No. 19-7018

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT RAY BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed structural error by excluding a portion of petitioner's trial testimony on the ground that it was inadmissible expert testimony.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Utah):

United States v. Bishop, No. 16-cr-662 (May 25, 2018)

United States Court of Appeals (10th Cir.):

United States v. Bishop, No. 18-4088 (June 10, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 926 F.3d 621.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2019. A petition for rehearing was denied on July 18, 2019 (Pet. App. B1).[1] On October 15, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to

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[1] The second appendix filed to the petition for a writ of certiorari is not paginated. This brief treats that appendix as if it was paginated beginning at B1.

and including December 16, 2019, and the petition was filed on that date. 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 Utah, petitioner was convicted of unlawfully manufacturing machineguns, in violation of 26 U.S.C. 5861(a), and unlawfully possessing or transferring machineguns, in violation of 18 U.S.C. 922(*o*). Judgment 1. The court sentenced petitioner to 33 months of imprisonment, followed by 36 months of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A21.

1. In 2015, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) recovered a "machine gun conversion device" while executing a search warrant in an unrelated case. Pet. App. A3 (citation omitted). The device "had paperwork with it that explained how it worked and it had pictures on it that showed how [to] install th[e] device." Ibid. (citation omitted; brackets in original). The paperwork indicated that the device was sold by a company called "TCGTR" through a website called "arfakit.com." Ibid. (citation omitted). Using state business registration records, ATF linked the TCGTR business and arfakit.com to petitioner. Ibid.

As petitioner acknowledges, he designed, manufactured, and sold the TCGTR ("trigger control group travel reducer") devices to customers who sought to increase the speed at which their AR-15 semiautomatic rifles fired. See Pet. App. A3, A5-A6 (citation omitted). The TCGTR is a "custom-made metal device" that, when properly bent according to petitioner's instructions, fits inside an AR-15. Id. at A3 (citation omitted). Petitioner "premarked * * * the bend location with a stencil" and provided "written instructions" and "photos" to his customers explaining how to bend the device correctly. Ibid. (citation omitted). ATF ordered multiple TCGTRs from petitioner and, after following petitioner's instructions for bending and installing a TCGTR, tested the effect on an AR-15. Ibid.

An AR-15 is, unless modified, a semi-automatic weapon. A semi-automatic weapon fires only a single shot with each pull of the trigger. Pet. App. A4 (citing Staples v. United States, 511 U.S. 600, 602 n.1 (1994)). An "automatic" or "fully automatic" weapon, in contrast, "fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." Ibid. (quoting Staples, 511 U.S. at 602 n.1). Federal law defines a machinegun to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading,

by a single function of the trigger." 26 U.S.C. 5845(b). "The term * * * also include[s] * * * any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." Ibid.; see Pet. App. A2.

Based on its testing, ATF concluded that the TCGTR was a machinegun because it caused an AR-15 to fire automatically more than one round with a single pull of the trigger. Pet. App. A4.

2. A federal grand jury in the District of Utah charged petitioner with unlawfully manufacturing machineguns, in violation of 26 U.S.C. 5861(a), and unlawfully possessing or transferring machineguns, in violation of 18 U.S.C. 922(*o*). Indictment 1-2. Petitioner chose to represent himself pro se, with standby counsel available at trial. Pet. App. A4; D. Ct. Doc. 25 (Nov. 28, 2017). At a pretrial hearing on the issue of self-representation, petitioner agreed to observe all the evidentiary and procedural rules that apply in a jury trial. Pet. App. A4.

Before trial, the government provided the defense with notice that it intended to call an expert witness on the topic of firearm functionality and sought reciprocal disclosure of any defense experts, as is required by Federal Rule of Criminal Procedure 16(b)(1)(C). Pet. App. A7. Petitioner did not disclose any experts, nor did he indicate that he planned to testify about matters within his own expertise. Ibid. At trial, the government

presented the expert testimony of ATF Special Agent Michael Powell. Id. at A5. Special Agent Powell explained how the TCGTR "overrides or negates the function" of the part of an AR-15 -- called the "disconnector" -- that stops the gun from firing a second shot until after the operator has released the trigger and pulled it again. Ibid. (citation omitted). Special Agent Powell observed that the TCGTR thereby allowed an AR-15 to "fire[] automatically." Ibid. (citation omitted).

Petitioner testified on his own behalf. Pet. App. A5. He admitted that he had designed the TCGTR "for an increased rate of fire," but maintained that he "wanted to do it legally." Ibid. (citation omitted). Specifically, petitioner testified that he designed the TCGTR to contact the AR-15's "trigger group assembly," but not to fully disable the AR-15's disconnector. Ibid. (citation omitted). As petitioner began to testify about specific parts of the "trigger group assembly," he attempted to "show the jury an animation that is on YouTube showing how that trigger group works," and offered to draw a diagram of the trigger group on a whiteboard. Ibid. (citation omitted). Specifically, petitioner wanted to testify that he

> designed the kit so that when a notched TCGTR is pushed down by a forward moving bolt carrier, it pushes down on the trigger bar causing the trigger to move back into its reset position. Because the operator is still trying to put pressure on the trigger, the operator will pull the trigger almost as soon as it is back in the reset position. The TCGTR in this configuration is called a forced reset trigger

> system, otherwise known as a positive reset trigger system. It requires a separate trigger pull to fire each round.

Id. at A9 (citation omitted).

The government objected, arguing that the proposed testimony was technical and specialized, and "would be required to come in through a qualified expert witness." Pet. App. A5 (citation omitted). The district court sustained the objection, determining that petitioner's proposed testimony was expert testimony that had not been disclosed to the government under Rule 16. Id. at A5-A6. It therefore did not permit petitioner's proposed testimony "about how the interaction between a TCGTR and an AR-15's trigger mechanism alters an AR-15's rate of fire." Id. at A11. The court did not, however, preclude petitioner from continuing to testify, and petitioner told the jury the following:

> What would I like you as the jury to know about this kit? I guess, again, I would start that I am its creator and I am the manufacturer of it. My design for it was completely different than what the prosecution has alleged. My intent for it is completely different than what the prosecution has alleged. It was intended as an educational experience. I designed these kits to fire one round for each pull of the trigger, and I sent each one of these kits out in a form that they couldn't do anything to an AR-15, maybe besides causing them to jam. I told people not to complete the kit, just use the information, the education. Some people chose to complete their kit in a way that I did not intend, and a choice that each of them had a right to make. Not my choice.
>
> I will stand here and continue to tell you point-blank, as the designer and manufacturer of this kit, that it is my absolute 100-percent belief that I did not make a machine gun, and that because of that I am not guilty of the charges leveled against me by the government.

Id. at A10 (citation omitted).

The jury found petitioner guilty on both counts. Judgment 1.

3. The court of appeals affirmed. Pet. App. A1-A21.

As relevant here, the court of appeals recognized that "[t]he Fifth and Sixth Amendments grant a defendant the 'right to testify, present witnesses in his own defense, and cross-examine witnesses against him -- often collectively referred to as the right to present a defense.'" Pet. App. A7 (citations omitted). But the court explained that "this right is not absolute; a defendant must still 'abide the rules of evidence and procedure.'" Ibid. (citations omitted). The court noted that petitioner was required by Rule 16 to disclose any expert testimony, and that the district court's exclusion of "a portion of [petitioner's] testimony" would be error "only * * * if [that portion] was not expert testimony governed by [Federal] Rule [of Evidence] 702." Id. at A7-A8.

The court of appeals determined that "the district court did not abuse its discretion when finding that this portion of [petitioner's] testimony was expert testimony subject to Rule 702." Pet. App. A9; see id. at A8-A10. The court rejected petitioner's argument that his testimony about "the technical aspects and functionalities" of the TCGTR was lay testimony to which Rule 702 did not apply. Id. at A8 (citation omitted). The

court explained that lay testimony is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702," and instead "results from a process of reasoning familiar in everyday life." Ibid. (citations omitted). The court determined that defendant's proposed testimony -- that the TCGTR installed in an AR-15 "pushes down on the trigger bar," functioning as a "forced reset trigger system" -- was based on "specialized knowledge" about AR-15s that is not "readily accessible to any ordinary person." Id. at A9 (citations omitted). And the court explained that even if petitioner "invented the TCGTR," the application of Rule 702 remained the same. Id. at A9.

The court of appeals also emphasized that, notwithstanding the district court's ruling on Rule 702, petitioner had presented testimony "directly addressing a core issue in the case -- his intent." Pet. App. A10 (brackets and citation omitted). The court of appeals hypothesized that petitioner's proffered technical testimony "might have strengthened" his "argument regarding intent," but found no reversible error in the district court's evidentiary rulings. Id. at A11.

ARGUMENT

Petitioner contends (Pet. 6-29) that (1) the district court erred in applying Federal Rule of Evidence 702 to a portion of his

testimony, and (2) the limitation of a defendant's testimony at trial is a structural error not subject to harmlessness analysis. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Furthermore, petitioner's argument about structural error is not properly before this Court, because petitioner took the opposite view in the court of appeals and the issue was therefore not passed upon below. No further review is warranted.

1. A criminal defendant has a constitutional right to present a defense and to testify on his own behalf. See Rock v. Arkansas, 483 U.S. 44 (1987). But those rights are not absolute. See Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). This Court has repeatedly recognized that "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998); and citing Crane v. Kentucky, 476 U.S. 683, 689-690 (1986), Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983), Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973), and Spencer v. Texas, 385 U.S. 554, 564 (1967)). Although the Constitution "prohibits

the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote," id. at 326, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," Scheffer, 523 U.S. at 308.

In United States v. Scheffer, for example, the Court emphasized that governments have a legitimate interest in ensuring that reliable evidence is presented at trial, and cited Federal Rule of Evidence 702 as an example of a rule that furthers that legitimate goal. 523 U.S. at 309. Federal Rule of Evidence 702 provides that a witness may give his expert opinion if his "scientific, technical, or other specialized knowledge" will assist the jury to "understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). And Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant to provide, "at the government's request," a written summary of "any testimony that the defendant intends to use" under Rule 702. District courts have discretion to exclude expert testimony as a sanction for a criminal defendant's failure to provide the disclosures required by Rule 16(b)(1)(C). See, e.g., United States v. Lundy, 676 F.3d 444, 451 (5th Cir. 2012); United States v. Hoffecker, 530 F.3d 137, 184-188 (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).

Petitioner's contention (Pet. 15) that "ordinary evidentiary ruling[s]" cannot apply to a defendant's own testimony thus has no basis in this Court's case law, the Federal Rules of Evidence and Criminal Procedure, or the Constitution. See Pet. at 16 (arguing that only "a witness other than the defendant" is subject to Federal Rule of Evidence 702). Federal Rule of Criminal Procedure 16 and Federal Rule of Evidence 702 are not "arbitrary restriction[s] on the right to testify" that require "[w]holesale inadmissibility of a defendant's testimony" without any "clear evidence" of their benefits. Rock, 483 U.S. at 61. To the contrary, they are procedural rules that further the "legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." Scheffer, 523 U.S. at 309. The district court and court of appeals were therefore correct to apply the rules even handedly here.

The rules requiring early disclosure of putative expert testimony serve important purposes regardless of the witness's identity. By its nature, such testimony increases the challenges of cross-examination and recruitment of qualified experts who can assist in preparing it or provide rebuttal testimony of their own. Its admission may also require lengthy proceedings and detailed

findings on reliability. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). The circumstances here are similar to those in Taylor v. Illinois, in which this Court upheld the exclusion of a defense witness's testimony due to the defendant's failure to comply with a pretrial discovery order, explaining that compliance with discovery rules "minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." 484 U.S. at 411-412.

Petitioner also errs in contending (Pet. 16-18) that the excluded testimony was merely lay testimony because petitioner invented the TCGTR device himself. Under Federal Rule of Evidence 701(c), a witness may give lay opinion testimony only if the proffered opinion is "not based on scientific, technical, or other specialized knowledge." As petitioner appears to acknowledge, the Federal Rules of Evidence distinguish lay and expert opinion testimony based "not [on] the status of the witness, but, rather the essence of the proffered testimony." Pet. 19 (quoting Gomez v. Rivera Rodriguez, 344 F.3d 103, 113 (1st Cir. 2003)). The same witness may give both lay and expert testimony, and any part of the testimony that offers opinions based on "scientific, technical, or other specialized knowledge" is subject to the requirements of Rule 702 and the corresponding disclosure requirements under the rules of civil and criminal procedure. See

Fed. R. Evid. 701 advisory committee's note (2000 Amendments); United States v. Yanez Sosa, 513 F.3d 194, 200 (5th Cir. 2008). And as the court of appeals observed, the same principles apply to inventors. Pet. App. A9-A10; see, e.g., Verizon Servs. Corp. v. Cox Fibernet Va., Inc., 602 F.3d 1325, 1339-1340 (Fed. Cir. 2010) (holding that the "district court did not abuse its discretion in limiting inventor testimony to factual testimony that did not require expert opinion") (cited at Pet. 18-19).

Because petitioner's proposed testimony about the workings of the TCGTR offered opinions based on "scientific, technical, or specialized knowledge" of AR-15s, the district court properly characterized it as expert testimony that was inadmissible because it had not been disclosed to the government. Fed. R. Evid. 701(c). The court of appeals' determination that the district court did not abuse its discretion in so holding is fact-bound, and petitioner points to no cases reaching a different result on similar facts. No further review is warranted.

2. Even if the district court had erred in limiting petitioner's testimony, that error was harmless. Petitioner was permitted to testify about the core theory of his defense, telling the jury that he "designed these kits to fire one round for each pull of the trigger," that his "intent [was] completely different than what the prosecution * * * alleged," and that it was his

"absolute 100-percent belief that [he] did not make a machine gun." Pet. App. A10. Although he was not permitted to present technical testimony about precisely how the TCGTR could increase the rate of firing without rendering the gun fully automatic, petitioner does not contend in this Court that any error in limiting his testimony was prejudicial. The proposed testimony was directly contrary to a wealth of evidence offered by the government at trial. Special Agent Powell showed the jury how the device caused an AR-15 to fire multiple shots per trigger pull; five of petitioner's customers testified that the device enabled their rifles to fire multiple shots with each trigger pull; petitioner had represented to his customers that his device would enable "fully automatic" firing; and petitioner had taken numerous steps to conceal his device from law enforcement. See Gov't C.A. Br. 42-43.

Rather than assert prejudice, petitioner contends (Pet. 7-13) that any limitation on a defendant's right to testify is a structural error that requires automatic reversal. That contention is mistaken. This Court has recognized that "most constitutional errors can be harmless," Arizona v. Fulminante, 499 U.S. 279, 306 (1991), and therefore "do[] not automatically require reversal of a conviction," Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (citation omitted). The Court has nevertheless determined that some errors "should not be deemed

harmless beyond a reasonable doubt," and are instead considered "structural" in nature. Ibid. The structural-error doctrine ensures "certain basic, constitutional guarantees that should define the framework of any criminal trial." Ibid. Any error in excluding petitioner's technical testimony was not structural.

As this Court has explained, "the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" Weaver, 137 S. Ct. at 1907 (quoting Fulminante, 499 U.S. at 310) (brackets in original). Structural errors exist "only in a very limited class of cases," including the denial of counsel, judicial bias, the exclusion of grand jurors of the defendant's race, the denial of self-representation at trial, the denial of a right to a public trial, and the use of erroneous reasonable-doubt instructions. Johnson v. United States, 520 U.S. 461, 468-489 (1997) (collecting cases). By contrast, normal "'trial error[s]'" that "occur[] during the presentation of the case to the jury" are generally not "structural." Fulminante, 499 U.S. at 307, 309.

Even if erroneous, the limitation on petitioner's testimony does not fall within the narrow class of structural errors recognized by this Court. A mistaken evidentiary ruling is quite different from the errors this Court has deemed structural, both

because such a ruling does not make the proceeding fundamentally unfair, and because its significance can be "quantitatively assessed in the context of other evidence presented in order to determine" its potential to have affected the verdict and thus whether it "was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307-308; see also Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (stating that error is structural and thus not susceptible to harmless error analysis in those rare instances when "the effect of the violation cannot be ascertained"). An erroneous limitation on a defendant's testimony is therefore normally subject to harmless error review. See, e.g., United States v. Books, 914 F.3d 574, 580 (7th Cir.), cert. denied, 139 S. Ct. 2682 (2019); Wright v. Estelle, 549 F.2d 971, 974 (5th Cir. 1977).

Petitioner contends that "four state courts of last resort" have concluded otherwise, finding that "a court's denial of a defendant's right to testify constitutes structural error." Pet. 9. But the cases cited by petitioner involve trial court rulings that barred all testimony by the defendants -- a very different situation from the one here. See, e.g., State v. Rivera, 741 S.E.2d 694 (S.C. 2013); State v. Dauzart, 769 So. 2d 1206 (La. 2000) (per curiam); State v. Corrigan, No. A11-1060, 2012 WL 612313

(Minn. Ct. App. 2012);[2] Arthur v. United States, 986 A.2d 398 (D.C. App. 2009). None of those cases holds that the partial limitation of a defendant's testimony based on the application of a valid procedural rule is structural error. Indeed, petitioner's proposed approach would appear to have the logical implication that a retrial must occur any time a district court makes any erroneous evidentiary ruling adverse to the defendant during the course of his testimony. He identifies no court that has embraced such an extreme result.

In any event, this case is a poor vehicle to consider whether the limitation on a defendant's testimony is amenable to harmless-error review. Before the court of appeals, petitioner did not press his structural-error argument, and instead accepted that the district court's alleged error must be "harmless beyond a reasonable doubt to avoid reversal." Pet. C.A. Reply Br. 1; see also Pet. C.A. Opening Br. 25. And the court of appeals, which found no error in the first place, did not even need to analyze whether the error alleged by petitioner would warrant appellate relief. This Court ordinarily does not review questions that were

[2] Petitioner's reliance (Pet. 10) on State v. Rosillo, 281 N.W.2d 877 (Minn. 1979), is inapposite. There, the state court affirmed the defendant's conviction after holding that defense counsel did not err by merely advising the defendant not to testify. Id. at 879.

"not pressed or passed upon below," United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted), and no reason exists to deviate from that practice here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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