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No. 22-

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In the Supreme Court of the United States

Raymond Howard,

Petitioner,

v.

United States of America,

Respondent

Petition for Writ of Certiorari

To the United States Court of Appeals

For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

=====

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## QUESTION PRESENTED

Whether the District Court's decision to allow the testimony of the Government's key expert witness over the Petitioner's objection based on late notice violated Petitioner's 6<sup>th</sup> Amendment Right of Confrontation.

## LIST OF ALL PARTIES

Raymond Howard is the only party to this petition.

## TABLE OF CONTENTS

Question Presented.....	i
List of All Parties.....	ii
Index to Appendices.....	iii
Table of Authorities.....	iv

### PETITION

Opinions Below.....	1
Jurisdiction.....	1
Text of Constitutional Provision and Rule Involved.....	1, 2
Statement of the Case .....	3-5
Reason for Granting the Writ.....	6-9
Conclusion.....	10

### INDEX TO APPENDICES

Opinion of the United States Court of Appeals for the Third Circuit in United States v. Raymond Howard, No. 21-1920, July 6, 2022.....	1a
Order Denying Rehearing, No. 21-1920, August 2, 2022.....	2a

## TABLE OF AUTHORITIES

### CASES

<u>U.S. v. Blair</u> , 493 Fed. Appx. 38, 53 (11th Cir. 2012).....	8.
<u>U.S. v. Bresil</u> , 767 F. 3d 124, 127 (1 <sup>st</sup> Cir. 2014).....	1.
<u>U.S. v. Curry</u> , 977 F. 2d 1042, 1052 (7 <sup>th</sup> Cir. 1992).....	8.
<u>U.S. v. Day</u> , 524 F. 3d 1361, 1372 (3 <sup>rd</sup> Cir. 1988) .....	7.
<u>U.S. v. Dowling</u> , 855 F. 2d 114, 118 (10 <sup>th</sup> Cir. 2008).....	6, 8
<u>U.S. v. Hoffecker</u> , 530 F. 3d 137 (3 <sup>rd</sup> Cir. 2008).....	6, 8
<u>U.S. v. Holmes</u> , 670 F. 3d 586, 597-599 (4 <sup>th</sup> Cir. 2012).....	8.
<u>U.S. v. Mahaffey</u> , 2007 WL 1213738, at *3 (E.D.N.Y 2007).....	8.
<u>U.S. v. Martinez</u> , 657 F. 3d 811, 817 (9 <sup>th</sup> Cir. 2011).....	7.
<u>U.S. v. Perry</u> , 524 F. 3d 1361 (D.C. Cir. 2008).....	8.
<u>U.S. v. Petrie</u> , 302 F. 3d 1280, 1288 (11 <sup>th</sup> Cir. 2002).....	7, 8
<u>U.S. v. Shaw</u> , 891 F. 3d 441, 453 (3 <sup>rd</sup> Cir. 2018).....	6.
<u>U.S. v. Ulbricht</u> , 2015 U.S. Dist. LEXIS 11936 (S.D.N.Y. 2015).....	7.
<u>U.S. v. Wilson</u> , 493 F. Supp. 2d 484, 485-488 (E.D.N.Y 2006).....	8.
<u>U.S. v. 68.94 Acres of Land</u> , 918 F. 2d 389, 396 (3 <sup>rd</sup> Cir. 1990).....	6.

### OTHER AUTHORITIES

Fed. R. Crim. P. 16.....	1, 8
Supreme Court Rule 13.1.....	1.
28 U.S.C. §1254(1).....	1.
Sixth Amendment to the United States Constitution.....	i, 1, 6, 10
21 U.S. C. § 846.....	2.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

Raymond Howard respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding Petitioner's conviction and sentence.

**OPINIONS BELOW**

The Third Circuit's July 6, 2022 non-precedential opinion is set forth in Appendix 1a. The Third Circuit's August 2, 2022 opinion on Petitioner's Petition for Rehearing is set forth in Appendix 2a.

**JURISDICTION**

On July 6, 2022, the United States Court of Appeals for the Third Circuit filed its opinion affirming Petitioner's conviction and sentence. See Appx. A. On August 2, 2022, the Third Circuit denied Petitioner's timely petition for rehearing. See Appx. B. Pursuant to this Court's Rule 13.1, this Petition for Certiorari is timely filed within 90 days of August 2, 2022. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED**

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right.....to be confronted with the witnesses against him.

**F. R. Crim. P. 16 Discovery and Disclosure**

**(a) Government's Disclosure**

(1) (G) Expert Witnesses. At the defendant's request, the Government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial.

(d)(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(B) grant a continuance;

(C ) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

**F. R. Crim P. 16 Discovery and Disclosure – Amendment to take effect on December 1, 2022**

(G) Expert Witnesses

(ii) Time to Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

**21 U.S.C. § 846 Attempt and Conspiracy**

Any person who attempts or conspires to commit an offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

## **STATEMENT OF THE CASE - FACTUAL**

Petitioner was initially indicted in this case on April 12, 2018 for conspiracy to distribute heroin and carfentanil. The undersigned CJA panel attorney was appointed to represent Petitioner who entered a plea of not guilty. On April 17, 2018, the undersigned filed a general request for discovery pursuant to Rule 16. On that same date, the undersigned also filed a request for notice of expert testimony. Both requests were filed and served on the Government on April 17, 2018, some 30 months before the trial was scheduled to begin.

After many continuances and several superseding indictments and numerous pretrial conferences, the District Court entered an order on May 1, 2020 setting a date certain trial to begin on Oct.19 ,2020.

On Friday, October 16, 2020, at 5:30 p.m., the undersigned received, via email, a Notice of Expert Witness filed by the Government notifying the undersigned that the Government wished to call Det. Bell as an expert in its case in chief. This 13-page document set forth Det. Bell's experience and expert qualifications and, more importantly, his proposed testimony, in part, as follows:

“ The United States will offer Det. Bell's expert testimony related to the use of cellular telephones in furtherance of drug trafficking generally, and more specifically his review of several hundred messages exchanged between the Davidson phone and two phone numbers saved in the



Davidson phone as 'Smizz', including that the exchanges are consistent with the indirect and coded language commonly used by drug distributors to negotiate and make arrangements concerning drug transfers and related monetary transactions. Det. Bell will also offer testimony that, based on his review of the exchanges of messages, over the course of October of 2016 to July 2017, the holder of the Davidson telephone and the replier from the two phone numbers saved in the Davidson phone as 'Smizz' **were responsible for conspiring to distribute at least 100 grams or more of a substance or mixture containing heroin.** (emphasis added)

The undersigned immediately notified the Court's staff<sup>1</sup> that he objected to this witness due to the obvious late notice. As a result of the undersigned's objection, a conference was held at 9:00 a.m. on Oct.19, 2020, the morning the jury selection and trial were set to begin. Following the conference, the Court denied the undersigned's request for a continuance to consult with and retain an expert to refute the proposed testimony of Det. Bell. The Court further advised that it would take the undersigned's request to disallow the testimony of Det. Bell under advisement.

On Oct. 23, 2020, the fifth day of trial, the Government advised the Court

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<sup>1</sup> Because the Notice of Expert was not filed until after 5:00 pm on Friday, October 16, 2020, the undersigned emailed the Court's courtroom deputy who contacted the Court. Later that evening the deputy responded to the undersigned that the court would take the matter up at 900 am: on Monday, Oct 19, 2020, the day of jury selection and trial.

that it wished to call Det. Bell as an expert witness. Over the undersigned's objection, The Court allowed the testimony.

Det. Bell testified that he reviewed 40 pages of text messages between the phone of co-defendant Wayne Davidson and that of "Smizz", who the Government alleged was Petitioner Howard. Det. Bell explained the meaning of terms such as "hammer" (potent heroin), fire (good heroin), sleeve (250 bags of heroin) and brick (50 bags of heroin).

Det Bell also testified that a photo from the "Smizz" device depicted 19.2 grams of Heroin and another photo depicted 196 grams of heroin. Appx51. Ultimately, Det Bell testified that, in his expert opinion, "Smizz" was responsible for distributing at least 200 grams of heroin. All of his testimony was based on his examination of photos of substances that he never tested or weighed.

On October 26, 2020, the jury convicted Petitioner of Count One: Conspiracy to distribute 100 grams or more of heroin. Petitioner was sentenced on April 30, 2021 to 25 years imprisonment.

## REASONS FOR GRANTING THE WRIT

- I. THIS CASE REPRESENTS A FUNDAMENTAL QUESTION OF WHETHER, IN ALLOWING THE TESTIMONY OF THE GOVERNMENTS EXPERT WITNESS OVER PETITIONER'S OBJECTION BASED ON LATE NOTICE, THE DISTRICT COURT ABUSED ITS DISCRETION WHICH VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT THE GOVERNMENT'S KEY WITNESS ON THE ULTIMATE ISSUE IN THE CASE.

Federal courts have upheld the exclusion of expert witnesses as an appropriate sanction for a party's violation of a discovery order or some other pre-trial order. United States v. Hoffecker, 530 F. 3d 137, 184 (3<sup>rd</sup> Cir. 2008); United States v. 68.94 Acres of Land, 918 F. 2d 389, 396 (3<sup>rd</sup> Cir. 1990); United States v. Dowling, 855 F.2d 114, 118 (3<sup>rd</sup> Cir. 1988).

Federal Rule of Criminal Procedure 16(a)(1)(G), which concerns reciprocal discovery of expert witnesses, states, in part, that at Defendant's request the Government must give the Defendant a written summary of the proposed testimony of its expert witnesses. This rule is meant to prevent the Government from obtaining an unfair advantage and to minimize surprise that results from unexpected expert testimony, reduce the need for continuances and to provide the defendant with a fair opportunity to test the merits of the expert's testimony through focused cross-examination. Hoffecker, supra at 184. If a party fails to comply with this rule, the Court may grant a continuance or prohibit the offending party from introducing the undisclosed evidence. Hoffecker at 184.

The Eleventh Circuit Court of Appeals upheld the exclusion of a defense expert where the defendant waited until the Friday afternoon before the commencement of the trial on the following Monday to disclose its expert to the Government. United States v. Petrie, 302 F. 3d 1280, 1283, 1288 (11<sup>th</sup> Cir. 2002). Why should such a ruling be any different for the Government in the instant case? The Court of Appeals in Petrie noted that almost a year and a half had passed between the indictment and the defendant's trial. Petrie at 1288-1289. In the instant case, two and one half years had passed.

While the Government in the instant case can certainly point to ample evidence that Appellant was, in fact, "Smizz", that did not relieve the Government of the burden of proving beyond a reasonable doubt that "Smizz" conspired to traffic in 100 grams and more of heroin. They needed Det. Bell to prove that ultimate issue. In order to avoid a challenge to Bell's testimony and expert report, and to ensure that the undersigned did not have time to study Bell's report and hire a defense expert to refute his testimony, the Government waited until after the close of business on Friday before the start of trial to the report and thus obtained an unfair advantage. Thus, the Government's actions in the instant case appear to have been deliberate and in bad faith. See e.g. United States v. Day, 524 F. 3d 1361, 1372 (D.C. Cir. 2008). This is exactly what Rule 16 was designed to protect against.

The Government's notice was clearly untimely because it was unreasonable to expect the undersigned in the midst of trial preparation to drop everything and try to obtain an expert during trial. See United States v. Bresil, 767 F. 3d 124, 127

(1<sup>st</sup> Cir. 2014) citing United States v. Martinez, 657 F. 3d 811, 817 (9<sup>th</sup> Cir. 2011).

In United States v. Ulbricht, 2015 U.S. Dist. LEXIS 11936 (S.D.N.Y 2015), the defense failed to timely disclose its expert and the court granted the Government's motion to preclude stating that the Rules of Criminal Procedure regarding timely disclosure of experts are not a mere technicality but are a requirement of Rule 16 and apply equally to the Government as well as to the Defendant.

Numerous other courts have upheld the preclusion of defense experts where notice was untimely. See U.S. v. Hoffecker, 530 F. 3d 137 (3<sup>rd</sup> Cir. 2008) (notice given 3 business days before the start of trial); United States v. Blair, 493 Fed. Appx 38, 53 (11<sup>th</sup> Cir. 2012) (preclusion of Defense expert where notice was given after trial had begun); United States v. Holmes, 670 F. 3d 586, 597-599 (4<sup>th</sup> Cir. 2012) (disclosure on Friday before the Monday start date of trial); U.S. v. Perry, 524 F. 3d 1361, 1372-72 (D.C. Cir. 2008) (disclosure 48 hours before Daubert hearing); United States v. Petrie, 302 F. 3d 1280, 1288 (11<sup>th</sup> Cir. 2002) (disclosure on Friday before start date of trial); United States v. Mahaffy, No. 05 Cr. 613(ILG), 2007 U.S. DSupp. ist. LEXIS 30099, 2007 WL 1213738, at \*3 (E.D.N.Y. 4/24/2007)( disclosure the day before trial); United States v. Wilson, 493 F. Supp. 2d 484, 485-88 (E.D.N.Y 2006)( disclosure less than one week before trial); United States v. Dowling, 855 F.2d 114, 118 (3<sup>rd</sup> Cir. 1988) (disclosure 5 days before trial); United States v. Curry, 977 F.2d 1042, 1052 ( 7<sup>th</sup> Cir. 1992)( disclosure 4 days before trial). Why should the result be any different when it is the Government who violates Rule 16? <sup>1</sup>

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<sup>1</sup> *What's sauce for the goose is sauce for the gander.*

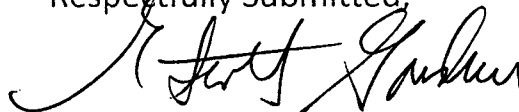
The District Court below should have precluded Det. Bell from testifying or, at the very least, should have granted the undersigned's request for a continuance to meaningfully review Det. Bell's expert report and consult with an expert of his own. The failure to do so denied the Petitioner a fair trial and violated his Sixth Amendment right to confront and cross examine the Government's key witness on the ultimate issue of the case.

## CONCLUSION

The Government's Rule 16 violation was intentional, in bad faith and designed to gain an unfair advantage over Petitioner. The trial court refused to disallow the testimony of Det. Bell or grant Petitioner a continuance. As a result, Petitioner's Sixth Amendment Rights were violated and he was denied a fair trial.

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his conviction or, in the alternative, vacate the sentence of the United States District Court for the Middle District of Pennsylvania and remand for re-sentencing with instructions that the District Court not consider Det. Bell's testimony in fashioning a fair sentence.

Respectfully Submitted,



s/ G. Scott Gardner

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October 30, 2022