APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 19-2111
(D.C. No. 2:18-CR-02311-KG-1)
(D. New Mexico)

[Filed: October 5, 2020]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
FRANCISCO JAVIER PALILLERO,	)
	)
Defendant - Appellant.	)
	)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **McHUGH**, Circuit Judges.

A jury convicted Francisco Javier Palillero of sexual abuse, and the district court sentenced him to 121

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

months' imprisonment. This is Mr. Palillero's direct appeal from his conviction and sentence. He raises four arguments: (1) insufficient evidence; (2) improper exclusion of a defense expert; (3) imposition of a substantively unreasonable sentence; and (4) cumulative error. We affirm.

The evidence at trial was sufficient for a reasonable jury to find Mr. Palillero guilty of sexual abuse. The district court did not abuse its discretion when it excluded the testimony of Mr. Palillero's DNA expert as a sanction for late and inadequate disclosure. The district court's sentence was not unreasonable. And, because Mr. Palillero has not shown error, he cannot prevail on his claim of cumulative error.

I. BACKGROUND

A. *Factual History*

We review "the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict." *United States v. Poe*, 556 F.3d 1113, 1124 (10th Cir. 2009).

1. Criminal Conduct

On April 27, 2018, Ashley Napier[1] and her fiancé, Adam Pratschler, attended a backyard barbeque on Holloman Air Force Base hosted by their neighbors, Shante and Francisco Palillero. Ms. Napier and Mr. Pratschler had attended prior social events at the Palilleros' house; Ms. Napier considered them "friends."

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[1] Ashley Napier is now Ashley Pratschler. We refer to her using her last name at the time of the events in question: Napier.

App., Vol. IV at 201. Yet, Ms. Napier had never spent any time alone with Mr. Palillero. Another neighbor, Lieutenant Douglas Cole, also attended the barbeque.[2]

Around 10:00 p.m., Ms. Napier walked home with Mr. Pratschler. Ms. Napier took her two dogs to bed with her and closed the bedroom door. She then fell asleep sometime before 11:00 p.m. Mr. Pratschler returned to the barbeque.

Sometime later, Lieutenant Cole walked Mr. Pratschler home. Mr. Palillero accompanied them. Lieutenant Cole and Mr. Pratschler talked in the living room for thirty or forty-five minutes, with Mr. Palillero occasionally walking in and out of the room.

At approximately 2:16 a.m., Ms. Napier was awakened by her dogs rustling on the bed. She perceived light coming through the bedroom door and could hear Mr. Pratschler, who "sounded upset." App., Vol. IV at 218. Ms. Napier then texted Mr. Pratschler to "[g]o to sleep" and fell back asleep. App., Vol. IV at 218.

Next, Ms. Napier "was woken up to someone's hands all over [her], fast and hard, rubbing all over [her] body, like [her] breasts, into [her] underwear, sliding them around." App., Vol. IV at 218. The assailant's tongue touched her lips, face, and teeth. And, the assailant touched Ms. Napier's clitoris with a

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[2] Lieutenant Cole arrived late and noticed that many of the people in attendance were intoxicated, including Mr. Palillero and Mr. Pratschler.

fingernail, causing pain. Lastly, the assailant tried to push his finger inside Ms. Napier's vagina.

Ms. Napier recognized the assailant as Mr. Palillero and pushed him off. Mr. Palillero "scurried out of the room back into the hallway, and then came back in and said, 'Don't say anything. Don't say anything.'" App., Vol. IV at 220. Ms. Napier then texted Mr. Pratschler, "Francisco was just in here trying to finger me as I slept." App., Vol. IV at 220.

Meanwhile, Lieutenant Cole witnessed Mr. Pratschler exit the bathroom holding his phone, "very shaken up." App., Vol. V at 42. Mr. Pratschler asked Mr. Palillero, "Did you touch my wife?" App., Vol. V at 42. Mr. Pratschler then asked Lieutenant Cole to read the text message because he was "the only one sober." App., Vol. V at 42. Lieutenant Cole read the text message and then asked Mr. Palillero whether he had touched Ms. Napier. Mr. Palillero answered no but "wasn't making eye contact." App., Vol. V at 42. Lieutenant Cole repeated the question, and Mr. Palillero again answered no.

At that point, Ms. Napier put on a pair of pants and exited the bedroom. Seeing Mr. Palillero "leaning up against the door at the end of the hallway," she punched him in the face, screaming, "You were touching me when I slept." App., Vol. IV at 222. Ms. Napier shoved Mr. Palillero and he fell. Lieutenant Cole separated Ms. Napier and Mr. Palillero. At some point, Mr. Palillero left the house.

Lieutenant Cole asked Ms. Napier if she wanted him to call the security forces at Holloman Air Force

Base. When Ms. Napier responded yes,[3] Lieutenant Cole exited the house and called the security forces.

2. The Investigation

Holloman Air Force Base Security Forces responded to the scene. According to the Security Forces report, Ms. Napier was "shocked" and "traumatized" during her discussion with the security forces officers, and could not recall her own address. App., Vol. IV at 225.[4] In a written statement that Ms. Napier provided to Officer Shamelia Nicholson, Ms. Napier recalled Mr. Palillero entering the bedroom and attempting to touch her three times while she was sleeping, like "a bad dream." App., Vol. IV at 227.[5]

Later, members of the Holloman Air Force Base Office of Special Investigations ("OSI") arrived. OSI Special Agent Leslie Keopka[6] interviewed Ms. Napier for approximately twenty-five minutes.

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[3] At trial, Lieutenant Cole suggested that he made the decision to call the security forces. Whether Lieutenant Cole or Ms. Napier made the ultimate decision to call the security forces is immaterial.

[4] Sergeant Justin Goad spoke with Ms. Napier and did not notice any indicia of intoxication.

[5] At trial, Ms. Napier clarified that she had not actually seen Mr. Palillero exit the bedroom and return. Rather, her written statement recounted three separate "glimpses" of him touching her before she opened her eyes. App., Vol. IV at 234.

[6] Leslie Keopka is now Leslie Franz. As with Ms. Napier, we refer to Agent Keopka using her last name at the time of the events in question.

Agent Keopka then called Federal Bureau of Investigation Special Agent Karen Ryndak. Agent Ryndak and Supervisor Special Agent Amy Willeke traveled the approximately one-hour drive to Holloman Air Force Base. While Ms. Napier was waiting for the FBI agents to arrive, she repeatedly touched her face while adjusting her glasses, resting her hand on her face, and rubbing her neck. Agents Willeke and Ryndak then interviewed Ms. Napier, who was "visibly shaken," "upset," "embarrassed," and "angry." App., Vol. IV at 149, 189. During the interview, neither Agent Willeke nor Agent Ryndak "notice[d] any signs of intoxication on [Ms. Napier]." App., Vol. IV at 149, 190.

After the interview, the FBI agents drove Ms. Napier back to her house, where they dusted for fingerprints. The fingerprints the agents collected were smudged, and consequently not suitable for analysis.

The agents also obtained consent to search Ms. Napier's cell phone. Mr. Palillero was not listed in Ms. Napier's contacts, and there were no text messages between Mr. Palillero and Ms. Napier.

Around 11:45 a.m., the FBI agents sent Ms. Napier to a clinic for a Sexual Assault Nurse Exam ("SANE"). One standard step in a SANE is collection of DNA. Michelle Wood, a nurse, swabbed Ms. Napier's face, lips, teeth, fingers, nails, knuckles, left arm, left hip, mons pubis, and labia majora. Nurse Wood also collected Ms. Napier's underwear.[7]

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[7] As part of the SANE, Ms. Napier filled out a questionnaire. At trial, Ms. Napier acknowledged that several of her responses on

Ms. Napier told Nurse Wood that after the assault she had inserted a tampon, thrown up, smoked, and drank.[8] App., Vol. V at 136. Ms. Napier also specifically told Nurse Wood that Mr. Palillero had attempted "digital penetration." App., Vol. V at 137.

Later that day, FBI agents arrested Mr. Palillero. During the drive to jail, Mr. Palillero asked for a drink of water. The agents provided Mr. Palillero with water from a water bottle and collected the bottle for a DNA sample. Agent Ryndak later collected an additional sample of Mr. Palillero's DNA using a swab. Although Ms. Napier was menstruating on April 27, Agent Willeke did not recall seeing any blood on Mr. Palillero's hands during her investigation.

At some point, Mr. Palillero called his wife from jail and stated that he "was in [Ms. Napier's] bedroom" and "went in her room to wake her up." App., Vol. IV at 157, 184.

3. DNA Expert Testimony

At trial, the United States presented expert testimony from Jerrilyn Conway, an FBI forensic examiner. Ms. Conway explained that "DNA transfer can occur anytime someone comes in contact with an item." App., Vol. V at 162. "Another way is through skin cells or contact," with various factors influencing

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that questionnaire were not accurate. For example, Ms. Napier answered that she had not brushed her teeth prior to the SANE when, in fact, she had brushed her teeth.

[8] It is not clear from the trial transcript what liquid Ms. Napier drank.

the amount of the transfer. App., Vol. V at 162. Two of those factors are post-transfer contact—for example, handwashing, teeth brushing, or vomiting—and the passage of time.

Ms. Conway reviewed each DNA sample that was submitted to her laboratory and testified as follows:

- No DNA other than Ms. Napier's was found in the mons pubis, labia majora, cheek, hip, arm, or mouth samples.
- The finger and knuckle samples contained a mixture of male and female DNA. Ms. Conway excluded Mr. Palillero as a contributor.
- A sample taken from the outside of Ms. Napier's underwear contained a mixture of DNA. Ms. Conway was unable to exclude Mr. Palillero as a contributor. She testified that the amount of DNA present in the sample was so low it could have been the result of "going through the washing machine." App., Vol. V at 173.
- A sample taken from the inside of Ms. Napier's underwear contained a mixture of male and female DNA. Ms. Conway excluded Mr. Palillero as a contributor.

Ms. Conway explained that these "inconclusive" results do not "tell us anything either way" about Mr. Palillero's guilt. App., Vol. V at 175. Ms. Conway further opined that she was not surprised at her inability to identify Mr. Palillero's DNA in any of the

samples, given the events that transpired in the ten hours between the assault and collection of the samples.

B. *Procedural History*

On July 18, 2018, a grand jury in the District of New Mexico indicted Mr. Palillero on one count of knowingly engaging in a sexual act with a person incapable of appraising the nature of the conduct or physically incapable of declining, within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 2242(2)(A) and (B) and 2246(2)(C).

On November 7, 2018, the United States filed its witness list; this witness list included Ms. Conway, the FBI forensic examiner. On November 19, five days after the district court's deadline for disclosure of experts, the United States gave notice of its intent to introduce DNA expert testimony via Ms. Conway. In response, Mr. Palillero moved to exclude the United States' DNA expert or, in the alternative, to delay the trial.

At the pretrial conference on November 30, the United States explained that it had been unable to provide notice of its intent to call a DNA expert before the district court's deadline because it did not receive one of Ms. Conway's DNA reports until November 16. In addition, the United States argued there was no prejudice because it had included Ms. Conway on the November 7 witness list and had disclosed her first DNA report to defense counsel on October 29. The district court determined that the United States' late

filing was "excused" and permitted Ms. Conway to testify as a DNA expert. Appellee App. at 64.

On December 2, the day before trial, Mr. Palillero noticed his intent to introduce expert testimony from Dr. Michael J. Spence to rebut the United States' DNA expert. That notice "anticipate[d] that [Dr.] Spence will provide rebuttal testimony regarding FBI policies and procedure relating to serological and DNA examination and their application to the examination in this case." Appellee App. at 36. The notice further "anticipated that [Dr.] Spence will testify in rebuttal to the methods of DNA analysis including Y short tandem repeat and autosomal genotyping in addition to rebuttal testimony about the transfer of DNA, including by touch." Appellee App. at 37.

At the start of trial on December 3, the United States asked that Dr. Spence's testimony be excluded because Mr. Palillero's notice did not include a meaningful summary. The district court asked defense counsel to clarify and he responded:

> Well, Your Honor, he's going to say that it is possible -- I mean, that it's -- that it's really not possible for all of this touching and kissing and licking and so on to go on without transferring DNA, Your Honor. But we're anticipating that the Government's expert is going to testify that it's possible to touch someone and kiss them and do all these other things and not transfer DNA, Your Honor. He's going to testify to just the opposite.

App., Vol. IV at 255–56.

The district court then asked defense counsel what efforts he had made to secure expert testimony prior to trial, and defense counsel responded:

> Your Honor, we contacted the New Mexico Criminal Defense Lawyers Association, we also called some other people that we know, and we did search for some other individuals, Your Honor.
>
> Your Honor, so I -- some of my clients are doctors. We talked to them. We contacted the New Mexico Criminal Defense Lawyers Association. Beyond that, I'm not sure what else my staff may have done, but that's -- that was the crux of it, Your Honor.

App., Vol. IV at 257–58.

The district court ruled that Dr. Spence would not be permitted to testify because defense counsel's notice was neither timely nor detailed enough to give the United States a chance to prepare. The district court also found that Mr. Palillero would not be prejudiced by the inability to rebut the United States' DNA expert testimony because that testimony was exculpatory.

On December 4, after the prosecution rested, Mr. Palillero filed a renewed notice that he intended to introduce Dr. Spence's testimony. The renewed notice parroted the first notice in all relevant respects. Attached to the renewed notice was Dr. Spence's summary of his findings; namely, that DNA evidence provided "no scientific support for the allegations associated with this case investigation." Appellee App. at 47.

The United States objected on the grounds that the renewed notice was not timely and that it was cumulative of Ms. Conway's testimony. The district court asked defense counsel what would be "new" about Dr. Spence's testimony. App., Vol. V at 208. Defense counsel replied:

> Well, Your Honor, let me take a look here to see. Your Honor, I think he would definitely testify to some peer-review articles. That's definitely new. Those haven't been heard.
>
> Let me see what else. So I know he has a peer-reviewed article that he wanted to discuss. And I'm trying to see what else he said here, Judge.

App., Vol. V at 208.

After the district court pointed out that defense counsel's renewed notice did not mention any peer-reviewed articles, defense counsel stated, "I don't know what all he's going to testify to." App., Vol. V at 210. And in response to more prodding from the district court, defense counsel replied, "I do think there would be something new, Your Honor, but I can't tell you what that is." App., Vol. V at 211.

The district court refused to permit Dr. Spence's testimony on the basis that it would be cumulative of Ms. Conway's testimony. The district court also found that Mr. Palillero was not prejudiced because defense counsel had the opportunity to cross-examine Ms. Conway.

In addition to Ms. Conway, the prosecution called Ms. Napier, Lieutenant Cole, and others to testify. Defense counsel did not call any witnesses. The jury found Mr. Palillero guilty of sexual abuse.

The United States Probation Office then prepared a Presentence Investigation Report ("PSR"). The PSR calculated a base offense level of 30, with a two-level enhancement because Mr. Palillero knew or should have known the victim was vulnerable. The resulting total offense level of 32, combined with a criminal history category of I, yielded a United States Sentencing Guidelines ("Guidelines") imprisonment range of 121 to 151 months.

On July 2, 2019, the district court sentenced Mr. Palillero to a 121-month term of imprisonment, to be followed by a 5-year term of supervised release. With respect to Mr. Palillero's conduct, the district court stated:

> I am convinced that you went down that hall and went into that bedroom with intentions to do more than just digitally touch. You went in there with the intentions to do much more, and it was only because -- it was only because she woke up that it didn't go further.

App., Vol. VI at 107.

Mr. Palillero timely filed a notice of appeal.

II. DISCUSSION

Mr. Palillero asserts four grounds for reversal: (1) that the prosecution presented insufficient evidence;

(2) that the district court improperly excluded defense expert testimony; (3) that the district court's chosen sentence was substantively unreasonable; and (4) that the district court committed cumulative error. We address each of these contentions in turn.

A. *Whether the Prosecution Presented Sufficient Evidence of Sexual Abuse*

"We review the sufficiency of the evidence de novo." *Poe*, 556 F.3d at 1124. "The evidence is insufficient to support a conviction only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.* at 1124–25. "In our review, we do not weigh conflicting evidence or consider witness credibility, as that duty is delegated exclusively to the jury." *Id.* at 1125 (internal quotation marks omitted).

The jury found Mr. Palillero guilty of violating 18 U.S.C. §§ 2242(2)(A) and (B) and 2246(2)(C). To find Mr. Palillero guilty, the jury needed to find that he "knowingly . . . engage[d] in a sexual act" with Ms. Napier while she was "incapable of appraising the nature of the conduct," or "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." *Id.* § 2242. Mr. Palillero does not contest he knew Ms. Napier was asleep, so we focus our analysis solely on the sexual act element of the offense.

The sexual act charged in the indictment was "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *Id.*

§ 2246(2)(C). A reasonable jury could have found beyond a reasonable doubt that Mr. Palillero knowingly engaged in a sexual act.

First, a reasonable jury could credit Ms. Napier's testimony that Mr. Palillero entered her bedroom and attempted to or did insert his finger into her vagina. Within seconds of the assault, Ms. Napier identified Mr. Palillero in her text message to Mr. Pratschler. And in multiple interviews with various law enforcement officers over the course of the subsequent twelve hours, Ms. Napier's story remained consistent in all material respects.

Second, a reasonable jury could credit Lieutenant Cole's testimony that Mr. Palillero was present in Ms. Napier's house at the time in question, occasionally walking in and out of the living room. A reasonable jury could also credit Lieutenant Cole's impression of Mr. Palillero's reaction when initially confronted with Ms. Napier's text message: namely, that he "wasn't making eye contact." App., Vol. V at 42.

Third, a reasonable jury could partially disbelieve the statements Mr. Palillero made to Ms. Palillero from jail. To reiterate, Mr. Palillero stated that he "was in [Ms. Napier's] bedroom" and "went in her room to wake her up." App., Vol. IV at 157, 184. A reasonable jury could accept that Mr. Palillero was in Ms. Napier's bedroom but was not there to wake her up. None of the trial testimony suggests any reason why Mr. Palillero might have needed to awaken Ms. Napier. And if there were some emergency that required such an unusual step, Lieutenant Cole would presumably have been aware of it. Further, Mr. Palillero would have had

ample incentive to misrepresent to his wife what his actual conduct and intentions were when he went into Ms. Napier's bedroom.

Mr. Palillero's counterarguments all rest on the idea that the prosecution overlooked one or more dogs that did not bark (both figuratively and literally). That is, he relies on the absence of certain evidence. The overarching problem with these arguments is that, for them to create reasonable doubt, there must be some evidentiary support for the notion that we would *ordinarily expect* such things to happen under similar circumstances. And here that support is missing, in large part because Mr. Palillero did not call a single witness to the stand in his defense. With that in mind, we now review each of Mr. Palillero's specific arguments.

Mr. Palillero first argues that if Ms. Napier were telling the truth, there would have been DNA recovered from various parts of her person and clothing. To the contrary, Ms. Conway testified she was not surprised at her inability to identify Mr. Palillero's DNA in any of the samples due to the time that had passed and the actions taken between the attack and the recovery of the samples. Mr. Palillero's argument rests on the idea that the absence of DNA would support reasonable doubt. But no trial testimony, scientific or otherwise, supports that broad assertion. And even if such evidence had been presented, the jury was free to credit Ms. Conway's contrary testimony.

Next, Mr. Palillero posits that—because Ms. Napier was menstruating on the night in question—investigators should have found blood on Mr. Palillero's

hands. First, no trial testimony, scientific or otherwise, supports the notion that any contact between a finger and a vagina during menstruation necessarily results in the transfer of residual blood to that finger. Second, Mr. Palillero went home before investigators arrived at the scene, leaving him time to wash his hands or otherwise wipe off traces of evidence. Third, Ms. Napier testified she was wearing a tampon at the time of the attack.

Mr. Palillero also contends investigators should have taken DNA samples from his fingers or hands the night of the assault. Perhaps, but our task when reviewing the sufficiency of the evidence is to evaluate the evidence presented to the jury. We are not reviewing the thoroughness of the investigation, a topic that defense counsel could have explored during cross-examination but chose not to.

Mr. Palillero further asserts that—"[i]n light of [Ms. Napier's] knowledge of martial arts"—there should have been "signs of an assault" on Mr. Palillero's hands or face. Appellant Br. at 37. To the extent Mr. Palillero is suggesting he must not have assaulted Ms. Napier because she did not physically injure him as she woke from her slumber, a reasonable jury could reject that argument. No trial testimony supports the notion that a person trained in martial arts who awakens during a sexual assault usually (or even generally) inflicts physical injury on the assailant. Further, Ms. Napier did react physically once she was fully awake.

Mr. Palillero next argues Ms. Napier's written statement contradicts her testimony at trial, because in that statement, she described Mr. Palillero entering

the bedroom and attempting to touch her three times. At trial, Ms. Napier clarified her written statement, testifying that she glimpsed Mr. Palillero several times before she fully opened her eyes. A reasonable jury could credit Ms. Napier's clarification and conclude that Mr. Palillero entered the bedroom once prior to the assault.

Mr. Palillero also contends it is implausible that Ms. Napier responded to sexual assault by immediately texting Mr. Pratschler. That misstates the record, somewhat. In fact, Ms. Napier responded by pushing Mr. Palillero away. Then, Mr. Palillero left her bedroom, returned, told her not to say anything, and left again. Only then did Ms. Napier text Mr. Pratschler.

Mr. Palillero similarly asserts that it "strains credulity" that Ms. Napier did not "fight back or scream or yell." Appellant Br. at 38. First, no testimony supports the notion that victims of sexual assault—particularly those assaulted while sleeping—typically do any of those things. So, the absence of those responses from Ms. Napier does not supply reasonable doubt. Second, Ms. Napier did fight back. She got up, put pants on, left the bedroom, and punched Mr. Palillero in the face.

Lastly, Mr. Palillero argues that one or both of Ms. Napier's dogs should have barked during the assault. At trial, Ms. Napier testified that when Mr. Palillero entered her bedroom, the dogs rustled around on the bed and briefly woke her. Otherwise, no trial testimony addresses the question of how Ms. Napier's dogs

typically react or do not react to movement in the bedroom.

In sum, a reasonable jury could conclude, beyond a reasonable doubt, that Mr. Palillero knowingly engaged in a sexual act when he inserted his finger into Ms. Napier's vagina while she was sleeping. Mr. Palillero's sufficiency of the evidence challenge fails.

B. *Whether the District Court Erred when it Excluded the Defense's DNA Expert*

The district court excluded Dr. Spence's testimony because Mr. Palillero's two notices of intent to introduce that testimony were late and non-specific. "We review the exclusion of expert testimony for abuse of discretion." *United States v. Paup*, 933 F.3d 1226, 1230 (10th Cir. 2019). We uphold the district court's decision to exclude Dr. Spence's testimony due to its untimely disclosure and inadequacy.

1. Discovery Violation

Rule 16 of the Federal Rules of Criminal Procedure states that, if the United States discloses a written summary of expert testimony, "[t]he defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial." Fed. R. Crim. P. 16(b)(1)(C). In other words, the defendant must disclose a written summary of expert testimony. "This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Id.*

There is no doubt that Mr. Palillero failed to comply with Rule 16. The district court set a deadline of November 14 for the disclosure of written summaries. Yet Mr. Palillero did not file his first notice of intent to introduce expert testimony until December 2, the day before trial. In addition, defense counsel provided only a vague statement of the expected testimony that lacked the bases and reasons for Mr. Spence's opinions and his qualifications.

Mr. Palillero responds that his late disclosure was justified by the United States' late disclosure. It is true that the United States filed its written summary five days late. But Mr. Palillero does not cite anything in our cases suggesting that a short delay by one party excuses a much longer delay by the other party. *Cf. United States v. Bishop*, 926 F.3d 621, 628 (10th Cir. 2019) ("[O]ne party's failure to comply with the Rules does not alter the other party's obligation to follow the Rules"). And while the United States' disclosure was late, that disclosure was complete and provided well before the scheduled trial date. Accordingly, the district court did not err in concluding that Mr. Palillero failed to comply with Rule 16.

2. Sanction

Rule 16 also addresses the question of remedy. It states:

> 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.

Fed. R. Crim. P. 16(d)(2).

We have instructed district courts to consider three factors when contemplating a discovery sanction in a criminal case: "(1) the reason for the delay in disclosing the witness; (2) whether the delay prejudiced the other party; and (3) the feasibility of curing any prejudice with a continuance." *United States v. Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001). "These factors do not dictate the bounds of the court's discretion, but merely guide the district court in its consideration of sanctions." *Paup*, 933 F.3d at 1232 (internal quotation marks omitted).

a. *The reason for the delay*

At the start of trial, the district court asked defense counsel what efforts he had made to secure expert testimony in a timely manner. Defense counsel replied that he had "contacted the New Mexico Criminal Defense Lawyers Association" and others. App., Vol. IV at 257–58. But defense counsel did not contact Dr. Spence until the eve of trial and even then, did not know what the substance of his testimony would entail.

Defense counsel's explanation for the delay was wholly inadequate. Defense counsel should have known

from the start that DNA would play a role in this case, given that he was present when detectives swabbed Mr. Palillero. In addition, defense counsel received Ms. Conway's lab report on October 29, which should have put him on notice of the significance of the DNA evidence. At the very latest, defense counsel should have known on November 7, when the United States disclosed its witness list, that it intended to call Ms. Conway to testify as to that report.

This court has previously held defense counsel accountable for comparable delay. In *Adams*, for example, we upheld the district court's exclusion of the defendant's expert witness, reasoning

> that three months had passed since the defendant's indictment, that defense counsel knew or should have known of defendant's claim that he lied to the police in order to protect his girlfriend, and that concerns about the defendant's mental state and ability had been raised by the defendant's grandmother both prior to and at the plea hearing.

271 F.3d at 1244.

Here, the nurse collected evidence to be processed for DNA on the night of the attack and, as of September 21, defense counsel was provided with the results of those tests. To the extent defense counsel hoped to argue those results were exculpatory, he should have initiated his search for a DNA expert immediately. Instead, defense counsel waited until December 2, the day before trial, to name Dr. Spence as

an expert and then did so without any understanding of the details of the anticipated testimony.

b. *Prejudice*

The district court found that Mr. Palillero's inadequate and late notice prejudiced the United States by denying it the chance to prepare for Dr. Spence's testimony. We agree. In *Adams*, we held that a notice filed three days before trial prejudiced the United States. *Id.* It follows that a notice filed the day before trial likewise creates prejudice.

Mr. Palillero argues that he was prejudiced by the exclusion of Dr. Spence's testimony. But that turns the inquiry on its head. Our analysis asks whether the failure to comply with the expert disclosure deadlines prejudiced the other party, not whether exclusion of the expert would harm the violator. Here, the prejudicial effect of the discovery violation is apparent. The United States had no opportunity to prepare for the cross examination of Dr. Spence.

Regardless, "even in the absence of prejudice, a district court may suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court." *Id.* (internal quotation marks omitted). If we were to require the district court to allow Dr. Spence's testimony where it was neither timely nor properly summarized, it could undermine the integrity of the judicial proceeding by encouraging gamesmanship.

c. *The feasibility of a continuance*

Next we consider the feasibility of granting a continuance.[9] This factor further supports the district court's decision. The Air Force transported Lieutenant Cole from Japan to New Mexico so he could testify at trial. A continuance on the eve of trial would have required that Lieutenant Cole make an extra trip across the Pacific at some future date. As a result, a continuance was not feasible.

In summary, defense counsel failed to present a reasonable justification for the failure to adequately and timely comply with the disclosure of the defense's DNA expert. The failure prejudiced the United States, and that prejudice could not have been feasibly avoided by a continuance. Accordingly, we affirm the district court's exclusion of Dr. Spence's testimony.

C. *Whether Mr. Palillero's Sentence is Substantively Unreasonable*

1. Standard of Review

"This court reviews a district court's decision to grant or deny a request for variance under a deferential abuse of discretion standard." *United States v. Beltran*, 571 F.3d 1013, 1018 (10th Cir. 2009). "A district court abuses its discretion when it renders a

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[9] Although the district court did not expressly address the feasibility of a continuance, our precedents do not require that it do so. In *United States v. Adams*, for example, the district court failed to address this factor but we nevertheless affirmed its decision to exclude expert testimony. 271 F.3d 1236, 1244 (10th Cir. 2001).

judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (internal quotation marks omitted). "When the district court's sentence falls within the properly calculated [G]uideline[s] range, this Court must apply a rebuttable presumption that the sentence is reasonable." *Id.* "The presumption of reasonableness is, however, a deferential standard the defendant may rebut by demonstrating that the sentence is unreasonable when viewed against the other factors delineated in [18 U.S.C.] § 3553(a)." *Id.* (internal quotation marks omitted). One of those factors is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

2. Analysis

Mr. Palillero argues the district court's sentence was unreasonable because his offense conduct was less severe than most offense conduct punishable under the same statute, as well as for the related reason that the cases cited by the prosecution and relied on by the district court involved more serious sexual abuse than what occurred in this case. Mr. Palillero fails, via these arguments, to rebut the presumption of reasonableness that we attach to his within-Guidelines sentence.

The district court imposed a sentence of 121 months' imprisonment, at the low end of the applicable Guidelines range. The district court agreed with the Guidelines calculations in the PSR and considered the § 3553 factors in imposing sentence. In addition, the district court noted, that to the extent Mr. Palillero's assault was less serious than some other instances of

sexual abuse, that was only because Ms. Napier woke up and pushed him away. Under these circumstances, the district court did not abuse its discretion in denying Mr. Palillero's request for a variance. *See United States v. Lente*, 759 F.3d 1149, 1168 (10th Cir. 2014) (explaining that even "disparate sentences are allowed where the disparity is explicable by the facts on the record" (quotation marks omitted)).

Mr. Palillero also contends 121 months' imprisonment is unreasonably long because "there was no force or intercourse." Appellant Br. at 51. By intercourse Mr. Palillero appears to mean penetration with a penis. But that is not Congress's definition of a sexual act, which includes digital penetration of another person's genital orifices. *See* 18 U.S.C. § 2246(2)(C). It was Mr. Palillero's nonconsensual commission of a sexual act, as defined by Congress, that in turn determined his applicable Guidelines range of 121 to 151 months' imprisonment.

Finally, Mr. Palillero argues that other sexual abuse cases resulting in comparable or longer sentences involved more serious sexual abuse than what occurred in this case. Though some of the cited cases involved observable physical injuries, here Mr. Palillero inflicted pain on Ms. Napier by rubbing his fingernail on her clitoris. Mr. Palillero's argument also assumes the only relevant injuries are physical injuries. At the sentencing hearing, Ms. Napier testified about the long-term emotional harm she has suffered as a result of Mr. Palillero's assault. In light of these considerations, the district court's chosen sentence was neither unreasonable nor arbitrary.

D. *Whether the District Court Committed Cumulative Error*

1. Legal Standard

"We consider cumulative error only if the appellant has shown at least two errors that were harmless." *United States v. Christy*, 916 F.3d 814, 827 (10th Cir. 2019). "Anything less would leave nothing to cumulate." *Id.* "The question is whether the two or more harmless errors together constitute prejudicial error." *Id.*

2. Analysis

Mr. Palillero's opening brief spends approximately three pages on cumulative error, in which he asserts seven errors allegedly made by the district court. The first four asserted errors are merely different versions of the argument that it was an abuse of discretion to exclude Dr. Spence's testimony (discussed above). The other three asserted errors are each raised in a single sentence, and we do not consider them. *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) ("[A]rguments may be deemed waived when they are advanced in an opening brief only in a perfunctory manner." (internal quotation marks omitted)).

The district court did not err. As a result, Mr. Palillero's cumulative error claim fails.

III. CONCLUSION

We AFFIRM Mr. Palillero's conviction and sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
District of New Mexico

Case Number: 2:18CR02311-001KG
USM Number: 97843-051
Defendant's Attorney: William S. Jennings, Retained

[Filed: July 2, 2019]

UNITED STATES OF AMERICA)
)
V.)
)
FRANCISCO JAVIER PALILLERO)

Judgment in a Criminal Case

THE DEFENDANT:

☐ pleaded guilty to count(s) .

☐ pleaded nolo contendere to count(s) which was accepted by the court.

X was found guilty on count(s) **1 of the Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title and Section	***Nature of Offense***	***Offense Ended***	***Count***
18 U.S.C. Sec. 2242(2)(A) and (B) and 2246(2)(C)	Sexual Abuse	04/28/2018	

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s).

☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/2/2019
Date of Imposition of Judgment

/s/ Kenneth J. Gonzales
Signature of Judge

Honorable Kenneth J. Gonzales
United States District Judge
Name and Title of Judge

7/2/2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **121 months**.

The Court recommends that Immigration and Customs Enforcement begin removal proceedings during service of sentence.

X The court makes the following recommendations to the Bureau of Prisons:

Federal Correctional Institution in the State of New Jersey, or as close to as possible, if eligible.

The Court recommends the defendant participate in the Bureau of Prisons sex offender program, if eligible.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at on .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **5 years**.

If the defendant is deported, said term of supervised release shall be unsupervised. If the defendant is not deported, said term of supervised release shall be supervised.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

    ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. X You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer

instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

If deported, you must not reenter the United States without legal authorization.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:

Assessment	**JVTA Assessment***	**Fine**	**Restitution**
$100.00	**$**	**$**	**$59.98**

☐ The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X In full immediately; or

B ☐ $ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

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* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Pursuant to the Mandatory Victim Restitution Act, it is further ordered that the defendant will make restitution to the victim in the amount of $59.98. Restitution shall be submitted to the Clerk of the Court, Attention Intake, 333 Lomas Boulevard N.W. Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victim(s). The restitution will be paid during the defendant's term of incarceration.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest,

(6) community restitution, (7) JVTA assessment, (8) penalties; and (9) costs, including cost of prosecution and court costs.

APPENDIX C

* * * *

[pp. 203]

THE COURT: Okay. Thank you, Mr. Jennings.

Mr. Saltman -- Let me just note what Mr. Saltman had indicated, which are the elements of the offense as charged in the Indictment. And to find the Defendant guilty of the crime, and we're not at the stage of finding guilt or innocence, Mr. Palillero, we're just determining whether there's enough evidence in the record to allow the trial to proceed.

So the elements, once again, as Mr. Saltman described, first, that the Defendant knowingly engaged in or knowingly attempted to engage in a sexual act with Jane Doe; that the Defendant knew that Jane Doe was incapable of apprizing the nature of the conduct, or the Defendant knew that Jane Doe was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act; and, third, the offense was committed within the special maritime and territorial jurisdiction of the United States at Holloman Air Force Base.

The term "sexual act" means the penetration, however slight, of the genital opening of another by finger with the intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person.

So the rule that I'm applying here is Rule 29, and under that rule of the Federal Rules of Criminal Procedure after the Government closes its evidence, the Court on the Defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. In determining whether to grant a motion for judgment of acquittal, the Court asks only whether taking the evidence in the record in the light most favorable to the Government a reasonable jury could find the Defendant guilty beyond a reasonable doubt.

The Court must enter both -- excuse me -- consider both direct and circumstantial evidence together with reasonable inferences that can be drawn from the evidence. And the Court must not weigh conflicting evidence or consider the credibility of witnesses, but simply determine whether the evidence if believed would establish each element of the offense.

Ultimately, the evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt, and that would be considering whether there's substantial evidence.

I've considered the evidence that Mr. Saltman described. I'm also considering the audiotape that was played as Exhibit 1, that includes Defendant's statement where he acknowledges that he was in the victim's room. I'm also considering the testimony of the victim which, in her view, in her testimony that the Defendant was in her room at least once -- twice, and may have been in there as many as three times that evening, and that was corroborated at least to some extent by the testimony of Lieutenant Cole, who did

indicate that while he was meeting with the spouse in the living room Mr. Palillero had withdrawn from that group and went down the hall.

I'm also considering the victim's testimony where she identifies Mr. Palillero positively, including a description of his eye, that he had -- perpetrator had beer or alcohol on his breath. That was corroborated with other testimony that Mr. Palillero had been drinking alcohol that evening and that he had been intoxicated.

So that is among the items of evidence. I'm finding that, again, viewed in the light most favorable to the Government, to determine that there is sufficient evidence to allow the trial to proceed, and so in this way I'm denying the motion that Mr. Jennings brought on behalf of Mr. Palillero under Rule 29(a). Okay. That's the ruling.

So with that, Mr. Jennings, for the defense case, what is your intention for this afternoon?

MR. JENNINGS: Your Honor, our intention this afternoon is not to call Ms. Ashley Napier or Adam Pratschler, and we're not going to call Mr. Palillero either.

THE COURT: All right. And that's certainly Mr. Palillero's right to determine whether to testify or to not testify. And I'll have an instruction for the jury that they cannot consider that decision of Mr. Palillero to not testify in determining whether he is guilty of the offense.

So with that not being part of your evidence, what will you do for this -- for your defense case?

MR. JENNINGS: Well, Your Honor, we did file a renewed motion for intent to offer expert testimony. Would the Court -- We're withdrawing our 412 motion, Judge, with intent to present DNA, the DNA evidence.

APPENDIX D

* * * *

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THE COURT: Okay. Is Mr. Spence, your proposed expert, available to testify this afternoon?

MR. JENNINGS: I believe he is, Your Honor.

THE COURT: Is he here in the courthouse?

MR. JENNINGS: He is not in the courthouse.

THE COURT: All right. Then what witness will you be calling to the stand this afternoon?

MR. JENNINGS: I will not be calling any witnesses to the stand this afternoon, Your Honor.

THE COURT: Okay. But you say Mr. Spence is available to testify this afternoon?

MR. J ENNINGS: I believe that he is, Your Honor.

THE COURT: All right. I suggest you give him a call and get him here as soon as possible. But as to whether he should testify at all, Mr. Saltman?

MR. SALTMAN: I'm going to let Ms. Villalobos handle this.

THE COURT: Okay. Go ahead.

MS. VILLALOBOS : Your Honor , again today -- we have the same objection that we did. We did not receive notice of what Mr. Spence would testify to until -- I'm

not sure when the notice came through -- sometime today. I reviewed it just at the end of the lunch hour. It is -- Essentially, it's just a resuscitation of exactly what Ms. Conway just testified to. It is just a -- the notice is just a resuscitation of exactly what's in the lab reports that Ms. Conway just testified to, so I would object that we didn't receive notice of what he was going to testify to until this afternoon, so my expert hasn't had any time to review any of this. But additionally, it would be cumulative because it's exactly what -- what's in here, at least, is exactly what Ms. Conway just testified to.

THE COURT: Mr. Jennings, what would be new if Mr. Spence were allowed to testify?

MR. JENNINGS: Well, Your Honor, let me take a look here to see. Your Honor, I think he would definitely testify to some peer-review articles. That's definitely new. Those haven't been heard.

Let me see what else. So I know he has a peer-reviewed article that he wanted to discuss. And I'm trying to see what else he said here, Judge.

Your Honor, may I give him a call real quick?

THE COURT: Let me ask. So one -- when we discussed this on Friday -- here I'm speaking to Ms. Villalobos -- my recollection is that there was no objection if Mr. Jennings was able to secure an expert for testimony this week.

MS. VILLALOBOS: That is correct.

THE COURT: And part of it was so that as long as the Government had a chance to interview or even voir dire the witness before testifying before the jury.

MS. VILLALOBOS: That is correct, Your Honor.

THE COURT: Okay. And if you were given a chance to voir dire Mr. Spence, what would your position be at this time?

MS. VILLALOBOS: Your Honor, the Government's position is we would be okay with that, but again, I would renew the objection that what is in this notice is -- there's nothing about this peer-reviewed article in this notice. It is just purely a resuscitation of what Ms. Conway testified to that was in the lab reports. So there's nothing about this peer-reviewed article in there, there's nothing about any other items that Mr. Spence would testify to in there, so I still haven't gotten notice of any other items that he would testify to.

MR. JENNINGS: Your Honor, in the renewed notice there should be Exhibit 1, which is his "Summary: Motion of Intent to Testify -- Motion of Intent for Defense Expert to Testify: U.S.A. v. Francisco Palillero." That exhibit should be in there, Judge.

THE COURT: And is there peer-review literature in that document?

MR. JENNINGS: There is not, Your Honor, but I don't know that he would -- I don't think that you would be submitting everything he's going to testify to in our motion for intent to testify. I don't think that you submit absolutely everything in that.

THE COURT: Well, there is kind of a notice aspect to this to give both sides whenever there's expert testimony proffered at least some notice what the testimony would be, what the expert opinion would be, and so that way opposing counsel can prepare and determine whether any rebuttal or opposing testimony would be - - should be elicited as a response. So --

MR. JENNINGS: Well, Your Honor --

THE COURT: There's no peer-review reference in the document 87-1 that you tendered to the Court. What else would he testify to?

MR. JENNINGS: Well, Your Honor, again, this is that question, I think it's come up before. I don't -- I don't know what all he's going to testify to, Judge. I guess I could take a look here.

He's definitely going to testify to "Item 1: Two mons pubis/outer labia majora swabs from AN. There was no indication of seminal material or sperm.

"Item 2: Two oral swabs from AN"; that "There was no indication of seminal material or sperm cells on these swabs. DNA Results: Autosomal (STR) DNA . . ."

Your Honor, I can go through the whole list but, again, I think that's the reason that I need my expert here, is to testify to the things that are beyond what I would understand to testify to, and the Government keeps saying that it would just be duplicative, so at the very least I don't see what it is that they have to prepare for if they think it's nothing more than a duplicative testimony, Judge, which we should be allowed to have.

If this is considered purely exculpatory evidence, then I think that we should have an expert who can explain it to the jury because it's very important, Your Honor. And again, I think that, you know, considering that I had made numerous requests for DNA reports, Your Honor, I had made -- at least filed a couple of motions, one asking to compel the identities of the other DNA contributors. I also filed a motion for a continuance based on this issue. And, Judge, I mean, I've made numerous motions on this and I think to deny us the ability to have our expert testify kind of that cumulative effect, overall, is becoming pretty prejudicial to Mr. Palillero and his defense.

THE COURT: Okay. So there would be nothing new, necessarily, that Mr. Spence would testify to beyond what Ms. Conway has already testified to --

MR. JENNINGS: Well, no.

THE COURT: -- her testing and the results of her testing?

MR. JENNINGS: I do think there would be something new, Your Honor, but I can't tell you what that is.

THE COURT: If you don't know, then I can't make a judgment as to whether it's relevant and not cumulative, whether the Government has had any ability to prepare for their case in rebuttal to any defense case.

MR . JENNINGS: Well, Your Honor, can we have a hearing to determine if he has anything new to determine if he has anything new to testify to and then

make a determination? He says he can be here in a little less than an hour.

THE COURT: All right. Ms. Villalobos?

Mr. Saltman?

MS. VILLALOBOS: Your Honor, I believe defense counsel has just stated he doesn't even know what his expert would testify to, so I don't know how the Government could have any notice as to what Mr. Spence would testify to if defense counsel does not even know what he's going to testify to.

THE COURT: Well, that's what I heard as well, Mr. Jennings, so given the timing of the notice -- The first notice was on December 2nd, two days ago, the day before we began trial. Your second notice was filed today. That's document 87. You have attached document 87-1 . You indicated earlier that the witness would testify to peer-review articles, though you have indicated now that you do not know what Mr. Spence would be testifying to. Given the timing, he's not here in the courthouse available to testify at this particular time, I'm compelled to deny your motion to allow Mr. Spence to testify. So that's my ruling. I understand what your position is, though I'm not clear, neither is counsel, aware of what the witness would say if given a chance to testify.

So for that reason, if he is going to testify, based on some of the description you gave, I will find that it is cumulative to the testimony already provided by Ms. Conway. Given where we are, the Government has rested its case. We had no other defense witness to put up this afternoon. It's five minutes after three. The jury

is waiting. I'm going to exclude his testimony. So that's my ruling.

* * * *

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THE COURT: Give me one second. Please be seated for just a moment.

All I wanted to do was at least supplement or augment my ruling on the denial of the motion to allow Mr. Spence to testify. I'm going to note also I'm -- it's discretionary on the Court, and part of my consideration is that Mr. Jennings did have an ample opportunity to cross-examine Ms. Conway in

* * * *

[pp. 218]

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.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CRIMINAL NO. 18-2311 KG

[Filed: November 19, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FRANCISCO JAVIER PALILLERO,	)
	)
Defendant.	)
	)

UNITED STATES' NOTICE OF INTENT TO INTRODUCE EXPERT WITNESS TESTIMONY PERTAINING TO SEROLOGY AND DNA EVIDENCE PURSUANT TO RULES 702, 703 and 705

Pursuant to Rule 16(a)(1)(G), the government hereby discloses its expert witnesses and the type of testimony it intends to introduce under Rules 702, 703 and 705 of the Federal Rules of Evidence. The United States has provided discovery as it was made available.

DNA / SEROLOGY / TRACE EVIDENCE

At the trial of this cause, the government intends to call Forensic Scientist Jerrilyn Conway, the DNA Examiner from the DNA Casework Unit with the Federal Bureau of Investigation (FBI) assigned to the case. Ms. Conway's testimony may include her expert opinions or specialized knowledge regarding this matter, derived from her education, training, and professional experience as a forensic scientist. Ms. Conway has testified as an expert in the area of DNA examinations on numerous occasions. The United States anticipates that Ms. Conway will testify regarding FBI policies and procedures relating to serological and DNA examinations and their application to the examination in this case. It is anticipated Ms. Conway will testify about methods of DNA analysis including Y short tandem repeat and autosomal genotyping. Ms. Conway may testify about the transfer of DNA, including by touch.

The United States anticipates Ms. Conway may testify to the following matters:

The DNA Casework Unit examined an array of items seized as evidence in this case and subjected those items to serology or DNA analysis. Among other things, Ms. Conway will testify that the victim's DNA was present on a number of swabs taken from the victim's body and the victim's clothing, and the Defendant's DNA cannot be included on any of these items.

Two mons pubis/outer labia majora swabs and two oral swabs from the victim were tested for the presence

of semen; however none was detected. Additionally, only female DNA, consistent with the victim, was present on these items. Swabs from the victim's cheeks and around her mouth, left hip, and left arm showed no DNA typing results unlike the victim.

Swabs from the fingers and knuckles of the victim showed both female and male DNA. The Defendant's DNA was excluded as a potential contributor.

The victim's underwear was examined for the presence of semen; however none was detected. 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.

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 quantity 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.

The DNA results obtained from the tested items are not eligible for entry into the Combined DNA Index System (CODIS).

DNA typing using the polymerase chain reaction (PCR) was performed with the GlobalFiler™ and/or AmpFlSTR® Yfiler™ PCR Amplification Kits. The Y-STR loci are located on the male Y-chromosome and are transmitted through a paternal lineage from father to son. Barring mutation, all males in the same paternal lineage have the same Y-STR typing results. A paternal lineage consists of those male relatives to whom the same Y-chromosome has been transmitted from a common ancestor.

Because the FBI Laboratory is continuing to evaluate statistical approaches for calculating the rarity of mixed Y-STR profiles, it only provides inclusionary and statistical conclusions for distinguishable individual contributors in Y-STR mixtures.

Forensic Scientist Jerrilyn Conway's full reports, including bench notes, chain-of-custody logs, statistics, communication logs, laboratory worksheets, evidence check-in notes, and manuals and procedures of the DNA Casework Unit, have previously been disclosed to the defendant as bates stamped discovery numbered 338-484.

This disclosure sets forth all the opinions of the expert and describes the reasons and bases supporting her opinions. Further, the United States has previously

disclosed the *curriculum vitae* of Jerrilyn Conway, setting forth the training, experience, and qualifications that permit the proffered opinions.

CONCLUSION

WHEREFORE, the United States respectfully requests, pursuant to Kumho Tire Co., Ltd. v. Carmichael, that this Court exercise its "special gatekeeping obligation" and allow the above described expert testimony of the witness, Jerrilyn Conway, to be offered in the United States' case-in-chief at trial in this matter and that the Court find that the proposed testimony by this witness has a "reliable basis in the knowledge and experience" in her identified discipline, and is therefore admissible. 526 U.S. 137, 152 (1999); *see also Dodge v. Cotter Corp.,* 328 F.3d 1212, 1221-22 (10th Cir. 2003).

Electronically Filed 11/19/18
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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. 2:18-cr-02311-KG

[Filed: November 28, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FRANCISCO JAVIER PALILLERO,	)
	)
Defendant.	)
	)

DEFENDANT RESPONSE TO THE UNITED STATES NOTICE TO INTRODUCE EXPERT WITNESS TESTIMONY PERTAINING TO SEROLOGY AND DNA EVIDENCE PURSUANT TO RULE 702, 703 and 705

COMES NOW, Defendant, by and through his counsel W. Shane Jennings, and hereby responds to the United States' motion as follows:

I. DNA/SEROLOGY/TRACE EVIDENCE

The government intends to call Forensic Scientist Jerrilyn Conway, the DNA Examiner from the DNA

casework Unit with the Federal Bureau of Investigation (FBI) assigned to the case.

II. LEGAL STANDARDS

Ms. Conway can testify to the FBI's policies, procedures relating to the DNA evidence. She is certified as an expert in DNA. Ms. Conway should testify that she discovered DNA evidence or that she did not. Moreover, she can testify that there were other males' DNA present but the Defendant's DNA was excluded from being present on her clothing or person.

According to Federal Rule 702, the government has failed to establish that Y-STR typing is based on sufficient data and methods. It has also failed to prove it is the product of reliable principles and methods. The government has also failed to prove that the expert witness will apply the principles and methods reliably to the facts in this case.

According to Federal Rule 702, the Government has failed to establish that trace evidence is based on sufficient evidence dates and methods. It has also failed to prove that it is the product of reliable principles and methods. Moreover, the Government has not shown how they intend to apply the principles of trace evidence reliably to the facts in this case.

According to Federal Rule 703, inferences based on Y-STR typing and on trace evidence have not been proven reliable. The Government has also not shown how either of these theories apply to the facts in this case. It would be substantially more prejudicial than probative if Ms. Conway is allowed to testify to these theories. Ms. Conway's testimony should be limited and

exclude any testimony regarding Y-STR or trace evidence.

According to Rule 705, the expert may state an opinion without disclosing the underlying facts. This is unless the court orders otherwise.

All that has been disclosed thus far is DNA results that specifically exclude the Defendant. There has been no other evidence or data to suggest Y-STR typing nor has there been any data to suggest trace evidence.

III. ARGUMENT

Ms. Conway can testify to the facts that were discovered. The Defendant's DNA was not found on the victim's clothing or person. The Defendant's semen was not detected in the victim's underwear. Two other male DNA was detected in the outside crotch of the victim's underwear. The Defendant is excluded as a potential contributor to any male DNA present.

Defendant objects to any polymerase chain reaction (PCR) as performed. The DNA in this case excluded the Defendant's male DNA. The other male DNA was extremely diluted. It was not even eligible into the Combined DNA Index System (CODIS).

It is unreliable to suggest that a parental lineage consists those whom the same Y chromosome has been transmitted from a common ancestor based on samples that were diluted. They could not be used as a sample for CODIS. It is substantially more prejudicial than probative to use diluted sample as a factual basis to create an inference from, of any sort.

It is also unreliable to suggest that there is a basis to show trace evidence. There was no DNA evidence discovered that was the Defendant's on the victim's person or her clothing.

Defendant requests that the expert not be allowed to testify to an opinion. Furthermore, that the expert disclose any facts, data underlying the theories, how they relate to the facts in this case and reasons she believes that said facts relate.

IV. CONCLUSION

WHEREFORE, the Defendant respectfully requests the Court to issue a pretrial ruling that the Court limits the expert witness, Jerrilyn Conway's testimony to what she has discovered and to her discipline only. Defendant further requests that she be limited from making any assumptions or proffering testimony on the DNA polymerase chain reaction and the Y-STR profiles.

Respectfully submitted,

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for Purposes of this Appendix]

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Case No. 2:18-cr-02311-KG

[Filed: December 2, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FRANCISCO JAVIER PALILLERO,	)
	)
Defendant.	)
	)

DEFENDANT'S NOTICE OF INTENT TO INTRODUCE REBUTTAL EXPERT TESTIMONY PERTAINING TO SEROLOGY AND DNA EVIDENCE PURSUANT TO RULES 702, 703 and 705

COMES NOW, Defendant, by and through his counsel W. Shane Jennings, pursuant to Rule 16(a)(1)(G), and discloses its expert witness and the type of testimony it intends to introduce under Rules 702, 703 and 705 of the Federal Rules of Evidence, and in response to the Government's disclosure and Notice of Intent to Introduce Expert Witness Testimony

Pertaining to Serology and DNA Evidence Pursuant to Rules 702, 703 and 705 [DOC 59], as follows:

DNA / SEROLOGY / TRACE EVIDENCE

At the trial of this case, the Defendant intends to call Michael J. Spence, Ph.D., of Spence Forensic Resources, to offer rebuttal testimony to the Government's expert witness Jerrilyn Conway. Dr. Spence's testimony may include his expert opinions or specialized knowledge regarding this matter and the discovery disclosed to date, derived from his education, training, and professional experience in forensic biology/DNA examination. Mr. Spence has testified as an expert in the area of forensic biology/DNA examinations on numerous occasions. The Defendant anticipates that Mr. Spence will provide rebuttal testimony regarding FBI policies and procedure relating to serological and DNA examination and their application to the examination in this case. It is anticipated that Mr. Spence will testify in rebuttal to the methods of DNA analysis including Y short tandem repeat and autosomal genotyping in addition to rebuttal testimony about the transfer of DNA, including by touch.

It is further anticipated that rebuttal expert, Mr. Spence, will offer rebuttal testimony regarding the topics outlined in the Government's Notice of Intent to Introduce Expert Witness [DOC 59] as follows:

> "The DNA Casework Unit examined an array of items seized as evidence in this case and subjected those items to serology or DNA analysis. Among other things, Ms. Conway will

testify that the victim's DNA was present on a number of swabs taken from the victim's body and the victim's clothing, and the Defendant's DNA cannot be included on any of these items.

Two mons pubis/outer labia majora swabs and two oral swabs from the victim were tested for the presence of semen; however none was detected. Additionally, only female DNA, consistent with the victim, was present on these items. Swabs from the victim's cheeks and around her mouth, left hip, and left arm showed no DNA typing results unlike the victim.

Swabs from the fingers and knuckles of the victim showed both female and male DNA. The Defendant's DNA was excluded as a potential contributor.

The victim's underwear was examined for the presence of semen; however none was detected. 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.

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 quantity 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.

The DNA results obtained from the tested items are not eligible for entry into the Combined DNA Index System (CODIS).

DNA typing using the polymerase chain reaction (PCR) was performed with the GlobalFiler™ and/or AmpFlSTR® Yfiler™ PCR Amplification Kits. The Y-STR loci are located on the male Y-chromosome and are transmitted through a paternal lineage from father to son. Barring mutation, all males in the same paternal lineage have the same Y-STR typing results. A paternal lineage consists of those male relatives to whom the same Y-chromosome has been transmitted from a common ancestor.

Because the FBI Laboratory is continuing to evaluate statistical approaches for calculating the rarity of mixed Y-STR profiles, it only provides inclusionary and statistical conclusions

for distinguishable individual contributors in Y-STR mixtures."

This disclosure sets forth all the opinions of the expert and described the reasons and basis supporting his opinions.

CONCLUSION

WHEREFORE, the Defendant respectfully requests that this Honorable Court allow the above described rebuttal testimony of witness Michael J. Spence, Ph.D., to be offered in the Defendant's case at trial in this matter and that the Court find that the proposed rebuttal testimony by this witness has a "reliable basis in the knowledge and experience" in his identified discipline and is therefore admissible.

Respectfully submitted,

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for Purposes of this Appendix]

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. 2:18-cr-02311-KG

[Filed: December 4, 2018]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FRANCISCO JAVIER PALILLERO,	)
	)
Defendant.	)
	)

DEFENDANT'S RENEWED NOTICE OF INTENT TO INTRODUCE REBUTTAL EXPERT TESTIMONY PERTAINING TO SEROLOGY AND DNA EVIDENCE PURSUANT TO RULES 702, 703 and 705

COMES NOW, Defendant, by and through his counsel W. Shane Jennings, pursuant to Rule 16(a)(1)(G), and discloses its expert witness and the type of testimony it intends to introduce under Rules 702, 703 and 705 of the Federal Rules of Evidence, and in response to the Government's disclosure and Notice of Intent to Introduce Expert Witness Testimony

Pertaining to Serology and DNA Evidence Pursuant to Rules 702, 703 and 705 [DOC 59], as follows:

TIME LINE

On November 7, 2018, the Federal Court established that all motions were to be filed by November 14, 2018 and any responses are due by November 28, 2018.

On November 19, 2018, the government filed a Notice of Intent to Introduce Expert Witness pertaining to Serelogy and DNA evidence pursuant to Rule 702, 703 and 705. This was in violation of the court order.

On November 30, 2018, the court stated that if the Defense could find a DNA Expert he or she could testify.

On December 3, 2018, Defense counsel produced an expert. Defense counsel also has a summary of the expert's intent to testify. Exhibit 1. The court originally stated that the defense expert could testify. However, the court then changed its decision and denied defense counsel's motion to introduce expert witness testimony of Michal J. Spence, Ph.D for rebuttal testimony. Defense counsel requests that the court reconsider this decision.

DNA / SEROLOGY / TRACE EVIDENCE

At the trial of this case, the Defendant intends to call Michael J. Spence, Ph.D., of Spence Forensic Resources, to offer rebuttal testimony to the Government's expert witness Jerrilyn Conway. Dr. Spence's testimony may include his expert opinions or

specialized knowledge regarding this matter and the discovery disclosed to date, derived from his education, training, and professional experience in forensic biology/DNA examination. Mr. Spence has testified as an expert in the area of forensic biology/DNA examinations on numerous occasions. The Defendant anticipates that Mr. Spence will provide rebuttal testimony regarding FBI policies and procedure relating to serological and DNA examination and their application to the examination in this case. It is anticipated that Mr. Spence will testify in rebuttal to the methods of DNA analysis including Y short tandem repeat and autosomal genotyping in addition to rebuttal testimony about the transfer of DNA, including by touch.

It is further anticipated that rebuttal expert, Mr. Spence will offer rebuttal testimony regarding the topics outlined in the Government's Notice of Intent to Introduce Expert Witness [DOC 59] as follows:

> "The DNA Casework Unit examined an array of items seized as evidence in this case and subjected those items to serology or DNA analysis. Among other things, Ms. Conway will testify that the victim's DNA was present on a number of swabs taken from the victim's body and the victim's clothing, and the Defendant's DNA cannot be included on any of these items.
>
> Two mons pubis/outer labia majora swabs and two oral swabs from the victim were tested for the presence of semen; however none was detected. Additionally, only female DNA, consistent with the victim, was present on these

items. Swabs from the victim's cheeks and around her mouth, left hip, and left arm showed no DNA typing results unlike the victim.

Swabs from the fingers and knuckles of the victim showed both female and male DNA. The Defendant's DNA was excluded as a potential contributor.

The victim's underwear was examined for the presence of semen; however none was detected. 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.

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 quantity 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.

The DNA results obtained from the tested items are not eligible for entry into the Combined DNA Index System (CODIS).

DNA typing using the polymerase chain reaction (PCR) was performed with the GlobalFiler™ and/or AmpFlSTR® Yfiler™ PCR Amplification Kits. The Y-STR loci are located on the male Y-chromosome and are transmitted through a paternal lineage from father to son. Barring mutation, all males in the same paternal lineage have the same Y-STR typing results. A paternal lineage consists of those male relatives to whom the same Y-chromosome has been transmitted from a common ancestor.

Because the FBI Laboratory is continuing to evaluate statistical approaches for calculating the rarity of mixed Y-STR profiles, it only provides inclusionary and statistical conclusions for distinguishable individual contributors in Y-STR mixtures."

This disclosure sets forth all the opinions of the expert and described the reasons and basis supporting his opinions.

CONCLUSION

WHEREFORE, the Defendant respectfully requests that this Honorable Court reconsider its decision and allow the above described rebuttal testimony of witness Michael J. Spence, Ph.D., to be

offered in the Defendant's case at trial in this matter and that the Court find that the proposed rebuttal testimony by this witness has a "reliable basis in the knowledge and experience" in his identified discipline and is therefore admissible.

Respectfully submitted,

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* * * *

APPENDIX I

[Filed: December 4, 2018]

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Summary: Motion of Intent for Defense Expert to Testify: U.S.A. v. Francisco Palillero

This case involves allegations of criminal sexual abuse, from an incident occurring on Holloman Air Base, located near Alamogordo, New Mexico. The alleged victim will be referred to as **'AN'**. This adult female reported to investigating officers that she was sound asleep in her bed at about 2:10 a.m., on April 28, 2018. At that time, AN was wearing a t-shirt and a pair of panties. She believed that during the following several minutes, a person repeatedly entered her bedroom and touched her inappropriately. This included the following: kissing her lips/cheek area, touching her hand, touching her breasts through her t-shirt, and touching her buttocks area. AN alleged that, eventually, this person used one hand to forcibly reach into her panties, made contact with her genital area, and used fingers to penetrate her vagina. AN stated that she was convinced that this person was Mr. Francisco Palillero. Consequently, she shoved him away. When Mr. Palillero denied these allegations to

others, AN ran out of the bedroom and attacked him. This caused both Mr. Palillero and AN to fall into some boxes located in the hallway of the residence.

AN arrived at the Otero-Lincoln County SANE Clinic at about 11:45 a.m. on April 28, 2018. A **S**exual **A**ssault **N**urse **E**xamination (SANE) was conducted shortly thereafter. This was about 9½ hours after the alleged incident. After the incident—but prior to the SANE exam—AN reportedly urinated, used a tampon, vomited, smoked, ate, and drank.

The Federal Bureau of Investigation (FBI) Laboratory released two forensic biology/DNA lab reports. These reports were dated September 21, 2018 and November 1, 2018. Eight evidence items were subjected to examinations. Known reference standards were collected from AN, and from Mr. Francisco Palillero. DNA typing results from these two individuals allowed comparisons to the DNA from the various evidence items. Summarized below are the results from tests for body fluids, as well as DNA comparisons between the two known standards and specific evidence items:

Item 1: Two mons pubis/outer labia majora swabs from AN. There was no indication of seminal material or sperm cells on these swabs. **DNA Results:** Autosomal (STR) DNA testing of **Item 1** failed to indicate the presence of any genetic material other than the expected DNA from AN. No indication of male DNA was observed, and no YSTR typing was attempted.

Item 2: Two oral swabs from AN. There was no indication of seminal material or sperm cells on these swabs. **DNA Results:** Autosomal (STR) DNA testing of

Item 2 failed to indicate the presence of any genetic material other than the expected DNA from AN. No indication of male DNA was observed, and no YSTR typing was attempted.

Item 3: Two swabs from cheeks and around the mouth area from AN.
DNA Results: Autosomal (STR) DNA testing of **Item 3** failed to indicate the presence of any genetic material other than the expected DNA from AN. No indication of male DNA was observed, and no YSTR typing was attempted.

Item 4: Two swabs from left hip area from AN.
DNA Results: Autosomal (STR) DNA testing of **Item 4** failed to indicate the presence of any genetic material other than the expected DNA from AN. No indication of male DNA was observed, and no YSTR typing was attempted.

Item 5: Two swabs from the left arm area from AN.
DNA Results: Autosomal (STR) DNA testing of **Item 5** failed to indicate the presence of any genetic material other than the expected DNA from AN. No indication of male DNA was observed, and no YSTR typing was attempted.

Item 6: Two swabs from fingers and knuckles from AN.
DNA Results: Autosomal (STR) DNA testing of **Item 6** revealed both male and female DNA. The FBI report stated as follows: **"Interpretation of item 6 was performed assuming that the DNA originated from two individuals, one of whom is AN. PALILLERO is *excluded* as a potential contributor to item 6."**

Item 8(1): Sample from the outside crotch area of underwear collected from AN. There was no indication of seminal material or sperm cells on this item.
DNA Results: Total DNA estimated at **39.8 nanograms (ng)**. Male DNA was estimated at **0.15 ng**, or **0.37%** of the total DNA. Although a mixture of male and female DNA was reported from **Item 8(1)**, the autosomal (STR) analysis of this item failed to indicate the presence of any genetic material other than the expected DNA from AN. According to the FBI Crime Lab report: **"The Y-STR typing results for item 8(1) 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 item 8(1) can be provided for PALILLERO."** In more simplified terms: DNA from at least two males was present here on this area of the underwear. However, there is no scientifically reliable indication of DNA from Mr. Palillero.

Item 8(2): Sample from the inside crotch area of underwear collected from AN. There was no indication of seminal material or sperm cells on this item.
DNA Results: Total DNA estimated at **73.1 ng**. Male DNA was estimated at **0.145 ng**, or **0.2%** of the total DNA. Although a mixture of male and female DNA was reported from **Item 8(2)**, the autosomal (STR) analysis of this item failed to indicate the presence of any genetic material other than the expected DNA from AN. According to the FBI Crime Lab report: **"Based on**

the Y-STR typing results, PALILLERO is *excluded* as a potential contributor to the male DNA obtained from item 8(2).”

Conclusions: The forensic biology/DNA results from these eight evidence items provide no scientific support for the allegations associated with this case investigation.

Michael J. Spence, Ph.D. **12/03/18**