No. 25-565

IN THE

Supreme Court of the United States

YOGESH K. PANCHOLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

INTEREST OF *AMICUS CURIAE* [1]

Due Process Institute is a nonprofit, bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. It is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Due Process Institute is weighing in on this matter as part of its work to protect the fundamental integrity of the adversarial process in the criminal legal system and ensure that the American people enjoy robust protections from prosecutorial misconduct.

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[1] This brief was not authored in any part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental aim of an adversarial trial—and more broadly, all of Constitutional criminal procedure—is to seek the truth. That criminal procedure by its very nature favors the government and prosecutors. The government chooses the charges. It chooses the defendants. It knows the universe of evidence available and chooses what evidence it presents to the jury. Defendants—before they get to judgment by trial or plea—face a host of unknowns: Who will be the key witnesses in the trial? Who among co-defendants or potential witnesses is cooperating with the government? And what has the government offered to witnesses and potential witnesses? In comparison, criminal defendants have little to offer any witness.

In that context, establishing the truth requires examining *all* the evidence, while curtailing the fundamental imbalance between the prosecution and defense. This can be done by permitting defendants to present non-bad-faith late-disclosed witnesses, given that the most powerful evidence a defendant can bring is their own live witness. Statistically, such witnesses are far more likely to be convincing to juries than other types of evidence, and presenting competent witness testimony contributes to the criminal trial's truth-seeking function. Conversely, excluding such witnesses may increase the risk of wrongful conviction, and is inconsistent with this Court's rulings that have set aside evidentiary rules that block defendants from presenting exculpatory testimony. Further, allowing such witness testimony obviates one avenue of appeal that may arise from its

exclusion. That, in turn, would reduce the caseload on an overburdened federal judiciary, which has seen an increasing number of criminal trials and appeals.

Adopting a rule preventing the exclusion of witnesses absent bad faith also remedies the inherent structural imbalances of a criminal trial. The prosecution holds all the cards: knowledge of the charges, defendants, witnesses, and available evidence; and the ability to offer witnesses incentives for cooperation. Because of this structural imbalance, a defendant that lacks such information may in good faith take action that results in the court later treating nondisclosure as a discovery violation and precluding the presentation of evidence. These information asymmetries increase the chance that such "violations" occur, especially in instances where the government may be talking to multiple co-defendants and offering them plea deals or other favorable treatment in exchange for cooperation in the case. This structure, and innocent confusion arising from the fluid nature of criminal trials—which permit a flexible application of evidentiary rules—exerts substantial pressure on how and when a defendant makes disclosure.

This Court should reverse the Sixth Circuit and impose a similarly forgiving rule here. Reversing the Sixth Circuit would not just be in service of fairness—it would further the fundamental goals of the criminal trial.

ARGUMENT

I. Precluding Witnesses is Likely to Substantially Harm Criminal Defendants and Lead to an Increase in Wrongful Convictions.

Permitting witnesses to testify furthers the truth-seeking function of the criminal-trial process. Receiving testimony decreases the likelihood of wrongful convictions, and a discovery rule that permits such testimony may further combat the informational asymmetry inherent in a criminal trial. Conversely, excluding such evidence is likely to increase the risk of a wrongful conviction, as evidenced by the reasoning underlying this Court's *Brady* jurisprudence.

Witness testimony is considered more powerful than other types of evidence, and this Court has repeatedly set aside rules that block the admission of such exculpatory evidence. Failing to set aside the Sixth Circuit's rule is likely to create an avenue for wrongful convictions and subsequently increase the chances of an appeal that could have otherwise easily been avoided. Given the federal judiciary's ever-increasing caseload, reducing the potential for an easily mitigated error at the trial level will benefit the judiciary overall. This Court should overturn the Sixth Circuit's rule.

A. Excluding Defense-Witness Testimony Threatens the Fundamental Purpose of the Criminal Trial: Finding the Truth.

Our judicial system has long been committed to the idea that the aim of an adversarial trial is to seek the truth. *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004)

(citing M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better")). But the adversarial criminal trial reveals the truth only when it examines all the evidence. See *United States* v. *Leon*, 468 U.S. 897, 900–901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'") (quoting *Alderman* v. *United States*, 394 U.S. 165, 175 (1969)).

The search for truth underlies foundational principles of Constitutional criminal law. This Court has "ma[d]e it clear," for instance, that "the mission of the Confrontation Clause [is] to advance . . . the accuracy of the truth-determining process in criminal trials." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970). Along similar lines, this Court has explained that when prosecutors knowingly use perjured testimony, they engage in prosecutorial misconduct "and, more importantly" they "corrupt[] . . . the truth-seeking function of the trial process." *United States* v. *Bagley*, 473 U.S. 667, 680 (1985) (citing *United States* v. *Agurs*, 427 U.S. 97, 104 (1976), holding modified in other respects by *Bagley*, 473 U.S. 667).

When liberty is on the line, the search for truth based on admitting evidence is constrained only when required by a weightier concern. For example, before the exclusionary rule (which in many cases results in the exclusion of illegally obtained prosecution evidence), evidence could be admitted if it was "clearly competent as tending to establish the guilt of the accused of the offense charged." *Adams* v. *New York*, 192 U.S. 585, 594 (1904). So long as such evidence

"establishe[d] guilt," "the weight of [the] authority as well as reason" would "limit[] the inquiry to the competency of the proffered testimony," and courts would not "stop to inquire as to the means by which the evidence was obtained." *Ibid.* Nonetheless, this Court, considering a procedurally proper challenge to warrant-seized evidence, recognized more than a century ago that condoning illegal searches and seizures undermines societal liberty interests and, in federal criminal procedure, exclusion is often the proper remedy applied, even at the expense of truth-seeking. See *Weeks* v. *United States*, 232 U.S. 383, 398 (1914). Here, though, there is no such conflict: The interests of liberty and truth-seeking align.

First, permitting defense witnesses to testify absent bad-faith discovery violations reduces the risk of wrongful conviction. See Pet. Br. at 25 (citing Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369, 1412 (1991), 33; see also Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 Colum. L. Rev. 223, 237 (1966) (describing witness preclusion as "a conscious mandatory distortion of the fact-finding process"). And permitting witness testimony can result in uniquely powerful evidence. See Section I.B, *infra* (explaining that, as an empirical matter, witness testimony is particularly persuasive). For that reason, witness testimony is especially useful to the search for truth, and the effect is only amplified when the witness is testifying for the defense because it counterbalances the significant resources and structural advantages held by the state.

Second, permitting such testimony may help combat the informational asymmetry between defense and prosecution that is inherent to criminal adjudication. See Section II.B, *infra*. This asymmetry makes threats to the trial's truth-seeking function even more dire. This Court recognized as much in *Wardius* v. *Oregon*, which addressed the need to even the "balance of forces between the accused and his accuser." 412 U.S. 470, 474 (1973). And "[g]iven that defense counsel alone has a duty to investigate evidence of innocence, laws that make such evidence selectively unavailable to the defense also selectively suppress evidence of innocence." Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. Rev. 212, 246 (2021). Indeed, these asymmetries so profoundly shape the adversarial field that their presence "alone [is] enough to even out any advantage a defendant might get from the formal structure of our criminal process." Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 Harv. L. Rev. F. 91, 94 (2015). *Wardius* therefore remains the touchstone: taking into account "the State's inherent information-gathering advantages," any imbalance in discovery rights "should work in the defendant's favor." 412 U.S. at 475 n.9.

In some instances, the tradeoff between truth and liberty is complicated. Here, it is not. A rule allowing defense-witness testimony absent bad faith will both increase the odds that the truth is uncovered and protect the liberty interests placed at risk in criminal proceedings.

B. Excluding Defense Evidence Heightens the Risk of Wrongful Conviction.

Barring a defendant from presenting exculpatory evidence significantly increases the risk of wrongful conviction. A survey of cases involving *Brady* violations (which similarly deprive defendants of their ability to present exculpatory evidence) shows that such violations are present in wrongful-conviction cases at nearly *three times* the rate of other prosecutions. See Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 Iowa L. Rev. 471, 517 (2014); see also Brandon L. Garrett, *Actual Innocence and Wrongful Convictions, in* Academy for Justice: A Report on Scholarship and Criminal Justice Reform 204 (Erik Luna ed., 2017) ("An Innocence Project study found that 37 percent of the DNA exoneration cases involved the suppression of exculpatory evidence.").

Witness testimony is among the most powerful evidence a defendant can produce. In a study of mock jury trials, 72 percent of jurors voted to convict a defendant when the prosecution presented an eyewitness; that number plummeted to 18 percent when no such witnesses testified. See Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 Jurimetrics J. 188, 189 (1975). In contrast, a defense attorney's cross-examination does not have a similar effect; in the same study, an eyewitness discredited by the defense only lowered the conviction rate to 68 percent. *Ibid.* Cross-examination cannot do what a defendant's own witnesses can—provide a sworn, affirmative counterweight to the prosecution's evidence. See

Brian L. Cutler, Steven D. Penrod & Hedy R. Dexter, *The Eyewitness, the Expert Psychologist, and the Jury*, 13 L. & Hum. Behav. 311, 327 (1989) (finding that "[e]xpert testimony increased [juror] reliance on" factors that influence identification accuracy "when drawing inferences about the credibility of the eyewitness" and "decreased [juror] reliance on witness confidence"). The ability to introduce exculpatory testimony is a powerful counterweight to the myriad prosecutorial advantages.

Defendants' need for latitude to present effective evidence in the form of witness testimony is especially significant given prosecutors' considerable investigative advantages. For example, courts will not overturn a conviction under *Brady* so long as prosecutors disclose evidence when a defendant still has some opportunity to use it—and some courts allow prosecutors to disclose exculpatory evidence well after trial has started. See, *e.g.*, *United States* v. *Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) ("[T]he prosecution need not produce *Brady* material before trial."); *United States* v. *Senegal*, 371 F. App'x 494, 501 (5th Cir. 2010) ("[T]he Government need not necessarily disclose *Brady* material prior to trial."); *Reid* v. *Miller*, 2003 WL 22383097, at *3 (S.D.N.Y. Oct. 20, 2003) *("Brady* material does not have to be disclosed by the prosecution to defense counsel prior to the beginning of trial."). Before a defendant accepts a guilty plea, prosecutors must only disclose evidence that "establishes the factual innocence of the defendant," excluding valuable impeachment evidence necessary for a defendant to evaluate the strength of the government's case. Andrew Liepold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am.

Crim. L. Rev. 1123, 1149–1150 (2005) (internal quotations and brackets omitted) (citing *United States* v. *Ruiz*, 536 U.S. 622, 625, 631 (2002)). Prosecutors may similarly withhold witness names from defendants until well past when they would "assist in preparing a defense." *Id.* at 1151 (citing Fed. R. Crim. P. 16(a)(1)). Defendants are also at the mercy of prosecutors to preserve evidence; they have no remedy if exculpatory evidence is destroyed so long as government investigators acted in good faith. *Id.* at 1152 (citing *Arizona* v. *Youngblood*, 488 U.S. 51 (1988)). As such, although *Brady* is intended to protect defendants, in practice, courts' application of *Brady* still allows prosecutors a large margin for error: Prosecutions are not thrown out over minor oversights in prosecutorial communication. The law should not compound this imbalance by hamstringing a defendant's ability to present witnesses.

Recognizing the central role of defense evidence in preventing wrongful convictions, this Court has repeatedly set aside evidentiary rules that blocked defendants from presenting exculpatory testimony because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi,* 410 U.S. 284, 302 (1973) (holding "the hearsay rule may not be applied mechanistically to defeat the ends of justice" by excluding evidence that "was critical to [the defendant's] defense"); see, *e.g.*, *Washington* v. *Texas*, 388 U.S. 14, 23 (1967) (striking down rule barring accused accomplices from testifying in defense of other accused participants unless they were first acquitted); *Rock* v. *Arkansas*, 483 U.S. 44, 61 (1987) (striking down categorical bar of all testimony elicited

through hypnotism because "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections").

C. Allowing Defendants to Present Exculpatory Evidence at Trial Promotes Judicial Economy and Benefits Society.

Courts have a strong institutional interest in permitting defendants to fully present their case at trial. A criminal conviction is often just the first step in a chain of expensive and labor-intensive court processes. After a conviction, an innocent defendant will almost certainly move for a new trial based on insufficiency of the evidence. From there, they may pursue appeals through multiple levels of review, potentially all the way to this Court. After the appellate process, defendants may seek post-conviction relief—and can often appeal those petitions. Each stage consumes substantial judicial resources.

Those resources are already strained. From March 2024 to March 2025, 68 percent of state courts reported experiencing staff shortages and 78 percent reported delaying hearings weekly.[2] During the same period, federal criminal filings in district courts increased by 12 percent, and criminal appeals increased by 7.4 percent.[3] There is already a severe

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[2] Thomson Reuters Institute, Staffing, Operations and Technology: A 2025 Survey of State Courts 5, 7 (2025), https://bit.ly/48saSPz.

[3] United States Courts, Federal Judicial Caseload Statistics 2025 (2025), https://bit.ly/4rs2sQV.

strain on the federal judiciary, compounded by government shutdowns that interrupt the functioning of courts even further.[4] Despite this workload increase, the federal judiciary is facing a $391 million budget shortfall in Fiscal Year 2025.[5] Courts are already struggling to adequately fund their own security.[6] Private attorneys appointed to represent indigent defendants have gone unpaid since July 23, 2025.[7] This failure to pay was extended by the October 2025 shutdown, but the 2025 Appropriations Bill made no provisions for paying these public defenders in the first place. These overlapping financial and operational challenges underscore the urgent need for an efficient judicial process.

Granting a defendant some procedural latitude upfront—whether by granting a continuance or permitting evidence with prosecutorial comment about late disclosure—would help construct a more complete evidentiary record. Reducing the bases for a defendant to claim mistrial based on exclusion could reduce the need to order retrials to address such error. That could save thousands of dollars and person-hours of judicial resources in the long run.

Beyond economic drains on the court system, wrongful convictions incur real public safety costs.

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[4] *Judiciary Funding Runs Out*, U.S. Courts (Oct. 17, 2025), http://bit.ly/446OCJG ("The judicial branch announced that beginning on Monday, Oct. 20, it will no longer have funding to sustain full, paid operations.").

[5] Letter from Hon. Amy J. St. Eve, Chair, Jud. Conf. Comm. on Budget, to Hon. Tom Cole, Chairman of House Appropriations Comm. (Apr. 10, 2025), https://bit.ly/3KlD3aU.

[6] *Id*. at 2.

[7] *Ibid*.

When a wrongfully convicted person sits in prison, the true perpetrator likely remains at large and able to commit more crimes. A 2019 study examining DNA exonerations found that true perpetrators committed an average of 3.1 additional crimes while their corresponding innocent defendants were incarcerated. Robert J. Norris et al., *The Criminal Costs of Wrongful Convictions*, 19 Criminology & Pub. Pol. 1, 9 (2019). Across the United States, "the wrongful convictions that occur each year would ultimately enable true perpetrators to commit between 21,824 and 41,664 additional crimes." *Ibid.* These extra crimes do not even count the criminogenic effect of incarceration itself upon the innocent defendant. See William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. Experimental Criminology 71, 96, 98 (2012) (finding that "imprisonment leads to higher recidivism when compared to a non-incarcerative alternative," with prison leaving convicts 7.9–9.6 percent more likely to reoffend within a year of release). Preventing defendants from presenting exculpatory evidence does not serve prosecutors' goals of protecting the public—instead, it consumes thousands of dollars and hours from court resources without public-safety upside.

All of the extra time and resources can be saved, and potential harm avoided, by adopting a bright-line rule—courts may only preclude witnesses as a sanction against a defendant who has acted in bad faith.

II. The Government's Control of Information Gathering and Disclosure Gives It an Overwhelming Advantage in Criminal Prosecutions Against Defendants Who Inevitably Lag in Developing Evidence.

A criminal prosecutor wields great power. Prosecutors tailor the charges around the evidence and witnesses they choose to expose. Defendants, on the other hand, are in the dark and face a panoply of unknowns. A criminal defendant has few proactive options while waiting for the government to choose charges, defendants, and witnesses. Recognizing this asymmetry, courts protect defendants against some of the prosecutor's investigative advantages, beginning with the most fundamental: the "beyond a reasonable doubt" standard.

Despite these protections, as this Court has acknowledged, a fundamental structural information asymmetry favors the government and prosecutors. That asymmetry increases the likelihood of precluding the presentation of defense evidence based on technical noncompliance with discovery, since defendants have little to offer potential witnesses and have little or no independent access to the breadth of crime-scene evidence. The likelihood of technical but non-bad-faith noncompliance only increases because of rules that permit the government to withhold evidence from the defense until absolutely required, and because defendants often reasonably assume that potential witnesses may be cooperating with the government. While not the issue in this case, given these asymmetries and barriers, defendants and their counsel often accidentally and innocuously make decisions in discovery that can result in preclusion

and can appear, in hindsight, ill-advised. To sanction such good-faith choices through the severe penalty of preclusion is disproportionate and unduly prejudices defendants.

A. Courts Protect Defendants Against the Prosecutor's Investigative Advantages.

This Court has long recognized that criminal adjudications are structured to protect defendants from the state's asymmetric power. The State bears the entire burden of proof, while the accused has no obligation to produce evidence or prove anything. See *In re Winship*, 397 U.S. 358, 364 (1970); *Williams* v. *Florida*, 399 U.S. 78, 111–112 (1970) (Douglas, J., concurring in part and dissenting in part) ("The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that . . . . [t]he defendant . . . need not do anything at all to defend himself . . . . [but] challeng[e] the State at every point to: 'Prove it!'").

As a counterbalance to that burden, prosecutors operate with significant advantages over defendants. Specifically, the prosecution alone enjoys the "inherent information-gathering advantages" of law enforcement—resources, investigators, subpoena power, grand juries, access to government files, and early control of the crime scene and witnesses—so criminal procedure cannot pretend the parties stand on equal footing. *Wardius,* 412 U.S. at 475 n.9. And as *Wardius* recognized, if the scales in discovery are to tip at all, they should tilt towards the *defendant. Ibid*. The government has tools to obtain evidence freely and to structure its case accordingly (and on its

own time, during pre-indictment investigation). It can leverage search warrants, wiretaps, and compulsory processes to compel cooperation. The accused typically confronts a record created by the State after memories have faded and evidence is no longer fresh. *Ibid*. A defendant, therefore, should have some latitude to assemble evidence for the defense case and be protected from rules or sanctions that would impede the presentation of evidence on technical grounds. Indeed, that is the purpose of the Bill of Rights and the procedural protections that flow from it: "to redress the advantage that inheres in a governmental prosecution." *Id*. at 480 (Douglas, J., concurring).

As Justice Harlan noted, "it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). Consistent with that principle and as several Justices have observed, the prosecutor's significant advantage in resources means criminal defendants need every legitimate tool to protect their liberty. *Ake* v. *Oklahoma*, 470 U.S. 68, 76–77 (1985) (fairness requires providing indigent defendants the "basic tools" necessary to meet the State's case); see also *Bagley*, 473 U.S. at 694–695 (Marshall, J., dissenting) (prosecutors' superior access to evidence and resources makes robust disclosure essential to a fair trial). Courts should be wary of tipping the scales against the defense, especially when rules or sanctions burden the right to present a complete defense. See, *e.g., Chambers*, 410 U.S. at 302 (due process violated when state evidentiary rules were applied "mechanistically" to exclude critical defense evidence). Absent a truly compelling reason, courts

should not adopt measures that further disadvantage the defense.

This Court has raised concerns about witness preclusion because preclusion does more than threaten the defense's story: it distorts the fairness of an adversarial system that already tilts toward the State. Because defendants lack the prosecution's investigative machinery, live testimony is often the most meaningful way to respond to the government's case, as it is "a fundamental element of due process of law." *Washington*, 388 U.S. at 19. A sanction that silences defense witnesses therefore falls with disproportionate force on the party least able to afford the loss.

Accordingly, this Court has made clear that preclusion is a "drastic" remedy and the "severest sanction," appropriate only where the defendant withheld information willfully and to secure an unfair advantage. *Taylor* v. *Illinois*, 484 U.S. 400, 413, 415–417 (1988). Short of such egregious conduct, courts should allow a defendant to present witness testimony or other evidence with conditions that specifically address any purported prejudice to the government from late disclosure. In other words, the sanction should address the specific prejudice—*but go no further*.

Consistent with this principle, courts regularly turn to intermediate measures that protect fairness without silencing a defense witness. Common tools include brief continuances or recesses to allow the prosecution time to investigate; mid-trial interviews or depositions of the witness before they testify, offering a limiting instruction that confines testimony

to topics previously disclosed; and sanctions directed at counsel (*e.g.,* contempt, fines, or disciplinary action) rather than exclusion of defense evidence. See, *e.g.*, *Taylor*, 484 U.S. at 413 (noting preclusion is a "drastic" remedy that requires consideration of lesser alternatives, including continuances and sanctions on counsel). These measured responses implement *Taylor*'s fairness-oriented approach and reflect the realities of criminal litigation, where late disclosures often stem from limited resources and evolving prosecutions—not gamesmanship.

Various courts of appeals have also recognized that rules invoked in the name of order or efficiency cannot be enforced in a manner that swallows a defendant's right to present a meaningful defense. See, *e.g.*, *Scrimo* v. *Lee*, 935 F.3d 103, 118, 120 (2d Cir. 2019) (granting habeas petition when trial court excluded testimony on "delay, prejudice, and confusion" grounds); *Chandler* v. *Brown*, 137 F.4th 525, 542, 551 (6th Cir. 2025) (granting habeas petition when trial court excluded witness testimony because of discovery violations caused by the court's "'accelerated' timeline"); *Smith* v. *Brookhart*, 996 F.3d 402, 417–420 (7th Cir. 2021) (granting habeas relief where state courts arbitrarily applied evidentiary rules to exclude reliable third-party-guilt and impeachment evidence central to the defense); *Lunbery* v. *Hornbeak*, 605 F.3d 754, 761–763 (9th Cir. 2010) (granting habeas petition when trial court failed to recognize the "statement against penal interest" exception to hearsay). These cases are based on the premise that defendants must be afforded every reasonable chance to disprove the prosecution's case. Precluding a witness because of a good-faith discovery decision undermines a

defendant's constitutional rights and increases the risk of a wrongful conviction.

B. Structural Information Asymmetries Increase the Likelihood of Inadvertent Discovery Violations.

The informational asymmetries that pervade criminal proceedings make late disclosure by defense counsel more likely. Constitutional and procedural discovery rules like *Brady*, *Giglio*, and their progeny have not closed this gap.

The information gap opens even before a defendant is charged. "[T]he police, and then the prosecution in cooperation with the police, have a monopoly on information gathering and assembly . . . in secret until a charging decision is made." Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. Sch. L. Rev. 911, 928 (2012). Because "only one side—the State—has access to all of the crime scene evidence and all of the government's resources to collect the evidence," it follows that "only the State typically has much ability to look for and produce the key evidence in the case." *Id*. at 914. This imbalance is so pronounced that "in a significant percentage of cases, the defense undertakes virtually no independent investigation" at all. *Ibid.*

Even when defense counsel engages in factual discovery, barriers block the defense from obtaining information on equal footing with the prosecution. These are acute for testimonial evidence, where prosecutors, but not the defense, can offer witnesses powerful non-monetary inducements to testify, such as promises to recommend reduced sentences or to

forgo prosecution altogether, even in unrelated cases. See Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 Yale L.J. 690, 692 (2012). In the digital realm, "privacy asymmetries" permit prosecutors to compel disclosure of third-party data that might reveal or corroborate witness information, while defendants generally lack that access. See Wexler, *supra*, at 214–215. And these disparities are compounded by procedural limits that constrain the defense's investigative tools, such as the inability to issue subpoenas or compel production before formal charges are filed. See Norah Senftleber, *No More Nixon: A Proposed Change to Rule 17(c) of the Federal Rules of Criminal Procedure*, 92 Fordham L. Rev. 1697, 1701–1704 (2024).

In addition to what occurred in this case—where a witness's lawyer incorrectly represented that the witness would not testify—potentially exculpatory evidence and the witnesses it could lead to often come to light only after late government disclosures or limited court-ordered access. Defense counsel acting reasonably, expediently, and in good faith may, for instance, fail to disclose evidence properly or in a timely manner simply because they lack access to the tools and information available to a prosecutor.

And while constitutional disclosure requirements are designed to offset some of these imbalances, other legal rules permit, and sometimes even require, the government to withhold or delay evidence from the defense. The Jencks Act, 18 U.S.C. § 3500, requires disclosure of government witness statements only after the witness has testified on direct examination. 18 U.S.C. § 3500(a)–(b). Federal Rule of Criminal

Procedure 16 similarly limits discovery by shielding internal government memoranda and most witness statements from disclosure. Fed. R. Crim. P. 16(a)(2). And Rule 6(e) bars disclosure of "matter[s] occurring before the grand jury" except in narrow circumstances, frequently precluding defense access to transcripts or exhibits until after indictment or trial preparation is well underway. Fed. R. Crim. P. 6(e)(2)(B), (3).

C. Innocent Confusion, Not Gamesmanship, Often Explains Good-Faith Discovery Missteps.

The pace and structure of criminal trials, including their various disclosure deadlines, are fluid. For example, privilege and self-incrimination issues resolve mid-trial, cooperation postures change at the eleventh hour, and counsel can reasonably reassess whether a particular witness should testify in light of the ever-shifting sands of what is unfolding. Likewise, witness willingness or availability also shifts in real time. Inside this construct, counsel can inadvertently fail to disclose in a timely manner—without any design to secure a tactical advantage.

These realities matter because courts may not enforce evidentiary or procedural rules in ways "arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 56. They may not apply otherwise valid rules "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. And they may not erect categorical barriers that disqualify defense witnesses. See *Washington*, 388 U.S. at 22–23.

This Court's decisions supply a clear limiting principle. *Taylor* sustained preclusion where the trial court found a willful discovery violation "motivated by a desire to obtain a tactical advantage," but noted that "alternative sanctions are adequate and appropriate in most cases." 484 U.S. at 413–416. *Michigan* v. *Lucas* rejected two blanket rules—automatic preclusion and a categorical bar on preclusion—and required a case-specific assessment attentive to proportionality and "legitimate state interests." 500 U.S. 145, 152–153 (1991). Read together with *Crane* v. *Kentucky*'s guarantee of a "meaningful opportunity to present a complete defense," 476 U.S. 683, 690 (1986) (citation omitted), these precedents state a straightforward rule: absent willful sandbagging, courts should cure presentation of a "surprise" witness with measured remedies and not gag the defense.

That rule will fit the most common, innocent scenarios. Proportionate trial-management devices—brief continuances to permit interviews, targeted disclosure, in-camera proffers, limiting instructions, and allowing cross-examination to explore timing—protect the Government's interests without categorically silencing the defense. See Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 138 (1974) ("The less drastic alternative need not be equally efficient, so long as it is *adequate*. . . . [T]he added effectiveness, if any, of disqualification, [does] not justify the additional burden it imposes on the defendant.") (emphasis in original).

Preclusion, by contrast, is an "extreme" sanction. *Taylor*, 484 U.S. at 417 n.23. Where narrower remedies are available, this Court has consistently

applied proportionality principles to avoid preclusion's "significant adverse effect" on the ability to present a defense. *Rock*, 483 U.S. at 57–61; see *Washington*, 388 U.S. at 22 (rejecting "arbitrary" rules grounded in "a priori categories that presume" certain defense witnesses are "unworthy of belief"); *Chambers*, 410 U.S. at 295–298 (warning that rigid evidentiary applications out of step with the "realities of the criminal process" defeat the ends of justice).

Here, the Sixth Circuit affirmed preclusion on the premise that a last-minute defense witness is "suspect," citing efficiency and potential prejudice—though the timing reflected the very nonwillful, structural forces described above—and blurred a bespoke witness-list order with Rule 16's expert-disclosure regime. Pet. App. 5a–7a & n.1, 18a–23a; Op. 5–6 & n.1. This approach punishes good-faith decision-making, not tactical sandbagging, and cannot be squared with this Court's precedents, including its limiting principles and *Taylor*'s instruction that lesser remedies will suffice "in most cases." 484 U.S. at 413.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Sixth Circuit's decision.

Respectfully submitted,

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December 5, 2025