No. _____

In the
Supreme Court of the United States

FRANCISCO JAVIER PALILLERO,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 4, 2021

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QUESTION PRESENTED FOR REVIEW

Whether precluding a criminal defendant's DNA rebuttal expert testimony as a Rule 16(d)(2) sanction for a non-willful violation is compatible with the Sixth Amendment right to present a defense.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Francisco Palillero hereby petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit in *United States v. Palillero*, No. 19-2111. App. A.

OPINIONS BELOW

The order and judgment of the Tenth Circuit can be found at Appendix A. The judgment in a criminal case can be found at Appendix B. The trial court's oral ruling denying Petitioner's Rule 29 motion for judgment of acquittal can be found at Appendix C. The trial court's oral ruling excluding Petitioner's DNA expert witness testimony can be found at Appendix D.

JURISDICTION

On October 5, 2020, the United States Court of Appeals for the Tenth Circuit issued its order and judgment affirming Petitioner's conviction and the district court's exclusion of his rebuttal DNA expert. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND COURT RULE INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Federal Rule of Criminal Procedure 16(d)(2) provides, in pertinent part, as follows: "If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances."

STATEMENT OF THE CASE

Petitioner was accused of sexual assault on a military base in New Mexico. App. 1-2. The prosecution delayed disclosure of DNA reports. App. 9. The prosecution's DNA expert witness notice was late. *Id.* When Petitioner asked for either exclusion or a continuance---so that he could obtain an expert to analyze the proposed expert testimony of the government's DNA expert---the trial court denied the continuance and allowed the government's expert to testify. App. 10. When Petitioner filed a late disclosure of his rebuttal DNA expert, the trial court excluded it. App. 11.

When addressing the court, the government characterized its expert's testimony as exculpatory and Petitioner's proposed rebuttal testimony as cumulative. App. 12. But to the jury, the government argued that its DNA expert's testimony showed that Petitioner could not be excluded. Petitioner had no rebuttal DNA expert testimony to point to in closing argument, due to the trial court's exclusion.

After the jury returned a guilty verdict, Petitioner was sentenced to 121 months in prison. App. 31. His appeal to the Tenth Circuit was unsuccessful. App. 28. This case raises the question whether exclusion of an important defense witness due to a non-willful violation of Rule 16 is compatible with the Sixth Amendment right to present a defense.

In August 2018, approximately four months prior to trial, Petitioner's attorney sent a written request to the prosecutor for DNA results, noting that the DNA evidence had been taken in April of 2018, and he had still not received the requested DNA report about the evidence that had been obtained and analyzed by federal law enforcement officials.

The prosecution argued to the district judge that there would be no need for Petitioner's attorney to "investigate what is an exculpatory report," and thus there would be no need for a continuance. When the prosecutor characterized the DNA report for the judge, she claimed that it "reads that Defendant's DNA was not found on the victim's body."

The Government actively and persistently tried to persuade the trial judge that Petitioner's attorney had no need to investigate the Government's DNA report. The prosecution told the court that if an expected second DNA report "reads that the [Petitioner's] DNA [is] not present on the victim's clothing, then it is also exculpatory. And I'm again hard-pressed to think of a reason why a defense counsel would need time to investigate that report." The prosecutor told the judge that "the DNA evidence at this point is exculpatory"

and that she doesn't think "there's anything to investigate."

The prosecutor told the judge that "[t]he DNA swabs that are the subject of the first DNA report were DNA swabs taken from the victim['s] body. The [Petitioner's] --- And the report reads the [Petitioner's] DNA was not present on the victim's body."

Petitioner's attorney noted that "in regards to the first DNA report . . . there was another male's DNA on the subject's hands and knuckles. And [he stated that he] would like to know who that DNA belongs to." He emphasized that the "identity of that person is important" to Petitioner's case. He noted that he had asked the prosecution on August 24, 2018 for DNA results from a DNA test conducted on August 14, 2018.

The prosecutor once again tried to turn the court's attention away from the DNA results, asserting that "the state of affairs is that the [Petitioner's] DNA was not present on the body."

Petitioner's attorney asked the trial court for "a determination who[m] the DNA belongs to that's present on [Ashley Napier], both on her body and if --- There's some indication male DNA may be on her undergarments. I'd like to know who it is, Judge. If it's not [Petitioner], it's got to be somebody. That's very exculpatory, Judge. I think that's the most exculpatory thing that may arise out of this case at this point."

Approximately two weeks prior to trial, on November 19, 2018, the government filed its notice of intent to offer expert DNA testimony by FBI forensic examiner Jerrilyn Conway, even though the trial court

had set November 14, 2018 as the applicable deadline. App. 9. On November 30, 2018, the court stated that if Petitioner's attorney could find a DNA expert, he or she could testify. *Id.*

On December 2, 2018, less than two weeks after the filing of the prosecution's notice, Petitioner's trial counsel filed a notice of intent to introduce Dr. Michael J. Spence as a rebuttal DNA expert. App. 10. Dr. Spence was anticipated to testify about three specific aspects of Ms. Conway's expected testimony: (1) Y-STR analysis, (2) autosomal genotyping, and (3) touch DNA. *Id.*

After briefly summarizing Dr. Spence's expert qualifications in this area---which the prosecution never contested---the notice stated that "[i]t is anticipated that [Dr.] Spence will testify in rebuttal to the methods of DNA analysis including Y short tandem repeat [Y-STR] and autosomal genotyping in addition to rebuttal testimony about the transfer of DNA, including by touch." *Id.* In addition, the notice stated that Dr. Spence would "offer rebuttal testimony regarding the topics outlined in the Government's Notice of Intent to Introduce Expert Witness." These specific topics were described in nine paragraphs, spanning most of two pages.

The notice referenced government evidence that Dr. Spence was anticipated to address. Dr. Spence intended to rebut aspects of the following anticipated testimony of the prosecution's DNA expert:

> The Y-STR typing results for the outside crotch of the victim's underwear indicate the presence

> of DNA from two or more males. Because these mixture results cannot be attributed to individual contributors, they are not suitable for matching purposes; however, they may be used for exclusionary purposes. Based on the Y-STR typing results, no comparison information for the outside crotch of the victim's underwear can be provided for Defendant, thus the Defendant cannot be included or excluded as a potential contributor.

Another area that Dr. Spence was anticipated to testify about pertained to deficiencies in the prosecution's expert's reasoning, inferences and conclusions from the DNA testing data. Specifically, Dr. Spence was expected to refute parts of the following:

> A mixture of male and female DNA was obtained from the inside crotch of the victim's underwear. No autosomal DNA typing results unlike the victim's were obtained from the inside crotch of the victim's underwear. The Y-STR typing results for the inside crotch of the victim's underwear indicate the Defendant is excluded as a potential contributor to the male DNA present.
>
> The low quality of male DNA present on the victim's underwear could be consistent with touch DNA or DNA remaining from a previous sexual encounter after the underwear were subjected to washing in a washing machine.

On December 4, 2018, Petitioner's trial counsel filed a renewed notice, offering additional and more specific descriptions of Dr. Spence's anticipated rebuttal

testimony. App. 11. Attached to this notice was a detailed report---approximately 800 words in length---from Dr. Spence, describing his findings. Among the reported findings was Dr. Spence's conclusion that "there is no scientifically reliable indication of DNA from [Petitioner]" on the outside crotch area of Ms. Napier's underwear. Dr. Spence offered the following overall conclusion, which the jury never heard: "The forensic biology/DNA results from these eight evidence items provide no scientific support for the allegations associated with this case investigation." App. 11.

At the beginning of the second day of trial, the court addressed Petitioner's notice of intent to offer the testimony of a rebuttal DNA expert. App. 12. The prosecution contended that

> the defense characterizes this as two other male DNA's present, and he is---the Defendant has multiple times throughout testimony referred to two other male DNA's present; however, that is not what the results of that item says, is that there was two male DNA present and the Defendant could not be included or excluded. And so we just take issue with the characterization of the emphasis on "two other," because we don't---it's just two male's DNA present, not "two other."

Petitioner's attorney argued that the prosecution's claims were not correct. He observed that the report "says two swabs from fingers and knuckles." He further noted that there were six items listed in the FBI lab report. Petitioner's attorney argued also that the entire argument of the prosecution "about Ms. Conway taking

the stand is that it's exculpatory. The only way it can be exculpatory is when she talks about that he was excluded . . . as a match." The judge "push[ed] the pause button" on this issue and returned to it later.

From December 2, 2018 onward, Petitioner's attorney consistently requested admission of his DNA expert's testimony, to which the prosecutor lodged objections. App. 12. Petitioner's attorney again raised the issue after the conclusion of the prosecution's case, observing that Dr. Spence was available to testify that afternoon, but was not currently in the courtroom. *Id.*

The prosecution claimed that it did not receive notice of what the defense's rebuttal DNA expert would testify to, that the notice that Petitioner had filed was inadequate, and that it would be cumulative for Dr. Spence to offer any rebuttal testimony because Petitioner's expert would be testifying to "exactly what Ms. Conway just testified to." App. 11.

Although the government had previously agreed not to object to a rebuttal DNA expert's testimony at trial, it nevertheless renewed its objections. App. 11-12.

Mr. Jennings noted that he "had made numerous requests for DNA reports, including a request to obtain" the identities of the other DNA contributors. He argued that he had made numerous requests and filed notices, and that to "deny [the defense] the ability to have [its] expert testify kind of that cumulative effect, overall, is becoming pretty prejudicial to [Petitioner] and his defense."

Petitioner's attorney offered to present Dr. Spence that afternoon for voir dire, but the court abruptly

rejected the offer and barred Petitioner's DNA expert from testifying at the trial. App. 12. The court later supplemented its ruling as follows:

> Mr. Jennings did have an ample opportunity to cross-examine Ms. Conway in the area of her analysis and the results of her testing and was able to elicit testimony that the results of her testing ruled out Mr. Palillero's DNA from any of the samples that were taken from Ms. Napier in the form of swabs, et cetera. So that was well-established by Mr. Jennings, and in this way I'm finding that with my ruling I'm not finding that Mr. Prejudice---Mr. Palillero was prejudiced by the ruling to exclude Mr. Spence. So that's what I wanted to add to my ruling.

At trial, Ms. Napier, read into the record before the jury her written statement provided just after the alleged assault. In her written statement, she alleged that Petitioner initially came into her room and touched her; she also alleged that he came into her room a second time and sexually touched her again; and she further alleged that he came into her room a third time and sexually touched her again. But at trial, she admitted that in fact she did not see Petitioner (or anyone else) enter or exit her bedroom three times. She had only "glimpses of those touchings."

Ms. Napier testified that her dogs routinely barked at her neighbor, Lieutenant Cole, when he grilled in his backyard. Even though the dogs were in her bed during the alleged assault, neither of them barked, in spite of Ms. Napier's claim that Petitioner entered her bedroom three separate times and sexually assaulted her three

times while she and her dogs were in her bed. She also claimed that all of this occurred within a 45-second window of time.

FBI Special Agent Karen Ryndak testified that none of the photos she took of the residence, inside or out, showed any evidence that Petitioner committed sexual assault of Ms. Napier. Special Agent Ryndak testified that she was not aware of any physical evidence that Petitioner sexually assaulted Ms. Napier. A SANE nurse testified that she saw no visible injuries anywhere on Ms. Napier.

Although fingerprints were taken from the door to Ms. Napier's bedroom, they did not provide any evidence to inculpate Petitioner. A forensic science consultant recommended that investigators swab the door handle of Ms. Napier's bedroom door, but Agent Leslie Franz testified that she did not do so. An Air Force security officer scanned Ms. Napier's face and hands for signs of an assault but found none. A technical sergeant also testified that he looked at Petitioner's hands and face and founds no signs of an assault. A SANE nurse examined Ms. Napier extensively and found no visible indicia of any injuries.

Ms. Napier testified that Petitioner's saliva was all over her face, that his hands were in her pants, and he was all over her. App. 3. Agent Franz testified that she was not aware of any face-washing or hand-washing by Ms. Napier. The SANE nurse also wrote in her report, based on Ms. Napier's answers to her investigative questions, that Ms. Napier had not wiped or washed her genital area between the time of the alleged assault and the time of the SANE exam. Investigators took

many swabs from all over Ms. Napier's body and clothing, including her mouth area, her cheeks, her hip area, her fingers and fingernails, and her genital area. Ms. Napier had asked them to take swabs from all of the places on her body where Petitioner allegedly touched her. App. 6.

Ms. Conway testified that there was no DNA of Petitioner in Ms. Napier's mouth, on her mouth, on her cheek or anywhere else on her body. App. 8. But there was DNA of someone else on her fingers and knuckles; Petitioner was excluded as the source of that person's DNA. *Id.*

On the outside of Ms. Napier's underwear, there was no DNA other than hers detected, using autosomal testing. *Id.* The Y-STR method detected very low amounts of male DNA; Ms. Conway opined that she "could not attribute that to individuals, and so [she] was unable to include or exclude [Petitioner] from that sample." She further speculated that it could have been Petitioner's DNA, even though the data showed no indication of any of his DNA on any of Ms. Napier's clothing or body. Due to the district court's exclusion order, Petitioner's rebuttal DNA expert was precluded from offering any testimony on this aspect of the prosecution's DNA testimony. App. 11.

Inside the crotch area of Ms. Napier's underwear, her DNA was found, as well as the DNA of an unknown male. App. 8. Petitioner was excluded as the source of the male DNA found on the inside crotch area of Ms. Napier's underwear. *Id.* The DNA of other males in the house and at the party were neither taken nor tested.

At the conclusion of the presentation of evidence, Petitioner's attorney again objected to the exclusion of his rebuttal DNA expert's testimony. App. 11.

In the Government's closing, it argued to the jury that Ms. Conway testified

> that this could have happened exactly the way Ashley said it did and the Defendant's DNA wouldn't be present. Ms. Conway told you that time elapse, crying, rubbing of the face, vomiting, brushing the teeth, eating, drinking, urinating, laying down, especially if tossing and turning, can all significantly impact the ability to collect DNA later. And what you heard in this case is that every single one of those things occurred between the time that the Defendant sexually assaulted Ashley and when those swabs were taken.

The prosecutor also argued to the jury that Ms. Conway was "not surprised that the Defendant's DNA couldn't be seen in this case."

The prosecution argued to the jury that Petitioner "seems to make a big deal of the fact that there's another male's DNA on [Ms. Napier's] panties." The prosecutor continued to contend that

> [w]e don't know [whose] DNA that is because Adam's DNA was not collected, but ask yourselves and remind yourselves: Ashley was engaged to Adam at the time. Ashley and Adam lived together. Ashley and Adam shared a bed. Connect the dots. Whose DNA do you think was in Ashley's panties? Adam's DNA. Your reason

> and common sense tells you that. . . . There's a perfectly good explanation for why there's male DNA on Ashley's panties, DNA different than the Defendant. It's the husband, the fiancé at the time, the husband now, the husband who's sitting with Ashley right now in the gallery.

After the jury returned a guilty verdict, the district court imposed a sentence of 121 months. *See* App. 31.

Petitioner appealed the conviction to the United States Court of Appeals for the Tenth Circuit. App. 1-2. He argued, *inter alia*, that the district court reversibly erred in barring his rebuttal DNA expert from testifying. App. 13-14. The Tenth Circuit affirmed the conviction, finding no reversible error. It relied on its previous opinion in *United States v. Adams*, 271 P.3d 1236 (10th Cir. 2001). App. 21-24.

BASIS FOR GRANTING THE WRIT AND ARGUMENT

Petitioner's case presents an opportunity to resolve a circuit split, answer the lingering question of appropriate sanction for a non-willful violation of Rule 16, and more clearly define the boundary of the Sixth Amendment right to present a defense in this context.

The fundamental right to present a defense, grounded in the Sixth Amendment right to compulsory process, precludes exclusion of an important defense witness as sanction for a non-willful discovery violation. The district court's exclusion of an important defense witness in this case---choosing the harshest remedy for a non-willful tardiness in disclosure of a rebuttal DNA expert witness---was particularly egregious in light of the following five facts: (1) the

court allowed the government's own DNA expert to testify in spite of a late disclosure; (2) the government had delayed release of important DNA reports in spite of Petitioner's requests; (3) the government actively sought to thwart the defense from investigating the DNA reports; (4) the government falsely claimed that Petitioner's witness would offer only cumulative testimony; and (5) the trial court refused to allow a one-hour recess for Petitioner's expert to arrive at the courthouse so that court and counsel could voir dire him. Under these circumstances, the exclusion of Petitioner's expert due to a non-willful violation of Rule 16 deprived him of the right to present a defense guaranteed in the Sixth Amendment Compulsory Process Clause.

1. The right to present a defense is fundamental.

The right of a criminal defendant to present witnesses in his own defense is one of the most fundamental rights. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987), this Court noted that its "cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." This right has been recognized as "an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). In *United States v. Nixon*, 418 U.S. 683, 709 (1974), this Court observed that it has

> elected to employ an adversary system of criminal justice in which the parties contest all

> issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

A defendant's "right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words." *Taylor*, 484 U.S. at 409 (citing *Washington v. Texas,* 388 U.S. 14, 19 (1967)).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.

Washington, 388 U.S. at 19. The right to compulsory process provides the criminal defendant "with a sword

that may be employed to rebut the prosecution's case." *Taylor*, 484 U.S. at 410.

This Court underscored the due process implications of this right: "The substantive limitation on excluding criminal defense evidence secured by the plain terms of the Compulsory Process Clause is also grounded in the general constitutional guarantee of due process." *Chambers*, 410 U.S. at 298-302. *See also Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986). Accordingly, the "Compulsory Process and Due Process clauses thus require courts to conduct a searching substantive inquiry whenever the government seeks to exclude criminal defense evidence." *Taylor*, 484 U.S. at 423 (Brennan, Marshall and Blackmun, J.J., dissenting) (citing *Chambers*, 410 U.S. at 302; *Nixon*, 418 U.S. at 709; *In re Winship*, 397 U.S. 358 (1970); *Crane*, 476 U.S. at 689-90; *Washington*, 388 U.S. at 23). The right to compulsory process is "designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.'" *Taylor*, 484 U.S. at 411 (quoting *Nixon*, 418 U.S. at 709).

2. *Taylor* left unanswered whether defense witness exclusion for a non-willful discovery violation is compatible with the Sixth Amendment right to present a defense.

Judge Richard Posner, of the Seventh Circuit, observed decades ago that there is uncertainty in the law in cases where the excluded witness would undoubtedly have been helpful to the defense and the violation of the discovery order was not willful. *See*

Tyson v. Trigg, 50 F.3d 436, 445 (7th Cir. 1995). He noted that "[n]o hard and fast rule has been devised to strike the balance between the competing interests." *Tyson*, 50 F.3d at 444-45.

In *Taylor*, this Court noted that exclusion of a defense witness due to a blatant and willful violation did not violate the defendant's Sixth Amendment right to present a defense. *See* 484 U.S. at 416. The question left open by *Taylor* is whether it violates the Compulsory Process Clause to exclude an important defense witness when the discovery violation is non-willful.

The lower federal courts are split on how to approach sanctions for non-willful discovery violations. *See Bowling v. Vose*, 3 F.3d 559, 564 (1st Cir. 1993); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991); *Escalera v. Coombe*, 852 F.2d 45, 48 (2nd Cir. 1988) (per curiam). In each of these cases, the courts require a deliberate violation of the discovery order to exclude a helpful defense witness. But other courts have diverged from this approach. *See, e.g., United States v. Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992); *United States v. Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001). Some circuits, such as the Second Circuit, are internally inconsistent. *See, e.g., United States v. Cervone*, 907 F.2d 332, 346 (2nd Cir. 1990); *Escalera*, 852 F.2d at 48.

In Petitioner's case, there was no blatant or willful violation; the delay in disclosure of the DNA witness's proposed rebuttal testimony was in part due to the delay in the government's own late disclosure of its expert and in the government's delay in releasing DNA

and serology reports to Petitioner. Neither the prosecution nor the trial court suggested that Petitioner's attorney's tardy disclosure was willful in any way.

Four months prior to trial, Petitioner's attorney attempted to obtain DNA reports from the government. Two months later, on October 29, 2018, the prosecution disclosed a DNA report to Petitioner. Although the trial court had set November 14, 2018 as the deadline for disclosure of expert witnesses, the government did not disclose its witness until November 19, 2018. Petitioner moved to either exclude this late-disclosed witness or continue the December 3, 2018 trial setting so that he could obtain a rebuttal DNA expert to investigate the government's DNA evidence and its late-disclosed notice of intent to offer expert testimony regarding DNA. The trial court excused the government's late disclosure, denied the request for continuance, and allowed the government's DNA expert to testify.

On November 30, 2018, the trial court told Petitioner's attorney that if he found a DNA expert, the expert could testify. Two days later, on December 2, 2018, Petitioner's attorney filed a notice of intent to offer Dr. Spence as an expert to rebut certain statements made by the government's expert in her report. He specified three areas addressed in the government's own DNA and serology report---(1) Y short tandem repeat analysis, (2) autosomal genotyping, and (3) transfer of DNA by touch.

On December 3, 2018, on the first day of trial, the government requested that Dr. Spence be excluded as a witness. It contended that its own expert's testimony

was exculpatory and that Dr. Spence's testimony would be merely cumulative. The trial court excluded Dr. Spence. At no point in the hearings addressing Petitioner's rebuttal expert was there any suggestion that Petitioner was engaging in gamesmanship, or that his witness would be presenting fabricated testimony, or that Petitioner had blatantly or willfully violated discovery rules. On the contrary, the prosecutor acknowledged that Petitioner's attorney was diligent in his preparation for trial. Dr. Spence's testimony was excluded in spite of the absence of any evidence of a willful violation of a discovery rule.

The exclusion of Petitioner's rebuttal witness on DNA and serology interfered with Petitioner's ability to present a defense. Petitioner was not able to offer Dr. Spence's testimony challenging the conclusions and inferences of Ms. Conway. For instance, whereas she contended that the absence of any of Petitioner's DNA on Ms. Napier's body was consistent with her (latest) version of the events, Dr. Spence would have testified that "[t]he forensic biology/DNA results from these eight evidence items provide no scientific support for the allegations associated with this case investigation."

When the prosecutors argued to the judge, they characterized the DNA evidence as being exculpatory, such as when they suggested there was no need for a defense continuance, or when they pushed the court to bar Petitioner's rebuttal DNA expert from testifying. But in front of the jury, the prosecutor's slant on the DNA evidence was notably different. For instance, the prosecution claimed---without any evidence---that the unknown male's DNA could have been Adam's, and

was still there after going through a washing machine. There was no evidence at trial that it was from Adam; nor was there any evidence as to when or how the underwear had been washed. At the time of the assault, Adam and Ms. Napier were engaged; by the time of trial, they were married, yet there was no mention of Adam's DNA being taken for comparison to the unknown male DNA on the underwear.

To the judge, out of the hearing of the jury, the prosecution characterized the DNA evidence as being exculpatory in pre-trial hearings. It succeeded in persuading the district court that this was a valid reason for excluding Petitioner's rebuttal DNA expert from testifying at trial, and not continuing the trial date. But in the presence of the jury, the prosecution took a very different approach, conducting the following exchange with its own DNA expert at trial:

> Q: And the [Petitioner] could not be included on any of these items, correct?
>
> A: That's correct.
>
> Q: And he could not be ***excluded*** from every single item. Is that correct?
>
> A: That's correct, for the one sample where he was inconclusive, yes.

Far from being viewed as exculpatory evidence, the prosecution suggested to the jury that the very low levels of DNA detected on Ms. Napier's underwear might have in fact been Petitioner's. And the prosecution used its DNA expert to drive home this

point. But Petitioner's proffered rebuttal expert regarding DNA evidence was excluded from the trial.

The district court's exclusion of Petitioner's expert meant that the jury did not have an opportunity to consider Dr. Spence's testimony. He was anticipated to expose serious weaknesses in Ms. Conway's conclusions and inferences. The jury did not hear from Dr. Spence that "there is no scientifically reliable indication of DNA from [Petitioner]" on the outside crotch area of Ms. Napier's underwear. Nor was the jury allowed to hear Dr. Spence testify that "[t]he forensic biology/DNA results from these eight evidence items provide no scientific support for the allegations associated with this case investigation."

Dr. Spence would have challenged Ms. Conway's statement that Petitioner "cannot be included or excluded as a potential contributor" of DNA found on the outside crotch of Ms. Napier's underwear. Ms. Conway told the jury that Petitioner "could not be excluded" from this DNA, Dr. Spence would have testified that "there is no scientifically reliable indication of DNA from [Petitioner]" there.

The government's closing argument was built in part on Ms. Conway's unchallenged testimony. The prosecutor repeatedly came back to its expert's DNA testimony as supporting its own theory of the case. Petitioner's attorney was not able to present a rival version of the DNA and serology evidence, even though three specific areas of challenge had been identified in his proffer.

3. Where a discovery violation is not willful, exclusion of a helpful defense witness is incompatible with the right to present a defense.

In *Taylor*, this Court recognized that "[o]ne of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed." 484 U.S. at 413. In Petitioner's case, there was no suggestion that Dr. Spence's rebuttal testimony regarding the government's DNA and serology reports would be fabricated. At no time did the prosecution argue or even hint that Dr. Spence's testimony would be untruthful, or that defense counsel was engaging in gamesmanship or intentional delay in disclosure of a witness: "The Government agrees that defense counsel has been very diligent in preparing for this case to go to trial." (Transcript, Nov. 5, 2018, at 13.) In *Taylor*, by contrast, the Court expressed distrust in late disclosure of the witness by the defense: "It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." 484 U.S. at 413-14.

In Petitioner's case, there was no pattern of discovery violations leading to a reasonable presumption of a deliberate design to thwart the discovery process or surprise the prosecution. On the

contrary, Petitioner's counsel had been seeking a second DNA report from the government, and had sought a continuance to secure a DNA expert who could examine the delayed report and possibly testify at the trial in rebuttal. It was the government that argued against Petitioner's investigating its DNA report; it contended there's nothing to investigate. It was the government that contended that the DNA evidence was exculpatory (at least when it was arguing to the judge out of hearing of the jury); and it was the government that delayed the release of DNA reports that Petitioner's attorney had been doggedly seeking access to for months prior to trial.

In August 2018, nearly four months prior to trial, Petitioner's attorney had made a written request to the government asking for DNA reports. The first DNA report was not disclosed until October 29, 2018, even though it had been requested in August.

The government's notice of its DNA expert was five days late; Petitioner requested either exclusion due to this discovery violation or a continuance to obtain a rebuttal DNA expert to investigate the government's proposed DNA testimony. The court denied both requested forms of relief and allowed the government's late-disclosed DNA expert to testify.

On November 30, 2018 the court told Petitioner's attorney that if he could find a DNA expert, the court would allow the expert to testify. Two days later, and less than two weeks after the government's late notice of its DNA expert, Petitioner's attorney filed a notice of rebuttal DNA expert testimony, specifying three areas of testimony: (1) Y short tandem repeat analysis;

(2) autosomal genotyping; and (3) transfer of DNA by touch.

In dissent in *Taylor*, Justices Brennan, Marshall and Blackmun noted 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." *Taylor*, 484 U.S. at 419 (Brennan, Marshall and Blackmun, J.J., dissenting).

In light of the fact that "discovery sanctions serve the objectives of discovery by correcting for the adverse effects of discovery violations and deterring future discovery violations from occurring," the dissenters in *Taylor* proposed an approach to sanctions that more fairly balances the competing values: "If sanctions other than excluding evidence can sufficiently correct and deter discovery violations, then there is no reason 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 (Brennan, Marshall and Blackmun, J.J., dissenting) (quoting Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 Colum. L. Rev. 223, 237 (1966)).

Neither of the two justifications for precluding evidence as a corrective measure---(1) barring the defendant from introducing testimony that has not been tested by discovery, and (2) screening out witnesses who are inherently suspect because they were not disclosed until trial---apply in Petitioner's case. The first justification has no bearing on this case

because Petitioner's attorney offered to bring the witness to the court for voir dire by the prosecution and the court. The court arbitrarily denied this request. The second justification also does not apply because Petitioner's DNA expert was offered in rebuttal. Dr. Spence was offered as a rebuttal DNA expert; his qualifications were presented to the court, and he was going to present evidence to rebut three specific claims made by the government's DNA expert. His testimony is easily distinguishable from an inherently suspect fact witness whose testimony is brought to light only at the last minute. The timing of the disclosure of Dr. Spence as a rebuttal expert was delayed, in part, by the government's delay in disclosing DNA evidence to Petitioner's attorney. The notice of Dr. Spence's rebuttal testimony, which included a summary of the points he would be rebutting, was disclosed less than two weeks after the government's disclosure.

Petitioner sought to introduce testimony of a DNA expert to rebut the testimony of the prosecution's DNA expert. The district court excluded this expert on dubious grounds, choosing the harshest remedy for a technical error by the trial attorney in the timing of the disclosure of the DNA expert in advance of trial. The prosecution had known for months that Petitioner was questioning the DNA evidence, and the prosecution had itself helped to bring about the late disclosure by the defense due to the prosecution's own late disclosure and its efforts to prevent any defense investigation of the DNA reports.

The trial court's exclusion of Petitioner's rebuttal DNA expert witness, for a non-willful violation of Rule

16, cannot be squared with the Sixth Amendment right to present a defense. The Court should review Petitioner's case to resolve a circuit split, and clarify that the Sixth Amendment right to present a defense forbids exclusion of a helpful defense witness as a Rule 16 sanction for a discovery violation that is not willful.

CONCLUSION

For these reasons, Mr. Palillero respectfully requests this Court to issue a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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