. 2015) (internal citations omitted).

The government's argument that "the court could not be expected to delay trial until Ely regains competency," illustrates the government's mistake of law, i.e., that Ely would be a priori incompetent to testify as a defense witness for Petitioner unless and until a determination was made that Ely did not suffer from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of future proceedings against him or to assist properly in his defense. The government's argument provided the basis for the district court's denial of Petitioner's motion to continue trial was contrary to Rule 601 of the Federal Rules of Evidence and conflicted with relevant decisions of this Court,

therefore, was an error of law. See *Washington v. Texas*, 388 U.S. 14, 22 (1967), *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006) (collecting cases), Fed. R. Evid. 601.

Under *Koon v. United States*, the district court abused its discretion when it denied Petitioner's motion to continue trial based on an error of law. See *Koon v. United States*, 518 U.S. 81, 100 (1996), superseded by statute on other grounds as noted in *United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir. 2004).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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