No. 20-1240

In the Supreme Court of the United States

FRANCISCO JAVIER PALILLERO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to permit an expert defense witness, where petitioner disclosed the witness on the eve of trial, in violation of a court order under Federal Rule of Criminal Procedure 16, and where the court found that the expert's testimony would be cumulative.

RELATED PROCEEDINGS

U.S. District Court (D. N.M.):

United States v. *Palillero*, No. 18-cr-2311 (July 2, 2019)

U.S. Court of Appeals (10th Cir.):

United States v. *Palillero*, No. 19-2111 (Oct. 5, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is not published in the Federal Reporter but is reprinted at 829 Fed. Appx. 351.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was

convicted on one count of engaging in a sexual act on federal land with a person incapable of consenting, in violation of 18 U.S.C. 2242(2)(A) and (B) and 2246(2)(C). Pet. App. 29-30. He was sentenced to 121 months of imprisonment, to be followed by five years of supervised release. *Id.* at 31, 33. The court of appeals affirmed. *Id.* at 1-28.

1. Petitioner sexually assaulted his neighbor, Ashley Napier, while she was sleeping after a neighborhood barbeque. On April 27, 2018, Napier and her fiancé, Adam Pratschler, had attended a barbeque hosted by petitioner and his wife, who lived next to them on Hollman Air Force Base in New Mexico. Pet. App. 2. All four of them consumed alcohol. 4 C.A. App. 205-211. At approximately 10 p.m., Napier walked home with Pratschler, took her two dogs to bed with her, closed the bedroom door, and fell asleep. Pet. App. 3. Pratschler returned to the barbeque at petitioner's home. *Ibid.*

In the early morning hours of April 28, another neighbor attending the barbeque—Lieutenant Douglas Cole—walked Pratschler home because he was intoxicated. Pet. App. 3; 5 C.A. App. 37. Petitioner went with them, and the three men talked in the living room of Pratschler's and Napier's residence for 30 or 45 minutes. Pet. App. 3; 5 C.A. App. 38. During that time, Lieutenant Cole noticed petitioner disappear at least twice toward the back of the house where Pratschler's and Napier's bedroom was located. Pet. App. 3; 5 C.A. App. 39-40.

Napier initially awoke at approximately 2:16 a.m., when she heard Pratschler sounding upset and texted him to "[g]o to sleep." Pet. App. 3 (citation omitted; brackets in original). Sometime later, Napier awoke to the feeling of hands rubbing all over her body and

someone kissing her face. A hand slid under her underwear and between her legs; she felt pain as the hand rubbed her genitalia and a fingernail scraped her clitoris. *Id.* at 3-4. A finger then penetrated her vagina, at which time Napier became aware enough of what was occurring to push the hands away from her. *Id.* at 4. When Napier opened her eyes, she immediately saw the assailant was petitioner. 4 C.A. App. 219. Petitioner scurried out of the room and into the hallway, but soon came back in and told Napier not to "say anything." Pet. App. 4 (citation omitted).

Napier, however, texted Pratschler that "[petitioner] was just in here trying to finger me as I slept." Pet. App. 4 (citation omitted). Lieutenant Cole saw Pratschler exit the bathroom holding his phone and looking "very shaken up." *Ibid.* (citation omitted). Pratschler asked Lieutenant Cole to read the text message. *Ibid.* After Lieutenant Cole did so, he asked petitioner whether he had touched Napier. *Ibid.* Petitioner answered no, but Lieutenant Cole observed that he was not "making eye contact." *Ibid.* (citation omitted).

At that point, Napier put on a pair of pants and came out of the bedroom. Pet. App. 4. She saw petitioner leaning against a door at the other end of the hallway and then punched him in the face, screaming, "[y]ou were touching me when I slept." *Ibid.* (citation omitted). Napier then shoved petitioner to the ground, at which point Lieutenant Cole was able to separate the two. *Ibid.* Petitioner eventually left. *Ibid.*

After Lieutenant Cole reported the sexual assault to security forces on the base, Napier was interviewed first by investigators on the base and then by agents of the Federal Bureau of Investigation (FBI). Pet. App.

5-6. The two FBI agents did not notice any sign that Napier was intoxicated at that point. *Id.* at 6. The agents drove Napier back to her home, dusted for fingerprints, and, with her consent, searched her cell phone. *Ibid.* At approximately 11:45 a.m. that morning, the agents sent Napier to a clinic for a Sexual Assault Nurse Exam (SANE). *Ibid.* As part of that exam, a nurse collected DNA by swabbing Napier's face, lips, teeth, fingers, nails, knuckles, left arm, left hip, mons pubis, and labia majora. The nurse also collected Napier's underwear. *Ibid.*

Petitioner was arrested later that day. Pet. App. 7. Agents collected a DNA sample from a water bottle from which petitioner had been drinking during the drive to the jail. *Ibid.* They later took a second DNA sample in the presence of petitioner's counsel. *Id.* at 7, 21-22. In petitioner's first call from jail, he told his wife that he had been in Napier's bedroom, but just to wake her up. *Id.* at 7. His wife responded that he should not say anything. 4 C.A. App. 157.

2. a. A grand jury in the District of New Mexico indicted petitioner on one count of knowingly engaging in a sexual act within special or maritime federal jurisdiction with a person incapable of appraising the nature of the conduct or physically incapable of declining, in violation of 18 U.S.C. 2242(2)(A) and (B) and 2246(2)(C). Pet. App. 9. After granting petitioner's request for a continuance, the district court scheduled the trial to begin on Monday, December 3, 2018. D. Ct. Doc. 32, at 2 (Aug. 21, 2018). The court set additional dates for the parties to make the pretrial disclosures required under Federal Rule of Criminal Procedure 16, including a deadline of November 14, 2018 for the parties to provide summaries under Rule 16(a)(1)(G) and (b)(1)(C) of the

testimony of any expert witnesses. Pet. App. 9; 3 C.A. App. 58-59.

a. In advance of the November 14 deadline, the government twice produced to petitioner DNA lab reports with the results of the swabs taken from Napier's body and underwear. Gov't Supp. C.A. App. 58-59. Both lab reports stated that FBI analyst Jerrilyn Conway had conducted the analysis, and the first of the lab reports included a copy of Conway's curriculum vitae. *Ibid.* On November 7, 2018, the day before producing the second of the two lab reports, the government filed a list of anticipated trial witnesses that included Conway. Pet. App. 9. And on November 19, 2018, the government docketed a notice under Rule 16(a)(1)(G) documenting its intent to introduce expert testimony by Conway, listing her qualifications, and stating the nature of her anticipated testimony. *Ibid.*; Gov't Supp. C.A. App. 28-31.

Petitioner moved to exclude Conway's expert testimony, noting that the government had given notice of that testimony five days after the November 14 deadline. Gov't Supp. C.A. App. 32-34. The government explained in response that its notice was delayed because it had not received one of Conway's reports until November 16 and that petitioner would suffer no prejudice because the government's prior disclosures had both put him on notice that Conway would testify and made clear the substance of her testimony. Pet. App. 9. After hearing the government's explanation, the district court "excused" the government's late filing and permitted Conway to testify as a DNA expert. *Id.* at 9-10. The court also suggested that it would allow petitioner to call a rebuttal expert if the government were given an adequate "opportunity to interview or voir dire th[at] person." Gov't Supp. C.A. App. 69.

b. On the evening of Sunday, December 2, 2018—the evening before the trial was to begin—petitioner filed a notice of intent to call Michael Spence as a rebuttal DNA expert. Pet. App. 62-66. The notice stated that Spence had "testified as an expert in the area of forensic biology/DNA examinations on numerous occasions" and that he would offer testimony on "the topics outlined in" the government's November 18 notice, which petitioner reproduced verbatim. *Id.* at 63.

The government objected to the late-disclosed testimony, and the district court addressed that testimony at the end of the first trial day. Pet. App. 10-11. After seeking more details from petitioner on the content of Spence's testimony and any earlier efforts defense counsel had made to secure expert testimony, the district court sustained the government's objection and barred Spence from testifying. *Ibid.* The court found petitioner's notice of a rebuttal expert to be both untimely and inadequate to give the government a chance to respond. *Id.* at 11. The court further found that petitioner would not be "prejudiced in the sense that" the government's expert would herself be testifying that the lab results indicated "that no DNA from [petitioner] was found on any of the samples that were taken from * * * the alleged victim in this case." 4 C.A. App. 263.

The next day, the government's DNA expert (Conway) testified as described in the pre-trial notice. Pet. App. 7-9. Specifically, Conway testified that DNA testing had excluded petitioner as a possible contributor of DNA to any item analyzed for comparison except for an outer portion of Napier's underwear, as to which the analysis was inconclusive. *Id.* at 8. Conway elaborated that the inconclusive sample contained a low level mixture of DNA from at least two males and that the

amount of DNA present in it was so low that it could have been the result of secondary transfer or even just going through the washing machine. *Ibid.*; 5 C.A. App. 172-173. Conway testified that the DNA results did not "tell us anything either way" about whether petitioner had sexually assaulted Napier and that they did not preclude Napier's account of the assault. Pet. App. 8 (citation omitted); 5 C.A. App. 175. Conway further stated that, given the events that took place in the ten hours between the assault and the collection of the DNA, it did not surprise her that none of petitioner's DNA would be found. Pet. App. 8-9; 5 C.A. App. 175.

c. After the government had rested its case, petitioner filed a renewed notice of intent to call Spence as a rebuttal expert. Pet. App. 11, 67-77. The renewed notice tracked the filing that petitioner had made the evening before the trial but also appended a three-page report from Spence that reviewed the FBI lab results and stated his conclusion that "[t]he forensic biology/DNA results from these eight evidence items provide no scientific support for the allegations associated with this case investigation." *Id.* at 77.

The government objected on the grounds that the renewed notice was untimely and that Spence's testimony would be cumulative of Conway's recently completed testimony. Pet. App. 12. The district court engaged petitioner's counsel in a colloquy to determine what would be new in Spence's testimony. *Ibid.* Defense counsel initially stated that he expected Spence to testify to something new because Spence would discuss "some peer-review[ed] articles," which was "definitely new." *Ibid.* (citation omitted). But when the court observed that the renewed notice regarding the expert testimony did not in fact mention any peer-reviewed articles,

defense counsel stated that he did not "know what all [Spence's] going to testify to," and that he thought it "would be something new," but that he could not tell the court "what that is." *Ibid.* (citations omitted). Following the colloquy, the district court excluded Spence's testimony, citing both the "timing" of the notice and the court's finding that the testimony would be "cumulative" of Conway's. *Ibid.*; 5 C.A. App. 212-213.

Petitioner emphasized in his closing argument that "[n]ot one speck, fleck, or cell of [his] DNA" was found on Napier, and he discussed Conway's testimony at length. 6 C.A. App. 49; see *id.* at 49-52. The jury, however, found petitioner guilty. Pet. App. 13. The district court sentenced him to 121 months of imprisonment, to be followed by five years of supervised release. *Ibid.*

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-28. As relevant here, petitioner argued that the district court had "abus[ed] its discretion in excluding [his] DNA expert." Pet. C.A. Br. 42. Petitioner cited circuit precedent setting forth factors to be considered in reviewing a district court's exclusion of testimony under Federal Rule of Criminal Procedure 16(d), Pet. C.A. Br. 42, and he contended that the court had acted "capriciously and arbitrarily by excluding" Spence's rebuttal testimony, *id.* at 45. See also Pet. C.A. Reply Br. 4-6. Petitioner did not, however, make any constitutional argument. He neither mentioned the right to compulsory process under the Sixth Amendment nor urged that the right limited the district court's exclusion authority to cases where a defendant has willfully violated a pretrial discovery order.

The court of appeals upheld "the district court's decision to exclude Dr. Spence's testimony due to its untimely disclosure and inadequacy." Pet. App. 19. The

court first found "no doubt that [petitioner] failed to comply" with the pre-trial disclosure requirements of Rule 16, where he gave notice of Spence's rebuttal expert testimony "the day before trial" and weeks after the November 14 deadline, and where the notice "provided only a vague statement of the expected testimony that lacked the bases and reasons for Mr. Spence's opinions and his qualifications." *Id.* at 20.

The court of appeals then reviewed the decision to exclude Spence's testimony in light of three factors—on which petitioner's own briefing relied—that its precedents had instructed district courts to consider "when contemplating a discovery sanction in a criminal case: '(1) the reason for the delay in disclosing the witness; (2) whether the delay prejudiced the other party; and (3) the feasibility of curing any prejudice with a continuance.'" Pet. App. 21 (quoting *United States* v. *Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001), cert. denied, 535 U.S. 978 (2002)). The court found petitioner's reasons for the delay to be "wholly inadequate," observing that petitioner's counsel "should have known from the start that DNA would play a role in this case" and that the government's pre-trial disclosures further "put him on notice of the significance of the DNA evidence." *Id.* at 21-22. The court of appeals also agreed with the district court that petitioner's "inadequate and late notice prejudiced the [government] by denying it the chance to prepare for Dr. Spence's testimony." *Id.* at 23. And, although noting that the district court had not expressly discussed the possibility of a continuance, the court of appeals explained that a continuance was not feasible here because the Air Force had transported an important government witness (Lieutenant Cole) "from

Japan to New Mexico so he could testify at trial." *Id.* at 24.

ARGUMENT

Petitioner contends (Pet. 13-26) that the district court's exclusion of his proposed expert testimony violated his Sixth Amendment right to compulsory process and that this Court's review is warranted to resolve a circuit conflict over whether a trial court may, consistent with the Sixth Amendment, exclude a defense witness as a sanction for a defendant's violation of a discovery order without first finding that the violation was "willful." The court of appeals, however, correctly determined in an unpublished opinion that the district court did not abuse its discretion in excluding petitioner's proposed expert witness after petitioner violated the court's order regarding expert disclosures and also failed to explain why the expert's testimony would not be cumulative. This case presents no occasion to resolve petitioner's Sixth Amendment challenge because it was neither pressed nor passed upon below, and this Court recently denied a petition for a writ of certiorari asserting the same circuit conflict that petitioner claims, see *Moreno Ornelas* v. *United States*, 139 S. Ct. 2638 (2019) (No. 18-7599); see also *Nichols* v. *United States*, 528 U.S. 934 (1999) (No. 99-5063). The same result is especially appropriate here because petitioner cannot satisfy the plain-error standard that would govern review of his constitutional challenge.

1. The court of appeals correctly determined (Pet. App. 19-24) that the district court acted within its discretion in enforcing its pretrial deadlines for Rule 16 expert disclosures by excluding petitioner's proffered expert witness.

a. "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citations and internal quotation marks omitted), including through the Sixth Amendment right "to have compulsory process for obtaining witnesses," U.S. Const. Amend VI. But a "defendant's right to present relevant evidence is not unlimited." *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). Rather, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and "[s]uch rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Ibid.* (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 56 (1987)); see *Holmes*, 547 U.S. at 326-327.

The specific rule at issue here is Federal Rule of Criminal Procedure 16. Under Rule 16(a)(1)(G), the government "must give to the defendant a written summary of any [expert] testimony that the government intends to use * * * during its case-in-chief at trial," but only if the defendant requests such a summary. If the defendant makes such a request, then the government is entitled to receive, upon request, a similar summary from the defendant of "any [expert] testimony that the defendant intends to use * * * as evidence at trial." Fed. R. Crim. P. 16(b)(1)(C). In either case, the summary "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G) and (b)(1)(C). Rule 16 also specifies that, "[i]f a party fails to comply with this rule, the court may * * * prohibit that party from

introducing the undisclosed evidence." Fed. R. Crim. P. 16(d)(2)(C).

Although this Court has not previously considered a Sixth Amendment challenge to the application of Rule 16(b)(1)(C) itself, its decision in *Taylor* v. *Illinois*, 484 U.S. 400 (1988), found the enforcement of an analogous pretrial disclosure requirement to be consistent with the Sixth Amendment. In particular, the Court in *Taylor* upheld a state court's order precluding the defendant from calling a witness as a sanction for the defendant's failure to comply with a state rule requiring defendants to produce a list of potential witnesses to the government upon request. *Id.* at 401-403 & n.2. The Court explained that "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments," *id.* at 410-411, and that rules "provid[ing] for pretrial discovery of an opponent's witnesses" serve the "broad[] public interest in a full and truthful disclosure of critical facts" at a criminal trial, *id.* at 411-412. The Court emphasized that precluding the defendant from presenting evidence may be "an entirely proper method of assuring compliance" with such rules. *Id.* at 412 (quoting *United States* v. *Nobles*, 422 U.S. 225, 241 (1975)).

The Court has also recognized that, for the adversarial system to function properly, criminal discovery cannot be "a one-way street." *Nobles*, 422 U.S. at 233 (upholding the exclusion of a defense investigator after the defendant refused to disclose the investigator's report) (citation omitted). Accordingly, this Court has affirmed the application of rules requiring defendants to disclose a witness's prior statements before trial, *ibid.*, to notice an alibi defense, *Williams* v. *Florida*, 399 U.S. 78, 84-86

(1970), and to comply with rape-shield rules, *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991).

b. The district court in this case reasonably exercised its authority under Rule 16 to exclude petitioner's proposed expert testimony, which petitioner disclosed belatedly—and inadequately—on the eve of trial. Pet. App. 19-24. In August 2018, the district court had set pretrial disclosure deadlines when it granted a joint motion to continue the trial. D. Ct. Doc. 32, at 2. Under that schedule, as later modified to "accommodate" the travel schedule of petitioner's counsel, 3 C.A. App. 58, the parties were required to disclose the reports of their expert witnesses by November 14, 2018, just under three weeks before the trial date, see Pet. App. 9. Yet petitioner first disclosed his intent to call Spence as a rebuttal witness on Sunday December 2, the evening before the trial. *Id.* at 10. The disclosure itself, moreover, provided scant information about Spence's qualifications and planned testimony. *Ibid.*; see *id.* at 63 (stating without elaboration that Spence had "testified as an expert in the area of forensic biology/DNA examinations on numerous occasions"). And even after supplementing the disclosure two days later, petitioner's counsel could not tell the government or the district court what Spence would "testify to" or why his testimony would not be cumulative. *Id.* at 12 (citation omitted).

The court of appeals correctly found no abuse of discretion in the district court's exclusion of the late-proffered testimony in those circumstances. As the court of appeals recognized, petitioner's reasons for his eve-of-trial disclosure were "wholly inadequate." Pet. App. 21. In particular, while petitioner points to the government's own late notice, he overlooks that the government's other timely pretrial disclosures alerted

petitioner to the identity of its expert and the nature of her testimony. See p. 5, *supra*. He also disregards the court of appeals' determination that petitioner's counsel "should have known from the start that DNA would play a role in this case, given that he was present when detectives swabbed [petitioner]." Pet. App. 21-22. The tardiness of petitioner's notice—combined with its inadequacy —also "prejudiced" the government "by denying it the chance to prepare for Dr. Spence's testimony." *Id.* at 23. And petitioner's alternative suggestion of a continuance would have created problems of its own because, as the court of appeals explained, a key government witness (Lieutenant Cole) had been sent by the Air Force "from Japan to New Mexico so he could testify at trial" and would have had to "make an extra trip across the Pacific at some future date" had the trial been delayed. *Id.* at 24.

c. Petitioner contends (Pet. 13-14, 22-26) that the district court erred in excluding his proposed expert without first finding that his discovery violation was "willful." That contention—which petitioner raises for the first time in this Court—does not warrant further review.

As an initial matter, petitioner's constitutional argument was "not raised or resolved in the lower courts." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (brackets and citation omitted). To the contrary, petitioner's briefs in the court of appeals never mentioned the Sixth Amendment specifically or grounded his challenge in the Constitution more generally. See p. 8, *supra*. They instead cited circuit precedent listing three factors that courts should consider "when contemplating a discovery sanction in a criminal case" under Federal Rule of Criminal Procedure 16. Pet. App. 21. The

court of appeals' unpublished opinion accordingly did not address any constitutional question or discuss the decisions of this Court, such as *Taylor*, *supra*, on which petitioner now relies. This Court's "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"). No reason exists for deviating from that rule in this case.

In any event, this Court's decisions do not impose the willful-violation requirement that petitioner urges. In urging such a narrow rule, petitioner attempts to convert the particular facts of *Taylor* into a general constitutional limitation on the application of procedural rules to criminal defendants—a limitation that *Taylor* itself expressly declined to impose.

The state court in *Taylor* had found that the particular discovery violation at issue there was "both willful and blatant." 484 U.S. at 416; see *id.* at 405. Addressing the facts before it, this Court observed that a "willful" violation of a pretrial obligation to disclose a witness, or a violation "motivated by a desire to obtain a tactical advantage," would "entirely" justify a trial judge in "exclud[ing] the witness' testimony." *Id.* at 415. But the Court declined to "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* at 414.

Here, Rule 16 authorizes a district court to "prohibit [a] party from introducing * * * undisclosed evidence" as a means of addressing the party's failure to comply with Rule 16 disclosure obligations. Fed. R. Crim. P.

16(d)(2)(C). And it permissibly leaves the selection of an appropriate sanction in a particular case to the sound discretion of the district court, without limiting the exercise of that discretion to "willful" violations of discovery orders. See *ibid.* The district court's exercise of its discretion on the facts of this case was appropriate and, in any event, is the sort of factbound determination that does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so because the district court did not rest its ultimate exclusion of petitioner's witness only on the discovery violation, but also on the fact that the testimony would be "cumulative" of the testimony of the government's DNA expert. Pet. App. 12.

2. Petitioner contends (Pet. 16-17) that the courts of appeals are divided about whether a trial court may preclude a defense witness from testifying as a sanction for the defendant's violation of a pretrial disclosure obligation, without first finding that the violation was "willful." But the existence or extent of any actual conflict that would suggest different results in cases similar to this one is far from clear.

The courts of appeals routinely recognize that district courts have discretion to exclude expert testimony as a sanction for a defendant's failure to provide the disclosures required by Rule 16(b)(1)(C)—including in cases in which the district court did not first find that the failure was willful. See *United States* v. *Lundy*, 676 F.3d 444, 451 (5th Cir. 2012); *United States* v. *Hoffecker*, 530 F.3d 137, 185-188 (3d Cir.), cert. denied, 555 U.S. 1049 (2008); *United States* v. *Petrie*, 302 F.3d 1280, 1288-1289 (11th Cir. 2002), cert. denied, 538 U.S. 971 (2003); cf. *United States* v. *Johnson*, 970 F.2d 907, 911

(D.C. Cir. 1992) (explaining, in a case involving the exclusion of an undisclosed alibi, that *Taylor* does not "establish[] 'bad faith' as an absolute condition for exclusion"); *Short* v. *Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006) (similar; exclusion of an undisclosed fact witness), cert. denied, 552 U.S. 848 (2007). As the D.C. Circuit has explained, "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors." *Johnson*, 970 F.2d at 911; cf. *Tyson* v. *Trigg*, 50 F.3d 436, 445 (7th Cir. 1995) ("The rules are empty if they cannot be enforced, and weak if they can be enforced only against willful violators."), cert. denied, 516 U.S. 1041 (1996).

Petitioner is incorrect in asserting (Pet. 17) that three courts of appeals have adopted a contrary rule. His cited decisions simply recognize that exclusion should be ordered sparingly; they do not adopt the bright-line rule that petitioner advocates. In *Bowling* v. *Vose*, 3 F.3d 559 (1993), cert. denied, 510 U.S. 1185 (1994), for example, the First Circuit concluded that exclusion was not warranted on the facts of the case given "the nonwillful character of the" discovery violation in combination with other factors, including that "the prosecution itself was willing to have the evidence admitted." *Id.* at 562; see *United States* v. *Portela*, 167 F.3d 687, 705 n.16 (1st Cir.) ("We * * * have never held that willfulness is the sole predicate of an exclusionary sanction."), cert. denied, 528 U.S. 917 (1999). Similarly, although language in *Escalera* v. *Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (per curiam), suggests that the validity of a district court's preclusion order might turn on whether the defendant had willfully sought a tactical

advantage, the Second Circuit has since clarified that it "do[es] not believe * * * that the Sixth Amendment is encroached upon by a discretionary, if strict, enforcement of the Federal Rules of Criminal Procedure." *United States* v. *Cervone*, 907 F.2d 332, 346 (1990), cert. denied, 498 U.S. 1028 (1991).*

Petitioner's reliance (Pet. 17) on the Ninth Circuit's decision in *United States* v. *Peters*, 937 F.2d 1422 (1991), is also misplaced. The court in *Peters* reversed an order excluding a defense expert from testifying, but only after concluding that the defendant had committed no discovery violation at all. *Id.* at 1424-1426. As the Ninth Circuit has more recently explained in *United States* v. *Ornelas*, 906 F.3d 1138 (2018), cert. denied, 139 S. Ct. 2638 (2019), the court's separate reference to the absence of "willful and blatant discovery violations" in *Peters*, 937 F.2d at 1426, "was a response to the government's alternative argument that, even if the defendant's attorney did not commit a clear-cut violation of any discovery rule, the witness was properly excluded because defense counsel deliberately failed to divulge the existence of the expert witness to get an advantage at trial." *Ornelas*, 906 F.3d at 1151 n.15. In *Ornelas*, the Ninth Circuit upheld an order excluding the testimony of a defense expert where, as here, the defendant's tardy disclosure violated a pretrial order and the district court did not make an explicit finding that the violation was willful. *Id.* at 1149-1151. Petitioner therefore

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* Petitioner's suggestion (Pet. 17) that the decisions in *Escalera* and *Cervone* reflect "internal[] inconsisten[cy]" within the Second Circuit does not provide a basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

cannot show that the Ninth Circuit, or any other federal court of appeals, would reach a different outcome on the facts of his case.

3. Even if the Sixth Amendment issue petitioner asserts would otherwise warrant the Court's review, this case would be an unsuitable vehicle for addressing it because petitioner cannot satisfy the plain-error standard that would govern review, and because the exclusion of petitioner's witness was additionally based on the district court's determination that the expert's testimony would be "cumulative," Pet. App. 12.

a. As explained above, petitioner failed to present his constitutional claim in the lower courts. That claim would therefore be reviewable, if at all, only for plain error. See Fed. R. Crim. P. 52(b); *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Accordingly, petitioner would be entitled to relief only if he could show (1) an error, (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted).

Petitioner cannot make the requisite showings. As an initial matter, he cannot establish that the district court committed a "clear or obvious" error in excluding a defendant's proffered expert witness for a non-willful violation of a discovery order, *Puckett*, 556 U.S. at 135, where no court of appeals has adopted a categorical rule that the Sixth Amendment requires such a finding. See pp. 16-19, *supra*. Nor can petitioner show any likelihood that the exclusion of Spence's testimony affected the outcome of the trial—a prerequisite to satisfying the remaining plain-error criteria. See *Marcus*, 560

U.S. at 262 (effect on substantial rights ordinarily means "a reasonable probability that the error affected the outcome of the trial"); *id.* at 265-266 ("[I]n most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process.") (citation omitted); cf. Gov't C.A. Br. 38-40 (arguing that any error was harmless).

Petitioner suggests that Spence would have aided his defense in two ways: (1) by "expos[ing] serious weaknesses" in the government's expert (Conway) through his testimony that "'there is no scientifically reliable indication of [petitioner's] DNA' * * * on the outside crotch area of [the victim's] underwear," and (2) by testifying "that [t]he forensic biology/DNA results from" certain tested "items provide no scientific support for the allegations associated with this case investigation." Pet. 21 (fourth set of brackets in original). Neither of those assertions, however, is responsive to Conway's actual testimony. As the court of appeals observed, Conway did not testify that petitioner's DNA was present in any way in the sample taken from the outside of the victim's underwear. Pet. App. 8. Conway instead explained that petitioner was *excluded* as a contributor of DNA to all items analyzed for comparison except for the outer area of the victim's underwear—which itself, Conway acknowledged, yielded inconclusive results. *Ibid.*; 5 C.A. App. 167-174; see Pet. 20. Likewise, Conway did not testify that the DNA results provided affirmative "scientific support for the allegations" made by the victim. Pet. 21. To the contrary, when asked whether the results of her analysis allowed her to make a determination about whether petitioner sexually abused the victim, Conway answered that "[t]he DNA results really

don't tell us anything either way." 5 C.A. App. 175; see Pet. App. 8-9, 16.

Because Conway's testimony did not directly incriminate petitioner, but instead explained why the absence of DNA did not disprove the allegations, Spence's bare assertion that the DNA results "provide[d] no scientific support for the allegations associated with th[e] case" (Pet. 21) was unlikely to affect the jury's verdict. Indeed, the exclusion of Spence's anticipated testimony was especially unlikely to affect the outcome given the strength of the government's other evidence. That included the testimony of the victim, whose description of the assault remained consistent in material respects and was corroborated in relevant part by the contemporaneous text message she sent to her husband reporting the assault, the testimony of Lieutenant Cole, and petitioner's admission—in a call to his wife from jail—that he had entered the victim's bedroom. Pet. App. 4, 5 n.5, 6-7 & n.7, 15-16; see *id.* at 42-43.

b. Finally, review of the Sixth Amendment question would be complicated by the fact that the district court excluded the expert's testimony not only because of the violation of the discovery order, but also because the court found that "it would be cumulative" of the testimony provided by the government's witness. Pet. App. 12. The court based that determination on the account of the proposed testimony in the notice and report defense counsel submitted, coupled with defense counsel's admission that while he did "think there would be something new" in the proposed expert testimony, he could not "tell [the judge] what that is." *Ibid.* (citation omitted). That alternate basis for the district court's evidentiary ruling in itself makes this case an unsuitable vehicle for considering when the Sixth Amendment permits

the exclusion of an expert witness based on a Rule 16 violation alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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