No. 21-5911

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL HERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's constitutional right to present a complete defense by excluding an expert witness's proffered testimony under Federal Rules of Evidence 401 and 403.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 997 F.3d 251. The order of the district court is not published in the Federal Supplement but is available at 2019 WL 1865284.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2021. By order of March 19, 2020, this Court extended the deadline for all petitions for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ

of certiorari was filed on October 4, 2021 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and five counts of willfully filing false tax returns, in violation of 26 U.S.C. 7206(1). Pet. App. 3-4. The court sentenced petitioner to 21 months of imprisonment, to be followed by three years of supervised release. Id. at 4. The court of appeals affirmed. Id. at 1-30.

1. Petitioner and his wife owned, operated, and managed three restaurants -- Cindy's Gone Hog Wild, Cindy's Downtown, and Hassler Brothers Steakhouse -- that received a significant portion of their revenues in cash. See Pet. App. 2; Gov't C.A. Br. 3. Petitioner and his wife fraudulently misappropriated some of that cash and prevented it from being reported to the Internal Revenue Service (IRS): Between 2007 and 2012, the three restaurants had aggregate cash receipts of more than $570,000 that were not deposited into the businesses' bank accounts, reported to the accountant who prepared petitioner and his wife's personal and business tax returns, or included as gross income on the relevant tax returns. See Gov't C.A. Br. 3-4. Petitioner and his wife also spent approximately $94,000 in business funds on personal

expenses without disclosing those funds to their accountant or reporting those amounts as income on their personal tax returns. See id. at 4.

In 2013, the IRS began an undercover investigation of petitioner and his wife. Pet. App. 2. An IRS agent assumed the identity of a buyer interested in purchasing petitioner's restaurants. Ibid. Petitioner and his wife made several statements to the undercover agent suggesting that they did not include all of their restaurants' cash receipts on their financial reports and tax returns. See, e.g., id. at 3 ("[T]he IRS is not going to allow us to run this business the way we were running it. Paying our house, paying our utility, paying our car notes, paying everything without us showing we were making something.") (brackets in original).

2. A federal grand jury in the Western District of Texas indicted petitioner on one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and six counts of willfully filing false tax returns, in violation of 26 U.S.C. 7206(1). Indictment 1-9. The grand jury also charged petitioner's wife with several related offenses. Pet. App. 3-4.

Before trial, the government moved to exclude testimony from William Brown, a forensic accountant, who would have testified for the defense that petitioner's accountant had made certain errors in preparing petitioner's tax returns, and that petitioner had

paid some business expenses using personal funds -- the latter in rebuttal to the government's evidence of petitioner paying personal expenses with business funds. See Gov't C.A. Br. 32. The government argued that Brown's proposed testimony was essentially an effort to recalculate petitioner's tax liability, which was irrelevant because a tax deficiency was not an element of any crime charged against petitioner. See ibid. The government also argued that the testimony should be excluded because its potential to confuse the jury substantially outweighed any probative value. See id. at 33.

The district court granted the motion in part. See 2019 WL 1865284, at *3. The court agreed with the government that Brown should not be permitted to testify about his recomputation of petitioner's tax liabilities, but preliminarily determined that Brown could challenge the government's evidence that petitioner had paid personal expenses using business funds. See ibid. The court deferred an ultimate assessment on Brown's testimony, however, until after trial. See Pet. App. 17.

3. At trial, the government's evidence focused on the restaurants' unreported cash receipts and petitioner's use of business funds to pay personal expenses. See Pet. App. 17, 19-20; Gov't C.A. Br. 5-6, 8-13. The government played several excerpts from recorded conversations between petitioner and the undercover IRS agent in which petitioner admitted that he did not include all

of the restaurants' cash receipts on his financial reports and tax returns. See Gov't C.A. Br. 5-6. An IRS special agent who analyzed the restaurants' financial records testified that the restaurants had accordingly failed to report at least $570,000 in cash receipts on their tax returns, and moreover that petitioner and his wife had used more than $94,000 of the restaurants' funds to pay personal expenses. See Pet. App. 3; Gov't C.A. Br. 11-13. Specifically, they used business funds to pay "$50,376 in wages for their nanny, $19,528 toward [their] residential electric bills, $5,274 toward their personal water bills, $7,049 toward [their] personal propane bills, $4,564 on their residential mortgage, and $1,458 toward [their] pool service" without reporting those amounts as personal income. Pet. App. 22.

Petitioner's accountant also testified. He explained that he had told petitioner to deposit all of the restaurants' receipts into the business bank accounts so that the accountant could use those deposits to calculate the total revenue to be reported on the financial statements. See Gov't C.A. Br. 8-9. The accountant further testified that petitioner had promised to handle the restaurants' receipts in that manner. See id. at 9. Accordingly, the accountant had relied on the businesses' bank records to determine the restaurants' gross receipts. See id. at 10. To classify the restaurants' expenses, the accountant used codes that petitioner and his wife entered on checks drawn on the business

bank accounts. See id. at 9. The accountant also shared the businesses' financial statements with petitioner for review before using them to generate the tax returns. See id. at 8-10.

At the close of the government's evidence, the district court revisited whether petitioner's expert Brown would be permitted to testify. See Pet. App. 17; Gov't C.A. Br. 33. The court conducted a voir dire examination of Brown outside the presence of the jury. See Pet. App. 17. Brown stated that he intended to testify about two topics: revenue and expenses. Ibid. Regarding revenue, Brown said that he would testify that the government had overstated the actual gross receipts of the restaurants by $409,000, because the government had purportedly failed to subtract non-income items such as loans and bank transfers. Ibid. Regarding expenses, Brown proposed to testify that he had identified about 400 transactions totaling $94,000 that could constitute business expenses that had been paid from the personal accounts of petitioner and his wife, ibid. -- "coincidentally, the same amount" that the government alleged that they had taken from the businesses to pay personal expenses without reporting the funds as income. Id. at 22. In Brown's view, such payment of other business expenses from personal funds "should be considered as well as some sort of mitigating factor." Id. at 17. On cross-examination at the voir dire examination, Brown acknowledged that he did not intend to testify about the government's main allegations against petitioner and his

wife: that they had $570,000 worth of undeposited cash receipts and that they paid personal expenses through their business without reporting those amounts as income. See ibid.; Gov't C.A. Br. 33.

After the voir dire, the district court excluded Brown's proposed testimony as both irrelevant and confusing. See Pet. App. 17. The court found the proposed testimony irrelevant because it did not "bear upon" whether petitioner and his wife had "failed to include cash receipts" received by the restaurants "on the appropriate returns" and did not "challenge at all the expenditures for personal use by [petitioner and his wife] that were presented before the jury." See id. at 20; Gov't C.A. Br. 34 (citation omitted). The court also determined that the proposed testimony "would merely cause confusion to the jury and would not aid the jury in its analysis of the facts it needs to find," and should be excluded "under [Federal Rule of Evidence] 403 balancing." 5/23/2019 Trial Tr. 769.

The jury found petitioner guilty on the conspiracy count and five of the six false-tax-return counts. See Pet. App. 4. The jury also found petitioner's wife guilty on the conspiracy count and two counts of willfully filing false tax returns. See ibid.

4. The court of appeals affirmed. Pet. App. 1-30.

Petitioner argued, among other things, that the exclusion of Brown's proposed testimony violated his Sixth Amendment right to present a defense. See Pet. App. 18. But the court explained

that petitioner's claim did not have significant constitutional implications, and was instead best viewed as a challenge to the district court's discretionary application of the Federal Rules of Evidence. See id. at 18 n.8. Quoting this Court's decision in Crane v. Kentucky, 476 U.S. 683 (1986), the court of appeals observed that, while "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense[,]'" it also "'leaves to the judges who must make these decisions wide latitude to exclude evidence that is repetitive . . . , only marginally relevant[,] or poses an undue risk of harassment, prejudice, or confusion of the issues.'" Pet. App. 18 n.8 (quoting 476 U.S. at 689-690) (brackets and internal quotation marks omitted). The court of appeals additionally noted that this Court's decisions in this area of law have generally "focus[ed] on categorical prohibitions of certain evidence," "not discretionary decisions to exclude evidence under general and otherwise uncontroversial rules." Ibid. (citation omitted).

The court of appeals determined that the district court did not abuse its discretion in finding Brown's proffered testimony irrelevant and confusing, and excluding it under the Federal Rules of Evidence. Pet. App. 18-23. The court of appeals first explained why Brown's proffered testimony that the government's evidence had overstated the restaurants' gross receipts by $409,000 was not relevant to any of the elements of the charges

against petitioner. Id. at 20. The court observed that "Brown's testimony would have related to errors that [petitioner's accountant] made in preparing [the] defendants' tax returns," and those alleged errors were "unrelated to the [defendants'] failure to fully disclose their cash receipts" on their returns. Ibid. The court accordingly found that Brown's testimony was not probative either as to the defendants' intent to defraud the United States or to the materiality of the false income statements on their tax returns. See ibid.

The court of appeals likewise affirmed the district court's decision to preclude Brown from testifying that petitioner and his wife had paid some business expenses using personal funds. See Pet. App. 21-23. The court of appeals first observed that, as a matter of law, "[t]he fact that [they] paid for some business expenses using personal funds does not negate the fact that they paid for personal expenses using business funds" without reporting those business funds as income. Id. at 21. The court did agree with petitioner that it was "plausible" that the jury could have relied on Brown's proffered testimony about petitioner paying business expenses using personal funds to "infer[ ]" that petitioner and his wife "were incompetent bookkeepers, which could tend to negate the 'knowledge' element" of the charged conspiracy count and "the 'willful' element" of the charged false-tax-return count. Ibid. (citations omitted). The court of appeals agreed

with the district court, however, that insofar as "Brown's testimony regarding [the defendants'] payment of business expenses with personal funds w[as] relevant," "any probative value of [that] testimony would have been substantially outweighed by the risk of confusing the jury." Id. at 22 (citing Fed. R. Evid. 403).

The court of appeals observed that the government had "put on evidence that [the defendants] paid $94,000 in personal expenses from [unreported] business funds" over five years, and that Brown proposed to testify that the defendants had "coincidentally" paid "the same amount" ($94,000) in business expenses from their personal funds. Pet. App. 22. The court found that the jury might have improperly "considered these two $94,000 amounts as cancelling each other out," or "may have considered Brown's analysis to be a recomputation of the [defendants'] tax deficiency, which the jury might have viewed as important but was actually irrelevant to the case." Ibid. The court also observed that Brown himself had "acknowledged on cross-examination in voir dire during his proffer" that his testimony would not address or undermine any of the government's core allegations against petitioner and his wife: that they did not deposit "all of their cash receipts" and that they improperly paid for personal expenses through business funds without reporting those amounts. Id. at 22-23.

ARGUMENT

Petitioner renews his contention (Pet. 16-27) that the district court's exclusion of Brown's testimony violated his Sixth Amendment right to present a complete defense. Petitioner argues that the court of appeals, by declining to treat his challenge as a constitutional claim, misapplied this Court's precedents (Pet. 16-20) and created a conflict with the decisions of other courts of appeals (Pet. 20-24). The court of appeals correctly rejected petitioner's claim, and its decision does not conflict with any decision of this Court or another federal court of appeals. Petitioner's fact-bound challenge to the exclusion of Brown's testimony does not warrant this Court's review. This Court recently denied a petition for a writ of certiorari raising a similar claim, see Lucio v. Lumpkin, No. 21-5095, 2021 WL 4822723 (Oct. 18, 2021), and it should do the same here.

1. The Due Process Clause and the Sixth Amendment protect a criminal defendant's "meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citation omitted); see California v. Trombetta, 467 U.S. 479, 485 (1984). The Constitution does not, however, give the accused "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Rather, the right to present a complete defense is abridged only "by

evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 324-335 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)) (brackets and internal quotation marks omitted).

The Court has applied that standard to find that certain state-law rules prohibiting categories of evidence were unconstitutionally "'arbitrary'" insofar as they "excluded important defense evidence but * * * did not serve any legitimate interests," such as a state-court rule that "prevented [the defendant] from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained." Holmes, 547 U.S. at 325-326 (collecting cases). But the Court has made clear that "the Constitution permits judges 'to exclude evidence that is repetitive, only marginally relevant[,] or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" Id. at 326-327 (quoting Crane, 476 U.S. at 689-690) (ellipsis and internal quotation marks omitted; brackets in original). In Holmes, this Court specifically identified Federal Rule of Evidence 403 as a "rule[ ] of this type" that is "well-established" and "'familiar and unquestionably constitutional'" Ibid. (quoting Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality opinion)).

2. The court of appeals correctly applied this Court's precedents in rejecting petitioner's claim that the exclusion of Brown's proffered testimony violated petitioner's constitutional right to present a complete defense. Contrary to petitioner's contention that the court of appeals "did not address" his constitutional argument, Pet. 16, the court acknowledged that petitioner had invoked the Constitution, and then explained why, under this Court's precedent, the exclusion of Brown's testimony implicated only the application of the Federal Rules of Evidence, not the Sixth Amendment. See Pet. App. 18 n.8. Because Rule 403 is unquestionably constitutional and implements the "wide latitude" that the Constitution leaves to trial judges to exclude evidence that is "repetitive," "only marginally relevant," or "poses an undue risk of harassment, prejudice, or confusion of the issues," ibid. (brackets and citation omitted), the court of appeals recognized that the appropriate inquiry in this case was whether the district court had correctly applied the "well-established rules of evidence," Holmes, 547 U.S. at 326, to the specific facts here. See Pet. App. 18 n.8.

In conducting that inquiry, the court of appeals correctly determined that the district court did not abuse its discretion in excluding Brown's testimony under the circumstances here. The court of appeals observed that the evidence proffered by petitioner's expert that the tax returns had overstated the

restaurants' gross receipts was irrelevant to any element of the charges against petitioner. See Pet. App. 20. And the court explained that the excluded evidence regarding the payment of business expenses using personal funds was of limited relevance that was outweighed by the risk of unnecessarily confusing the jury. See id. at 22. Those fact-bound determinations do not warrant this Court's review.

a. The court of appeals correctly determined that Brown's proposed testimony that petitioner's accountant had mistakenly over-reported the restaurants' gross receipts by $409,000 was irrelevant to the charges against petitioner.

Petitioner errs in asserting (Pet. 13) that if his accountant made multiple accounting errors, as Brown sought to testify, then that evidence would be "highly relevant and probative as to whether [petitioner] knew" that his tax returns were false. As a threshold matter, petitioner claimed to be unaware of his accountant's errors, see Gov't C.A. Br. 37, so those errors cannot have been probative regarding his mental state. In any event, the charges against petitioner concerned his deliberate act of falsifying his tax returns by omitting $570,000 in cash from the reported gross receipts, and that intentional conduct would not have been disproved, negated, or excused even if petitioner's accountant erred by partly over-reporting the total gross receipts. See Pet. App. 20 ("[T]he unreported cash, emphasized by the Government, and

the overstated gross receipts, offered * * * through Brown, are not related."). Even if it turned out that the magnitude of the falsity was less than petitioner intended, nothing in Brown's testimony would rebut the government's evidence that petitioner knew his tax returns were inaccurate at the time that he filed them. And no constitutional right permits a defendant to offer irrelevant evidence. See Taylor, 484 U.S. at 410.

The lower courts also correctly rejected petitioner's argument (Pet. 4) that he could have used Brown's testimony about the accountant's errors to show that the misstatements on his tax returns were not material. A false statement on a tax return is material if it has a natural tendency to influence the IRS or is capable of influencing the IRS in investigating or auditing a tax return or in verifying or monitoring a taxpayer's reporting of income. United States v. Gaudin, 515 U.S. 506, 509 (1995); see Pet. App. 19. Omitting cash receipts from a tax return is certainly capable of influencing the IRS, and that omission was therefore material. Even if the district court had permitted Brown to testify that petitioner's accountant made other errors in preparing his tax returns, the sum of the evidence would still have shown that petitioner substantially under-reported gross receipts on each of the tax returns for which he was convicted -- by amounts ranging from $15,000 for the 2011 tax return for Cindy's Gone Hog Wild to $84,000 for petitioner's individual 2010 tax

return, see Gov't C.A. Br. 36 n.12 -- and those amounts plainly qualify as material. Brown's testimony about the accountant's errors was therefore properly excluded as irrelevant, and its exclusion did not deprive petitioner of his constitutional right to present a complete defense. Crane, 476 U.S. at 690-691.

b. The court of appeals also correctly determined that the district court did not abuse its discretion in applying Rule 403 to exclude Brown's testimony that petitioner had paid $94,000 in business expenses out of personal funds. Petitioner does not dispute that Brown's testimony would not have refuted the government's evidence that petitioner and his wife unlawfully paid $94,000 in personal expenses using business funds without reporting those amounts as income.

Although the court of appeals accepted that the jury might have considered the excluded evidence to "infer[ ] that [petitioner] w[as] [an] incompetent bookkeeper[ ], which could tend to negate" the knowledge and willfulness elements of the charged offenses, the court explained why "the potential [of]" such evidence "to confuse the jury" substantially outweighed its probative value. Pet. App. 21-22. Brown's proffered testimony about a "coincidentally" identical (but separate) $94,000 in payments could improperly invite the jury to treat the two amounts "as cancelling each other out." Id. at 22; see id. at 17 (describing how Brown hoped the separate $94,000 in payments could

be "considered * * * as some sort of mitigating factor"). Or the jury might have viewed Brown's testimony as an attempt to recompute petitioner's tax liability, even though that computation was not relevant to the charges against him. See id. at 22. The court of appeals thus correctly determined that the district court acted well within its discretion by excluding Brown's likely confusing evidence, and the application of Rule 403 to the circumstances here did not violate petitioner's constitutional rights. See Holmes, 547 U.S. at 326-327.

3. Petitioner's assertions that the court of appeals misapplied this Court's precedent (Pet. 16-20), and created a conflict with other courts of appeals (Pet. 20-24), rest on an overreading of one sentence in the court of appeals' opinion. In addition to quoting the relevant principles from this Court's decision in Crane v. Kentucky, the court of appeals included an additional sentencing noting that this Court's decisions finding violations of a defendant's constitutional right to present a complete defense have "typically focus[ed] on categorical prohibitions of certain evidence," rather than "discretionary decisions to exclude evidence under general and otherwise uncontroversial rules." Pet. App. 18 n.8 (quoting Caldwell v. Davis, 757 Fed. Appx. 336, 339 (5th Cir. 2018) (per curiam)). Petitioner errs (Pet. 16-24) in describing that observation about this Court's precedent as a holding that only the exclusion of

whole categories of evidence can abridge a defendant's right to present a complete defense. The court of appeals made no such holding; it merely noted correctly that most of the decisions in which this Court has addressed the complete-defense right have involved evidentiary rules that excluded categories of evidence. See Pet. App. 18 n.8; see also Holmes, 547 U.S. at 325-326, 328-331 (discussing prior cases applying the complete-defense right).

The court of appeals' determination that petitioner's particular claim here was best described as a challenge to the application of the Federal Rules of Evidence, rather than a constitutional claim, accords with this Court's recognition that "well-established" evidence rules such as Federal Rule 403 are "'unquestionably constitutional'" when properly applied. Id. at 326-327 (citation omitted). And the Fifth Circuit has accordingly analyzed the complete-defense right by considering whether the exclusion of particular evidence in light of all the facts and circumstances in a case gave rise to a constitutional violation, not by applying any rule that only the exclusion of whole categories of evidence can implicate the Sixth Amendment. See, e.g., Kittelson v. Dretke, 426 F.3d 306, 319-321 (2005) (per curiam). Because the court of appeals' opinion did not adopt the rule that petitioner ascribes to it, the opinion does not conflict with any decision of this Court.

Nor has petitioner shown any genuine circuit conflict, as his asserted conflict depends on the same misreading of the court of appeals' opinion. Petitioner asserts that several courts of appeals -- the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh -- have held that the right to present a complete defense can be violated when a court excludes evidence "based on generally applicable and valid rules," Pet. 21, whereas the Fifth and Ninth Circuits "narrow the reach of the complete-defense right to the categorical invalidity of the rules applied in district court," Pet. 23. But as explained above, the Fifth Circuit neither endorsed nor relied on any requirement of "categorical invalidity"; the court instead correctly recognized that the proper application of Rules 401 and 403 would not violate petitioner's right to present a complete defense in this case, and then found that the district court had properly exercised its discretion in applying those rules to the facts here.[1]

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[1] Petitioner also errs (Pet. 23-24) in his description of the Ninth Circuit's rule for analyzing a complete-defense claim. In Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir.), cert. denied, 562 U.S. 1102 (2010), the Ninth Circuit concluded that "California's application of its evidentiary rules denied [the defendant] her constitutional right to present a defense," id. at 762, not because the state-law rule had categorically excluded certain evidence, but because the state court had, on the facts there, improperly addressed "each item of information [the defendant had] sought to introduce * * * independently without connecting it to the chain of circumstances * * * [that] gave meaning and coherence to" the defense," id. at 761. See also Rose v. Baker, 789 Fed. Appx. 5

None of the decisions on which petitioner relies holds that an appropriate application of Federal Rule 403 offends a defendant's constitutional right to present a complete defense.[2] Indeed, one of the cases that petitioner cites (Pet. 22) recognized that this "Court has never questioned the traditional reasons for excluding evidence that may have some relevance" that are "set[ ] * * * forth" in Rule 403. Dodd v. Trammell, 753 F.3d 971, 985-986 (10th Cir. 2013), cert. denied, 572 U.S. 1020, and 572 U.S. 1028 (2014). And decisions from multiple other courts of appeals that petitioner describes as in conflict with the decision below have similarly recognized that an appropriate exercise of discretion to exclude evidence under Federal Rule 403 typically

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(9th Cir. 2019), cert. denied, 141 S. Ct. 447 (2020). That is the precise type of analysis that petitioner endorses.

[2] See Fortini v. Murphy, 257 F.3d 39, 45-47 (1st Cir. 2001) (excluded evidence was relevant, and was excluded on grounds other than undue prejudice), cert. denied, 535 U.S. 1018 (2002); Scrimo v. Lee, 935 F.3d 103, 115-116 (2d Cir. 2019) (evidence was improperly excluded under state law); Savage v. District Att'y, 116 Fed. Appx. 332, 334-335 (3d Cir. 2004) (exclusion of impeachment evidence under state law); Barbe v. McBride, 521 F.3d 443, 457-461 (4th Cir. 2008) (exclusion of evidence under state rape-shield law); Ferensic v. Birkett, 501 F.3d 469, 471, 475-748 (6th Cir. 2007) (exclusion of expert testimony because of late disclosure of expert report); Kubsch v. Neal, 838 F.3d 845, 850-853, 858-862 (7th Cir. 2016) (en banc) (exclusion under state hearsay rule), cert. denied, 137 S. Ct. 2161 (2017); Guinn v. Kemna, 489 F.3d 351, 354 (8th Cir. 2007) (exclusion of hearsay testimony), cert. denied, 552 U.S. 1286 (2008); Pittman v. Secretary Fla. Dep't of Corr., 871 F.3d 1231, 1248-1249 (11th Cir. 2017) (exclusion of hearsay statement that fell outside state-law exception for statements against penal interest), cert. denied, 139 S. Ct. 102 (2018).

does not give rise to a violation of the Sixth Amendment. See, e.g., Richardson v. Kornegay, 3 F.4th 687, 696 (4th Cir. 2021) (quoting Holmes and concluding that "discretionary decisions under Rule 403 generally lack constitutional implications"); United States v. Alayeto, 628 F.3d 917, 922-923 (7th Cir. 2010) ("As the Supreme Court reiterated in Holmes, * * * judges may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights"); cf. United States v. Mitrovic, 890 F.3d 1217, 1221-1222 (11th Cir. 2018) (observing that this Court "has never held that a federal rule of evidence violated a defendant's right to present a complete defense" and that it has likewise "never overturned a district court's proper application of a Federal Rule of Evidence") (emphasis omitted), cert. denied, 139 S. Ct. 267 (2018).

This Court recently denied the petition for a writ of certiorari in Lucio, supra, No. 21-5095, which attributed a similar rule to the Fifth Circuit and asserted a similar circuit conflict. See Pet. iii n.1 (asserting that the petition in Lucio raised the same question). The same course is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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