No. 20-1240

In the
Supreme Court of the United States

FRANCISCO JAVIER PALILLERO,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

SCOTT M. DAVIDSON
Counsel of Record
THE LAW OFFICE OF SCOTT M. DAVIDSON, PH.D., ESQ.
1011 Lomas Boulevard NW
Albuquerque, New Mexico 87102
(505) 255-9084 (ph)
(505) 213-7212 (fax)
scott@justappeals.net

Counsel for Petitioner Palillero

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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This case is a good vehicle for resolving a split among the lower courts as to whether excluding a rebuttal DNA expert witness for the defense as a sanction for a non-willful violation of a discovery rule violates the Sixth Amendment right to present a defense.

It is undisputed that an important defense DNA expert witness's testimony was excluded *in toto* even though the non-existence of Petitioner's DNA anywhere on the victim's clothing or person was a critical fact needed to prove his innocence. Furthermore, an easy cure for any potential prejudice to the prosecution was offered but then capriciously rejected when the trial court refused to recess proceedings for one hour to *voir dire* the DNA expert witness.

1. The issue presented is unresolved in the lower courts.

Respondent's contention that this issue does not need resolving is not supported by the cases it relies on. For instance, Respondent mistakenly relies on *United States v. Cervone*, 907 F.2d 332, 336 (2d Cir. 1990). Resp. at 18. In *Cervone*, although the defendant knew of his medical condition as early as 1987, he waited until August 1988—six months after the applicable February 1988 deadline—to notify the prosecution that he intended to introduce evidence at trial to show side-effects on his short-term memory arising from medications he was taking for this condition. *See* 907 F.2d at 345-46. Although the defendant argued that no notice was required, the court rejected this contention.

See id. The court excluded the evidence as a Rule 12 sanction, noting that the defendant had failed to move the court for a ruling as to good cause to excuse the six-month delay. *See* 907 F.2d at 346.

Cervone did not involve Rule 16 at all. *See* 907 F.2d at 345-46. Nor was there any discussion of willful versus non-willful delays, or whether exclusion as a sanction for a non-willful violation improperly impedes the defendant's Sixth Amendment right to present a defense. *See* 907 F.2d at 345-46. The Second Circuit's brief treatment of the sanction for a sixth-month delay in providing notice and the failure to show good cause provides no basis for denying certiorari in Petitioner's case, which involves a non-willful violation of Rule 16 and exclusion of an important witness, impeding his ability to present a defense.

Contrary to Respondent's contention, Petitioner's case is a better vehicle than *Moreno Ornelas v. United States*, 906 F.3d 1138 (9th Cir. 2018), to resolve this issue because the *Ornelas* panel's decision was based in part on the holding that the district court had not imposed any sanction at all. *See* 906 F.3d at 1150-51 (Zilly, J., dissenting) ("The exclusion here, as in *W.R. Grace*, was no sanction."). In addition, in *Ornelas* the defendant unsuccessfully argued that his intention to call the expert only surfaced after the deadline had passed, so the deadline did not apply to him. *See* 906 F.3d at 1051. There is no discussion in *Ornelas* as to whether a less extreme sanction was available to the court, as it was in Petitioner's case.

Unlike *Ornelas*, Petitioner's case cleanly presents the question whether a non-willful discovery violation

warrants the extreme sanction of exclusion of an important defense expert witness where less extreme sanctions were available.

Respondent ignores the persuasive dissent in *Ornelas*. Judge Zilly persuasively argued that the drastic remedy of exclusion "violated Moreno's fundamental right to due process." *See* 906 F.3d at 1154 (Zilly, J., dissenting). He found no support for witness exclusion without a finding of a willful violation, pointing to this Court's decisions in *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), and *Taylor v. Illinois*, 484 U.S. 400, 416 (1988). He read *Taylor* as holding that "exclusion is possible *only* if the violation was 'willful and blatant,'" 906 F.2d at 1154 (emphasis in original), and described this as "well-established law." *Id.*

This is apparently how the Government read the law as recently as 2008. In *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (*en banc*), the Government argued "that the exclusion of witnesses can be imposed as a sanction only when the district court finds that the violation was 'willful and motivated by a desire to obtain a tactical advantage.'" 526 F.3d at 514-15 (quoting *United States v. Finley*, 301 F.3d 1000, 1016-18 (9th Cir. 2002)).

The Sixth Amendment implications of exclusion are underscored in *Finley*. In that case, the Ninth Circuit reversed an exclusion of a defendant's expert witness, reasoning that, even if a discovery violation occurred, the "severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by

the government." 906 F.3d at 1154 (Zilly, J., dissenting in part) (citing *Finley*, 301 F.3d at 1016-18).

Respondent's reliance on the denial of certiorari in *Nichols v. United States*, 528 U.S. 934 (1999) (No. 99-5063), is also mistaken. In *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999), even though the defense had for more than a year known a former FBI special agent's views on the Bureau's forensic work in bombing cases, the former agent was omitted from a list of 390 possible defense witnesses, apparently as a maneuver "to provide the defense with a tactical advantage." 169 F.3d at 1268-69. The Tenth Circuit found support in the record to suggest gamesmanship by the defense. *See id.*

The multiple indicators of bad faith or gamesmanship in *Nichols* sets it apart from Petitioner's case. Unlike *Nichols*, Petitioner's case does not present any indication of bad faith; on the contrary, it is undisputed that Petitioner's counsel was diligent in his preparation for trial. *See* Transcript, Nov. 5, 2018 at 13. *Nichols* did not present the question raised by Petitioner's case—*viz.*, whether exclusion of an important defense witness is an appropriate sanction where prejudice could easily be cured without unnecessarily impeding the Sixth Amendment right to present a defense. The Government's suggestion to the contrary is without merit.

Respondent's citation to *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012), as a case where exclusion was proper for non-willful discovery violations, is misplaced. In *Lundy*, the defendant's "dereliction is particularly egregious and the excuse implausible due

to the fact that [the expert witness] testified nearly identically as he had in the first trial," and it was not clear the witness "was an expert capable of offering such testimony." 676 F.3d at 452.

Similarly, *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008), is not a case involving a non-willful violation:

> [W]e are struck by the circumstance that not one or two but three witnesses suddenly became available. How can we avoid believing that their availability reflected a change or refinement of Hoffecker's trial strategy? Inasmuch as we are not as gullible as Hoffecker's victims, we simply cannot believe that it was not until that late date that all three of these experts suddenly became available or could have become available.

530 F.3d at 188. Petitioner's case presents no such tactics or dubious excuses.

The exclusion of an expert witness in *United States v. Petrie*, 302 F.3d 1280, 1288-89 (11th Cir. 2002), was proper where the testimony "would have simply provided the jury with background information regarding financial matters," and the defendant "mischaracterized the explanations of the funding scheme provided by the cooperating witnesses as 'expert testimony.'" The Eleventh Circuit did not mention the Sixth Amendment, did not address the unanswered question discussed by Judge Posner in *Tyson*, and did not cite *Taylor*. *See* 302 F.3d at 1288-89. *Petrie* provides no support for the Government's argument.

That the issue is unresolved and subject to inconsistent approaches by the lower courts is underscored by *United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992). The D.C. Circuit noted that the circuit courts have applied a multitude of approaches to the issue. *See id.* at 911 (discussing *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (applying bad faith for exclusion); *United States v. Cervone*, 907 F.2d 332, 346 (2d Cir. 1990) (emphasizing inadequacy of defendant's excuse); *Eckert v. Tansy*, 936 F.2d 444, 446 (9th Cir. 1991) (balancing test); *Chappee v. Vose*, 843 F.2d 25, 29-32 (1st Cir. 1988) (balancing test); *Horton v. Zant*, 941 F.2d 1449, 1466-67 (11th Cir. 1991) (upholding refusal to grant a new trial based on new evidence; emphasizing likelihood that evidence was fabricated)). The D.C. Circuit also emphasized that a defendant's "manipulative conduct" or trickery could justify a witness's exclusion, while emphasizing bad faith "as an important factor but not a prerequisite to exclusion." 970 F.2d at 911.

The decision by the Tenth Circuit in *Short v. Sirmons*, 472 F.3d 1177 (10th Cir. 2006), is of no assistance to the Government's argument here. Exclusion was justified in *Short* because the witness "was not a material witness" and the defendant failed to establish "that he was substantially prejudiced." *Id.* at 1185. The three-part test applied in *Short* is unlike that applied in other circuits. *See, e.g., Johnson*, 907 F.2d at 911-12; *Escalera*, 852 F.2d at 48-49 (remanding to assess whether "the attorney's conduct was sufficiently willful under *Taylor* to support preclusion").

A footnote in *United States v. Portela*, cited by Respondent, *see* Resp. at 17, shows that circuits have employed differing and inconsistent tests in this area. *See* 167 F.3d 687, 705 n.16 (1st Cir. 1999) (contrasting First Circuit's approach with tests applied in the Second, Ninth, and D.C. Circuits).

Respondent is unable to refute Petitioner's central contention that *Taylor* left open the question whether the right to present a defense as protected in the Compulsory Process Clause is compatible with exclusion of an important defense witness as a sanction for non-willful discovery violation. A survey of the published opinions of the circuit courts shows a potpourri of approaches, proving Judge Posner's point that "[n]o hard and fast rule has been devised to strike the balance between the competing interests." *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995).

2. The record below provides ample facts to present this issue.

Although Respondent argues that Petitioner's case is a poor vehicle for deciding this question, *see* Resp. at 10, 14, 19-20, it ignores the fact that Petitioner expressly warned the district court that denying his expert testimony was prejudicing his defense. *See* 10th Cir. App. Vol. V at 211. He argued that the first DNA report showed "there was another male's DNA on the subject's hands and knuckles." 10th Cir. App. Vol. III at 26. He told the court below that the "identity of that person is important" to Petitioner's defense. *Id.* He informed the court that the Government had not provided results of a DNA test on August 14, 2018, in spite of Petitioner's request for that important DNA

information. *See id.* at 28. Petitioner observed that the presence of another male's DNA on the victim's undergarments is "very exculpatory . . . [and is] the most exculpatory thing that may arise out of this case at this point." *Id.* at 32.

Contrary to Respondent's contention that the impact of the exclusion on Petitioner's defense was not raised below, the district court declared that Petitioner was not "prejudiced by the ruling to exclude Dr. Spence." *Id.* at 217-18. Petitioner's counsel "made numerous requests for DNA reports," including a request to obtain "the identities of other DNA contributors." *Id.* at 211. At the close of evidence, Petitioner renewed his objection to the exclusion of his DNA expert's testimony, noting that it had "prejudicial effects against Mr. Palillero." *Id.* at 229-30. On appeal, Petitioner argued vigorously that the exclusion of his DNA expert went to the core of the prosecution's case. *See* 10th Cir. Opening Brief at 45-49. The prejudicial impact on Petitioner's defense was repeatedly raised.

Furthermore, the unfairness and arbitrariness of the exclusion in Petitioner's case is palpable. Although Respondent had previously agreed not to object to a DNA expert's testimony at trial, it nevertheless objected. *See* 10th Cir. Vol. V at 208-09. And despite the fact that the court informed Petitioner that if he found a DNA expert to testify, such testimony would be allowed, *see* Dist. Ct. Doc. 87 at 1, the court abruptly reversed course, and prevented Petitioner from presenting his expert for *voir dire* to cure any potential

prejudice to the prosecution. *See* 10th Cir. App. Vol. V at 212-15.

3. Respondent ignores Sixth Amendment implications of Rule 16 sanctions.

Respondent's treatment of the issue removes Rule 16 from the Sixth Amendment context, side-stepping the implications of and lack of a need for exclusion, particularly where any potential prejudice could easily have been cured by a brief continuance to *voir dire* the witness. *See* Resp. at 15-16 (arguing for unfettered discretion to exclude witnesses even where the violation is non-willful). Respondent's illogic would elevate Rule 16 over the Compulsory Process Clause, upsetting the delicate balance developed over decades of this Court's jurisprudence. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 298-302 (1973) ("The substantive limitation on excluding criminal defense evidence secured by the plain terms of the Compulsory Process Clause is also grounded in the general constitutional guarantee of due process."); *see also Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

4. Respondent ignores its own delays in disclosure of DNA reports and DNA expert witness.

Respondent attempts to rewrite history and cast blame exclusively on Petitioner's counsel for the delays, ignoring the prosecution's repeated delays in disclosing critical DNA evidence to Petitioner, in spite of multiple requests for such evidence. *See* Pet. at 3 (four months prior to trial, Petitioner made written request to

prosecution for DNA test results); *id.* at 4-5 (prosecution made late disclosure of its own DNA expert). The government's dilatory conduct caused delays that it later complained to be prejudiced by. The rebuttal expert could not perform any work, or provide Petitioner's counsel any indication whether he could testify, until after the prosecution produced requested DNA test results. The prosecution's delays directly contributed to Petitioner's tardy expert disclosure.

When these delays were brought up in district court—out of the presence of the jury in pre-trial hearings—the government insisted that there would be no need for Petitioner to "investigate what is an exculpatory report." *Id.* at 3. The prosecutor claimed to be "hard-pressed to think of a reason why a defense counsel would need time to investigate that report." *Id.* The prosecutor told the judge that "the DNA evidence at this point is exculpatory" and she didn't think "there's anything to investigate." *Id.* at 3-4.

The prosecution's pretrial tactic of deflecting attention away from the DNA evidence stands in sharp contrast to its portrayal of the DNA evidence to the jury. The government DNA analyst testified that Petitioner could not be excluded from the sample taken from the victim's underwear, App. 11, and even speculated that it could have been Petitioner' DNA, even though there was no evidence to support this conjecture. *Id.*

The prosecution did not tell the jury the DNA report was exculpatory, even though this argument was made to the judge repeatedly. 10th Cir. App. Vol. VI at 61. In its closing argument, the prosecution mocked

Petitioner's interest in the source of unidentified male DNA on the victim's underwear: Petitioner "seems to make a big deal of the fact that there's another male's DNA on [the victim's] panties." *Id.* Then, going beyond any evidence introduced at trial, the prosecutor told the jury it was the victim's fiance's DNA, even though he had never been tested, and his DNA was never compared to the underwear: "Whose DNA do you think was in [the victim's] panties? Adam's DNA." *Id.* Although Respondent's brief in opposition to certiorari elides the prosecution's duplicitous tactics employed before and at trial, the damage to Petitioner's defense is palpable.

CONCLUSION

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

Respectfully submitted,

SCOTT M. DAVIDSON
Counsel of Record
THE LAW OFFICE OF SCOTT M. DAVIDSON, PH.D., ESQ.
1011 Lomas Boulevard NW
Albuquerque, New Mexico 87102
(505) 255-9084 (ph)
(505) 213-7212 (fax)
scott@justappeals.net

Counsel for Petitioner Palillero