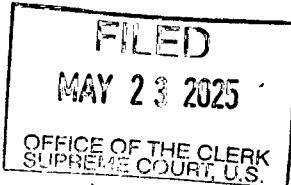


24-7350

No. \_\_\_\_\_



IN THE  
SUPREME COURT OF THE UNITED STATES

RUSTY JAMES DRISCOLL, Petitioner

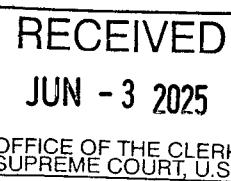
vs.

UNITED STATES OF AMERICA, Respondent

ON A PETITION FOR A WRIT OF CERTIORARI TO  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Rusty James Driscoll  
Reg. No. 78106-509  
USP Victorville  
PO Box 3900  
Adelanto, CA 92301



QUESTION PRESENTED

1. Whether District Court of South Dakota's Local Rules, 16.1 and 57.10, which restrict an inmate's ability to access and to personally possess his/her discovery material, violates an inmate's constitutional rights under the 5th and 6th Amendments to receive adequate notice of the charges against him/her, and/or to assist in his/her own defense.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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## STATEMENT OF THE CASE

On December 9, 2021, Petitioner was arrested in the state of Arizona and subsequently indicted with conspiracy to distribute a controlled substance, in violation of 21 U.S.C. sections 841(a)(1) and 846.

On August 4, 2023, Petitioner was found guilty by a jury of the above charge, and, on November 28, 2023, Petitioner was sentenced in the District Court of South Dakota to 540 months (45 years).

Petitioner appealed, but the Eighth Circuit Court of Appeals affirmed Petitioner's sentence and conviction on December 17, 2024. Petitioner's subsequent motion for rehearing was denied on February 28, 2025.

## REASONS FOR GRANTING THE WRIT

### ARGUMENT

1. The District Court erred by denying Petitioner's motions for access to discovery and denied him his Sixth Amendment right to meaningful assistance of counsel

A. The Sixth Amendment vs. the District Court's Local Rules.

Merits. The District Court erred when it denied Petitioner's requests for access to his discovery and impaired his ability to exercise his Sixth Amendment right to meaningfully assist his counsel. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI. "The core of this right has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.' (In Petitioner's first motion for limited access to his discovery materials, he also argued that the District Court's Standing Orders (now Local Rules) violated his Fifth Amendment due process rights. (R. Doc. 83, at 4-7).) *Kansas v. Ventris*, 556 U.S.

586, 590 (2009)(quoting *Michigan v. Harvey*, 494 U.S. 334, 348 (1990)). "Conducting a defense necessitates adequate time and resources to prepare for trial." *Ladeaux*, 61 F.4th at 586 n. 4 ("[T]he opportunity...to prepare a defense for trial' with one's attorney is "the core" of the Sixth Amendment right to counsel." (quoting *Ventris*, 556 U.S. at 590)).

The Sixth Amendment also provides defendants with a right to be meaningfully present in their case and assist in their own defense. *United States v. Mosquera*, 816 F. Supp. 168, 172 (E.D.N.Y. 1993); see also *United States v. Darden*, No. 3:17-CR-00124, 2017 WL 3700340, at 2 (M.D. Tenn. Aug. 28, 2017)(explaining that "an essential component to the Sixth Amendment right to counsel is that a defendant be allowed to assist and participate meaningfully in his own defense"). "If the right to be present is to have any meaning it is imperative that every criminal defendant possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Mosquera*, 816 F. Supp. at 172-73 (cleaned up); see also *Faretta v. California*, 422 U.S. 806, 819 (1975)( "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). "Effective assistance of counsel is impossible unless the client can provide his or her lawyer with intelligent and informed input." *Mosquera*, 816 F. Supp. at 173. This is because defense counsel, "however expert, is still just an 'aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* (quoting *Faretta*, 422 U.S at 820).

In *Ladeaux*, the Court of Appeals for the Eighth Circuit addressed the argument that the restrictions for access to discovery under the District Court's Local rules 16.1 and 57.10 denied *Ladeaux* his Sixth Amendment right to prepare effectively for his trial. *Ladeaux*, 61 F.4th at 584-86. The Court concluded that, because *Ladeaux* did not present this argument below, the District Court did not plainly err in entering its Local Rules 16.1 and 57.10. *Id.* at 585-86. Despite this conclusion, in footnote four the Eighth Circuit made the point to explain that the District Court's local rules limiting discovery access by defendants "raise Sixth Amendment concerns" considering that "district courts can (and regularly do) provide incarcerated defendants with secure digital discovery." *Id.* at 856 n. 4 (cleaned up)(citing U.S. D.O.J. Joint Elec-

"I've been on the bench for 16 years. And before I went on the bench, this stipulation was not mandatory. The Government would send it over, but I would frequently refuse to sign it, and I still got discovery anyway." (MHT #2 p. 14). Currently, however, that is not the case and discovery is not shared unless counsel signs the stipulation."

D.S.D. Crim. LR 16.1. Local Rule 16.1 explains how the District Court's standard discovery order "restricts dissemination of discovery materials and precludes defense counsel from giving discovery materials to the defendant without the court's express permission." Id. The Court mandated discovery order further requires that discovery provided must be kept in defense counsel's possession and "shall not be given to the Defendant or anyone else without the permission of the Court. Defense counsel may allow the Defendant to read the discovery materials, but only in the presence of defense counsel, the defense investigator, or a defense expert." (See R. Doc. 127 (discovery order applying to Petitioner's counsel)). The justification for Local Rule 16.1 and the standing order comes from Local Rules 57.10, which states "In order to protect the safety of federal defendants and the integrity of ongoing investigations and related prosecutions, access to certain criminal documents and transcripts is restricted." D.S.D. Crim. LR 57.10A.

Although the goals of the District Courts Local Rules 16.1 and 57.10 are laudable, when compared to a criminal defendant's Sixth Amendment right to assist his counsel in the preparation of his own defense, the Local Rules sweep too broadly. As the Department of Justice Working Group report cited in Ladeaux explains, courts have "an overriding interest in the delivery of e-discovery to detainees," to help "avoid delays in cases resulting from the inability of detainees to access and review discovery necessary to participate in their defense." Guidance for the Provision of ESI to Detainees at 3. The report further explains the interest courts have "in minimizing discovery costs and discovery litigation and in avoiding collateral issues, such as motions for new counsel by detainees complaining about delays in reviewing discovery." Id. The report also explains how there is "an interest in avoiding the expenses incurred when an attorney or other member of the defense team must travel to lengthy legal visits merely to permit a detained client to review ESI on a defense team device." Id.

These concerns are important in cases like this where, as described above, *supra*, at 14 (citing R. Doc. 186, at 2), and *supra* at 17 (citing R. Doc. 201 at 1-4), the amount of digital

discovery provided in this case was extensive and was a large portion of the exhibits used at trial. Supra at 18 n. 7 (citing trial exhibits). If the District Court were to employ more tailored Local Rules that address the growing use of digital discovery and balance the ability for defendants and defense counsel to have ways to effectively review that digital discovery while still protecting the safety of federal defendants and the integrity of ongoing investigations and related prosecutions, substantial savings could be realized by the public. (Such savings might have been possible in this case, for example, where most of the amount paid to the defense investigator and to Petitioner's counsel were incurred so that Petitioner could review his discovery. (See R. Doc. 337 (CJA 21 for investigator); R. Doc. 357 & 358 (CJA 20s for Petitioner's counsel)). Importantly, in the context of the Sixth Amendment and Petitioner's right to meaningfully participate in his defense, Petitioner stated during his sentencing hearing that:

I don't believe the trial process in this court was fair because of the rulings on the discovery and my inability to access that. Although Mr. Sutton and Ms. Lorena, they did the best they could, there's still much of the discovery I've never seen myself. None of the--hardly any of the electronic discovery--I never seen any of that. And I sent you a letter prior to trial, though we found out you didn't get it until after trial, explaining that.

(SENT, p. 43); (see also R. Doc. 279 at 1-2, ADD 21-24 (letter from Petitioner)).

Here, the District Court's Local Rules violated Petitioner's Sixth Amendment right to assist in the preparation of his defense and assist his counsel. Had Petitioner been able to possess any portion of his discovery, whether written or electronic, he could have spent less time with his counsel reviewing discovery and more time strategizing regarding potential defenses. The same could be said for whether Petitioner would choose to even go to trial because, with a better understanding of the evidence against him, he would be able to make a more informed decision. (R. Doc. 187 (Petitioner stating he had reviewed the decision from Ladeaux "and believe I have a Sixth Amendment right to assist my current counsel in the preparation of my defense and to allow me to make a meaningful decision regarding whether to go to trial"); R. Doc. 279 at 1-2, ADD 21-24 (July 14, 2023 letter from Petitioner stating that "my ability to assist my attorney in my defense is sevearly [sic] hampered and in many aspects impossible due to the

discovery restrictions outlined in [the Local Rules]. And the rulings made regarding said restrictions specifically in my case."). This is important when viewed in the context of this case where Petitioner has repeatedly complained that he felt as if he was not able to participate in his defense and fully comprehend the evidence against him. See R. Doc. 84 (May 13, 2022 Affidavit of Petitioner); R. Doc. 187 (Apr. 11, 2023 Affidavit of Petitioner); MHT #2, p. 16-17 (statement by Petitioner explaining he has not had much time to review his written discovery or the other discovery "such as phone calls, the PRTT data, any of the stuff computerized that is not translated into paper form I haven't had a chance to read, and we have one month left until trial"); R. Doc. 279 at 1-2, ADD 21-24 (July 14, 2023 letter from Petitioner); (SENT, p. 43).

The District Court's Local Rules and discovery order sweep too broad and prevented Petitioner from the exercise of his Sixth Amendment right to meaningfully assist his counsel in the preparation and investigation of his defense and impacted his right to make a knowing choice to go to trial. In light of this constitutional violation, this Court should reverse and remand for Petitioner to have a new trial where he can have the ability to meaningfully assist and participate in his defense.

B. Petitioner demonstrated good cause for limited access to his discovery.

Standard of Review. Should this Court determine that the District Court's Local Rules are not constitutionally invalid, Petitioner believes this Court should review the District Court's good cause determination for an abuse of discretion. While the Eighth Circuit has not addressed the standard of review to a properly presented claim alleging a violation of Federal Rule of Criminal Procedure 16(d)(1), in discussing the remedies available under Federal Rule of Criminal Procedure 16(d)(2), the Court has applied an abuse of discretion standard. See *United States v. Strebs*, 36 F.4th 782, 787 (8th Cir. 2022). The First Circuit has reviewed a district court's decision to grant a protective order under Federal Rule of Criminal Procedure 16(d)(1) using an abuse of discretion standard. See *United States v. Padilla-Galarza*, 990 F.3d 60, 77 (1st Cir. 2021). Further, Rule 16(d)(1) itself also indicates that "[a]t any time the court may, for good cause, deny, restrict, or defer discovery

or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1). "The use of the word 'may' in [Rule 16(d)(1)] highlights the court's discretion." *United States v. Griffin*, Criminal No. 3:13-cr-80-DPJ-LRA, 2014 WL 1767201, at 1 (S.D. Miss. May 2, 2014)(citing *In re Terrorist Bombing of U.S. Embassies in E. Afr.*, 552 F.3d 93, 122 (2d Cir. 2008)).

Where an abuse of discretion is found, this Court "will not reverse if the error was harmless." *United States v. Kimble*, 54 F.4th 538, 544 (8th Cir. 2022). "An error is harmless if no substantial rights of the defendant were affected, and the error did not influence or had only very slight influence on the verdict." *Id.*

Merits. The District Court erred when it determined that Petitioner's motions for access to discovery were not supported by good cause. Federal Rule of Criminal Procedure 16 "is intended to provide a criminal defendant 'the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case.'" *United States v. O'Keefe*, No. CRIM. 06-0249 (PLF), 2007 WL 1239204, at 2 (D.D.C. Apr. 27, 2007) (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989)). This principle comports with the sentiments outlined by the Department of Justice Working Group Report that "[t]o mount an effective defense, a represented defendant ~~he~~<sup>who</sup> is detained pending trial must generally have the opportunity to personally view some or all of the discovery and disclosure, which is now commonly in ESI format." *Guidance for the Provision of ESI to Detainees*, at 2. Under Federal Rule of Criminal Procedure 16(d)(1), a court "may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."

The District Court determined that Petitioner failed to establish good cause under Federal Rule of Criminal Procedure 16(d) to grant relief from the discovery order and Local Rules 16.1 and 56.10. (R. Doc. 191, at 2; R. Doc. 208 (order affirming Magistrate Judge Duffy's order)). Other factors the District Court considered in determining Petitioner failed to show good cause to amend the discovery order and get relief from the Local Rules included the time Petitioner already spent reviewing written discovery in his case, his relocation from the Sherburne County Jail to a jail closer to Sioux Falls, and the Government's claims that Petitioner shared information from his discovery with a defendant in another matter. (See R. Doc. 191 at 2-5). Although these factors warrant consideration, when weighed against

Petitioner's Sixth Amendment rights, they fail to tip the scale away from finding he presented good cause to obtain relief from the Discovery Order and the District Court's Local Rules.

Regarding Petitioner's access to discovery and the amount of discovery reviewed, as he himself indicated, he has only had an opportunity to fully review the written discovery on one occasion. (MHT #2, p. 16-17). These concerns are important in cases like this where much of the discovery in the case was digital discovery and there were large amounts of digital discovery produced. (See R. Doc. 186, at 2 (summarizing digital discovery produced by the United States to Petitioner); R. Doc. 201 at 1-4 (same); R. Doc. 269, p. 1-5 (Exhibit List from Trial showing numerous digital exhibits introduced)). While the allegations made by co-conspirator Michael Hoeft during his trial that Petitioner discussed discovery that Petitioner reviewed with Hoeft is concerning and should factor into the good cause analysis, here, it should not have tipped the scale away from finding good cause when, there is no guarantee that Hoeft was telling the truth when he testified. Thus, although the allegation in the transcript is concerning, the lack of reliability of the testimony should not outweigh the rights the Sixth Amendment confers to Petitioner to meaningfully participate in his defense by having access to and the ability to thoroughly review his discovery.

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Moreover, the weight of Petitioner's firmly rooted Sixth Amendment rights to assist his own counsel in his own defense, should have tipped the scale of good cause in his favor. See Ventris, 556 U.S. at 590 ("The core of this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial." Thus, The District Court erred in determining that Petitioner failed to show good cause for relief from the District Court's Local Rules and the Discovery Order. This error was substantial, was not harmless, and this Court should reverse and remand for a new trial.

## CONCLUSION

For all of the foregoing reasons, Petitioner prays this Honorable Court to grant this writ of certiorari in order to address the question as to whether a District Court's Local Rules denying a defendant permission to adequately access his discovery material, encroaches on a defendant's rights under the 5th and 6th Amendment Constitutional rights to Due Process, to receive adequate notice of the charges against him/her, and/or to help assist his or her attorney in the preparation of his or her own defense. Needless to say, such a question has broad implications that affect inmates throughout the entire nation--particularly those in the District of South Dakota who are regularly denied the right to access their discovery material in an adequate manner.

Respectfully submitted,

  
Rusty James Driscoll