No. 21-

IN THE

Supreme Court of the United States

GREG CANTONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Which standard, among those currently in use at the circuit court level, must be applied to determine whether a government attorney's violation of the Jencks Act, 18 U.S.C. 3500, amounts to a prejudicial or harmless error?

2. Does the discretion afforded to district courts under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), permit the exclusion of otherwise admissible expert testimony relating to a critical issue where opposing expert testimony about the same issue has been admitted?

STATEMENT OF RELEATED CASES

- *United States v. Greg Cantoni*, No. 18-Cr-562-01, U.S. District Court for the Eastern District of New York. Judgment entered December 20, 2019.

- *United States v. Greg Cantoni*, No. 19-4358, U.S. Court of Appeals for the Second Circuit. Summary Order issued December 9, 2021; amended Summary Order issued January 25, 2022; petition for rehearing denied February 11, 2022.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

Constitutional Provisions, Statutes, and Rules

TABLE OF AUTHORITIES (cont.)

Page(s)

Other Sources

PETITION FOR A WRIT OF CERTIORARI

Greg Cantoni petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's amended Summary Order affirming Petitioner's conviction and sentence is reported at *United States v. Cantoni*, 2022 WL 211211 (2d Cir. Jan. 25, 2022), and is attached as App'x A.[1] The Second Circuit's initial Summary Order is reported at *United States v. Cantoni*, 2021 WL 5829754 (2d Cir. Dec. 9, 2021), and is attached as App'x B. The Second Circuit's Order denying rehearing is attached as App'x G.

The District Court's pre-trial Order granting the government's motion to admit fingerprint analysis expert testimony and denying Petitioner's motion to admit competing expert testimony is attached as App'x F. The District Court's pre-trial Order granting the government's motion to admit cellular telephone location ["cell site"] expert testimony and denying Petitioner's motion to admit competing expert testimony is attached as App'x D. The District Court's pre-trial Order

[1] "App'x" refers to the appendix attached hereto; "A" refers to the joint appendix on appeal; "SA" refers to the Supplemental Appendix; "Br." refers to Petitioner's opening brief on appeal; "Resp. Br." refers to the government's response brief on appeal; "Reply Br." refers to Petitioner's reply brief on appeal; "Reh'g Pet." refers to the petition for panel rehearing or rehearing *en banc*.

denying Petitioner's motion for sanctions under Rule 16, Fed. R. Crim. P., is attached as App'x E. The District Court's post-trial Order denying Petitioner's motion for sanctions under 18 U.S.C. 3500(d) is attached as App'x C.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of New York (Eric N. Vitaliano, J.) had subject matter jurisdiction under 18 U.S.C. 3231. The Second Circuit had appellate jurisdiction under 28 U.S.C. 1291. On December 9, 2021, the Second Circuit issued a summary order affirming Petitioner's conviction of one count of bank robbery, in violation of 18 U.S.C. 2113(a). On January 25, 2022, the Second Circuit issued an amended summary order which also affirmed the District Court judgment. Rehearing was denied on February 11, 2022.

This Court's jurisdiction is now invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

18 U.S.C. 3500

* * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(d) If the United States elects not to comply with an order of the court under subsection (b) . . . hereof to deliver to the defendant any such statement . . . , the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

Rule 26.2(e), Federal Rules of Criminal Procedure

SANCTION FOR FAILURE TO PRODUCE OR DELIVER A STATEMENT. If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

Rule 403, Federal Rules of Evidence

EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 702, Federal Rules of Evidence

TESTIMONY BY EXPERT WITNESSES. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703, Federal Rules of Evidence

BASES OF AN EXPERT. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

INTRODUCTION

In *Rosenberg v. United States*, 360 U.S. 367, 371 (1959), this Court held that a prosecutor's failure to disclose a witness's prior statement to the defense, as required under 18 U.S.C. 3500 ["the Jencks Act"], amounted to a harmless error because "the very same information was possessed by defendant's counsel as would have been available were error not committed." Over the ensuing decades, the circuit courts have adopted a wide variety of standards, rules, and tests by which Jencks Act violations are assessed for prejudice. *Infra*, 25-31.

When such violations occur, a court's finding of prejudicial or harmless error has significant consequences: 18 U.S.C. 3500(d) specifically provides that, if a prosecutor has "elect[ed] not to comply with an order of the court under subsection (b)," the court "shall strike from the record the testimony of the witness," or "in its discretion . . . determine that the interests of justice require that a mistrial be declared." The lack of a uniform standard for assessing prejudice means that Jencks Act violations which may be considered harmless in some federal courts will lead to the striking of witness testimony or the declaration of a mistrial in others.

This case presents an ideal opportunity for the Court to lay down a uniform standard and provide much-needed guidance to the lower courts. The fact that the government violated its statutory obligations has never been in dispute.[2] And since

[2] *See* App'x A.3-5; App'x C.1-2; Resp. Br. 69. *See also United States v. Cantoni* Oral Arg. Recording, at 14:01-14:15, https://www.ca2.uscourts.gov/oral_arguments.html (Docket No. 19-4358, Dec. 2, 2021) (Appellate counsel for the government: "What happened in this case was unacceptable. . . . It was sloppy. The prosecutors' conduct reflected a lack of diligence.").

the government's Jencks Act violations related to their primary investigating law enforcement witness (among others), there is a high probability that the imposition of sanctions under Section 3500(d) would have affected the outcome of Petitioner's trial. What has always been in dispute, as described in the attached decisions from the Second Circuit and District Court, is the prejudicial effect of the trial prosecutors' misconduct. App'x A.5; App'x C.

*

This case also presents an opportunity for the Court to clarify whether Rules 403, 702, and/or 703 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), permit the exclusion of one party's otherwise admissible expert testimony relating to a "critical issue" where opposing expert testimony about the very same issue has been admitted. Until now, the only circuit courts to have squarely addressed the issue—the Third, Fourth, and Eleventh Circuits—were in agreement: such an unbalanced approach to the admission of otherwise admissible expert testimony amounts to an abuse of discretion. In this case, however, the Second Circuit rejected the "sweeping rule" adopted by these other circuits and denied Petitioner's claims relating to the exclusion of his expert witnesses. App'x A.2-3.

STATEMENT OF THE CASE

I. Proceedings Before the District Court

A. The Indictment and Pre-Trial Proceedings

On October 18, 2018, the government filed an indictment charging Petitioner with three counts of bank robbery, each in violation of 18 U.S.C. 2113(a). A.21-22. Under Count One, Petitioner was charged with robbing a TD Bank branch in Brooklyn, New York on August 5, 2018; Count Two charged a robbery of an M&T Bank branch in Staten Island, New York on September 6, 2018; Count Three charged a robbery of a Queens Savings Bank in Queens, New York on September 9, 2018. *Ibid.*

During a pre-trial conference held on November 8, 2018, Petitioner indicated that he wanted a "speedy trial." SA.11-12. After that, however, Petitioner consented to every adjournment requested by the government in order to accommodate what was represented to be discovery delays attributable to the New York City Police Department. SA.16; 19-20; 29-30. Due in large part to these consented adjournments, Petitioner's trial did not begin until April 1, 2019.

On March 15, 2019, the District Court ordered the government to provide all Jencks Act materials to the defense by March 25, one week before trial. A.533-34. On March 28, the government disclosed a witness list containing 19 names. SA.63. During a pretrial conference held the following day, defense counsel advised that, "we have received [Jencks Act] materials for about 11 of the witnesses," and "even as to those 11 witnesses" the disclosed materials were "surprisingly sparse." A.791.

In response, the government claimed that it "ha[d] turned over all [Jencks Act material] in [its] possession." *Ibid.*

B. The Trial and the Verdict

Without eyewitness identifications or other direct evidence of Petitioner's guilt, the government relied on fingerprint, cell site, license plate reader, GPS tracker, and "dye pack" evidence. Of primary importance, the jury heard that NYPD fingerprint analysts determined that a partial palm print found on a demand note left at the scene of the Staten Island robbery (the only crime of which Petitioner was convicted) matched Petitioner's palm print. A.1807. The jury also heard that Petitioner's mobile telephone activated cell site towers located near the Brooklyn and Staten Island banks and approximately nine miles away from the Queens bank during or close in time to the charged robberies of those banks.[3] A.1499-1524.

None of the eyewitnesses to the charged robberies identified Petitioner as the perpetrator. Moreover, the government's cell site expert testified that Petitioner lived approximately one-quarter of a mile from the Staten Island bank and could have been home when his mobile phone triggered a nearby cell tower while the robbery of that bank was in progress. A.1566-67. In addition, the government's various mid-trial discovery disclosures revealed that a months-old NYPD analysis had determined that a fingerprint found on a demand note recovered from the

[3] With respect to the Brooklyn robbery, the jury also heard that an automated license plate reader identified Petitioner's license plate approximately one block away from the Brooklyn TD Bank branch approximately 90 minutes before it was robbed. A.1122-1130.

Queens bank robbery did *not* match Petitioner's prints. A.1688. Finally, the jury heard that law enforcement agents did not recover "bait money," dye stains, identifiable clothing, or any other physical evidence connecting Petitioner to the charged robberies. A.1352-53; 2048-49.

After three days of deliberations, during which the jury submitted multiple requests for information and testimony relating to the government's fingerprint evidence, A.2402-04, Petitioner was convicted of the Staten Island robbery charged under Count Two. A.2414. The jury did not reach a verdict with respect to Counts One or Three. A.2412.

C. The Government's Pattern of Discovery Violations

1. Fingerprint Evidence

On November 28, 2018, Petitioner filed a written demand for discovery of documents relating to fingerprint analysis, cell site data, Petitioner's custodial statements, exculpatory information required for disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), and diligent preservation of Jencks Act material. A.26-32. On January 9, 2019, the government disclosed 26 pages of redacted NYPD fingerprint records that had been created in September of 2018. SA.21. On January 16, 2019, defense counsel filed a written demand for discovery of additional police fingerprint analysis documents that, based on prior experience, were known to exist. A.50. The government continued to withhold reports relating to fingerprint examinations that had been conducted in September of 2018, *infra,* 11-12, and on February 6, 2019, Petitioner filed a motion to compel. A.63-67. On February 8, the

government submitted a response in which it represented that "the full electronic file from the [NYPD Latent Print Section] has been provided to defense counsel." A.147.

Midway through trial, during cross-examination of one of the government's law enforcement witnesses, the defense learned for the first time that a fingerprint left on a demand note used in connection with the Queens bank robbery had been examined by the NYPD. A.1394-95. The following day, the government revealed that a fingerprint examination witness who had already provided direct examination testimony analyzed the Queens robbery demand note print in September of 2018, and the print "was found to belong to someone else." A.1415. *See also* A.832.

As trial progressed, the prosecutors continued to disclose, in piecemeal fashion, a series of documents and reports they had been given before trial relating to the exculpatory fingerprint examination. A.831-36. In response to the District Court's ensuing queries about their discovery violations, the trial prosecutors gave multiple, incompatible excuses. A.835-37; 1415-16; 1652-53. Even as it became clear that there were still more police reports and witness statements that had not been produced, the government repeatedly assured the court they had disclosed all they were required to disclose. *See* A.1624 (April 5, 2019: "[E]verything within our scope of production has been produced"); A.1659-60 (April 8, 2019: When the District Court asked whether "everything that [the government] can find has been turned over," the government advised "That's correct, Your Honor."); A.1921-22 (April 9,

2019: "What we did yesterday was . . . a full pull [to] produce everything without regard [to] how it would be characterized in any kind of disclosure category . . . everything that could be turned over has been turned over."). *See also* A.1730 (District Court noting the government was "on a slippery slope of what representations they make in this case"); A.2095 (District Court noting "there has been -- almost been 'the gang that couldn't shoot straight' on the part of the prosecution.").[4]

On April 7, 2019, five days into trial, Petitioner filed a second motion to compel and alerted the District Court to newly obtained evidence that the government had received NYPD documents relating to the exculpatory fingerprint analysis as early as November 8, 2018. A.838-39. That same day, the government produced a large amount of Jencks Act material for Detective Giuseppe Giuca, the government's primary law enforcement witness and lead investigator of the three charged robberies, who had testified four days before and had not mentioned the exculpatory fingerprint analysis or his prior statements relating thereto. A.1652. Then, on the night before the seventh day of trial, the government produced another cache of previously undisclosed reports and Jencks Act materials relating to the exculpatory fingerprint analysis. A.884-85; 1917-18.

Near the end of trial, Petitioner re-called Detective Giuca as a witness. Giuca testified that he had given the trial prosecutors a USB drive containing all of his

[4] The trial prosecutors' other discovery violations and misrepresentations are detailed on pages 21 through 27 of Petitioner's opening brief on appeal.

files relating to the charged robberies, including multiple reports relating to the exculpatory fingerprint analysis, before trial. A.2071-73. After trial, over the government's objection, the district court ordered the government to disclose the USB drive, at which point it was confirmed that the trial prosecutors had possession of *all* the relevant fingerprint examination documents and related Jencks Act materials before trial. A.898; 901; App'x C.1-2.

2. Cell Site Evidence

As noted above, Petitioner filed a written demand for discovery of cell site evidence on November 28, 2018. On December 19, 2018, the government obtained a warrant for cell site evidence, which soon yielded an 847-page data file. On December 28, the government's "case agent" recorded an entry in his "memo book" in which he described an analysis of the cell site data which found that Petitioner's phone was "not on the scene for" the Count Three robbery. A.716-17.

During a court conference held on December 20, the government requested an adjournment (to which Petitioner consented) on the grounds that it was still awaiting fingerprint analysis documents from the NYPD. SA.19-20. The government did not mention that it was in the process of obtaining cell site evidence. On January 9, 2019, the government disclosed "AT&T phone records" but did not mention their possession of a voluminous cell site data file. SA.22. On February 22, 2019—nearly two months after they received and analyzed the cell site data—the government filed a memorandum which included an extensive recitation of the evidence they expected to present at trial, including surveillance

videos, a GPS tracking device, an automated license plate reader, handwriting examinations, and the partial palm print found on the Staten Island robbery demand note. SA.42-43. Again, the government did not reveal their possession of cell site evidence.

It was not until March 11, 2019, three weeks before trial, that the government revealed their cell site evidence and notified the defense of their intent to call an "expert in Device Location Analysis." A.430; SA.49. The next day, the government produced its December 19, 2018 warrant application. A.437. Finally, on March 13, 2019, the government disclosed, for the first time, a U.S. Marshals intake form and a signed *Miranda* rights form, both dated September 20, 2018. A.450; 464-70. These documents established that the government had obtained Petitioner's mobile phone number, which was then used to obtain the cell site warrant, through uncounseled custodial questioning of Petitioner on the day of his arrest. A.464-70.

D. The District Court's Orders Denying Sanctions

1. Fingerprint Evidence

After the government was forced to disclose the USB drive it received from Detective Giuca before trial, Petitioner moved to strike Giuca's testimony under Section 3500(d).[5] A.909-10. In his supporting motion papers, Petitioner described how, as a result of the government's misconduct, he was "forced to constantly shift

[5] Petitioner also invoked Rule 26.2(e) of the Federal Rules of Criminal Procedure, which provides that "the court must strike [a] witness's testimony from the record" if "the party who called the witness disobeys an order to produce or deliver" a prior statement from that witness. A.909-10.

gears throughout trial, to respond to a new landscape of information that significantly altered the case, to argue and research disclosure motions mid-trial to obtain basic case material, and to cross-examine witnesses based on new documents revealed hours or minutes beforehand." A.961.

While decrying the government's "calamitous discovery" practices, the District Court blamed Petitioner for the prosecutors' conduct, asserting that it was "the breakneck pace of the litigation in an attempt to accommodate Cantoni's requests [sic] for immediate trial [that] led to a bushelful of disclosure hiccups." App'x C.5. The district court also opined that the government's misconduct was "harmless" because the long-withheld documents relating to the exculpatory fingerprint analysis, "at best, merely confirmed [that] . . . the government had no fingerprint evidence linking Cantoni to the [Count Three] robbery." *Ibid.*

2. Cell Site Evidence

On March 12, 2019, the day after the government first revealed its possession of cell site data, Petitioner moved to preclude it under Rule 16 of the Federal Rules of Criminal Procedure.[6] A.436-39. While recognizing that the government's months-long withholding of cell site evidence "came despite Cantoni's preemptive November 2018 request for any cell site evidence in the government's possession," the District Court blamed Petitioner for the prosecutors' misconduct, emphasizing that "abbreviation of trial preparation time resulted, in large part, from Cantoni's

[6] Petitioner also requested a hearing to determine whether the government obtained his phone number in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). A.439-41; 457-62.

insistence on moving expeditiously to trial." App'x E.1; 3-4. By that point, the indictment was more than five months old, Petitioner had been in been in pre-trial detention for nearly six months, and more than four months had passed since Petitioner issued his one-time, unfulfilled request for a speedy trial.

E. The Simultaneous Admission of Government Expert Testimony and Preclusion of Qualified Defense Expert Testimony Relating to the Same Critical Issues

1. Fingerprint Experts

Before trial, the government filed expert disclosures relating to three separate NYPD Latent Print Examiners ("LPEs").[7] Petitioner moved to preclude the government's proposed experts and advised that, if their opinions were admitted at trial, he would seek to call Dr. Simon Cole to present expert testimony about scientific issues affecting the reliability of the NYPD's fingerprint analysis method. In support, Petitioner filed Dr. Cole's *curriculum vitae* and a lengthy affidavit in which Dr. Cole advised that he had reviewed the LPEs' files (limited by necessity to those which the government was not continuing to withhold), and that, in his opinion, "the fingerprint examiner failed to account for the increased probability of a mismatch as a result of the use of an automated print identification system." A.271-74. Dr. Cole also advised that only two empirical studies of the NYPD's fingerprint analysis method had been conducted, one of which found a "false positive" error rate as high as 1 in 18. A.271. Finally, with pages of supporting

[7] The government's disclosures relating to each of these proposed witnesses consisted of two identical sentences. A.183-84; 188.

evidence, Dr. Cole explained that "there is growing consensus in the scientific, governmental, and fingerprint communities that implying prints collected from a crime scene belong to a single person . . . lacks scientific foundation." A.261-71.

Through an Order issued on March 19, 2019, the District Court admitted all three of the government's proposed experts and precluded Petitioner's competing expert. App'x F. The District Court did not address the reliability of Dr. Cole's opinions or his qualifications to present them. Instead, the District Court explained that Dr. Cole's testimony "*goes to whether the latent print analysis conducted was reliable, which is a question for the Court and has been answered in the affirmative.*" App'x F.7 (emphasis added). In addition, the District Court held that Dr. Cole's proposed testimony about high error rates and the increased probability of a mismatch stemming from the NYPD's fingerprint analysis methods were matters that could be explored through cross-examination of the government's experts, and that there was consequently no need for a defense expert to present his own opinions about those issues. App'x F.7-8. Finally, the District Court held that if Dr. Cole were to testify about "the contents of studies he did not conduct, he [would be] poised to act as a conduit for hearsay[.]" App'x F.8.

2. Cell Site Experts

Soon after Petitioner received the government's cell site evidence, he advised the prosecutors of his intent to call John Minor as an expert in cell site analysis, "in particular the areas of accuracy and validation." A.600-16. In his affidavit to the

court, Minor advised that he had reviewed the government's (still incomplete)[8] disclosures, and he explained in detail why, in his opinion, the government's cell site expert "did not perform a full and accurate analysis . . . in keeping with current forensic cell site analysis protocols." A.661. For example, Minor explained that the government's expert: "only validated the geographic location of one of the cell sites [at issue], neglecting a key . . . step in his analysis"; "failed to perform any other validation or error mitigation steps"; and did not conduct or failed to document "topographical analysis" or "research . . . into atmospheric conditions during crime commission times." A.661-62.

On the first day of trial, the District Court issued an Order admitting the government's cell site expert and precluding Petitioner's competing expert. Relying on *Daubert* to admit the government's expert—while stressing that "vigorous cross-examination, *presentation of contrary evidence*, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"—the court excluded Petitioner's opposing expert testimony on the grounds that Minor "*merely reviewed and highlighted weaknesses in the government's analysis*." App'x D.3, 5 (quoting 509 U.S. at 595-96) (emphases added). Moreover, the District Court faulted Petitioner's expert for "not perform[ing] his own analysis" of the very-recently-disclosed 847-page cell site data file, and went so far as to hold that "any opinion Minor may provide" as to "matters beyond the

[8] On the morning of the second day of trial, the government advised that it was still in the process of finalizing its cell site expert report. A.1008-09.

historical fact that, . . . at a certain precise time, Cantoni's cell phone connected to a certain precise cell tower . . . would only lead to jury confusion." App'x D.5-6. Finally, in stark contrast to its prior "conduit for hearsay" complaint about Petitioner's fingerprint expert, App'x F.8, the District Court criticized Minor for "citing essentially to himself for support." App'x D.6.

II. Proceedings Before the Court of Appeals

A. Petitioner's Arguments on Appeal

Appealing from his conviction under Count Two, Petitioner argued, among other things, that the District Court was required to strike Detective Giuca's testimony under Section 3500(d) of the Jencks Act and Rule 26.2, Fed. R. Crim. P. Br.56-58; Reply Br.25-29. In reply to the government's assertion of "harmless error," Petitioner wrote:

> The government's overarching theory was that one person committed all three of the charged robberies. *See* A.1023 (first line of government's opening statement); A.2142 (first line of government's summation). If the defense had known that the investigating detectives were aware that Cantoni had been excluded as the source of a thumbprint found on one of the robbery demand notes, that fact could have been emphasized during opening statements and could have played a central role in their trial strategy, Instead, throughout the trial, Cantoni's team was forced to play catch-up and make irrevocable strategic decisions without knowing what the next round of untimely disclosures would contain.
>
> * * *
>
> Cantoni could have utilized the withheld Jencks Act materials to formulate a comprehensive attack on the government's case and the credibility of their law enforcement witnesses, which would have been reasonably likely to instill a reasonable doubt in a reasonable juror as to any or all of the charged robberies. Moreover, compliance with the district court's Jencks Act order would have enabled the defense to

> formulate and execute their trial strategy without having to constantly respond to the government's piecemeal disclosures—which in itself would have been a benefit.

Reply Br.28-29. The underlined portions quoted above were also underlined in Petitioner's filing with the Second Circuit.

With respect to the preclusion of his proposed experts, Petitioner argued that the District Court's defense-specific interpretations of Federal Rules of Evidence relating to expert testimony and *Daubert* were manifestly erroneous. Br.40-46; Reply Br.3-12. Among other sources, Petitioner cited the advisory committee notes to Rule 702 (noting that the Rule "is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."); *Daubert*, 509 U.S. at 591 ("Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."); the plain language of Rule 703, Fed. R. Evid. ("If experts in the particular field would reasonably rely on [certain] facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."); *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993) ("It is an abuse of discretion to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue.") (internal quotation omitted); and *Ferensic v. Birkett*, 501 F.3d 469, 481-82 (6th Cir. 2007) (noting that cross-examination is "not an effective substitute" for expert testimony about the reliability of [an] identification method). Br.41-46; Reply Br.5-10.

In addition, Petitioner argued that the preclusion of his experts deprived him of his constitutional right to present a complete defense. Br.46-48; Reply Br.12-14. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.") (internal quotation omitted).

B. The Second Circuit's Initial Summary Order

On December 9, 2021, the Second Circuit issued a Summary Order affirming the judgment of conviction. App'x B. In dispensing with Petitioner's Jencks Act claim, the court declared that Petitioner's arguments "rest[] on a misapprehension of the availability of harmless error review of such Jencks Act violations." App'x B.5. The court further asserted that "*Cantoni makes no argument that he was prejudiced by the late disclosure of [Jencks Act] material related to Detective Giuca and merely argues that the statute and the Rule contain mandatory language*." Op.5 (emphasis added).

With respect to the preclusion of Petitioner's expert witnesses, the Second Circuit held that the District Court's reasoning was "sound" and did not amount to an abuse of discretion or a violation of Petitioner's constitutional rights. App'x B.3. Moreover, the Court specifically rejected Petitioner's reliance on the "sweeping rule" that an "error occurs whenever a court's evidentiary decision results in only one side presenting evidence on an issue for the jury." App'x B.3.

C. The Second Circuit's Amended Summary Order

In his request for rehearing, Petitioner noted that he had squarely addressed the government's arguments relating to the question of harmless error in his Reply Brief, "going so far as to underline certain passages in the hope they would not be overlooked" by the court. Reh'g Pet.19. Five days later, the Second Circuit issued an "amended summary order" in which it excised its prior declaration that Petitioner had failed to address the issue. App'x A.5. However, relying on *United States v. Nicolapolous*, the Court held that Petitioner had not met his burden of establishing prejudice because there was a "reasonable probability that, had the evidence been disclosed in a timely fashion," the outcome would not have been different. App'x A.5 (quoting 30 F.3d 381, 383-84 (2d Cir. 1994)).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The need for resolution of the first question presented is clear. The circuit courts have adopted many different standards and rules to review Jencks Act violations for prejudice or harmless error. As a result, if Petitioner's case had been tried outside of the Second Circuit, there is a significant chance the trial prosecutors' misconduct would have led to the striking of Detective Giuca's testimony and/or the declaration of a mistrial under Section 3500(d) and Rule 26.2(e).

As for the second question presented, the Second Circuit's order below creates a new conflict among the circuit courts regarding the purportedly "sweeping rule" that would have required a reversal of Petitioner's conviction if his appeal had been

heard in the Third, Fourth, or Eleventh Circuits. App'x A.3. Because there is a reasonable probability that effective defense expert testimony challenging the probative value of the government's fingerprint and/or cell site evidence would have affected the jury's verdict, this case is an ideal vehicle to resolve this new conflict.

I. There is a need for uniformity in the application of harmless error review in the context of Jencks Act violations.

A. This Court's precedents forbid trial and appellate courts from speculating about defense lawyers' ability to utilize withheld Jencks Act material.

In *Rosenberg*, this Court held that a prosecutor's failure to produce Jencks Act material was "empty of consequence" because the defense had been in possession of "the very same information . . . as would have been available were error not committed[.]" 360 U.S. at 370-71. However, this Court also held that, in circumstances where it is not clear that the defense had an alternative means of access to undisclosed witness statements, "appellate court[s] should not confidently guess what [a] defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Id.*, at 371.

Soon thereafter, in *Clancy v. United States*, 365 U.S. 312, 316 (1961), this Court emphasized that the *Rosenberg* opinion had identified a harmless error "under the particular circumstances of that case." Faced with evidence of Jencks Act violations relating to witness statements the defense's trial team did *not* otherwise have access to, the *Clancy* majority ordered a new trial and affirmed that "it is not for us to speculate whether [withheld documents] could have been utilized effectively." *Ibid. See also Scales v. United States*, 367 U.S. 203, 258 (1961)

("[W]hether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself.").

In *Killian v. United States*, 368 U.S. 231, 243 (1961), this Court again confirmed that "only the defense is in position to determine the precise uses that may be made of demanded documents." Because the Solicitor General had represented that the information contained in withheld witness statements "had already been given to petitioner" in another form, the *Killian* majority remanded that case to the District Court for a factual hearing to resolve the issue. *Id.*, at 244.

The majority in *Dennis v. United States*, 384 U.S. 855, 875 (1966), held that "[a] trial judge's function" in the context of reviewing Jencks Act claims "is limited to deciding whether a case has been made for production, and to supervise the process." This is because it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." *Id.*, at 874. To the contrary, "[i]n our adversary system," the *Dennis* majority emphasized, "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Ibid.*

Finally, in *Goldberg v. United States*, 425 U.S. 94, 111 n.21 (1976), this Court cited *Rosenberg* as standing for the proposition that "the harmless-error doctrine must be strictly applied in Jencks Act cases."

B. The circuit courts have adopted a wide variety of standards and rules to review Jencks Act violations for harmless error.

In the 46 years since *Goldberg* was decided, the circuit courts have implemented a wide variety of legal standards and rules to assess Jencks Act violations for prejudice or harmless error. Unfortunately, many of these rules encourage or require courts to engage in "confident guess[work]" and "speculat[ion]" about defense counsel's ability to effectively utilize improperly withheld witness statements. *Rosenberg*, 360 U.S. at 371; *Clancy*, 365 U.S. at 316. *See also United States v. Del Toro Soto*, 728 F.2d 44, 48 (1st Cir. 1984) (noting that, in spite of this Court's various "admonitions," courts have not been "especially reluctant to find a Jencks Act violation harmless.").

1. The Third Circuit requires courts to assess the "potential usefulness" of withheld Jencks Act materials.

In the Third Circuit, where it is "determined that a Jencks Act violation occurred, . . . [t]he test for harmless error is whether it is highly probable that the error did not contribute to conviction." *United States v. Zomber*, 299 Fed. App'x 130, 135 (3d Cir. 2008) (citing *United States v. Ali*, 493 F.3d 387, 392 n.3 (3d Cir. 2007)). In making these determinations, courts within the Third Circuit "must analyze the prejudice resulting from the non-disclosure . . . in terms of its potential usefulness to the defense." *United States v. Hill*, 976 F.2d 132, 141 (3d Cir. 1992). *Compare Killian*, 368 U.S. at 243 ("[O]nly the defense is in position to determine the precise uses that may be made of" withheld Jencks Act materials).

2. The First, Fifth, and Eleventh Circuits require trial courts to find harmless error where there are no substantial inconsistencies between withheld witness statements and a witness's trial testimony.

In the First Circuit, a new trial must be granted upon a showing of "material prejudice" flowing from a Jencks Act violation, which depends on whether a withheld witness statement "is merely duplicative of material already in the defendant's possession, shows no substantial deviation from [a witness's] trial testimony, or could not have materially enhanced defense counsel's cross-examination[.]" *United States v. Sorrentino*, 726 F.2d 876, 888 (1st Cir. 1984) (internal quotations omitted).

In *United States v. Beasley*, 576 F.2d 626, 629 (5th Cir. 1978), the Fifth Circuit recognized that "appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement." However, the court subsequently implemented a new rule under which "a failure to produce Jencks Act material . . . *is* harmless error where there is no substantial inconsistency, contradiction, or variation between the prior statements and the witness' trial testimony." *United States v. Keller*, 14 F.3d 1051, 1055 (5th Cir. 1994) (emphasis added). *See also United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000).

Along similar lines, the Eleventh Circuit has held that "[n]ondisclosure of inculpatory statements that are wholly consistent with the witness['s] testimony amounts to harmless error." *United States v. Jones*, 601 F.3d 1247, 1266 (11th Cir. 2010). Moreover, the Eleventh Circuit's review of a Jencks Act violation often hinges

on that court's independent assessment of what a defendant's trial attorney could or could not have accomplished if the government had complied with its obligations. *See ibid*. ("Because the [withheld] letters were inculpatory, the only purpose they could serve for Mr. Jones was for impeaching Mr. Seabrook."); *United States v. Delgado*, 56 F.3d 1357, 1364-65 (11th Cir. 1995) ('The most [the defense] could have done with the requested statements was to discredit the agent who gave testimony regarding the separate, later, unrelated crime."). *Compare Dennis*, 384 U.S. 855, 875 ("The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

3. In the Fourth and Seventh Circuits, a Jencks Act violation is deemed harmless only if it is "perfectly clear" the defense was not prejudiced.

The Fourth Circuit has held that, "because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, [a] violation of the [Jencks] Act is excused only in extraordinary circumstances." *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969). Therefore, "[u]nless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated." *Id.*, at 1304 *See also United States v. Snow*, 537 F.2d 1166, 1168 (4th Cir. 1976).

The Seventh Circuit has also determined that the government's failure "to tender to the defense material which relates to [a] witness'[s] direct testimony is harmless beyond a reasonable doubt only if it can be said that it is perfectly clear that defendant has not been prejudiced." *United States v. Cleveland*, 507 F.2d 731,

741 (7th Cir. 1974). *See also United States v. Johnson*, 200 F.3d 529, 535 (7th Cir. 2000).

4. The various rules imposed by the Sixth, Eighth, Ninth, Tenth, and D.C. Circuits require proof relating to the government's state of mind.

In *United States v. Taylor*, 13 F.3d 986, 990 (6th Cir. 1994), the Sixth Circuit held that "[t]he District Court is limited to the[] harsh remedies of [Section 3500(d)] only when . . . the government intentionally or consciously chooses to ignore the disclosure requirements under the statute." If a defendant is unable to make such a showing with respect to a prosecutor's state of mind, the question of harmless error "depends on whether the error is one that might reasonably be thought to have had [a] 'substantial and injurious effect or influence in determining the jury verdict.'" *United States v. Susskind*, 4 F.3d 1400, 1406 (6th Cir. 1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Moreover, the Sixth Circuit has held that "there is no prejudice from a tardy Jencks disclosure if the court gives the defendant the opportunity, upon disclosure, to recall the witness for cross-examination." *United States v. Davis*, 306 F.3d 398, 421 (6th Cir. 2002) *(*internal quotation omitted).

The Eighth Circuit, for its part, has held that "bad faith by the government *and* prejudice to the defendant must be shown to overturn a conviction based on Jencks Act violations." *United States v. Sturdivant*, 513 F.3d 795, 803 (8th Cir. 2008) (emphasis added). Moreover, in assessing prejudice, the Eighth Circuit routinely makes its own determinations about whether defense lawyers could have

made effective use of withheld Jencks Act materials. *See United States v. Adams*, 938 F.2d 96, 98 (8th Cir. 1991); *United States v. Due*, 205 F.3d 1030, 1033 (8th Cir. 2000). *Compare Scales*, 367 U.S. at 258 ("[W]hether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant.").

In the Ninth Circuit, a trial court's decision to impose sanctions under Section 3500(d) "should rest on (1) a consideration of the culpability of the government for the unavailability of the material and (2) the injury resulting to the defendants." *United States v. Riley*, 189 F.3d 802, 806 (9th Cir. 1999).

Courts within the Tenth Circuit are required to weigh "(1) the reasons the government delayed producing requested materials, including whether the government acted in bad faith; (2) the extent of prejudice to the defendant as a result of the delay; and (3) the feasibility of curing any prejudice with a continuance." *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002). Moreover, "in the absence of a finding of bad faith," the Tenth Circuit has held that trial courts "should impose the least severe sanction that will accomplish prompt and full compliance with the discovery order," while keeping in mind that "[t]he preferred sanction is a continuance." *Ibid.*

Finally, in *United States v. Rippy*, 606 F.2d 1150, 1154 (D.C. Cir. 1979), the D.C. Circuit held that "the Jencks Act does not contemplate automatic sanctions." *But see* Section 3500(d) ("[T]he court shall strike . . ."). Instead, "the trial court is required to 'weigh the degree of negligence or bad faith involved, the importance of

the evidence lost, and the evidence of guilt adduced at trial, in order to come to a determination that will serve the ends of justice.'") (quoting *United States v. Bryant*, 439 F.2d 642, 653 (1971)). *See also United States v. Lam Kwong-Wah*, 924 F.2d 298, 310 (D.C. Cir. 1991).

5. The Second Circuit's current approach depends on the government's culpability and a court's assessment of how defense counsel could or could not have taken advantage of withheld Jencks Act material.

In 1972, the Second Circuit noted its "agree[ment]" with the Fourth Circuit's "approach," which holds that a new trial is required "unless it is perfectly clear that the defense was not prejudiced" by the government's Jencks Act violation(s). *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972) (quoting *Missler*, 414 F.2d 1304). Moreover, the *Aaron* panel emphasized that "it is of little significance to the defense in this case that the Government's failure to furnish was inadvertent." *Ibid.*

While the Second Circuit has never formally overruled *Aaron*, it has plainly abandoned the "approach" set forth therein. Under its current interpretation of the law, if a criminal defendant-appellant cannot disprove a prosecutor's assertion of "inadvertent" misconduct, he "must establish that there is a significant chance that the added item would instill a reasonable doubt in a reasonable juror." *United States v. Gonzalez*, 110 F.3d 936, 943 (2d Cir. 1997). On the other hand, if a defendant-appellant is somehow able to prove that a Jencks Act violation was "deliberate," then "[a] less demanding standard applies" and "a new trial is

warranted if the evidence is merely material or favorable to the defense." *United States v. Jackson*, 345 F.3d 59, 77 n.14 (2d Cir. 2003) (internal quotation omitted).

In *Nicolapolous*, which is cited in the amended Summary Order below, the Second Circuit confirmed that it is the defense's burden to show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." App'x A.5 (quoting 30 F.3d at 383-84). Thus, while the Second Circuit's current approach differs from the standards and rules applied in other Circuits, it also requires reviewing courts to improperly "speculate whether [withheld documents] could have been utilized effectively," *Clancy*, 365 U.S. at 316, and to make their own "determination[s] of what may be useful to the defense," *Dennis*, 384 U.S. at 875.

II. The order below gives rise to a new conflict regarding the question of whether courts may exclude otherwise qualified expert witness testimony about critical issues while admitting the opinion of an opposing party's expert on the same issues.

"[I]n the law, what's sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016). In this case, however, the government was allowed to present multiple expert witnesses to bolster their fingerprint and cell site evidence, while Petitioner was forced to present his own case—which was largely grounded in attacks on the reliability of the government's fingerprint and cell site evidence—through cross-examination of the government's witnesses. The District Court specifically rejected the defense's proposed experts on the grounds that their opinions were: (1) irrelevant if they did not directly contradict something a government witness was expected to say on direct

examination; (2) unnecessary if they related to a subject that defense counsel could ask a government witness about on cross-examination; and (3) hearsay if they were based on empirical studies that were not conducted by the proposed experts themselves. *Supra*, 17-19. *See generally United States v. Frazier*, 387 F.3d 1244, 1295 (11th Cir. 2004) ("To exclude such helpful testimony on the inappropriate ground relied on by the district court was manifestly reversible error.").

In *United States v. Sellers*, 566 F.2d 884, 886 (4th Cir. 1977), the Fourth Circuit held that the discretion given to trial courts under the Federal Rules of Evidence "may not be utilized to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." *See also In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 836-37 (2d Cir. 1994) (Van Graafeiland, C.J., dissenting). The Eleventh Circuit has likewise held that "[i]t is an abuse of discretion 'to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue.'" *United States v. Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992) (quoting *Sellers*, 566 F.2d at 886). *See also United States v. Knowles*, 889 F.3d 1251, 1257-58 (11th Cir. 2018). Finally, the Third Circuit has made clear that "[i]f one side can offer expert testimony, the other side may offer expert testimony to undermine it, subject, as always, to offering a qualified expert with good grounds to support his criticism." *United States v. Mitchell*, 365 F.3d 215, 247 (3d Cir. 2004).

In *Holmes v. South Carolina*, 547 U.S. 319 (2019), this Court held that a rule precluding a defendant from introducing evidence that a third party committed the charged crime violated the defendant's right to present a complete defense. In so holding, this Court emphasized that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.*, at 331. Because the District Court below precluded the opinions of Petitioner's proposed experts on the grounds that the information supporting those opinions could be elicited through cross-examination of the government's opposing experts, App'x D.5-6; App'x F.7, Petitioner quoted this admonition from *Holmes* in both of his briefs on appeal. Br.47-48; Reply Br.6. But the Second Circuit conclusively deemed it to be "inapposite." App'x A.3. And while Petitioner also cited to the Third, Fourth, and Eleventh Circuit decisions quoted above, Br.43; Reply Br.5, the panel below explicitly rejected the purportedly "sweeping" rule that an "evidentiary decision result[ing] in only one side presenting evidence on an issue to the jury" amounts to a reversible error. App'x A.3.

If Petitioner's trial had been held within the Third, Fourth, or Eleventh Circuits, the law applicable therein would have prevented the District Court from excluding Petitioner's qualified expert testimony about scientific issues affecting the government's fingerprint and cell site evidence while simultaneously admitting all of the government's proposed expert testimony about those very same items of evidence. As such, certiorari is warranted to ensure that the Federal Rules of

Evidence, *Daubert*, and the constitutional right to present a complete defense will mean the same thing in different parts of the country.

III. This case is an ideal vehicle to resolve the questions presented.

A. The Second Circuit's current rules for assessing the prejudicial or harmless nature of Jencks Act violations governed the outcome of Petitioner's appeal.

The government's serious and persistent violations of their discovery obligations made it far more difficult for Petitioner to effectively challenge the reliability of inculpatory fingerprint and cell site evidence, to prepare for trial, or to execute a cohesive strategy as long-withheld exculpatory Jencks Act material and other discovery items were disclosed in piecemeal fashion throughout the trial. Unfortunately, without holding a single hearing with respect to any of the disputed discovery issues, the District Court denied all of Petitioner's requests for relief and explicitly blamed him for the government's misconduct because he had, on one occasion, made an unfulfilled request for a speedy trial. App'x C.5; App'x E.3-4.

In light of all this, the outcome of Petitioner's appeal depended, more than anything, on the federal circuit in which his case was tried. For example, given the obvious exculpatory nature of the Queens robbery fingerprint analysis, the government's withholding of Jencks Act materials relating to that analysis would have been far less likely to have gone unpunished in a circuit where criminal defendants are not required to make some sort of showing with respect to a prosecutor's state of mind (a near impossibility in most situations) to obtain a more favorable standard of harmless error review. And if this case had been tried in the

Fourth or Seventh Circuits, where Jencks Act violations are only excused if it is "perfectly clear" that such violations had no effect on the outcome, the government's egregious misconduct would have been far more likely to trigger the sanctions contemplated under Section 3500(d) and Rule 26.2.

B. An evenhanded application of the law relating to the admission of experts would have allowed Petitioner to present his defense, attack the most critical items of inculpatory evidence, and give the jury further reason to question the probative value of that evidence.

It has never been in dispute that the most critical items of inculpatory evidence presented at trial were: (1) the partial palm print found on a demand note left at the scene of the Staten Island bank robbery; and (2) cell site location data that purportedly identified Petitioner's mobile phone as being in or around the areas of and during the approximate times of the charged robberies. As such, it is noteworthy that the jury submitted numerous requests for information and testimony relating to the government's fingerprint evidence. A.2402-04; 2414. It is also noteworthy that the jury only convicted Petitioner of the Staten Island bank robbery—the only charged crime for which there was inculpatory fingerprint evidence.

On appeal, Petitioner did not dispute that the District Court was within its discretion to admit the government's various experts. With respect to his competing experts, who proposed to give well-founded testimony regarding scientific issues affecting the probative value of the government's fingerprint and cell site evidence, *supra*, 16-18, neither the government nor the District Court ever claimed that their

proposed opinions were unreliable or that they were somehow unqualified to present them.[9] As such, the expert testimony Petitioner sought to admit was "otherwise admissible," and if this matter had been tried in the Third, Fourth, or Eleventh Circuits, the District Court's orders precluding that testimony would have been considered an abuse of discretion.

CONCLUSION

The Court should grant the instant petition for a writ of certiorari.

Dated: May 10, 2022
New York, New York

Respectfully submitted,

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[9] This was for good reason. *Compare* A.183-84; 188 (government's fingerprint expert disclosures); A.251-330 (defense fingerprint expert disclosure); SA.49 (government's cell site expert disclosure); A.657-685 (defense cell site expert disclosure).

APPENDICES

APPENDIX A

19-4358-cr
United States v. Greg Cantoni

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER[*]

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of January, two thousand twenty-two.

Present:

GUIDO CALABRESI,
DENNY CHIN,
WILLIAM J. NARDINI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 19-4358-cr

GREG CANTONI,

Defendant-Appellant.

For Appellee: SARITHA KOMATIREDDY, Assistant United States Attorney (Jo Ann Navickas, David J. Lizmi, *on the brief*), *for* Breon Peace, United States Attorney, Eastern District of New York, Brooklyn, NY

For Defendant-Appellant: LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY

[*] Amended January 25, 2022.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Eric N. Vitaliano, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Greg Cantoni appeals from a judgment of conviction entered on December 20, 2019, after a jury found him guilty of bank robbery in violation of 18 U.S.C. § 2113(a). We assume the reader's familiarity with the record.

On appeal, Cantoni argues that: (1) the district court's preclusion of Cantoni's proffered expert witnesses constituted error, both under Federal Rule of Evidence 702 and the United States Constitution; (2) the government violated its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16(a) of the Federal Rules of Criminal Procedure; (3) the district court erred by admitting the government's late-disclosed cell site evidence; (4) the district court erred by refusing to strike the testimony of Detective Giuseppe Giuca as a sanction for the government's violation of its obligations under the Jencks Act, 18 U.S.C. § 3500; and (5) the district court erred by not holding an evidentiary hearing on Cantoni's motion to suppress evidence derived from Cantoni's cellphone number. As explained below, we disagree, and thus affirm the judgment of the district court.

I. The Preclusion of Cantoni's Expert Witnesses

Cantoni first argues that the district court erred under Federal Rule of Evidence 702 and the United States Constitution by precluding Simon Cole and John Minor from testifying as expert witnesses for the defense.

Rule 702 allows the admission of expert witness testimony if:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The determination of whether testimony is admissible as an expert opinion is multi-factored and flexible, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993), and a trial judge has "considerable leeway" in determining whether to admit expert testimony, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Accordingly, a district court's decision to admit or exclude expert scientific testimony is reviewable for abuse of discretion and will be overturned only where the decision was "manifestly erroneous." *United States v. Jones*, 965 F.3d 149, 161–62 (2d Cir. 2020).

The district court's decisions to preclude Cantoni's expert witnesses were not manifestly erroneous. It was not an abuse of discretion for the district court to conclude that Cole's opinions would not aid the jury. Cantoni proposed that Cole give three opinions: categorical conclusions

of identification are indefensible; there was an increased probability of a print mismatch due to an automated system; and there have been only two studies of latent print identification. Cantoni is correct that Rule 702 permits an expert to give a dissertation on general principles and to leave the factfinder to apply those principles. *See* Fed. R. Evid. 702 advisory committee's note ("[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case."). But the district court excluded Cole's opinions because they would only (1) rebut evidence that the district court had already precluded the government from presenting, (2) raise issues that the defense could address on cross-examination, and (3) convey several studies Cole had read without otherwise aiding the jury, rendering him a mere conduit to hearsay. The district court's reasoning was sound, and we conclude that it did not abuse its discretion in precluding Cole from testifying.[1]

Nor did the district court deprive Cantoni of his constitutional right to present a complete defense. Although a defendant "has a fundamental due process right to present a defense," that right is "not absolute, for a defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability." *United States v. Mi Sun Cho*, 713 F.3d 716, 721 (2d Cir. 2013) (internal citations and quotation marks omitted). "Whether the exclusion of witnesses' testimony violated defendant's right to present a defense depends upon whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist." *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) (alterations and internal quotation marks omitted). Cantoni argues that fingerprint and cell site evidence "w[as] absolutely critical to the government's case . . . ." Cantoni Br. 48. Even if true, this assertion does not explain how Cole's or Minor's testimony would have "create[d] a reasonable doubt that did not otherwise exist." *Schriver*, 255 F.3d at 56. Instead, Cantoni appears to argue that constitutional error occurs whenever a court's evidentiary decision results in only one side presenting evidence on an issue to the jury. Cantoni's sole authority for this argument, *Holmes v. South Carolina*, 547 U.S. 319 (2006), is inapposite and does not establish such a sweeping rule. *Id.* at 331. In sum, the district court's preclusion of Cantoni's expert testimony was not error, whether considered under Rule 702 or the United States Constitution.

II. The Government's Violations of their Discovery Obligations

Cantoni next argues that he was deprived of his right to a fair trial by the government's belated disclosure of: (1) cell site evidence; (2) the existence of an NYPD Latent Print Section analysis excluding Cantoni as the source of a fingerprint pulled from the demand note used in the robbery charged in Count Three of the indictment;[2] and (3) a USM-12 intake form reflecting that Cantoni provided his cell phone number to law enforcement during booking and an accompanying

[1] As to Minor, the district court did not merely fault Minor for not performing his own analysis of the cell site data, but also found that Minor failed to reach any conclusion beyond identifying certain best practices the government's expert failed to follow. The district court therefore concluded that Minor's opinion would not be helpful to the jury.

[2] Cantoni was indicted on three counts. Count One was robbery of a bank in Brooklyn, Count Two was a robbery of a bank in Staten Island, and Count Three was a robbery of a bank in Queens. The jury ultimately failed to reach a verdict on Counts One and Three, the district court declared a mistrial as to those counts, and the government dismissed those charges at Cantoni's sentencing. Cantoni was convicted only on Count Two, which was supported by evidence of a different latent palm print from that at issue in Count Three.

Miranda rights waiver form. Cantoni raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16(a).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused . . . ; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material under *Brady*, such that prejudice can be established, "when there is a reasonable likelihood that disclosure of the evidence would have affected the outcome of the case or would have put the case in such a different light as to undermine confidence in the outcome." *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004) (internal citation omitted).

Rule 16(a) requires that the government disclose certain types of evidence within its custody or control. Fed. R. Crim. Proc. 16(a)(1)(A)–(F). A district court's decision to nonetheless admit evidence that was the subject of a Rule 16(a) violation is reviewed for abuse of discretion. *See United States v. Walker*, 974 F.3d 193, 203 (2d Cir. 2020). Such a decision "is not grounds for reversal unless the violation caused the defendant substantial prejudice," *Walker*, 974 F.3d at 203 (internal quotation marks omitted). A showing of substantial prejudice requires that the defendant "demonstrate that the untimely disclosure of the evidence adversely affected some aspect of his trial strategy." *Id.* at 204 (internal quotation marks omitted).

As the government conceded at oral argument, it did not promptly comply with its discovery obligations. Nevertheless, it correctly argues that Cantoni has failed to demonstrate that he was prejudiced by the timing of its evidentiary disclosures within either the meaning of *Brady* or Rule 16. As to the cell site evidence, Cantoni offers only speculation, stating that with more time the defense "may have" found that Cantoni's phone often activated a cell tower near one of the three banks or determined that Cantoni's phone activated certain cell towers when he was not in fact close to them.[3] Cantoni Br. 52. As to the NYPD Latent Print Section fingerprint analysis, Cantoni simply argues that fingerprint evidence was "absolutely crucial to the government's case" and that Cantoni was "prevented . . . from taking full advantage of th[e] report to undermine the government's law enforcement witnesses and discredit their theory that all three of the charged robberies . . . involve[ed] the same perpetrator." Cantoni Br. 53. This argument is conclusory and fails to account for the fact that Cantoni apparently did convince the jury to doubt the government's theory that Cantoni committed all three robberies, as they returned a guilty verdict on only one of them. Finally, Cantoni devotes only one sentence to arguing that he was prejudiced by the timing of the government's disclosure of the statements he made during booking, asserting that he was "deprived . . . of a sufficient opportunity to challenge the admissibility of evidence recovered as a fruit of his custodial statements." Cantoni Br. 54. This is insufficient to establish prejudice, and so Cantoni's claims under *Brady* and Rule 16 fail.

[3] Because a district court's decision not to exclude evidence disclosed in violation of Rule 16 does not warrant reversal unless the violation caused the defendant substantial prejudice, *see Walker*, 974 F.3d at 203, Cantoni's argument that the district court abused its discretion by denying his motion to preclude the government from offering the cell site evidence also necessarily fails.

III. The District Court's Refusal to Strike Detective Giuca's Testimony

Cantoni next argues that the district court was required by the Jencks Act (18 U.S.C. § 3500), and by Federal Rule of Criminal Procedure 26.2(e) to strike the testimony of Detective Giuca. Under the Jencks Act, once a witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500. "If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record" or "declare a mistrial if justice so requires." Fed. R. Crim. P. 26.2(e). "While the harmless error doctrine must be applied strictly in Jencks Act cases, failure to disclose the withheld material must be deemed harmless where there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Nicolapolous*, 30 F.3d 381, 383–84 (2d Cir. 1994) (internal quotation marks and citation omitted). After the late disclosure of the § 3500 material, Cantoni was permitted to recall Detective Giuca to the stand, mitigating any prejudice caused by the late disclosure. Cantoni has therefore failed to show that he was prejudiced by the late disclosure of § 3500 material related to Detective Giuca.

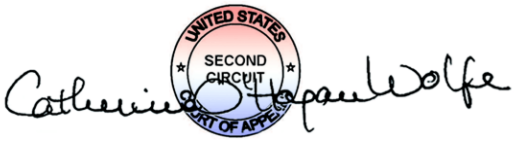
IV. The District Court's Refusal to Hold an Evidentiary Hearing on Cantoni's Motion to Suppress

Finally, Cantoni challenges the district court's refusal to hold an evidentiary hearing to determine whether Cantoni's statement providing his cell phone number on a preprinted, U.S. Marshals intake form during booking fell into the "routine booking question" exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), as recognized in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). *Muniz* also recognized an exception to that exception—"[w]ithout obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." *Id.* at 602 n.14. "To determine whether the police abused the gathering of pedigree information in a manner that compels *Miranda* protection requires an objective inquiry: Should the police have known that asking the pedigree questions would elicit incriminating information?" *Rosa v. McCray*, 396 F.3d 210, 222 (2d Cir. 2005). "[A]n evidentiary hearing on a motion to suppress ordinarily is required if 'the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.'" *United States v. Watson*, 404 F.3d 163, 167 (2d Cir. 2005) (quoting *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992)). Cantoni's counsel below asserted that the fact that Detective Bonacarti—the government's case agent—completed the intake form instead of a U.S. Marshal was suspicious because "Bonacarti knew that Mr. Cantoni's phone number was an important fact when he asked him for the information in the guise of doing a Marshal's intake, for he surely was aware that gathering cell site location data in a case involving robberies in three different boroughs could be critical." App'x 460. But as the district court noted, this assertion was speculative and "not borne out by objective evidence, which consists of a standard USM-312 form, providing a space for an arrestee's cell phone number." Special App'x 5–6. The district court therefore did not err by refusing to hold an evidentiary hearing because Cantoni's argument was completely "conjectural."

* * *

We have considered Cantoni's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

19-4358-cr
United States v. Greg Cantoni

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of December, two thousand twenty-one.

Present:

GUIDO CALABRESI,
DENNY CHIN,
WILLIAM J. NARDINI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 19-4358-cr

GREG CANTONI,

Defendant-Appellant.

For Appellee: SARITHA KOMATIREDDY, Assistant United States Attorney (Jo Ann Navickas, David J. Lizmi, *on the brief*), *for* Breon Peace, United States Attorney, Eastern District of New York, Brooklyn, NY

For Defendant-Appellant: LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY

Appeal from a judgment of the United States District Court for the Eastern District of New York (Eric N. Vitaliano, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Greg Cantoni appeals from a judgment of conviction entered on December 20, 2019, after a jury found him guilty of bank robbery in violation of 18 U.S.C. § 2113(a). We assume the reader's familiarity with the record.

On appeal, Cantoni argues that: (1) the district court's preclusion of Cantoni's proffered expert witnesses constituted error, both under Federal Rule of Evidence 702 and the United States Constitution; (2) the government violated its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule 16(a) of the Federal Rules of Criminal Procedure; (3) the district court erred by admitting the government's late-disclosed cell site evidence; (4) the district court erred by refusing to strike the testimony of Detective Giuseppe Giuca as a sanction for the government's violation of its obligations under the Jencks Act, 18 U.S.C. § 3500; and (5) the district court erred by not holding an evidentiary hearing on Cantoni's motion to suppress evidence derived from Cantoni's cellphone number. As explained below, we disagree, and thus affirm the judgment of the district court.

I. The Preclusion of Cantoni's Expert Witnesses

Cantoni first argues that the district court erred under Federal Rule of Evidence 702 and the United States Constitution by precluding Simon Cole and John Minor from testifying as expert witnesses for the defense.

Rule 702 allows the admission of expert witness testimony if:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The determination of whether testimony is admissible as an expert opinion is multi-factored and flexible, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993), and a trial judge has "considerable leeway" in determining whether to admit expert testimony, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Accordingly, a district court's decision to admit or exclude expert scientific testimony is reviewable for abuse of discretion and will be overturned only where the decision was "manifestly erroneous." *United States v. Jones*, 965 F.3d 149, 161–62 (2d Cir. 2020).

The district court's decisions to preclude Cantoni's expert witnesses were not manifestly erroneous. It was not an abuse of discretion for the district court to conclude that Cole's opinions would not aid the jury. Cantoni proposed that Cole give three opinions: categorical conclusions of identification are indefensible; there was an increased probability of a print mismatch due to an automated system; and there have been only two studies of latent print identification. Cantoni is

correct that Rule 702 permits an expert to give a dissertation on general principles and to leave the factfinder to apply those principles. *See* Fed. R. Evid. 702 advisory committee's note ("[I]t might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case."). But the district court excluded Cole's opinions because they would only (1) rebut evidence that the district court had already precluded the government from presenting, (2) raise issues that the defense could address on cross-examination, and (3) convey several studies Cole had read without otherwise aiding the jury, rendering him a mere conduit to hearsay. The district court's reasoning was sound, and we conclude that it did not abuse its discretion in precluding Cole from testifying.[1]

Nor did the district court deprive Cantoni of his constitutional right to present a complete defense. Although a defendant "has a fundamental due process right to present a defense," that right is "not absolute, for a defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability." *United States v. Mi Sun Cho*, 713 F.3d 716, 721 (2d Cir. 2013) (internal citations and quotation marks omitted). "Whether the exclusion of witnesses' testimony violated defendant's right to present a defense depends upon whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist." *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) (alterations and internal quotation marks omitted). Cantoni argues that fingerprint and cell site evidence "w[as] absolutely critical to the government's case . . . ." Cantoni Br. 48. Even if true, this assertion does not explain how Cole's or Minor's testimony would have "create[d] a reasonable doubt that did not otherwise exist." *Schriver*, 255 F.3d at 56. Instead, Cantoni appears to argue that constitutional error occurs whenever a court's evidentiary decision results in only one side presenting evidence on an issue to the jury. Cantoni's sole authority for this argument, *Holmes v. South Carolina*, 547 U.S. 319 (2006), is inapposite and does not establish such a sweeping rule. *Id.* at 331. In sum, the district court's preclusion of Cantoni's expert testimony was not error, whether considered under Rule 702 or the United States Constitution.

II. The Government's Violations of their Discovery Obligations

Cantoni next argues that he was deprived of his right to a fair trial by the government's belated disclosure of: (1) cell site evidence; (2) the existence of an NYPD Latent Print Section analysis excluding Cantoni as the source of a fingerprint pulled from the demand note used in the robbery charged in Count Three of the indictment;[2] and (3) a USM-12 intake form reflecting that Cantoni provided his cell phone number to law enforcement during booking and an accompanying *Miranda* rights waiver form. Cantoni raises claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 16(a).

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[1] As to Minor, the district court did not merely fault Minor for not performing his own analysis of the cell site data, but also found that Minor failed to reach any conclusion beyond identifying certain best practices the government's expert failed to follow. The district court therefore concluded that Minor's opinion would not be helpful to the jury.

[2] Cantoni was indicted on three counts. Count One was robbery of a bank in Brooklyn, Count Two was a robbery of a bank in Staten Island, and Count Three was a robbery of a bank in Queens. The jury ultimately failed to reach a verdict on Counts One and Three, the district court declared a mistrial as to those counts, and the government dismissed those charges at Cantoni's sentencing. Cantoni was convicted only on Count Two, which was supported by evidence of a different latent palm print from that at issue in Count Three.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused . . . ; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material under *Brady*, such that prejudice can be established, "when there is a reasonable likelihood that disclosure of the evidence would have affected the outcome of the case or would have put the case in such a different light as to undermine confidence in the outcome." *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004) (internal citation omitted).

Rule 16(a) requires that the government disclose certain types of evidence within its custody or control. Fed. R. Crim. Proc. 16(a)(1)(A)–(F). A district court's decision to nonetheless admit evidence that was the subject of a Rule 16(a) violation is reviewed for abuse of discretion. *See United States v. Walker*, 974 F.3d 193, 203 (2d Cir. 2020). Such a decision "is not grounds for reversal unless the violation caused the defendant substantial prejudice," *Walker*, 974 F.3d at 203 (internal quotation marks omitted). A showing of substantial prejudice requires that the defendant "demonstrate that the untimely disclosure of the evidence adversely affected some aspect of his trial strategy." *Id.* at 204 (internal quotation marks omitted).

As the government conceded at oral argument, it did not promptly comply with its discovery obligations. Nevertheless, it correctly argues that Cantoni has failed to demonstrate that he was prejudiced by the timing of its evidentiary disclosures within either the meaning of *Brady* or Rule 16. As to the cell site evidence, Cantoni offers only speculation, stating that with more time the defense "may have" found that Cantoni's phone often activated a cell tower near one of the three banks or determined that Cantoni's phone activated certain cell towers when he was not in fact close to them.[3] Cantoni Br. 52. As to the NYPD Latent Print Section fingerprint analysis, Cantoni simply argues that fingerprint evidence was "absolutely crucial to the government's case" and that Cantoni was "prevented . . . from taking full advantage of th[e] report to undermine the government's law enforcement witnesses and discredit their theory that all three of the charged robberies . . . involve[ed] the same perpetrator." Cantoni Br. 53. This argument is conclusory and fails to account for the fact that Cantoni apparently did convince the jury to doubt the government's theory that Cantoni committed all three robberies, as they returned a guilty verdict on only one of them. Finally, Cantoni devotes only one sentence to arguing that he was prejudiced by the timing of the government's disclosure of the statements he made during booking, asserting that he was "deprived . . . of a sufficient opportunity to challenge the admissibility of evidence recovered as a fruit of his custodial statements." Cantoni Br. 54. This is insufficient to establish prejudice, and so Cantoni's claims under *Brady* and Rule 16 fail.

III. The District Court's Refusal to Strike Detective Giuca's Testimony

Cantoni next argues that the district court was required by the Jencks Act (18 U.S.C. § 3500), and by Federal Rule of Criminal Procedure 26.2(e) to strike the testimony of Detective Giuca. Under the Jencks Act, once a witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in

[3] Because a district court's decision not to exclude evidence disclosed in violation of Rule 16 does not warrant reversal unless the violation caused the defendant substantial prejudice, *see Walker*, 974 F.3d at 203, Cantoni's argument that the district court abused its discretion by denying his motion to preclude the government from offering the cell site evidence also necessarily fails.

possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500. "If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record" or "declare a mistrial if justice so requires." Fed. R. Crim. P. 26.2(e). Cantoni's argument—that the plain language of § 3500 and Rule 26.2(e) *required* the district court to strike Detective Giuca's testimony—rests on a misapprehension of the availability of harmless error review of such Jencks Act violations. "While the harmless error doctrine must be applied strictly in Jencks Act cases, failure to disclose the withheld material must be deemed harmless where there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Nicolapolous*, 30 F.3d 381, 383–84 (2d Cir. 1994) (internal quotation marks and citation omitted). Cantoni makes no argument that he was prejudiced by the late disclosure of § 3500 material related to Detective Giuca and merely argues that the statute and the Rule contain mandatory language. In any event, after the late disclosure of the § 3500 material, Cantoni was permitted to recall Detective Giuca to the stand, mitigating any prejudice caused by the late disclosure.

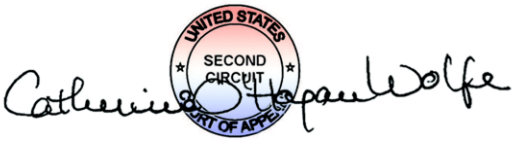
IV. The District Court's Refusal to Hold an Evidentiary Hearing on Cantoni's Motion to Suppress

Finally, Cantoni challenges the district court's refusal to hold an evidentiary hearing to determine whether Cantoni's statement providing his cell phone number on a preprinted, U.S. Marshals intake form during booking fell into the "routine booking question" exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), as recognized in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). *Muniz* also recognized an exception to that exception—"[w]ithout obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." *Id.* at 602 n.14. "To determine whether the police abused the gathering of pedigree information in a manner that compels *Miranda* protection requires an objective inquiry: Should the police have known that asking the pedigree questions would elicit incriminating information?" *Rosa v. McCray*, 396 F.3d 210, 222 (2d Cir. 2005). "[A]n evidentiary hearing on a motion to suppress ordinarily is required if 'the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question.'" *United States v. Watson*, 404 F.3d 163, 167 (2d Cir. 2005) (quoting *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992)). Cantoni's counsel below asserted that the fact that Detective Bonacarti—the government's case agent—completed the intake form instead of a U.S. Marshal was suspicious because "Bonacarti knew that Mr. Cantoni's phone number was an important fact when he asked him for the information in the guise of doing a Marshal's intake, for he surely was aware that gathering cell site location data in a case involving robberies in three different boroughs could be critical." App'x 460. But as the district court noted, this assertion was speculative and "not borne out by objective evidence, which consists of a standard USM-312 form, providing a space for an arrestee's cell phone number." Special App'x 5–6. The district court therefore did not err by refusing to hold an evidentiary hearing because Cantoni's argument was completely "conjectural."

* * *

We have considered Cantoni's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 09, 2021
Docket #: 19-4358cr
Short Title: United States of America v. Cantoni

DC Docket #: 1:18-cr-562-1
DC Court: EDNY (BROOKLYN)
DC Judge: Vitaliano

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

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DC Judge: Vitaliano

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-against-	:	MEMORANDUM & ORDER
GREG CANTONI,	:	18-cr-562 (ENV)
Defendant.	:	

VITALIANO, D.J.

On April 12, 2019, a jury returned a verdict, finding defendant Greg Cantoni guilty on one count of bank robbery, related to the robbery of an M&T Bank branch in Staten Island. (Jury Verdict, ECF No. 113). As a result of jury deadlock, the Court declared a mistrial as to two other counts, arising out of two additional charged bank robberies. Cantoni has filed a motion for sanctions, including sanction in the form of a judgment of acquittal, (Mot., ECF No. 120), contending that the government failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and the Jencks Act, 18 U.S.C. § 3500. He seeks to strike the testimony of government witness Detective Giuseppe Giuca. Cantoni further requests a judgment of acquittal, under Rule 29, contending that the evidence is insufficient without Detective Giuca's testimony. For the reasons set forth below, the motion is denied.

Background

Only a limited history is relevant to the disposition of this motion, and the Court will not needlessly recite the facts underlying the charged offenses or the lengthy history of discovery recounted in the parties' briefs. A more fulsome discussion of background facts, calamitous discovery, and evidentiary questions can be found in the Court's pretrial orders. (*See* ECF Nos.

20, 36, 47-49, 61, 71).[1]

In the midst of trial, following Detective Giuca's first trip to the witness stand, it became evident that the government possessed, but had not previously disclosed, a USB drive that contained, among other things, a DD-5 report prepared by Detective Paul Van Eyken. This DD-5 indicated that Cantoni's fingerprints had been excluded as the source of a latent print recovered from the scene of a robbery in Queens (the "exculpatory print"). The Queens robbery had been separately charged in Count Three of the indictment. The drive also contained an Unusual Occurrence Report by Detective Giuca, confirming this exclusion. After these documents were revealed, Cantoni cross-examined Detective Van Eyken, (Trial Tr. at 695-96), and fingerprint examiner Detective Cynthia Ramirez, (*id.* at 908-29), recalled government witness Detective Giuca before the jury, (*id.* at 1031-34), and examined case agent Detective David Bonacarti both outside the presence of the jury and before it, (*id.* at 991-1006, 1016-24).

Some 14 days after verdict, Cantoni made an application requesting, and the Court ordered, that the USB drive be provided to him. (Order, ECF No. 118). His lawyers subsequently discovered additional DD-5s on the drive that they claimed they did not possess before trial, although some of those reports were later revealed to be part of the government's earlier productions, (Letter, ECF No. 125; Resp., ECF No. 126). On May 8, 2019, Cantoni filed this motion.

Applicable Legal Standards

Cantoni's motion flows from two separate disclosure requirements: the *Brady* doctrine

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[1] *See also United States v. Cantoni*, No. 18-cr-562 (ENV), 2019 WL 1441128 (E.D.N.Y. Apr. 1, 2019); *Cantoni*, 2019 WL 1264899 (E.D.N.Y. Mar. 19, 2019); *Cantoni*, 2019 WL 1259633 (E.D.N.Y. Mar. 19, 2019); *Cantoni*, 2019 WL 1259530 (E.D.N.Y. Mar. 19, 2019).

and the Jencks Act. Both are quite important but, frankly, tend to be pedestrian by nature for they are almost always dutifully fulfilled by the government, though litigation at the edges is not unusual. Indeed, there is no true issue that the government, with prodding from the Court, has upheld its obligations, overall, in this case. The claimed breach at issue here is out of step with its overall disclosure in this case.

Under *Brady* and its progeny, it is well understood, the prosecution has an "affirmative duty to disclose evidence favorable to a defendant." *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). For purposes of this obligation, the Supreme Court has "disavowed any difference between exculpatory and impeachment evidence." *Id.* at 433. In sum, "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (opinion of Blackmun, J.)).

Inherent in this standard, then, is the requirement that a defendant show prejudice resulting from the government's nondisclosure before he is entitled to relief. *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). This is because the standard's "reasonable probability" requirement "necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Kyles*, 514 U.S. at 435 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). In other words, although "there is no need for further harmless-error review" after a *Brady* violation is identified, this is because the *Brady* standard itself, as clarified by *Bagley*, requires a

defendant to show prejudice, not because nondisclosure alone requires a new trial or other relief. *Id.*; *see generally Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (distinguishing "trial errors" subject to harmless-error review from "structural defects" that require automatic relief).

As for the Jencks Act, "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b); *see also* Fed. R. Crim. P. 26.2(a) (incorporating the Jencks Act into the Federal Rules of Criminal Procedure). "If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record." Fed. R. Crim. P. 26.2(e). Moreover, "[i]f an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires." *Id.*

Nonetheless, a court need offer relief under Rule 26.2 only if the party claiming a Jencks Act violation shows prejudice resulting from that violation. *Rosenberg v. United States*, 360 U.S. 367, 370-71, 79 S. Ct. 1231, 3 L. Ed. 2d 1304 (1959); *United States v. Nicolapolous*, 30 F.3d 381, 383-84 (2d Cir. 1994). "There is such a thing as harmless error," and "it would offend common sense and the fair administration of justice" to order drastic relief when a § 3500 violation was harmless. *Rosenberg*, 360 U.S. at 371. "[F]ailure to disclose the withheld material must be deemed harmless where there is no 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Nicolapolous*, 30 F.3d at 383-84 (quoting *United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir. 1987)). This language makes evident that the same standard for prejudice applies under both *Brady* and §

3500.

Discussion

Assuming without deciding that, as of the close of trial, the government had failed to disclose evidence favorable to Cantoni, as required by *Brady*, or failed to disclose statements of government witnesses, as required by § 3500, Cantoni is not entitled to relief because any nondisclosure was harmless. In that regard, despite the common practice in this district to do so, that disclosure of all information those rules require the government to produce was not made before trial does not necessarily establish prejudice, *see United States v. Persico*, 645 F.3d 85, 111-12 (2d Cir. 2011), particularly in the absence of an affirmative showing of actual prejudice, *see United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir. 1988); *see also United States v. Rittweger*, 524 F.3d 171, 182 (2d Cir. 2008).

As the Court recounted on more than one occasion during the pretrial and trial of this case, the breakneck pace of the litigation in an attempt to accommodate Cantoni's requests for immediate trial led to a bushelful of disclosure hiccups and presented issues of a far from traditional variety. Though not the case agent responsible for disclosure compliance and the orderliness of prosecution, Detective Giuca investigated all three robberies. Transparently, the defense seeks to fire back to pin all of the government's disclosure stumbles on him—that is, to undo the government's entire case by striking Detective Giuca's testimony.

But, any fair review of the record reveals that Cantoni's only hope of showing prejudicial nondisclosure by the government would relate solely to the government's case as to Count Three, the Queens robbery. More specifically, the undisclosed information, at best, merely confirmed what was already well known: unlike the second robbery, the government had no fingerprint evidence linking Cantoni to the Queens robbery. Despite the nondisclosure, not only

was Cantoni not convicted of the Queens robbery, a mistrial was declared, even prior to the making of this motion, and the government announced its intention to dismiss the Queens charge at sentencing.[2]

Moreover, even before the impending dismissal of Count Three, Cantoni was given adequate opportunity to use the initially undisclosed statements at trial, following the government's eventual announcement and disclosure of them. On the theory that the exculpatory, or, more precisely, non-inculpatory, print would affirmatively prove Cantoni's innocence, defense counsel cross-examined fingerprint examiner Detective Cynthia Ramirez, who testified that her analysis excluded Cantoni as a source of the print. (Trial Tr. at 908-29). Counsel was also able to cross-examine Detective Van Eyken, who investigated the Queens robbery and prepared the DD-5 that mentioned the exculpatory print. (*Id.* at 695-96). On the theory that the nondisclosure would impeach Detective Giuca, Cantoni was able to recall Giuca and to examine him on the reports that were allegedly not disclosed until trial. (*Id.* at 1031-34). Moreover, allowing Cantoni every opportunity to expose government misconduct, the Court permitted defense counsel to examine Detective Bonacarti both in front of and outside the presence of the jury on the issue of how the reports went undisclosed. (*Id.* at 991-1006, 1016-24). Counsel was further given the opportunity to mention the late disclosure in summation. (*Id.*

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[2] The Advisory Committee Notes to the 1979 adoption of Rule 26.2 explain that "if the prosecution refuses to abide by the court's order, the court is required to strike the witness's testimony unless in its discretion it determines that the more serious sanction of a mistrial in favor of the accused is warranted." The use of the term "unless" suggests that the two sanctions contemplated by the rule are mutually exclusive. Having already declared a mistrial as to Count Three—the count affected by the undisclosed evidence—the court would contravene the directive of the committee by imposing the additional though supposedly lesser sanction of striking all of Detective Giuca's testimony to reach counts not prejudicially affected by any claimed nondisclosure.

at 1110-11). These actions rendered any newly unearthed violation of the government's disclosure obligations harmless; any further effort to press that point by the defense would have been needlessly cumulative.

Finally, with respect to any documents on the USB drive that did not relate to the exculpatory print, nothing in defendant's briefing suggests that they could have been helpful to the preparation of a defense or that their nondisclosure was prejudicial. Although defendant avers that these documents "relate[] to the subject matter of [government] witness[es'] testimony," (Mot. at 9), he identifies no role those documents could have played at trial had they been disclosed earlier.[3]

Quite simply, there is no further use to which defendant could have put the evidence discovered from the USB drive had it been provided earlier. He was given a full opportunity to use any material evidence to exculpate himself and to impeach government witnesses—an opportunity that proved fruitful in light of the mistrial declared and the anticipated dismissal of two counts, including Count Three. Absent prejudice, no relief is warranted, under Rule 26.2. The Court will not strike any of Detective Giuca's testimony, much less testimony unrelated to the information that went undisclosed by the government, and, consequently, will not enter a

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[3] Cantoni does discuss a Best Practices Report completed by Detective Giuca that was not disclosed until after trial, a delay that the government ascribes to concerns about disclosing a bank's potential security weaknesses. Cantoni contends that this form could have been used to cross-examine Detective Giuca and bank teller Loretta D'Ambra about D'Ambra's description of the robber's height. However, defense counsel's cross-examination of D'Ambra elicited testimony that she had described the robber as 5'8", a height shorter than Cantoni's. (Trial Tr. at 165:12-21). Clearly, the jury did not believe this description, having convicted Cantoni on that count, and, in any case, defendant would not have sought to impeach this exculpatory testimony or to question D'Ambra further. Finally, Detective Giuca testified that he does not rely on estimates of a perpetrator's height given immediately following a robbery because the victims are often hysterical and provide inaccurate descriptions. (*Id.* at 306:15-307:7). Nothing in the Best Practices Report would serve to impeach this testimony.

judgment of acquittal, under Rule 29.

Conclusion

For the foregoing reasons, defendant's motion is denied in its entirety.

So Ordered.

Dated: Brooklyn, New York
June 28, 2019

/s/ USDJ ERIC N. VITALIANO

ERIC N. VITALIANO
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-against-	:	MEMORANDUM & ORDER
GREG CANTONI,	:	18-cr-562 (ENV)
Defendant.	:	

VITALIANO, D.J.

In the death throes of an epic pretrial struggle over the admissibility of certain science-based evidence, defendant Greg Cantoni has once again moved to preclude the government from offering expert testimony regarding cell phone location data, and the government has cross-moved to preclude Cantoni from offering the testimony of a competing expert. As spread on the record during the hearing held on March 29, 2019 concerning these motions and a variety of other issues, and for the reasons that follow, Cantoni's motion is denied, and the government's cross-motion is granted.

With echoes of his previous arguments, Cantoni contends that the government's expert disclosure is inadequate and that cell phone location analysis is insufficiently reliable to form the basis of an admissible expert opinion. The first level of attack relates to the government's compliance with Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure, which requires the government to disclose, upon a defendant's request, a summary of any anticipated expert testimony. This summary must "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). In a previous order, the Court directed the government "to supply defendant with a description of the expert's methodology and how it was applied to the data available here," and noted that "this disclosure must include more than the mere name of the method and must set forth details to enable

determination of whether the method was reliable." (Mem. & Order at 7, ECF No. 47). The disclosure the government has now provided offers sufficient detail to enable defense counsel to understand the opinion the expert will offer and to prepare a response. It includes the expert's curriculum vitae, as well as a ten-slide presentation documenting his analysis. This comes on top of the extensive cell phone records previously produced. Despite the substantive fulsomeness of the disclosure made by the government in response to the Court's order, Cantoni still strikes out against it. His motion notes a variety of alleged shortcomings in the analysis provided. Yet, whatever merit his gripes may have, they appear to be fodder for cross-examination rather than reasons to find the disclosure inadequate. For example, Cantoni points out that the government's disclosure depicts only "the 'primary direction' of the coverage area" for each cell tower rather than "the actual . . . footprint or coverage area." (Def. Mot. at 4, ECF No. 62). This does not represent a deficiency in the disclosure but, instead, a limitation of the testimony of the government's expert. It was precisely this limitation that led to the Court's ruling at oral argument on March 29, 2019 that the government revise its trial exhibits to clarify that its expert did not form an opinion as to the distance of Cantoni's cell phone from the various cell towers that it "pinged" but merely an opinion as to his geographical direction relative to those cell towers. Specifically, the government was directed to remove the shaded sectors from its exhibits to avoid any confusion that they might also suggest distance as well as direction.

Cantoni presses on, arguing further that the government's expert should be precluded from testifying because historical cellular location data are unreliable. This objection is tested against Rule 702 of the Federal Rules of Evidence, which permits "[a] witness who is qualified as an expert" to "testify in the form of an opinion or otherwise if" (a) the expert's specialized knowledge will help the jury "to understand the evidence or to determine a fact in issue," (b) "the

testimony is based on sufficient facts or data," (c) "the testimony is the product of reliable principles and methods," and (d) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. In assessing whether an expert's testimony "rests on a reliable foundation and is relevant to the task at hand," a court may consider whether the methodology (1) can be or has been tested, (2) has been subjected to peer review, (3) has a known error rate, (4) has controlling standards, and (5) has gained general acceptance in the scientific community. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94, 597 (1993). The Supreme Court has recognized that, despite this threshold requirement, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 595-96.

In his critique of the expert report disclosed by the government, Cantoni contends that the report suggests that a cell phone connects to the nearest cell tower at the time a call is placed when, in fact, a cell phone connects to the tower emitting the best quality signal at that time. (Mot. at 6). He further argues that the government's expert failed to validate his conclusion by using a method called "drive testing" or by documenting his consideration of topography, weather, and other factors that could affect the analysis. Although these supposed shortcomings may cast doubt on some or all of the findings to be offered by the government's expert, they are issues to be raised on cross-examination rather than concerns so severe as to undermine the admissibility of the expert testimony and require that it be precluded. Cantoni lists what he labels best practices to which the government's expert allegedly failed to adhere, but as with the best practices for latent fingerprint analysis discussed in deciding an earlier defense motion, (*see* Mem. & Order, ECF No. 48), defense counsel may raise the pitfalls they claim hollow out the

government's analysis on cross-examination. As noted in the first go-round, historical cellular location data have routinely been the subject of admissible expert testimony in this district, *see, e.g.*, *United States v. Krivoi*, No. 18-cr-100 (ENV) (E.D.N.Y. Nov. 6, 2018), and the Court declines to find them unreliable on the basis of defendant's concerns. Numerous other courts have arrived at the same conclusion. *See, e.g.*, *United States v. Schaffer*, 439 F. App'x 344, 347 (5th Cir. 2011) (per curiam); *United States v. Rosario*, No. 09-cr-415 (VEC), 2014 WL 6073634, at *1-3 (S.D.N.Y. Nov. 14, 2014); *United States v. Machado-Erazo*, 950 F. Supp. 2d 49, 53-57 (D.D.C. 2013), *aff'd*, 901 F.3d 326 (D.C. Cir. 2018); *United States v. Fama*, No. 12-cr-186 (WFK), 2012 WL 6102700, at *3-4 (E.D.N.Y. Dec. 10, 2012); *United States v. Allums*, No. 08-cr-30 (TS), 2009 WL 806748, at *2 (D. Utah Mar. 24, 2009).

Switching to a different lens, Cantoni attacks the admission in evidence of the cell phone location analysis on the ground that it is irrelevant or, in the alternative, more prejudicial than probative. He contends that, because a cell phone does not necessarily connect to the nearest cell tower, evidence that it connected to a particular tower does not make any fact that is of consequence more or less probable. *See generally* Fed. R. Evid. 401. Although, as the defense asserts, a cell phone may not always connect to the nearest cell tower, that is the red herring in the defense argument. With respect to whichever tower a cell phone *actually* connected to, the historical data relating to that actual connection can establish the connecting cell phone's direction relative to that tower at the time of connection. As applied here, the data might place Cantoni and his cell phone within an area that includes the sites of the charged robberies. Therefore, even though the data cannot pinpoint the cell phone's distance from the connecting tower, as the government's expert acknowledges, the cell phone location data are clearly relevant to show whether the robbery scene was within the arc that might be created from the directional

radio information.

As to the concern about unfair prejudice, *see generally* Fed. R. Evid. 403, the probative value of the location analysis is sufficient to overcome any risk of unfair prejudice, particularly given defense counsel's opportunity to cross-examine the government's expert on the claimed weaknesses in his analysis. Again, the government's expert disclosure makes clear that the expert will not overstate his conclusions. That is, he will not claim that his analysis can place Cantoni's cell phone at a precise location. With that understanding, at bottom, the government's disclosure illustrates the utility of the expert's analysis and his directional determination in helping to identify Cantoni's location during the charged robberies. Defendant's brief collaterally makes clear that defense counsel is well-prepared to cross-examine the government's expert. Given the substantial probative value and limited risk of unfair prejudice, the Court will not preclude testimony from the government's expert.

The government now switches from the shield to the sword. As he did in response to the government's latent print analysis, Cantoni has offered his own competing expert – John B. Minor – to cast doubt on the conclusions of the government's expert. Similarly, the government has moved to preclude this testimony. The arguments parallel those raised in response to Dr. Simon Cole, Cantoni's proffered expert on latent print analysis, whose testimony the Court precluded. As with Dr. Cole, Minor merely reviewed and highlighted weaknesses in the government's analysis, which, as previewed in the oral argument of March 29, 2019, strongly suggest his opinions are fixed on matters of general cell phone technology and towers that Cantoni's cell phone did not "ping" as opposed the ones it did "ping." Minor, for example, did not perform his own analysis of the actual cell phone location data provided by the carrier or arrive at a conclusion that such data established that Cantoni was not at the site of the charged

robberies when they occurred or even that Cantoni's cell phone was not located in the direction relative to the actually "pinged" tower that the government's expert claimed it was. The government's expert applied a specialized methodology to the facts. As related in the defense briefing and argument so far, citing essentially to himself for support, Minor would engage in a mini-trial about the utility of directional cell phone data with a focus on matters beyond the historical fact that, as actually recorded, at a certain precise time, Cantoni's cell phone connected to a certain precise cell tower. Any opinion Minor may provide as to other matters would only lead to jury confusion. Moreover, a vigorous cross-examination can expose whatever shortcomings there may be in the analysis of the government expert without the mini-trial on cell phone data that Minor's testimony would bring. Consequently, on the showing made by the defense thus far, Minor will be precluded from testifying at trial as an expert.

Conclusion

For the foregoing reasons, defendant's motion is denied, and the government's cross-motion is granted.

So Ordered.

Dated: Brooklyn, New York
March 31, 2019

/s/ Hon. Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-against-	:	MEMORANDUM & ORDER
GREG CANTONI,	:	18-cr-562 (ENV)
Defendant.	:	

VITALIANO, D.J.

Defendant Greg Cantoni is charged with three bank robberies. He has moved to preclude the government from offering cellular location data at trial. (Mot., ECF No. 44). In particular, he seeks to exclude historical data that allegedly place him at the scene of the charged robberies. His argument is based upon a variety of complaints about the government's compliance with its disclosure obligations. For the reasons that follow, the motion is conditionally denied.

Cantoni argues that the location data should be excluded because the government improperly withheld the evidence from him, despite the requirements of Rule 16 of the Federal Rules of Criminal Procedure. According to Cantoni, he was not notified of the government's intent to offer this evidence until March 11, 2019 – 21 days before trial – and he has yet to receive the search warrant that permitted the gathering of this evidence. (*Id.* at 2). This delay came despite Cantoni's preemptive November 2018 request for any cell site data in the government's possession. (*See* Def.'s Mot. for Discovery at 2, ECF No. 11). On the other side of this double-edged sword, this request confirms that defense counsel was well aware that historical cell phone data existed and were retrievable, that Cantoni had a cell phone, and that, if the defense had not foreclosed challenging the government's use of them, they should have been actively seeking the aid of an expert to do so.

Assuming *arguendo*, at any rate, that the government did inappropriately delay disclosure

of these data and its intent to use them, Cantoni has not shown prejudice sufficient to warrant preclusion. Although Rule 16(d)(2) permits the Court to "prohibit [the government] from introducing the undisclosed evidence," Fed. R. Crim. P. 16(d)(2)(C), the Court "has broad discretion in fashioning a remedy for the government's violation of its obligations" under the discovery rules, *United States v. Salameh*, 152 F.3d 88, 130 (2d Cir. 1998); *accord United States v. Kaur*, No. 08-cr-428 (KAM), 2009 WL 1296612, at *10 (E.D.N.Y. May 7, 2009) (quoting *id.*). To exclude evidence on the grounds of a discovery violation, a criminal defendant must show "prejudice resulting from the government's untimely disclosure of evidence, rather than the prejudice attributable to the evidence itself." *United States v. Lee*, 834 F.3d 145, 158 (2d Cir. 2016) (quoting *United States v. Sanchez*, 912 F.2d 18, 23 (2d Cir. 1990)). The showing must be heightened where, as here, the record indicates that the government's purported discovery violation was negligent rather than intentional.[1] *See United States v. Grammatikos*, 633 F.2d 1013, 1019 (2d Cir. 1980).

Cantoni argues that he has been prejudiced by the delay because he requires more than 21 days to retain his own cellular location expert and to allow that expert to analyze the data. This need is significant, he claims, because the accuracy of cellular location data is controversial. However, as noted earlier, the defense was aware that such an expert might be needed as early as November 2018, and that awareness should have been made more acute by the government's production of Cantoni's cellular telephone records as early as January 9, 2019, albeit without the recently disclosed data. Defendant, in other words, was on notice, more than two months ago,

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[1] The government asserts that the cell phone location data were omitted from its January 9, 2019 production of defendant's cell phone records only inadvertently, and defendant has not rebutted this claim. (*See* Gov't Opp'n at 1).

that cellular location data would likely be used by the government at trial and that defendant, with ample time, should retain an expert. (*See* Gov't Opp'n at 1, ECF No. 45; Letter Regarding Discovery, ECF No. 14). Furthermore, as the government highlights, only 20 pages of data are relevant to the times of the charged robberies, and not the entire 847 pages that were disclosed. The government has, helpfully, isolated those 20 pages for the defense, which should enable the defense to analyze the information in the more than two weeks until trial.[2] If defendant intended to argue that the 20 pages could not be analyzed in two weeks, then he should have produced a declaration to that effect. Finally, despite defendant's veiled challenge to the overall reliability of cellular location data and the mapping they generate, such evidence is routinely admitted in this district. *See, e.g.*, *United States v. Krivoi*, No. 18-cr-100 (ENV) (E.D.N.Y. Nov. 6, 2018).

Cantoni's effort to move the Court's focus away from the very manageable 20 pages of data that correspond to the only times relevant to this case underscores that his principal concern is that evidence placing him within an approximately 49 square block zone mapped by the data that includes the location of each of the charged robberies will be incriminating and is supportive of his argument that this renders the government's purported discovery violation prejudicial. However, this represents, at best, prejudice resulting from the nature of the evidence rather than from the delay in disclosing it. Moreover, to the extent that the timing of disclosure may have caused some prejudice, abbreviation of trial preparation time resulted, in large part, from

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[2] At oral argument, defense counsel suggested that the remaining material might be exculpatory. Specifically, it was represented that Cantoni lives close to one of the banks he allegedly robbed and, therefore, the cell site location data might be consistent with his being home. However, defense counsel need not review the remaining records to make this determination. The government has generated a map of where the data place Cantoni during the charged robbery, and defense counsel may visually confirm whether Cantoni's home is located within that area. Other than at times immediately before, during, and immediately after each of the charged robberies, where Cantoni and his cell phone were could not be "exculpatory."

Cantoni's insistence on moving expeditiously to trial, as is his right and the Court's objective in every case. That being said, that disclosure was moving at, perhaps, a hasty pace makes the government's representation that its failure to produce these data earlier was an oversight all the more credible.

The defense might also look introspectively. As noted above, Cantoni has long been aware that the government might use cell phone data mapping in this case, and his counsel's office has previously employed experts on the subject, *see, e.g.*, Trial Tr. at 1475:4-12, *United States v. Dervishaj*, No. 13-cr-668 (ENV) (E.D.N.Y. Apr. 20, 2016) (Federal Defender James Darrow refers to "our expert" on cell phone location data); *id.* at 1477-87 (Darrow cross-examines government expert Darryl Valinchus on cell phone location data). Consequently, at most, limited prejudice is attributable to the timing of the government's disclosure, and the cellular location evidence will not be precluded on this ground.

As a further reason for exclusion, Cantoni notes that the government's evidence is predicated on his statement to law enforcement that the target number was, in fact, his phone number. He claims that this statement was never disclosed, despite his requests and the requirements of Rule 16(a)(1)(A). However, Cantoni can show no prejudice resulting from the late disclosure of this detail. First, Cantoni has had access to the cell phone records collected by the government for several months, enabling him to determine that the government was aware of his cell phone number. Furthermore, Cantoni has made no showing that earlier awareness of this statement would have affected his trial strategy. He does not, for example, suggest that the government incorrectly recorded his cell phone number or obtained cell phone records corresponding to another person.

On a different tack, moreover, because, as the government has now disclosed, Cantoni's

statement was made during the United States Marshals' routine booking process, it was not subject to the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), and thus opens no opportunity for a constitutional challenge to this prosecution. *See United States v. Haygood*, 157 F. App'x 448, 449 (2d Cir. 2005) (summary order) (citing *Rosa v. McCray*, 396 F.3d 210, 221 (2d Cir. 2005); *United States v. Gotchis*, 803 F.2d 74, 79 (2d Cir. 1986)). In general, there is a "'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial services." *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (internal quotation marks omitted). "The collection of biographical or pedigree information through a law enforcement officer's questions during the non-investigative booking process" does not implicate *Miranda* even if "the information gathered turns out to be incriminating in some respect." *Rosa*, 396 F.3d at 221. The standard is objective: "Should the police have known that asking the pedigree questions would elicit incriminating information?" *Id.* at 222 (citing *Rhode Island v. Innis*, 446 U.S. 291, 302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

Persuasively, the exhibits to the motion illustrate that Cantoni's phone number was recorded on a standard USM-312 intake form routinely used by the United States Marshals Service. (Reply, Ex. A, ECF No. 46).[3] Recent precedent in this district makes clear that recording an arrestee's phone number is a routine booking question exempt from the requirements of *Miranda*. *United States v. Carpenter*, No. 18-cr-362 (ADS), 2019 WL 919553, at *2 (E.D.N.Y. Feb. 25, 2019); *United States v. Nogueira*, No. 08-cr-876 (JG), 2009 WL

[3] Cantoni avers that his cell phone number was not included in the pretrial report produced during discovery, but the exhibits reveal that the field for his cell phone number was merely redacted, like his Social Security number, for privacy purposes.

3242087, at *2 (E.D.N.Y. Oct. 6, 2009). Notably, in *Carpenter*, the police had already determined that the defendant's cell phone was critical to the prosecution, and the phone number was still held to be pedigree information. *Carpenter*, 2019 WL 919553, at *2. Despite Cantoni's citation to First Circuit precedent, creating an "exception to the exception" for cases where "law enforcement officers have reason to know that routine booking questions may indeed produce inculpatory responses," *United States v. Scott*, 270 F.3d 30, 44 n.8 (1st Cir. 2008), there is no indication that law enforcement had any reason to know this here. Therefore, regardless of any future use made of Cantoni's cell phone number, requesting it was not a form of interrogation subject to *Miranda*.

Although Cantoni notes that an FBI agent rather than a United States Marshal completed the intake form, this is irrelevant because the Court's inquiry must focus on the beliefs of a reasonable officer completing the form, not the subjective intent of the officer who actually completed the form. *See Rosa*, 396 F.3d at 222. Cantoni contends that the lack of an eyewitness or a confession meant that his intake officer needed to extract his phone number in order to obtain location data that would advance the prosecution, but this is entirely speculative and not borne out by the objective evidence, which consists of a standard USM-312 form, providing a space for an arrestee's cell phone number. Consequently, the cell phone number was provided as part of the routine booking process, rather than an interrogation, and was not subject to *Miranda* or Rule 16(a)(1)(A), which covers only statements made "in response to interrogation," Fed. R. Crim. P. 16(a)(1)(A).[4]

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[4] Defendant argues further that statute precludes the use of information obtained from Cantoni's disclosure of his cell phone number because "information obtained in the course of performing pretrial services functions in relation to a particular accused . . . is not admissible on the issue of

Finally, Cantoni argues that the expert notice provided by the government does not meet the requirements of Rule 16(a)(1)(G) because it does not explain what opinion the government's cell phone location expert will provide at trial. To be accurate, though, as defendant's motion makes clear, it is apparent that the government expert will opine that Cantoni was at the site of the charged robberies. The government has provided maps of the locations where it determined Cantoni to be for roughly the hour before and after the charged robberies. This is more than adequate to enable Cantoni to understand what opinion the expert will offer. Nonetheless, the government's disclosure is lacking insofar as it does not describe the methods its expert used to arrive at his conclusion. Consequently, the government is directed to supply defendant with a description of the expert's methodology and how it was applied to the data available here. In contrast to the description proffered at oral argument, this disclosure must include more than the mere name of the method and must set forth details to enable determination of whether the method was reliable.

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guilt in a criminal judicial proceeding," 18 U.S.C. § 3153(c); *see also United States v. Griffith*, 385 F.3d 124, 126 (2d Cir. 2004). However, the cell phone number was not given to a pretrial services officer and no pretrial services were provided to Cantoni because he has been incarcerated since the third charged robbery. Moreover, if § 3153(c) covered booking information, then the exception set out in *Muniz* would be irrelevant. Consequently, § 3153(c) will not preclude the use of the cell phone location data at trial.

Conclusion

For the foregoing reasons, defendant's motion is denied, on the condition that the government supply forthwith a description of its expert's methods and analysis as outlined in this Order.

So Ordered.

Dated: Brooklyn, New York
March 19, 2019

/s/ Hon. Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
-against-	:	MEMORANDUM & ORDER
	:	
GREG CANTONI,	:	18-cr-562 (ENV)
	:	
Defendant.	:	

VITALIANO, D.J.

Defendant Greg Cantoni moves on another front to bar the government from offering a category of evidence at his upcoming bank robbery trial. This time, he seeks to exclude the testimony of government experts regarding latent print analysis, pursuant to Rule 702 of the Federal Rules of Evidence. He contends that the method used by the latent print examiners is not sufficiently reliable as applied to this case. For the reasons that follow, the motion is granted in part and denied in part.

Background

Among the evidence the government has produced is a demand note recovered from one of the banks Cantoni allegedly robbed. (*See* Def. Br. at 1, ECF No. 24-2). The government intends to call three examiners from the New York City Police Department ("NYPD") Latent Print Section ("LPS") to testify to their conclusion that the palm print found on this note matched Cantoni's palm print. Cantoni has moved to exclude the government's proffered expert testimony. (Mot., ECF No. 24). In the alternative, he seeks a court order directing the LPS examiners to limit their testimony and to provide certain details about the limitations of latent print examination, and hopes to present his own expert, Dr. Simon Cole, to discuss these limitations.

Legal Standard

The admissibility of expert opinion testimony is governed by Rule 702 of the Federal Rules of Evidence, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Rule 702 permits "[a] witness who is qualified as an expert" to "testify in the form of an opinion or otherwise if" (a) the expert's specialized knowledge will help the jury "to understand the evidence or to determine a fact in issue," (b) "the testimony is based on sufficient facts or data," (c) "the testimony is the product of reliable principles and methods," and (d) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

This requires district courts to undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. The inquiry is "a flexible one," *id.* at 594, and is designed to ensure that an expert's testimony "rests on a reliable foundation and is relevant to the task at hand," *id.* at 597. Among the factors a court may consider are whether the methodology (1) can be or has been tested, (2) has been subjected to peer review, (3) has a known error rate, (4) has controlling standards, and (5) has gained general acceptance in the scientific community. *Id.* at 593-94. Although the *Daubert* standard is more liberal than its predecessor, which focused solely on "general acceptance," the standard is not intended to "result in a 'free-for-all'" because "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 595-96. Finally, "[i]n addition to the requirements of Rule 702, expert testimony is subject to Rule 403, and 'may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury.'" *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005) (quoting Fed. R. Evid. 403).

Discussion

I. Motion to Exclude Expert Testimony

Cantoni seeks to exclude the testimony of the LPS examiners on the ground that they did not follow established protocols for latent print examination. Like most police fingerprint laboratories, however, the NYPD LPS lab uses the ACE-V approach to print analysis. (*See* Def. Br. at 5). Under this approach, an examiner first *Analyzes* the latent print to assess its quality and usefulness. Second, the examiner *Compares* the latent print to a known print and documents any similarities and differences. At the third step, the examiner *Evaluates* the similarities and determines whether he can conclude that the prints came from a common source, relying on his judgment and experience. At the last step in the analysis, a different examiner *Verifies* the first examiner's conclusion.

Throwing incense in Caesar's face, Cantoni presents a variety of recent government reports indicating that the ACE-V method is not foolproof and may generate unreliable results, particularly given its dependence on subjective assessments by examiners. (*Id.* at 5-9).[1]

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[1] These reports include William Thompson *et al.*, *Forensic Science Assessments: A Quality and Gap Analysis of Latent Fingerprint Analysis* (2017), https://www.aaas.org; Executive Office of the President, President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf ("PCAST Report"); Nat'l Inst. of Sci & Tech., *Latent Print Examination and Human Factors: Improving the Practice Through a Systems Approach* (2012), https://nvlpubs.nist.gov/nispubs/ir/2012/NIST.IR.7842.pdf; and U.S. Dep't of Justice, Office of the Inspector General, *A Review of the FBI's Handling of the Brandon Mayfield Case* (2006), https://oig.justice.gov/special/s0601/final.pdf. The parties do not dispute the briefs' characterizations of the contents of these reports, and, consequently, for the sake of brevity, any references to the contents of these reports are cited to the briefs.

Specifically, he focuses on a five-step process for ACE-V analysis proposed in the report of the President's Council of Advisors on Science and Technology ("PCAST"). This process requires that latent print examiners (1) have undergone proficiency testing, (2) disclose whether they have analyzed the latent print before comparing it to the known print, (3) document their comparison of the prints' features, (4) disclose the existence of other facts that could have influenced their conclusion, and (5) verify that the latent print is comparable in quality to those prints used in certain foundational studies of latent print analysis. (*Id.* at 12). These steps are designed to mitigate the effects of bias that may be introduced by ACE-V's reliance on fingerprint examiners' personal experience and subjective impressions.

Although the NYPD examiners have undergone proficiency testing, Cantoni contends that the case file does not reveal that any of the other steps recommended by PCAST were taken in the analysis of the subject print. (*Id.* at 14). The government, however, notes several screenshots that document, in some detail, the points of comparison relied upon by the examiners, which may obviate some of Cantoni's concerns. (Gov't Br. at 21-23, ECF No. 29). Regardless, assuming without deciding that the analysis did not meet the standards recommended in the PCAST report, the analysis makes clear that LPS followed the ACE-V procedure, a procedure that the PCAST report deemed "scientifically valid and reliable," *United States v. Lundi*, No. 17-cr-388 (DLI), 2018 WL 3369665, at *3 (E.D.N.Y. July 10, 2018) (alterations adopted) (internal quotation marks and citation omitted). Indeed, an addendum to the PCAST report "concluded that 'there was clear empirical evidence' that 'latent fingerprint analysis [. . .] method[ology] met the threshold requirements of "scientific validity" and "reliability" under the Federal Rules of Evidence.'" *United States v. Pitts*, No. 16-cr-550 (DLI), 2018 WL 1116550, at *4 (E.D.N.Y. Feb. 26, 2018) (alterations in original) (quoting Addendum

to the PCAST Report on Forensic Science in Criminal Courts).

Moreover, even if, *arguendo*, LPS did not meet the gold standard for latent print analysis, the Court cannot conclude that the proffered experts failed to "reliably appl[y] the principles and methods [of ACE-V] to the facts of the case," Fed. R. Evid. 702(c). Although NYPD's methods may have been imperfect and may not have delivered scientifically certain results, there is no indication that they were so fundamentally unreliable as to preclude the testimony of the experts. At best, Cantoni's submission shows certain ways in which cognitive bias may have affected the NYPD examiners' analysis but does not show that it actually did so or that any cognitive bias was so significant as to produce an erroneous conclusion. Defendant's concerns are fodder for cross-examination rather than grounds to exclude the latent print evidence entirely. This is the approach that has been adopted each time courts in this district have considered similar motions. *See, e.g.*, *Lundi*, 2018 WL 3369665, at *3; *Pitts*, 2018 WL 1116550, at *4-5. As discussed above, *Daubert*'s liberal standard for the admission of expert testimony reflects the Supreme Court's view that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. As a result, rather than exclude the testimony, the Court will allow Cantoni to draw out the weaknesses of the analysis on cross-examination.

II. Proposed Requirements Regarding Expert Testimony

Recognizing the possibility that the Court would permit the government's experts to testify, Cantoni requests, in the alternative, that the Court require that the LPS examiners acknowledge that the certainty of their conclusion is limited by the highest potential false positive rate from empirical studies and that the government acknowledge, through the

examiners or by stipulation, that studies have found the error rate to be as high as 1 in 18 or 1 in 306. (Def. Br. at 16). To the extent that Cantoni seeks to mandate particular testimony by government witnesses, the motion is denied. Cross-examination is the appropriate means to elicit weaknesses in direct testimony. The government suggests that the studies Cantoni cites are inapposite because they involved the Federal Bureau of Investigation and the Miami-Dade Police Department. (Gov't Br. at 34). However, because each of these laboratories uses the ACE-V method of the NYPD lab and because the government itself has relied on these studies for confirmation that ACE-V is reliable, Cantoni may explore the error rates generated by the studies on cross-examination.

Cantoni also moves to preclude the government experts from testifying that their conclusion is certain, that latent print analysis has a zero error rate, or that their analysis could exclude all other persons who might have left the print. The government acknowledges that "[t]he language and claims that are of concern to defense counsel are disfavored in the latent print discipline," (*id.* at 33), and that "absolute[]ly] certain opinions" and identifications "to the exclusion of all others" are "[n]ot [a]pproved for [l]atent [p]rint [e]xamination [t]estimony," (*id.* at 16). Consequently, Cantoni's request to preclude such testimony is granted without opposition.

III. Defendant's Proposed Expert

Lastly, Cantoni seeks to present the expert testimony of Dr. Simon Cole, and the government, in its response, requests an order precluding Dr. Cole's testimony. (*See id.* at 35). Dr. Cole is a "Professor of Criminology, Law & Society at the University of California, Irvine," with expertise in "the sociology of forensic science and the development of criminal identification databases and biometric technologies." (Def. Br. at 3). He is prepared to offer

three opinions.

First, he seeks to opine that "there is now consensus in the scientific and governmental community that categorical conclusions of identification – such as the one made in this case – are scientifically indefensible." (*Id.*). In light of the Court's above order precluding claims that Cantoni was the certain source of the subject print or that latent print analysis has a zero error rate, this opinion will not be helpful to the jury and does not pass muster under Rule 702(a). Additionally, this opinion goes to whether the latent print analysis conducted was reliable, which is a question for the Court and has been answered in the affirmative, in light of the PCAST report and its addendum.

Second, Dr. Cole seeks to testify that "the latent print examiner in Mr. Cantoni's case failed to account for the increased probability of a mismatch as a result of the use of an automated print identification system." (Def. Br. at 3). This is a matter that may be explored on cross-examination rather than via a competing expert. Dr. Cole's analysis does not appear to involve the application of any "scientific, technical, or other specialized knowledge," Fed. R. Evid. 702, to this case but rather to be a mere reexamination of the NYPD case file in light of several prominent studies. Because defendant may cross-examine the government's experts with regard to the use of an automated system and the studies discussed above, there is no need for Dr. Cole to discuss the risk of error created by the automated system. This conclusion is reinforced by the fact that Dr. Cole nowhere opines that someone other than Cantoni was the source of the subject print or even undertakes an independent comparison of the subject print to Cantoni's prints.

Finally, Dr. Cole is prepared to testify that "only two studies of latent print identification accuracy have been conducted, each of which demonstrated significant error rates in latent print

examination." (Def. Br. at 3). Again, this is a matter that may be explored on cross-examination and does not require an expert to offer an opinion. Indeed, to the extent that Dr. Cole merely plans to convey the contents of studies he did not conduct, he is poised to act as a conduit for hearsay, which is a prohibited role for an expert. *See, e.g.*, *Williams v. Illinois*, 567 U.S. 50, 80, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012); *see also* Fed. R. Evid 703. Cantoni is concerned that the government's experts may not be familiar with the studies discussed above and, therefore, may not be able to answer questions about them. However, the impeachment value of the examiners' unawareness of the studies would be significant and, consequently, cross-examination offers an adequate opportunity to impugn the examiners' conclusions, regardless of the depth of their knowledge. Therefore, although this case is distinguishable from *Lundi*, where the court concluded that the government's experts would actually be familiar with the studies, 2018 WL 3369665, at *4, the distinction is not enough to justify expert testimony from Dr. Cole.

Overall, Dr. Cole's opinions appear to be directed at NYPD's methods for latent print analysis in general rather than specific issues in this case. Although he does highlight particular flaws in the analysis conducted by the government's experts, he does not thereby conclude that NYPD's conclusions were erroneous or that the process used was fundamentally unreliable. His testimony, therefore, would be unlikely to aid the jury.

Conclusion

For the foregoing reasons, defendant's motion is granted to the extent that he may cross-examine the government's experts on the error rate of latent print analysis, and the government's experts will be precluded from testifying that their conclusions were certain, but defendant's requests to exclude the government's proffered expert testimony, to mandate particular testimony by the government's experts, and to introduce the testimony of Dr. Cole are denied.

So Ordered.

Dated: Brooklyn, New York
March 19, 2019

/s/ Hon. Eric N. Vitaliano

ERIC N. VITALIANO
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of February, two thousand twenty-two.

United States of America,

Appellee,

v.

Greg Cantoni,

Defendant-Appellant.

ORDER

Docket No: 19-4358

Appellant, Greg Cantoni, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk