RECORD NO. 16-6694

In The Supreme Court of The United States

ERIC JORDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER ERIC JORDAN

Ruth J. Vernet*
RUTH J. VERNET, ESQ, LLC
31 Wood Lane
Rockville, MD 20850
(301) 251-9500
ruthv@vernetlaw.com

**Counsel of Record for Petitioner Eric Jordan*

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Introduction

It is now the law of the Fourth Circuit that an accused who takes the stand in his own defense may be ordered to change his otherwise admissible testimony into an alternate "narrative" that is acceptable to his non-testifying codefendant. Rather than defending the court's decision, the government's opposition abandons its original position and instead spends considerable space arguing that the question is a factual one of relevance that was resolved by the trial judge. Gov. Brf. 7. But the Fourth Circuit squarely rejected that argument, ruling that the petitioner's testimony had "probative value," but that it was nonetheless excludable under *Federal Rule of Evidence 403* because it unfairly implicated his codefendant. Pet. App. -73 and -76.

The government does not dispute that *Federal Rule of Evidence 403* is the lynchpin of the Fourth Circuit's published decision, and that *Rule 403*, by its terms, applies *only* to "*concededly relevant evidence*," *Old Chief v. U.S.*, 519 U.S. 172, 180 (emphasis added); *United States v. Bajoghli*, 785 F.3d 957, 966 (4th Cir. 2015). Nor does it dispute that the Fourth Circuit relied on an improper interpretation of "unfair prejudice" under *Rule 403* as the decisive factor in justifying exclusion of the petitioner's relevant testimony. *Id.*, Pet. Brf. 16. Indeed, the government seems to concede that the Fourth Circuit's reasoning was wrong.

The government attempts to downplay the significance of this case, but the Fourth Circuit's departure from well-established due process standards is stark. This Court has made crystal clear that the accused in a criminal case has a

"fundamental constitutional" right "to present *his version of events in his own words.*" *Rock v. Arkansas,* 483 U.S. 44 (1987) (emphasis added), and that the right to testify can only be limited by a "legitimate interest." The government insists that *Rock* is inapposite because the trial judge ruled that the Petitioner's testimony was irrelevant. But the Fourth Circuit held that the testimony *was* relevant, and it is the precedent set by the appellate court's published opinion – that an accused can be muzzled by his codefendant—which must be addressed.

I. The Fourth Circuit's Published Opinion Creates A New Paradigm Of Criminal Procedure That Is Contrary To This Court's Precedent And Other Courts Of Appeals.

A. The government does not dispute that the Fourth Circuit's published decision creates a new paradigm of criminal procedure.

At trial the prosecutor successfully argued that an accused should not be allowed to provide testimony that "fill[s] the prosecutor's bowl" with evidence that implicates his codefendant and alleged accomplice. Pet. Brf. at 4, 18; Pet. App.-259; Gov. C.A. Brf.34. There may be some who wonder why the government's opposition appears to have abandoned that argument. Perhaps the government recognizes that the Fourth Circuit's published decision creates a new paradigm of criminal procedure that is as detrimental to the government as it is to the accused.

The government does not dispute the petitioner's assertion that if the decision in this case stands, defendants could invoke *Federal Rule of Evidence 403* to prevent the prosecutor from making a case against them through the use of

accomplice testimony. Pet. Brf. 17-18. After all, if an accused who takes the stand in his own defense can be prohibited from implicating his codefendant, it follows that a government cooperator can be muzzled as well.

B. The government does not dispute that the Fourth Circuit's reasoning was wrong.

The government's entire opposition to further review rests on the premise that the petitioner's excluded testimony was irrelevant, but it is clear that the Fourth Circuit accepted the petitioner's argument in the court below that his testimony was relevant because it has "plus value." Pet. C.A. Brf. 73-76; Gov. Brf. 10.

The government does not dispute that the Fourth Circuit's decision was grounded in *Federal Rule of Evidence 403*. Nor does it deny that *Rule 403*, by its own terms and by universal application, applies only to relevant evidence, and that it was contrary to the precedent of this court and every other court of appeals to exclude the petitioner's testimony merely because it was prejudicial to his codefendant. *Fed.R.Evid.403*; *Old Chief v. United States*, 519 U.S. 172, 180 (1977); *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977), cert. denied, 435 U.S. 996 (1978); *Zafiro v. United States*, 506 U.S. 534 (1993); Pet. Brf. 13, 17-18.[1]

---

[1] The inapplicability of *Federal Rule of Evidence 403* aside, it makes no sense to conclude that the probative value of the excluded testimony to the petitioner was outweighed by the prejudice to his codefendant. The petitioner was never identified as a participant in any robbery and was even exculpated by the Shell station victim. By comparison, his codefendant was positively identified by several robbery victims. Pet. Brf. 5 and n. 10.

In fact, the government's opposition does not even mention *Federal Rule of Evidence 403*. Instead, the government simply states that federal and state lawmakers have broad latitude to establish rules excluding evidence --- a puzzling response since the petitioner does not challenge the validity of *Rule 403*, but rather that it was applied in an arbitrary manner that is inconsistent with the precedent of this Court and every other court of appeals. Pet. Brf. 19.; Gov. Brf. 18.

C. The trial court's ruling was arbitrary and conflicts with *Rock* and its progeny.

Although the judge held prior to trial that some of the excluded testimony was irrelevant, in actuality he applied the ruling as a blanket prohibition against any evidence that tended to implicate the codefendant. C.A. App. 2271, 2295, 3501. The government responds that the trial court's ruling was nevertheless consistent with *Rock* and its progeny because it was not a "wholesale" exclusion of testimony. Gov. Brf. 15-16. But the fact that the petitioner testified –albeit in a limited fashion—does not exclude him from the protection of *Rock*, where the defendant's testimony was also only partially restricted. *Rock v. Arkansas*, 483 U.S. at 48.

II. A Defendant Who Openly Resists Restrictions Imposed On His Testimony Does Not Forfeit His Right To Object.

A. The petitioner did not agree to the restrictions imposed on his testimony.

The government argues that the petitioner forfeited his right to object because his attorney consented to the exclusions of his testimony, but this is incorrect. The petitioner's personal opposition to the restrictions is apparent from

his testimony, during which he attempted to testify about the excluded matters, expressed frustration that there were things he could not say, and tried (for which he was rebuked) to ask questions about the limitations. C.A. App. 2302, 2239-40. The petitioner's confusion and resistance is not surprising, in light of the court's pre-trial ruling that the testimony would be allowed, and the petitioner's notice to the court on the morning of trial that he "definitely" intended to testify to the excluded matters. C.A. App. 979-982; Pet. C.A. Brf. 70-73; Gov. C.A. Brf. 83-84.

B. **The right to testify is personal to the defendant.**

Mr. Jordan never consented to the exclusions of his testimony, and it is the defendant, not his counsel, who retains the ultimate authority to decide whether or not to testify. *Jones v. Barnes*, 463 U.S. 745 (1983). Accordingly, any acquiescence by Mr. Jordan's counsel cannot be imputed to him in view of his express intention – and actual attempts-- to testify. C.A. App. 2266, 2302, 2339-40; Pet. C.A. Brf. 34-37, 79.

III. ***Holmes v. South Carolina*** **Prohibits One-Sided Analysis Of The Impact Of Improperly Excluding A Defendant's Testimony.**

The government argues that the petitioner has not established a legal basis for plain error. The government is incorrect. The petitioner has provided extensive authority that exclusion of the petitioner's testimony was a clear violation of his well-established, fundamental constitutional right to testify on his own behalf, and that as a result he was deprived of a fair trial. Pet. Brf. 10-12, 20-23; Pet. C.A. Brf. 73-76, 81-83.

The government does not address the petitioner's argument that the matters excluded from his testimony were directly related to the charges presented by the government, and therefore critical to the petitioner's claim of innocence. Pet. Brf. 20-21. The government also does not dispute that it was error for the prosecutor to impeach the petitioner on cross-examination by exploiting the excluded details of his testimony. Instead, the government asserts that that the excluded testimony was not important to the Petitioner's defense, but then contradicts itself by relying on the missing evidence as proof of guilt. Gov.Br. 15[2].

The government's one-sided analysis is inconsistent with this Court's ruling in *Holmes v. South Carolina*, and ignores the fact that the case against the petitioner was purely circumstantial and he was the only witness to the excluded evidence. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006); Pet. Brf. 5-6, 20-23. The devastating impact of the exclusions on the petitioner's credibility is clear when viewed in the context of the prosecutor's exploitation of the missing details to condemn the petitioner as a liar, and his suggestion that the jurors should be offended that the petitioner would have the "arrogance" to "take an oath" and testify to a "completely unbelievable physically impossible story." Pet. App. 204-205, 220.

---

[2] For example, the government asserts that it was harmless to prevent the petitioner from giving a full explanation of how his codefendant came to his apartment on the night of the Shell station robbery, but then relies on the discovery of evidence from the robbery in petitioner's apartment as "substantial evidence to disprove [petitioner's] version of events." Gov. Brf. 14 (ellipses in original).

The government does not dispute that the prosecutor's comments were improper, and instead asserts that they are too "far afield" to be part of the plain error analysis. Gov. Brf. 20. But in this circumstantial case where credibility was paramount, the prosecutor's comments ensured that the wounds inflicted by the exclusion of the petitioner's testimony would prove fatal to his credibility-based defense. They should not be ignored.

IV. The Court Should Grant the Petition For Certiorari To Resolve Continuing Disagreements Over Important Digital Privacy Issues, And To Resolve The Question About How To Apply Analogue Precedents To Technologically Enhanced Searches In The Digital Age.

The Petitioner adopts in its entirety the Reply Brief for Petitioner filed in the companion case of *Aaron Graham v. United States of America*, case no. 16-6308.

Respectfully submitted,

RUTH J. VERNET
Ruth J. Vernet Esq., LLC
31 Wood Lane
Rockville, MD 20850
(301)251-9500
ruthv@vernetlaw.com

Counsel of Record for Petitioner