

No. _____

In the
Supreme Court of the United States

Dr. Raynaldo Rivera Ortiz, Jr.,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether district courts have the discretion to permit witnesses to testify even if they have violated an order issued under Federal Rule of Evidence 615?**
- II. Which party bears the burden of persuasion to establish prejudice, or lack of prejudice, when a criminal defendant shows a deviation from Federal Rule of Evidence 615?**
- III. Whether the presumption that juries follow their instructions establishes harmless error in a case involving the erroneous admission of evidence under Federal Rules of Evidence 403 or 404?**

PARTIES TO THE PROCEEDING

Petitioner is Dr. Raynaldo Rivera Ortiz, Jr., who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Raynaldo Rivera Ortiz, Jr. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is available at *United States v. Rivera Ortiz*, No. 24-11032, 2026 WL 1419387 (5th Cir. May 20, 2026)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence entered in *United States v. Rivera Ortiz*, No. 3:22-CR-378-1 (Nov. 20, 2024), is attached as Appendix B. Petitioner filed a timely Petition for Panel Rehearing June 3, 2026. The order denying this Petition issued July 3, 2026, and is attached as Appendix C.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 20, 2026. The order denying a timely petition for rehearing issued July 3, 2026. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES

Federal Rule of Criminal Procedure 52 provides:

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Rule of Evidence 403 provides:

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.

Federal Rule of Evidence 404 provides in relevant part:

- (a) Character Evidence.
 - (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

- (b) Other Crimes, Wrongs, or Acts.
 - (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
 - (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Federal Rule of Evidence 615 provides:

- (a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
 - (1) a party who is a natural person;
 - (2) one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney;
 - (3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or
 - (4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:
(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and
(2) prohibit excluded witnesses from accessing trial testimony.

STATEMENT OF THE CASE

I. Trial Proceedings

Petitioner Dr. Raynaldo Rivera Ortiz, Jr. suffered conviction on five counts of violating 18 U.S.C. §1365(a), which prohibits tampering with consumer products, and five counts of violating 21 U.S.C. §331(k), which prohibits the adulteration of drugs. *See* (ROA.1150-51); [Pet App. B]. These ten counts related to allegations that Petitioner, an anesthesiologist, poisoned five IV bags with local anesthesia, and that four of these bags entered surgeries and caused injuries to the patients. *See* (ROA.54-64); [Pet App. C]. He received an aggregate sentence of 2,280 months (190 years) imprisonment. *See* (ROA.1152); [Pet App. B].

A. The trial evidence generally

At a jury trial, the government presented a highly circumstantial case –no eyewitness observed Petitioner injecting bags with foreign substances, no video captured the same, and the defendant made no incriminating statement. *See United States v. Rivera Ortiz*, No. 24-11032, 2026 WL 1419387, at **5-18 (5th Cir. May 20, 2026)(unpublished)(recounting government’s case). Further, the defense sharply contested every part of the government’s case. For example:

- The government presented evidence that all of the patients referenced in the indictment experienced an elevated heart rate and blood pressure during their surgeries. *See Rivera Ortiz*, 2026 WL 1419387, at *8. But the defense produced evidence that some of the patients had preexisting conditions that could have accounted for some of the symptoms, or that the symptoms might be explained by medical error. *See id.* at *9; (ROA.2099, 2103, 2144, 2148-50, 2611-39). And one of the treating physicians identified her own medical error as the most likely cause of her patient’s symptoms during surgery. *See id.* at *11; (ROA.2345, 2359).
- The government introduced evidence that the blood of two patients and multiple IV bags contained traces of local anesthesia. *See id.* at **9, 14-15. But the defendant presented evidence that one of the blood samples initially tested negative for such substances, that the hospital, under pressure to resolve the ongoing emergencies, forwarded the bags to a private chemist (rather than the police), that this private chemist used an unusual methodology to identify traces of anesthesia, and that some of his positive results likely resulted from the contaminants in the equipment. *See id.* at **9, 14-15; (ROA.2201, 2206-2207, 2246, 2709-2720).
- The government introduced evidence that three of the bags (or shells of the bags) had tiny holes in them, consistent with IV punctures. *See id.* at *9. But the defense produced evidence that the private chemist who saw them originally called them “possible holes.” (ROA.9897, 9899).

- The government introduced evidence that Petitioner was the last person to place IV bags in the IV warmer (a device that looks like a refrigerator, but which warms rather than cools IV bags) in three of the four surgeries mentioned in the indictment, and that an IV from the warmer went into each surgery. *See id.* at **12, 13, 17. But the defendant produced evidence that the warmer held 32 or 34 bags at a time, in three stacks, and that no one could tell whether the last bag to enter the warmer was the next one taken out. *See id.* at *2; (ROA.1498-1500, 1504, 1582-1583, 1792).
- The government introduced evidence that anesthesiologists did not generally place bags in the warmer at all. *See id.* at *7. But the defense introduced testimony that Petitioner had done so years earlier. *See* (ROA.2532, 2534, 2535).
- The government introduced evidence that Petitioner retrieved his own bags during the time in question, sometimes more than one at a time, as if to ensure that no tainted bags entered his own surgeries. *See id.* at *9. But the defense introduced evidence that Petitioner had retrieved his own bags before. *See* (ROA.1572, 2531)
- The government introduced video evidence of Petitioner filling multiple syringes in a suspicious manner. *See id.* at *18. But defense cross-examination of a government witness elicited testimony that the conduct was not necessarily suspicious. *See* (ROA.1543).

- The government introduced evidence that Petitioner suffered from financial instability and disciplinary issues at the time of the alleged poisonings. *See id.* at *10. But it never persuasively explained how poisoning random patients would help him solve these problems. And the defense showed that shutting down Petitioner’s worksite would have cost him money even if he never worked there again. *See* (ROA.2189).

B. The court’s refusal to enforce Rule 615

At the outset of the trial, the court ordered the exclusion of witnesses under Federal Rule of Evidence 615. *See* (ROA.1433). The parties sought and received exceptions for the defense investigator and two case agents. *See Rivera Ortiz*, 2026 WL 1419387, at *21. Although the government sought no exception for its expert in anesthesia, that witness remained in the courtroom and observed all testimony up until her own. *See id.* The defense objected to her testimony but the court purported to grant an exemption “after the fact.” *Id.*

This witness government provided detailed testimony excluding alternative causes for the patients’ symptoms during surgery; she also identified poisoning as the most likely cause of the patients’ injuries. *See* (ROA.2388, 2396, 2406, 2413-14, 2419, 2470). The defense introduced its own expert, arguing alternative possible causes for the ill-fated surgeries. *See* (ROA.2611-39). However, the government relentlessly challenged the reliability of the defense expert’s testimony on the grounds that she had not seen the trial evidence, exploiting its decision to disobey the court order. *See* (ROA.2640, 2657, 2670, 2673, 2676, 2691).

C. The admission of an uncharged death

During trial, the government also introduced evidence of a death that occurred in the time frame of the indictment, but that the indictment did not charge. *See Rivera Ortiz*, 2026 WL 1419387, at **18-19; (ROA.1714-1720). It elicited testimony from the husband of a doctor – Dr. MK -- who worked at the facility named in the indictment. *See id.*; (ROA.1714-1720). This witness said that Dr. MK came home from the facility after work and injected herself with an IV bag (possibly, though not certainly, taken from the facility where Petitioner worked) to alleviate symptoms of a cold or flu. *See id.*; (ROA.1714-1715). She then died screaming in agony in front of her husband with the IV bag in her arms. *See id.*; (ROA.1717-1719). The court admitted this evidence over objections under Federal Rules of Evidence 103, 403, and 404. *See id.*, at *19; (ROA.715-718, 1352).

The jury convicted.

II. Appellate Proceedings

A. Petitioner’s contentions on appeal

Petitioner appealed. He first challenged the sufficiency of the evidence as to each count. *See Appellant’s Initial Brief in United States v. Rivera Ortiz*, No. 24-11032, 2025 WL 1754743, at **31-53 (5th Cir. Filed June 26, 2025)(“Initial Brief”). Further, he contended that the district court erred in admitting testimony about the death of MK. *See Initial Brief*, at **55-66. He also argued that the district court erred in admitting testimony from the government’s expert, due to her violation of Federal

Rule of Evidence 615. *See id.* at **66-78. Finally, he argued that the prosecutor impliedly referenced his failure to testify during closing. *See id.*, at **78-84.

B. The majority opinion

A divided panel affirmed in a 70-page unpublished opinion. *See* [Pet. App. A]. The court found the evidence sufficient, relying heavily on the relaxed standard of review for sufficiency claims: the reviewing court’s duty to resolve all credibility disputes in favor of the verdict and to indulge all reasonable inferences for the government. *See Rivera Ortiz*, 2026 WL 1419387, at **5-18.

The majority assumed that the district court had erred in admitting evidence of MK’s death, but found the error harmless. *See id.*, at *20. In this respect, it first cited its sufficiency analysis – which, again, relied heavily on the standard of review – to describe the evidence against Petitioner as “substantial.” *Id.* It did not add any new analysis, but appeared instead to conflate the sufficiency analysis with harmless error analysis. *Id.* (“First, as outlined above, there was substantial evidence of Dr. Ortiz’s guilt. Second...”). It then noted the district court’s cautionary instruction to the jury – the trial court had instructed the jury to use the evidence about MK’s death only for certain purposes specified under Federal Rule of Evidence 404. *See id.* The court of appeals cited *Zafiro v. United States*, 506 U.S. 534, 541 (1993), quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), for the proposition that “juries are presumed to follow their instructions...” *Id.* at *20, & n. 331. It made no reference to the magnitude of possible prejudice entailed by evidence of an uncharged murder, delivered through the eyes of a grieving spouse. *See id.*

As for the Rule 615 claim, the court of appeals understood the record to reflect a judicial finding that the prosecution expert violated the Rule. But it thought that the district court chose to excuse the violation and permit the witness to testify:

When discussing whether the Government had moved to exempt Dr. Hail from the Rule, the court stated, “I think you have to get permission, but I’ll grant permission after the fact.” This suggests the court thought that a violation had occurred but nevertheless decided to allow Dr. Hail to testify. It therefore exercised its “broad discretion”—albeit in a conclusory manner—in allowing Dr. Hail to testify despite the Government’s failure to seek permission when the court invoked the Rule.

Id., at *22.

The court of appeals affirmed that decision. It emphasized that its precedent makes reversal for a Rule 615 violation an uphill battle, even when the defendant has established that such a violation occurred. Quoting circuit precedent, it said:

“Even if the Rule has been violated, the trial court has discretion to allow the testimony thereafter.” “In general, failure of a witness to abide by the sequestration order rarely will require reversal.” “To reverse a judgment based on a decision to include testimony that violated a sequestration order,” this court requires a party to “demonstrate an abuse of discretion and ‘sufficient prejudice.’”

Id. at *21, & nn. 337-339 (quoting *Cruz v. Maverick County*, 957 F.3d 563, 571 (5th Cir. 2020)(further citations omitted).

The court found no abuse of discretion in excusing the violation of the Rule. It thought that “experts are often exempted from the Rule,” and “are *supposed* to opine based on the facts in the case,” which “sometimes come out at trial.” *Id.* at *23, & n. 358 (citing *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629 (6th Cir. 1978). It also thought that the government’s Rule violation “does not appear willful.” *Id.* And

it said that Petitioner failed to carry his burden to show prejudice, noting that he could have sought an exemption for his witness. *Id.*, at *24.

Finally, the court rejected Petitioner's claim of an improper closing argument. *See id.*, at **25-28.

C. The partial dissent

A partial dissent would have remanded for the court to decide on the record whether the prejudicial effect of MK's death substantially outweighed its probative value. *See id.*, at **25-28 (Higginson, J., dissenting). The dissenting judge argued that such emotionally powerful testimony could not be called harmless in a case it described as "close." It said:

I cannot say that the grisly Dr. M.K. evidence—a brutal murder, recited with unimaginable anguish by a grieving widow who described his late wife's horrible, bewildered final moments—was harmless in this close, entirely circumstantial case about medical tampering.

Of course, reasonable minds often differ on harmlessness, so I greatly respect that my colleagues come to a different conclusion. *Compare* Roger Traynor, *The Riddle of Harmless Error* (1970), *with* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791 (2017), and Brandon L. Garrett, *Patterns of Error*, 130 Harv. L. Rev. F. 287 (2017); *cf. United States v. Dominguez Benitez*, 542 U.S. 74, 86–87 (2004) (Scalia, J., concurring in judgment) (observing that "ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp especially so when they are applied to the hypothesizing of events that never in fact occurred").

To ensure a fair trial in this complex case, the district court was required to do more with such tragic, impactful evidence. I don't diminish its significance, which the district court noted at sentencing, saying: "I just want to say in my view in a moral sense, not necessarily in a legal sense, Defendant Ortiz is, in fact, being punished for the death of Dr. Kaspar and the other unindicted victims who suffered from his conduct." Again, this extrinsic evidence was horrific, and possibly germane and

admissible earlier, at trial—but only after fair and requested adjudication, for carefully limited, instructed purposes.

Id. at *28–29 (some internal citations omitted)(citing *United States v. Fortenberry*, 860 F.2d 628, 632 (5th Cir. 1988); *United States v. Hernandez-Guevara*, 162 F.3d 863, 872 (5th Cir. 1998).

D. The petition for rehearing

Petitioner timely sought panel rehearing, pointing to flaws in the majority’s harmless error analysis regarding the death of MK. *See* Petition for Rehearing in *United States v. Rivera Ortiz*, No. 24-11032 (5th Cir. Filed June 3, 2026)(“Petition for Rehearing”). The Petition argued, *inter alia*, that the majority had conflated the standards for sufficiency review and harmless error review, that it had improperly applied the presumption that juries follow instructions, and that it had omitted any analysis of the evidence’s emotional power when evaluating the likelihood of prejudice. *See* Petition for Rehearing, at 4-15.

The court of appeals denied the Petition in a one sentence order. [Pet. App. C].

III. Summary

A. Two longstanding circuit splits persist regarding appellate review and Federal Rule of Evidence 615, which Rule requires the district court to sequester most witnesses upon request of a party. In two circuits, a defendant who shows a violation of this Rule may obtain reversal unless the government shows the violation to be harmless. *See United States v. Farnham*, 791 F.2d 331, 335 (4th Cir 1986); *United States v. Jackson*, 60 F.3d 128, 136–37 (2d Cir. 1995). But in at least five other

circuits, a defendant who shows a violation of the Rule must also show that the district court abused its discretion in permitting the testimony of the offending witness, *see Rivera Ortiz*, 2026 WL 1419387, at *21, & nn. 337, 339 (quoting *Cruz*, 957 F.3d at 571); *United States v. Gammon*, 961 F.2d 103, 105 (7th Cir.1992); *United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002); *United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018); *United States v. Graham*, 123 F.4th 1197, 1257 (11th Cir. 2024), notwithstanding the Rule’s mandatory language; *see* Fed. R. Evid. 615(a)(“At a party’s request, the court **must** order witnesses excluded from the courtroom so that they cannot hear other witnesses’ testimony.”)(emphasis added). Further, at least five circuits also invert the burden of persuasion on the question of prejudice, requiring defendants complaining of error to show harm, even when error is fully preserved. *See Rivera Ortiz*, 2026 WL 1419387, at *21, & n.339 (citing *Cruz*, 957 F.3d at 570); *Gov’t of Virgin Islands v. Edinborough*, 625 F.2d 472, 474 (3d Cir. 1980); *Gammon*, 961 F.2d at 105; *Kindle*, 925 F.2d at 276; *Graham*, 123 F.4th at 1258. This Court should grant certiorari to resolve these two closely related splits.

B. This Court should also grant certiorari to rectify the widespread misuse of a presumption that juries follow their instructions. The presumption has its place – it can accommodate the government’s legitimate interest in proving its case with the best available evidence, in conducting a joint trial, or the like. *See Richardson v. Marsh*, 481 U.S. 200 (1987); *Zafiro v. United States*, 506 U.S. 534, 540 (1993). But it has no place in harmless error analysis, because the government possesses no legitimate interest in defending a verdict that it obtained as a result of legal error. It

certainly has no place in a case like this, where the court of appeals *assumed* that the prejudicial effect of an error greatly outweighed any probative effect, notwithstanding a cautionary instruction.

REASONS FOR GRANTING THE PETITION

- I. The courts of appeals are divided on two closely related points regarding the appellate review of Rule 615 error. First, they disagree about whether district courts have the discretion to permit witnesses to testify who have violated the Rule. Second, they disagree about who bears the burden of persuasion to show prejudice, or lack of prejudice, when a defendant complains of such error on appeal. The position of the court below is wrong on the merits and seriously disruptive to the truth-seeking process. This increases the risk of erroneous verdicts, including the conviction of innocent persons.

A. The circuits are divided.

It is an ancient safeguard against false testimony, dating at least to the times documented in the Bible, *Frideres v. Schiltz*, 150 F.R.D. 153, 158 (S.D. Iowa 1993)(citing *Daniel* 13:36–64 (KJV)), and transmitted to our own legal system through the Germanic and English common law, *Geders v. United States*, 425 U.S. 80, 87 (1976)(citing 6 J. Wigmore, *Evidence* § 1837, p. 348 (3d ed., 1940)), to separate witnesses in the same case so that they cannot hear each other’s testimony. In the pre-Rules common law of this country, however, district courts enjoyed the discretion to sequester witnesses or not to do so, as they chose. 29 Wright & Miller, *Federal Practice & Procedure* § 6241. And when witnesses violated a sequestration order, the district courts could sanction the violation without excluding the witness. *See Holder v. United States*, 150 U.S. 91, 92 (1893).

This changed, however, with the enactment of Rule 615, which now provides, in clear and mandatory language, that “[a]t a party’s request, the court **must** order witnesses excluded from the courtroom so that they cannot hear other witnesses’ testimony.” Fed. R. Evid. 615(a)(emphasis added). This represents a deliberate

change from the common law. Wright & Miller, § 6241 (“Rule 615 departs from the common law in that, when a party requests exclusion of witnesses, such an order is mandatory rather than a matter of discretion.”); Advisory Committee Notes to Fed. R. Evid. 615, ¶1 (1975)(“The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position.”). The Rule contains four enumerated exceptions (witnesses that need not be excluded) – natural parties to the litigation, representatives of an organizational party, people shown to be essential to the presentation of the case, and other persons exempted by statute. *See* Fed. R. Evid. 615(a)(1-4). It does not suggest other exemptions.

The Rule operates to reduce the likelihood that juries will decide cases on the basis of false testimony. It does this in three different ways, as this Court explained:

The aim of imposing "the rule on witnesses," as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. Sequestering a witness over a recess called before testimony is completed serves a third purpose as well -- preventing improper attempts to influence the testimony in light of the testimony already given.

Geders, 425 U.S. 80, 87 (citing Wigmore, § 1838; F. Wharton, *Criminal Evidence* § 405 (C. Torcia ed., 1972))(internal citations omitted).

Many circuits have substantially undermined the critical purposes of the Rule, creating a serious risk of inaccurate verdicts and wrongful convictions. Their precedents flatly contradict those of other federal circuits, the plain language and purpose of the Rule, and this Court’s guidance, *see United States v. Olano*, 507 U.S.

725, 734-35 (1993), about the burden of persuasion on questions of prejudice. All of this is on full display in the opinion below.

1. The courts are divided about whether a defendant complaining on appeal of a violation of the Rule must also show that the district court abused its discretion in permitting an offending witness to testify.

First, in Circuit below, and in the Seventh, Eighth, Ninth, and Eleventh Circuits, district courts may allow witnesses to testify even after they have violated a sequestration order. *See United States v. Rivera Ortiz*, No. 24-11032, 2026 WL 1419387, at *21, & nn. 337, 339 (5th Cir. May 20, 2026)(unpublished)(“Even if the Rule has been violated, the trial court has discretion to allow the testimony thereafter.”)(quoting *Cruz v. Maverick County*, 957 F.3d 563, 571 (5th Cir. 2020)(citing *United States v. Wylie*, 919 F.2d 969, 976 (5th Cir. 1990), and *United States v. Ortega-Chavez*, 682 F.2d 1086, 1089 (5th Cir. 1982))); *United States v. Gammon*, 961 F.2d 103, 105 (7th Cir.1992)(“Absent evidence of prejudice, collusion, or willful violation, it was within the district court's sound discretion to allow [witness who violated sequestration order] to testify.”); *United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002)(“Sequestration of most witnesses is mandatory when requested, Fed.R.Evid. 615, but the district court is granted wide latitude in implementing sequestration orders ...”)(citing *United States v. Kindle*, 925 F.2d 272, 276 (8th Cir.1991)); *United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018)(court’s decision to permit no more than cross-examination as a “sanction” for violating the rule “was well within the district court's discretion”); *United States v. Graham*, 123 F.4th 1197, 1257 (11th Cir. 2024)(“A violation of the rule of sequestration does ‘not ...

require the automatic exclusion of testimony[.]”)(quoting *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978), *abrogated on other grounds by United States v. Bengivenga*, 845 F.2d 593, 595 (5th Cir. 1988)).

These courts review a district judge’s choice to excuse violations of the Rule only for “abuse of discretion.” *See Rivera Ortiz*, 2026 WL 1419387, at *21, & n. 339 (“To reverse a judgment based on a decision to include testimony that violated a sequestration order,’ this court requires a party to ‘demonstrate an abuse of discretion and “sufficient prejudice.””)(citing *Cruz*, 957 F.3d at 570 (citing *Wylie*, 919 F.2d at 976)); *Vallie*, 284 F.3d at 921 (“...the district court is granted wide latitude in implementing sequestration orders and the standard of review is abuse of discretion.”)(citing *Kindle*, 925 F.2d at 276).

This approach contradicts that of the Second and Fourth Circuits. Those courts explicitly reject the abuse of discretion standard and emphasize the mandatory language of the Rule. *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir 1986); *United States v. Jackson*, 60 F.3d 128, 136–37 (2d Cir. 1995)(agreeing with *Farnham*). When a defendant shows a violation of the Rule, these two courts proceed directly to the harmless error inquiry. *See Jackson*, 60 F.3d at 137 (explaining that when the defendant shows a violation of the Rule “a new trial is in order unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence.”); *Farnham*, 791 F.2d at 335 (proceeding from a finding of a violation of the Rule to harmless error). They do not

interpose a separate abuse of discretion inquiry before granting appellate relief. *See Jackson*, 60 F.3d at 137; *Farnham*, 791 F.2d at 335.

Panels of both the Fourth and Fifth Circuits have recognized the split. In *Farnham*, the Fourth Circuit held that the Fifth Circuit abuse of discretion standard “ignor[ed] the mandatory language of the rule.” *Farnham*, 791 F.2d at 335 (disagreeing with *United States v. Alvarado*, 647 F.2d 537, 540 (5th Cir.1981)). Subsequently, a panel of the Fifth Circuit said that *Farnham* was “neither controlling or persuasive, especially in light of its explicit rejection of the Fifth Circuit’s approach to Rule 615.” *United States v. Hickman*, 151 F.3d 446, 453–54 (5th Cir. 1998), *reh’g granted and opinion vacated*, 165 F.3d 1020 (5th Cir. 1999), *and on reh’g en banc*, 179 F.3d 230 (5th Cir. 1999)(aff’d by an equally divided court). This panel also recognized that its “strict prejudice requirement” under Rule 615 violation conflicted with the standard of the Fourth Circuit. *Id.* The *en banc* court vacated the *Hickman* panel opinion so that it could address an issue under the commerce clause, but this is beside the point. The fact remains that judges of both the Fourth and Fifth Circuits have found their approaches irreconcilable.

2. The courts disagree about who bears the burden of persuasion on prejudice when a criminal defendant shows a violation of Rule 615.

Second, the court below, in common with the Third, Seventh, Eighth, and Eleventh Circuits, requires criminal defendants complaining of a violation of the Rule to demonstrate prejudice before obtaining appellate relief. *See Rivera Ortiz*, 2026 WL 1419387, at *21, & n.339 (recounting that “[t]o reverse a judgment based on a decision to include testimony that violated a sequestration order,’ this court requires

a party to ‘demonstrate an abuse of discretion and ‘sufficient prejudice.’”)(citing *Cruz*, 957 F.3d at 570)(citing *Wylie*, 919 F.2d at 976)); *see also United States v. Green*, 324 F.3d 375, 380 (5th Cir. 2003)(“...we will reverse only if Green can demonstrate prejudice.”); *Gov't of Virgin Islands v. Edinborough*, 625 F.2d 472, 474 (3d Cir. 1980)(“Although we expect that the trial courts will comply with the requirements of Rule 615, we hold that in the absence of other circumstances showing reversal is appropriate, the failure to sequester witnesses is not, in itself, grounds for reversal unless defendant can show prejudice resulting from the failure to sequester.”); *Gammon*, 961 F.2d at 105 (requiring “evidence of prejudice” to defeat district court’s discretion to permit testimony in spite of the Rule); *Kindle*, 925 F.2d at 276 (“We will only reverse if evidence of clear prejudice indicates the trial court’s ruling was an abuse of discretion.”); *Graham*, 123 F.4th at 1258 (“...ordinarily a district court will not exclude a witness absent a showing of probable prejudice to the other side.”)(citing *Warren*, 578 F.2d at 1076 n.16).

This is diametrically opposed to the law of the Second, Fourth, Sixth, and Ninth Circuits. These courts have all explicitly placed the burden of persuasion regarding prejudice on the government when its witnesses testify in violation of Rule 615. *See Jackson*, 60 F.3d at 136 (“...the burden to demonstrate lack of prejudice, or harmless error, properly falls on the party that had opposed sequestration”); *Farnham*, 791 F.2d at 335 (warning that a “strict prejudice requirement” imposed on the complaining defendant, “would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process

and preserve the durability and acceptability of verdicts.”); *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991)(holding that “[t]here is no strict requirement that the defendant prove prejudice in a situation such as this,” and that the next step after finding a violation is to proceed to “the harmless error rule.”); *United States v. Brewer*, 947 F.2d 404, 411 (9th Cir. 1991)(“It is the law of this circuit that ‘when a court fails to comply with Rule 615, prejudice is presumed and reversal is required unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence.’”)(quoting *United States v. Ell*, 718 F.2d 291, 293–94 (9th Cir.1983)).

Unsurprisingly, this clear and direct circuit split is also judicially acknowledged. *Jackson*, 60 F.3d at 136 (“The circuits differ, however, as to who has the burden on the issue of prejudice.”).

3. The courts of appeals have taken opposite positions as to whether appellate relief should be “rare” when the defendant shows a violation of the Rule.

Because the Fifth Circuit has interposed difficult obstacles to appellate relief, *Rivera Ortiz*, 2026 WL 1419387, at *21, & n.339 (citing *Cruz*, 957 F.3d at 570)(citing *Wylie*, 919 F.2d at 976)), it has cautioned that “[i]n general “the failure of a witness to abide by the sequestration order rarely will require reversal,”” *id.* at *21, & n. 338 (quoting *Cruz*, 957 F.3d at 571)(quoting *Verdin v. Sea-Land Serv.*, No. 92-2833, 1993 WL 455645, at *4 (5th Cir. Oct. 25, 1993) (unpublished)). In direct contrast, the Second and Fourth Circuits have held that a violation of the Rule should result in a

reversal in all but “the exceptional case.” *Farnham*, 791 F.2d at 336; *accord Jackson*, 60 F.3d at 137. These positions, obviously, are directly contrary to each other.

B. The circuit splits merit this Court’s intervention.

This Court should not allow these divisions of authority to persist. As noted, they are clear and judicially acknowledged. See *Farnham*, 791 F.2d at 335; *Hickman*, 151 F.3d 446, 453–54; *Jackson*, 60 F.3d at 136. Also as noted, they are quite longstanding. The chief Fourth Circuit case, *Farnham*, acknowledged the split in 1986. And while *Farnham* and the Second Circuit’s chief case, *Jackson*, both issued some years ago, they still state the positions of the Second and Fourth Circuits. See *United States v. Teman*, 465 F. Supp. 3d 277, 324 (S.D.N.Y. 2020)(quoting *Jackson* for the proposition that “[t]he burden to demonstrate lack of prejudice, or harmless error’ from a Rule 615 violation ‘falls on the party that had opposed sequestration.”), *aff’d*, No. 21-1920-CR, 2023 WL 3882974 (2d Cir. June 8, 2023)); *United States v. Ali*, 991 F.3d 561, 567–68 (4th Cir. 2021)(citing *Farnham* and reiterating that “[w]hen a court has denied a request to remove a witness from the courtroom, we have not required the defendant to show prejudice but rather have applied the rule ‘strictly’ and vacated the conviction.”); *Kozlowski v. Hampton Sch. Bd.*, 77 F. App’x 133, 152–54 (4th Cir. 2003)(unpublished)(reaffirming *Farnham* and reiterating that while harmless error applies to violations of Rule 615, the Circuit will “presume prejudice ‘where it would be impossible for the defendant to prove that the [non-sequestered witness’s] testimony would have been different if he had not heard the first agent’s

testimony.” *Id.* at 153 (quoting *United States v. Harris*, 39 F.3d 1262, 1268 (4th Cir.1994)).

Of course, the decision below, which quotes settled and published law on all relevant points, also shows that the Fifth Circuit still adheres to a position contrary to the Second and Fourth. *See Rivera Ortiz*, 2026 WL 1419387, at *21, & nn. 337-339 (citing *Cruz*, 957 F.3d at 570, *Wylie*, 919 F.2d at 976, and *Ortega-Chavez*, 682 F.2d at 1089). In short, the division of authority is both longstanding and extant. It will not spontaneously resolve.

The positions of the court below, moreover, tend seriously to undermine the truth-seeking function of criminal trials, and accordingly increase the risk of inaccurate verdicts, including the conviction of innocent persons. “Witness sequestration (the exclusion of a witness from the courtroom prior to his testimony) prevents the witness from ‘adapt[ing] his testimony ... to victory rather than to veracity, so as to meet the necessities as laid open by prior’” testimony. *Villarreal v. Texas*, 607 U.S. 465, 476 (2026)(quoting 6 J. Wigmore, *Evidence* § 1869, p. 502 (3d ed. 1940), and citing *Perry v. Leeke*, 488 U.S. 272, 281–282 (1989)). This critical goal cannot be fully achieved in jurisdictions that offer no meaningful remedy for violations of the Rule.

Insofar as they require the defendant to prove prejudice, the Third, Fifth, Seventh, Eighth, and Eleventh Circuits demand the impossible in most cases. As the Fourth Circuit explained, “any defendant” objecting to a violation of the Rule “would find it almost impossible to sustain the burden of proving the negative inference that”

a second witness’s “testimony would have been different had he been sequestered.” *Farnham*, 791 F.2d at 335. For that reason, inverting the burden of establishing prejudice set forth in Rule 52(a) tends to “swallow a rule carefully designed to aid the truth-seeking process” *Id.*

Insofar as it recognizes an unbounded discretionary authority to permit testimony in violation of the Rule, the court below (and like jurisdictions) destroys the incentive for compliance. Or, at least, it destroys the incentive for compliance in the cases where it is most needed. Of course, a witness who desires to tailor his or her testimony to that of another witness cannot achieve that goal unless he or she testifies. The risk that the district court will choose to exclude the testimony as a matter of discretion may represent some deterrence. But to the witness who actually wishes to tailor his or her testimony, this risk may seem a tolerable one, and better than allowing the truth to come out. The only meaningful deterrent to a witness desperate or dishonest enough to change his or her testimony is to bar it entirely.

C. The positions of the court below are wrong on the merits.

The positions of the court below are unsupportable in light of the language and purpose of Rule 615, and in light of this Court’s guidance about the burden of persuasion when a party complains of error on appeal.

Federal Rule of Evidence 615 provides in clear, direct, and mandatory terms: “[a]t a party’s request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses’ testimony.” Fed. R. Evid. 615(a). It provides four exceptions: a party who is a natural person, a representative of a party that is

not a natural person, a witness whose presence is essential to the presentation of the case, or a witness exempted by statute. *See id.*

As noted, in many Circuits (the Third, Fifth, Seventh, Eighth, Ninth, and Eleventh) non-exempt witnesses can sometimes testify even if they have seen another witness's testimony. The district court's discretion to permit such testimony may turn on all manner of factors, which have never been exhaustively enumerated: whether the witness observed "substantive" parts of the trial, whether a party expected to use the observing witness, whether the witness or party acted willfully, and whether the injured party cross-examined about the violation. *See e.g. United States v. Posada-Rios*, 158 F.3d 832, 871 (5th Cir.1998); *Robertson*, 895 F.3d at 1216; *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir. 1991). And as noted, no defendant in the Third, Fifth, Seventh, Eighth or Eleventh may complain of a Rule violation without affirmative proof of "prejudice," which in practice appears to mean proof that the offending witness actually altered his or her testimony. *See Edinborough*, 625 F.2d at 474.

The effect of these holdings is to create an open-ended catch-all exception to the Rule, in addition to the four actually enumerated: a witness may observe the testimony of other witnesses and testify if, in the view of the district court, his or her doing so does not seem so bad. Thus, these courts have effectively transformed the Rule's mandatory language into a regime of discretion. This reverses the explicit policy choice made at the Rule's enactment, which altered the traditional common law. Wright & Miller, § 6241 ("Rule 615 departs from the common law in that, when

a party requests exclusion of witnesses, such an order is mandatory rather than a matter of discretion.”); Advisory Committee Notes to Fed. R. Evid. 615, ¶1 (1975)(“The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position.”). The judiciary enjoys no “[d]iscretionary power to disregard the considered limitations of the law it is charged with enforcing. *United States v. Payner*, 447 U.S. 727, 737 (1980); *see also Carlisle v. United States*, 517 U.S. 416, 428 (1996)(rejecting “any ‘inherent power’ to act in contravention of applicable Rules.”).

Defending the view that district courts may simply disregard violations of the Rule, the Eighth Circuit tried to “distinguish between a judge's failure to comply with a Rule 615 request and a party's violation of a Rule 615 order as in this case, with action on the latter committed to the sound discretion of the trial court.” *United States v. Collins*, 340 F.3d 672, 681 (8th Cir. 2003). But it is a strange Rule that compels district courts to issue orders no one need follow. In any case, the Rule does not merely tell the district court to order witnesses from the courtroom. Rather, it orders the court to do so “**so that they cannot hear other witness’s testimony.**” Fed. R. Evid. 615(a)(emphasis added). It thus directs courts not to issue a hollow order, but to achieve a certain goal – preventing witnesses from hearing each other’s testimony. Once a party or witness has violated the sequestration order, the court has but one way to achieve the goal -- to exclude the witness. If this remedy tends to deprive the jury or the court of critical testimony, the court can declare a mistrial. But cannot simply disregard a duly enacted Rule of Evidence.

Further, the position of the court below, in common with those courts that agree with it on the question of prejudice, defies the scheme laid out in Federal Rule of Criminal Procedure 52. As this Court explained in *Olano*:

When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called “harmless error” inquiry—to determine whether the error was prejudicial. Rule 52(b)¹ normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.

This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error “does not affect substantial rights” (emphasis added), Rule 52(b) authorizes no remedy unless the error does “affect substantial rights.”

Olano, 507 U.S. at 734. By imposing a burden of prejudice on the appellant in cases of preserved error, the court below (and like jurisdictions) disregards these distinctions between preserved and unpreserved error. It thus undermines a key incentive to lodge timely objection.

D. The present case is an ideal vehicle to resolve the conflicts.

This Court should use the instant case to resolve these longstanding circuit splits. Each of the propositions on which the courts of appeals have disagreed featured explicitly in the opinion below: 1) who bears the burden of persuasion as to prejudice when a party or witness violates Rule 615, 2) whether district courts enjoy the discretion to disregard violations of the Rule, and 3) whether reversals for the violation of the Rule should be “rare.” *See Rivera Ortiz*, 2026 WL 1419387, at *21.

¹ As noted, Rule 52(b) covers cases where a party seeks relief without an objection.

Because the court of appeals passed on all of the divisive issues, the case presents an opportunity to resolve them in one sitting.

The matters that have divided the courts of appeals are likely outcome-determinative. The court of appeals explicitly found that the government violated the Rule, or, at least, held that the district court made such a finding. *See id.*, at *22. In the Second and Fourth Circuits, the case would have proceeded to harmless error analysis, with the government shouldering the burden of persuasion.

If the government had been compelled to prove the error harmless, rather than relying on the inverted burden of persuasion, the conviction could not have stood. Nobody, neither the government nor the court below, has ever suggested that the government could have obtained its verdict without the challenged expert testimony. Each party offered an expert witness to interpret the medical evidence and provide an opinion on the cause of the patients' medical emergencies. *See* (ROA.2611-2639); (ROA.2388, 2406, 2413, 2419, 2470). The government expert reviewed the relevant cases and excluded pre-existing conditions and surgical error as the root cause. *See* (ROA.2388, 2406, 2413, 2419, 2470). Rather, she testified that the surgical emergencies most likely resulted from the intentional intravenous injection of local anesthesia. *See* (ROA.2396, 2406, 2413-2414, 2419). That conclusion, coming from a highly credentialed expert, was essential to the prosecution's case. Indeed, in answering Petitioner's challenge to the sufficiency of its highly circumstantial case, the government repeatedly cited the expert's testimony to resolve doubts about

whether each patient suffered poisoning. *See* (Appellee’s Brief, at 23, 24, 24, 24, 25, 25, 27, 38, 42, 42, 46, 47, 49, 49, 51, 52).

The Fifth Circuit held that the government *could have* sought and received an exemption for the expert under the Rule. *See Rivera Ortiz*, 2026 WL 1419387, at *23. In the view of the court below, experts should generally be permitted to view trial testimony so that they may use it to form their opinions. *Id.* (arguing that “...the reason experts are often exempted from the Rule is because they are *supposed* to opine based on the facts in the case, and sometimes those facts come out at trial.”)(emphasis in original). But this is beside the point. The government sought no such exemption at any point in the proceedings, and the witness’s presence violated the court order invoking Rule 615. Whatever the significance of the witness’s possible, unsought, exemption under the Fifth Circuit’s prejudice analysis, it is not relevant to a harmless error analysis. Rule 52(a), which sets forth the harmless error inquiry, asks whether errors “have affected the outcome of the district court proceedings.” *Olano*, 507 U.S. at 734. It does not ask whether the party defending the judgment might have avoided the error.

In any case, the government here cannot show that the jury would have convicted if it had sought an exemption to the Rule for its expert. Perhaps the government could have obtained an objection for its expert,² but if it had done so, the

² Or perhaps not. *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1374 (5th Cir. 198)(agreeing that rule 703 does not furnish an automatic basis for exempting an expert from sequestration under rule 615); *Morvant v. Construction Aggregates Corp.* 570 F.2d 626, 629–630 (6th Cir. 1978)(declining to find an automatic expert exception because “had the framers intended it, they would have said so, or added a fourth exception.”); *United States v. Seschillie*, 310 F.3d

defense would have surely sought an exemption for its own expert. This would have eliminated a critical line of government cross-examination used to discredit the defense expert. Specifically, the government repeatedly discredited the defense expert because she, unlike her counterpart, had complied with the Rule:

Q. But *you didn't hear the testimony in court* that this facility had never had a patient die at the facility. You didn't -- did you -- did you know that?

(ROA.2640)(emphasis added). And:

Q. Okay. So you didn't -- *you didn't hear any of the testimony* about what happened during these incidents?

A. No.

(ROA.2657)(emphasis added). And:

Q. (BY MR. RUNKLE) So *you didn't hear the testimony here in court* that as soon as the IV bag was changed she started experiencing extreme hypertension and pulmonary edema? Did you hear that testimony?

A. I did not.

(ROA.2673)(emphasis added). And:

Q. *And the testimony that was heard in this court ... Are you aware of that?*

A. I didn't hear any of the testimony that was given in court....

(ROA.2691)(emphasis added).

However the case is analyzed, there is a very good chance that Petitioner would have prevailed if his case had arisen in a different circuit. Instead, he is subject to an effective life sentence.

1208, 1213 (9th Cir. 2002)(“We decline to conclude, however, that an expert witness will always meet the criteria of Rule 615(3).”).

II. This Court should correct the widespread misuse of the presumption that juries follow their instructions.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court affirmed the admission of a co-defendant's confession in a joint trial. In doing so, it relied on a jury instruction that forbade the confession's use against the non-confessing co-defendant. This Court presumed that the jury had followed this instruction, offering the following explanation:

The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.

Richardson, 481 U.S. at 211 (underlining added).

The federal courts of appeals have plucked out the underlined portion of this passage – “juries are presumed to follow their instructions” – and used it without regard to the surrounding caveats or the context of the case. The present case illustrates the extent of this problem, and provides an ideal vehicle to correct it.

As this Court noted in *Richardson*, it has allowed courts to admit prejudicial evidence against a criminal defendant, so long as the evidence had some valid purpose, and so long as the jury received instructions about its proper and improper uses. *See Richardson*, 481 U.S. at 206. This Court in *Richardson* referenced an “almost invariable assumption of the law that jurors follow their instructions,” applied in a number of contexts: use of an un*Mirandized* confession to assess the credibility of a testifying defendant, *id.* (citing *Harris v. New York*, 401 U.S. 222 (1971)), use of a defendant's criminal record to determine applicability of sentence

enhancement, *id.* (citing *Spencer v. Texas*, 385 U.S. 554 (1967)), use of an accomplice's confession to rebut defendant's claim of coercion in his own confession, *id.* (citing *Tennessee v. Street*, 471 U.S. 409, 414–416 (1985), introduction of eye-witness identification in front of jury before defendant has had a chance to explore bases for suppression, *id.* (citing *Watkins v. Sowders*, 449 U.S. 341, 347 (1981)), and use of unlawfully seized physical evidence to assess defendant's credibility, *id.* (citing *Walder v. United States*, 347 U.S. 62 (1954)).

These examples generally involve the admissibility of evidence, and a particular kind of evidence at that: evidence that carries both important probative value and a risk of improper use. As *Richardson* noted, this Court has generally resolved that dilemma in favor of the admissibility of evidence, so long as the jury is given a limiting instruction to cabin the use of the dual purpose evidence. *See Richardson*, 481 U.S. at 206. But as it also noted, this does not necessarily flow from the Court's confidence that juries *actually* follow the limiting instruction. *See id.* Rather, it settles on the cautionary instruction as a compromise between the prosecution's right to prove its case and the defendant's right to be tried without the influence of improper considerations. *See id.*

Richardson, moreover, recognizes that the presumption cannot be applied unless it is *factually plausible* in the context of the case. In *Richardson*, the prosecution offered a redacted confession that omitted any reference to the defendant. *See Richardson*, 481 U.S. at 203-04. In that specific context, the Court thought the presumption. *See id.* at 211. It contrasted the case with *Bruton v. United States*, 391

U. S. 123 (1968), where this Court considered an unredacted confession directly implicating a co-defendant in the charged offense. *See id.* at 201-02. *Bruton* cautioned that:

there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Id.

These limitations on the presumption recognized in *Richardson* have mostly gone by the wayside. Very often, *Richardson* is cited, or even quoted, for the proposition that juries are presumed to follow their instructions, without any consideration of the surrounding caveats and limitations. *United States v. Sanchez*, No. 25-3533, 2026 WL 1865446, at *4 (6th Cir. June 29, 2026)(unpublished)(“...we presume that juries follow appropriate limiting instructions.”)(citing *Richardson*, 481 U.S. at 211); *Rivera Ortiz*, 2026 WL 1419387, at *20 (“The Supreme Court has stated that ‘juries are presumed to follow their instructions,’”)(quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993)(citing *Richardson*, 481 U.S. at 211))(underlining added); *United States v. Vanegas*, No. 23-50046, 2024 WL 3565268, at *1 (9th Cir. July 29, 2024)(unpublished)(“Vanegas did not rebut the presumption that the jury followed this instruction.”)(citing *Marsh*, 481 U.S. at 211); *United States v. Carter*, No. 22-3395, 2024 WL 195475, at *6 (3d Cir. Jan. 18, 2024)(unpublished)(“By limiting the purpose for which the jury could consider the evidence, and because we presume jurors follow the Court's instructions, the clear and specific limiting instruction minimized any unfair prejudice from the recording.”)(internal citation omitted)(citing

Richardson, 481 U.S. at 211); *United States v. White*, 848 F. App'x 830, 841 (11th Cir. 2021)(unpublished)(quoting *Richardson* for the proposition that “[J]uries are presumed to follow their instructions....”)(**brackets and elision in** original, underlining added); *Johnson v. Carpenter*, 918 F.3d 895, 908 (10th Cir. 2019)(in capital case, quoting *Richardson* for the proposition that “courts hold an ‘almost invariable assumption of the law that jurors follow their instructions’”(underlining added); *United States v. Council*, 77 F.4th 240, 262 (4th Cir. 2023)(“Because ‘juries are presumed to follow their instructions,’ we must assume the jury understood it could ‘only consider the impacts of the victims’ deaths on family, friends and coworkers’ rather than the broader community.”)(internal citation omitted)(quoting *Richardson*, 481 U.S. at 211)(underlining added); *United States v. Parshall*, 600 F. App'x 485, 489 (8th Cir. 2015)(unpublished)(“The jury is presumed to have followed these instructions.”)(citing *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson*, 481 U.S. at 211)).

This loss of context has led courts of appeals to extend the presumption to the harmless error context, where it would have no logical application, in light of the full rationale set forth in *Richardson*. See *United States v. George*, 761 F.3d 42, 56–57 (1st Cir. 2014); *Rivera Ortiz*, 2026 WL 1419387, at *20; *United States v. Dorsey*, 677 F.3d 944, 955 (9th Cir. 2012); *United States v. Collins*, 575 F.3d 1069, 1074 (10th Cir. 2009); *United States v. Jones*, 847 F. App'x 830, 835–36 (11th Cir. 2021)(unpublished). *Richardson* uses the presumption to accommodate a legitimate prosecutorial interest in admitting probative evidence. See *Richardson*, 481 U.S. at 211. But when the court

has already found (or assumed) an evidentiary error, there is no legitimate governmental interest to accommodate. The government has a legitimate interest in admitting probative evidence, even if an uninstructed jury might use it improperly. It has no legitimate interest in defending a conviction that was *in fact* obtained by evidence that should have been excluded. *See Berger v. United States*, 295 U.S. 78 (1935).

The harmless error inquiry asks whether the jury would have *actually* convicted in the absence of an error – this inquiry is grounded in a factual appraisal of the evidence’s impact on the jury. It is not compatible with a legal *fiction* designed to allow the prosecution to prove its case.

The present case is emblematic of the presumption’s misuse. The court below took the phrase – “juries are presumed to follow their instructions” – from this Court’s caselaw, without acknowledging the limitations this Court has placed on it. *Rivera Ortiz*, 2026 WL 1419387, at *20 (quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993)(citing *Richardson*, 481 U.S. at 211)). The opinion gives no consideration to the Court’s further caution in *Richardson* that the presumption is “rooted less in the absolute certitude that [it] is true,” than in the need for practical accommodation of the prosecution’s need to prove its case with the evidence available. *See id.* And it gives no consideration at all to the magnitude of prejudice the cautionary instructions were intended to contain, as required by *Bruton* and like cases. *See id.*

The result is something close to nonsense. The court below assumed that the district court erred under Federal Rules of Evidence 403 and 404 in admitting

evidence that Petitioner murdered Dr. MK. *See id.*, at *20 (“Assuming without deciding that the district court erred in admitting the Dr. MK evidence under Rules 104, 403, and 404, we address whether the error was harmful.”). But if the court in fact erred under these provisions, then it follows that the prejudicial impact of the evidence substantially outweighed its probative value, Fed. R. Evid. 403, notwithstanding the limiting instruction, or that it had no valid probative value at all, Fed. R. Evid. 404(a). The assumption of error in such a case necessarily conflicts with the presumption that the jury could be trusted to follow a cautionary instruction in the context of the case.

Further, if there is anything at all left of *Bruton*’s exception to the presumption for cases involving highly prejudicial evidence, this case very obviously falls within it. The jury heard evidence of a brutal and senseless uncharged murder, delivered in the most prejudicial way possible. *See* (ROA.1718-1719). As the partial dissent concluded, no jury could be reliably expected to stand unmoved by this evidence and turn its attention to the chemistry of anesthesia or the logistics of loading IV bags into a warmer. *See Rivera Ortiz*, 2026 WL 1419387, at *28 (Higginson, J., dissenting in part)(“I cannot say that the grisly Dr. M.K. evidence—a brutal murder, recited with unimaginable anguish by a grieving widow who described his late wife’s horrible, bewildered final moments—was harmless in this close, entirely circumstantial case about medical tampering.”) The time has come to reiterate the limits on the presumption that juries follow their instructions, and this case is the ideal means to do so.

CONCLUSION

Petitioner asks this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 30th day of September, 2026.

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