NO. 07-1311

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT, SUPPORTING THE PANEL OPINION

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In accordance with Federal Rule of Appellate Procedure 29(c), *amicus* states that it is a non-profit corporation; that it has no parent corporation; and that it has no stock, and therefore no publicly-traded corporation owns 10 percent or more of its stock.

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INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the nation's preeminent professional bar association of criminal defense attorneys. Founded in 1958, the Association has 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys, who are private lawyers, public defenders, and military defense counsel. They and the NACDL seek to ensure justice for those accused of committing crimes.

This case raises questions of great interest to all accused individuals who seek to use expert witnesses in their defense. The Panel was correct to reject the District Court's approach, which, by requiring that a Rule 16 notice of expert testimony include information sufficient to satisfy *Daubert*, would have worked a radical and unwise alteration of criminal law and practice. The Panel was also correct when it concluded that the District Court committed reversible error by banning the defense expert from testifying without providing Defendant with any opportunity to be heard. This error was particularly egregious because the District Court allowed two government experts – effectively unchallenged – to address the same issues about which the defense expert would have testified. As the Supreme Court has explained, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). For all of these reasons, the NACDL has a vital

[1] In accordance with Federal Rule of Appellate Procedure 29(a), *amicus* states that both parties to this case have consented to the filing of this *amicus* brief.

interest in the resolution of this case, and urges this Court to leave intact the panel decision.

ARGUMENT

A defendant's right to call witnesses is an integral part of the Sixth Amendment right to put on a defense. As the Supreme Court explained in *Chambers*, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." 410 U.S. at 294. *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a *complete* defense") (emphasis added, internal quotation marks omitted); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the defendant's "right to present his own witnesses" is "a fundamental element of due process of law").

"Restrictions on a criminal defendant's rights . . . to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). *See also Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) ("the state may not arbitrarily deny a defendant the ability to present testimony that is relevant and material and vital to the defense") (internal quotation marks and alterations omitted). Here there was no valid basis for the exclusion of the defense expert's testimony. Nacchio's Rule 16 disclosure was consistent with (indeed, exceeded) that which the Rule requires and went beyond what is normally provided in criminal trials.

Moreover, even if there had been a discovery violation, as the American Bar Association's Standards for Criminal Justice makes clear, sanctions for discovery

violations are appropriate, "*subject to the defendant's right to present a defense* and provided that the exclusion does not work an injustice either to the prosecution or to the defense." ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, § 11-7.1(iii) (3d ed. 1996) 109 (emphasis added). The ABA's Standards correctly takes account of the fact that, while following procedure is a bedrock principle of our justice system, criminal trials must focus on the ultimate goal of ensuring that justice is done, and injustice avoided.

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY CONSIDERING THE EXPERT'S RELIABILITY WITHOUT NOTICE TO THE DEFENDANT AND BY THEN IMPOSING THE SEVEREST POSSIBLE SANCTION WITHOUT A HEARING

The District Court made three key errors with regard to Federal Rule of Criminal Procedure 16 that resulted in a violation of the Defendant's constitutional rights to put on his defense. First, the District Court held that the Rule 16(b)(1)(C) summary of the defense expert's opinion was insufficient because it did not establish that the expert was reliable, when in fact Rule 16(b)(1)(C) contains no such criterion. Second, the District Court imposed a sanction without providing Defendant with any opportunity to be heard. Compounding this error, the District Court proceeded to impose the harshest punishment available – total exclusion of the expert witness – when the governing authority reserves that sanction for egregious cases in which a party is improperly gaming the system for strategic advantage.

The text of Federal Rule of Criminal Procedure 16(b)(1)(C) demonstrates its narrow scope. It simply says that if a defendant requests discovery from the government

about its experts, then the defendant must "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." While a mere "list of topics" is not enough, "a summary of the expected testimony" will suffice. *United States v. Rettenberger*, 344 F.3d 702, 706 (7th Cir. 2003); *see also United States v. Barile*, 286 F.3d 749, 758, 760 (4th Cir. 2002) ("conclusions" are not enough, but "opinions" satisfy Rule 16).

The narrow scope of the rule accords with the experience of the NACDL's members who routinely submit Rule 16 summaries to the government. The purpose of the rule is simply to give notice to the government. Should the government then object to an expert's qualifications, a separate process exists to evaluate the expert and the bases for his opinions. That process, however, proceeds pursuant to the standards set forth in Federal Rule of Evidence 702 and in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 16 itself calls for no such inquiry, and it is simply not the practice of lawyers in criminal cases (which, after all, proceed under a very different discovery regime than do civil cases) to provide anything even approaching an expert report at the Rule-16-notice stage. By grafting a Rule 702-*Daubert* analysis onto Rule 16's bare-boned requirements, the District Court invented a new obligation from whole cloth, thereby both impermissibly interfering with the Defendant's ability to present his defense and effectively circumventing Rule 16 by allowing the government to obtain the equivalent of a civil expert report in advance of the defense expert's testimony.

We can safely say that we are unaware of any instance in which the government has provided our members with a Rule 16 expert notice that laid out the full *Daubert*

justification (or anything even approaching it) for the proposed testimony. That is just not how it is done. If there is to be a new rule requiring that Rule 16 notice be more comprehensive than that provided here, then (a) the rule cannot in fairness be applied retroactively to Mr. Nacchio; and (b) the rule must be applied to the government as well as to defendants.

The District Court's error is all the more egregious because it did not even hold a *Daubert* hearing, or *any* sort of hearing, before sanctioning the Defendant. That violated the standards that would have applied if the Defendant had broken Rule 16 (which he did not). As the Commentary to the ABA Standards points out, "[w]here there is an alleged discovery violation, it is important that the trial court take all necessary evidence, and explain in detail the rationale for its decision to award or deny sanctions." ABA STANDARDS at 111. Similarly, the Ninth Circuit requires "a district court, before excluding a defense witness's testimony, to balance the countervailing interests in order to ensure that the exclusion complies with a criminal defendant's Sixth Amendment rights." *United States v. Bahamonde*, 445 F.3d 1225, 1231 (9th Cir. 2006). And where the district court has "not weighed *any* factors militating against exclusion of the witness, the district court abused its discretion." *Id.* at 1232. The District Court here has similarly abused its discretion.

The NACDL's members have extensive experience litigating cases and in accommodating the pressures to try cases as expeditiously as justice and the Constitution permit. However, here, the District Court ignored the crucial step of holding a simple

hearing before imposing sanctions on the Defendant, and in so doing stepped over the constitutional line.

Further, the District Court seriously exceeded its authority by going so far as to *exclude* the Defendant's expert without even considering lesser sanctions, such as a continuance to allow the Defendant to fix the alleged problem. As this Court recently emphasized, exclusion of witnesses is an "extreme sanction." *Short v. Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006), *cert. denied*, 128 S. Ct. 103 (2007). This Court further explained that "[i]t would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings." *Id.* (internal quotation marks omitted). Therefore, "[w]here the discovery violation is not willful, blatant or calculated gamesmanship, alternative sanctions are adequate and appropriate." *Id.* (internal quotation marks omitted). *See also Young v. Workman*, 383 F.3d 1233, 1239 (10th Cir. 2004) ("Where a party has failed to comply with a discovery request, and the failure is *willful and motivated by a desire to obtain a tactical advantage at trial*, then exclusion of the evidence is entirely consistent with the purposes of the Compulsory Process Clause of the Sixth Amendment") (emphasis added) (internal quotation marks omitted, emphasis added). Here, by contrast, no one has accused the Defendant of "a desire to obtain a tactical advantage." The Commentary to the ABA Standards makes clear that

exclusionary orders "should be issued only in *extreme* cases." ABA STANDARDS at 113 (emphasis added). This plainly is not such a case.[2]

II. BY EXCLUDING THE DEFENDANT'S EXPERT WITNESS WHILE ALLOWING THE GOVERNMENT TO CALL ITS OWN EXPERTS, THE DISTRICT COURT DAMAGED THE INTEGRITY OF THE JUDICIAL PROCESS

Egregiously, the District Court excluded the Defendant's expert even though it had allowed two of the government's experts to testify on precisely the same issues the defense expert would have testified on. Any criminal defense attorney would find it virtually impossible to properly defend a defendant under such conditions. The District Court's ruling essentially guaranteed that the Defendant would have no sophisticated means to rebut the government's case on topics vital to the case: namely, whether certain information was material and whether the Defendant was reasonable in his belief that the information was not.[3]

Even beyond the normal caution that district courts should exercise when considering exclusion of defense experts, they should virtually *never* prevent defense experts from presenting evidence on topics about which the government's experts will present evidence. Doing so unfairly cripples the defense.[4] "It is an abuse of discretion to

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[2] Even under *Daubert*, "rejection of expert testimony is the exception rather than the rule." Advisory Cmte. Notes to 2000 Amendments, Federal Rule of Evidence 702.

[3] For a summary of the issues the expert would have testified about if allowed, *see* Br. of Defendant-Appellant at 22-23, 47-51.

[4] The District Court further harmed the Defendant, and so exacerbated the Sixth Amendment violation, by excluding expert testimony that spoke to the Defendant's willfulness, given that the state of mind was an element of the offense. *See Cheek v. United States*, 498 U.S. 192, 203-04 (1991); Br. of Defendant-Appellant at 47-49.

exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." *United States v. Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992) (internal quotation marks omitted). *See also United States v. Sellers*, 566 F.2d 884, 886 (4th Cir. 1977) (holding that district courts must exercise their discretion to exclude witnesses "evenhandedly," and that a district court failed to act appropriately when it banned the defense's expert but allowed the government's to testify); *United States v. Gaskell*, 985 F.2d 1056, 1063-64 & n.7 (11th Cir. 1993) (expressly tying the requirement that expert testimony for the defense be admitted to the admission of similar testimony by prosecution expert).

The fundamental unfairness of the District Court's ruling here is all the more apparent when one considers the reasons that courts ever allow trial procedure to trump defendants' Sixth Amendment rights. The Supreme Court and this Court have emphasized that the sanction of exclusion is occasionally necessary to protect the "integrity of the adversary process." *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988); *Short*, 472 F.3d at 1186 (quoting *Taylor*). *See also United States v. Austin*, 981 F.2d 1163, 1165 (10th Cir. 1992) ("Defendant thus has a fundamental right to present witnesses in his own defense, but *only in conformance with rules of procedure and evidence that promote fairness and reliability*.") (emphasis added).

Here the need to protect the integrity of the process cuts the other way. Defendants and the public accept the legitimacy of criminal sanctions because our constitutional rules guarantee that courts will impose them only after fair trials. Therefore, courts must be vigilant in protecting "the interest in the fair and efficient

administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Taylor*, 484 U.S. at 414-15; *Short*, 472 F.3d at 1186 (quoting *Taylor*).

In order to achieve these crucial values of integrity, fair and efficient administration of justice, and preservation of the truth-seeking function of trials, the burden cannot be solely on defendants. That is, these values preclude a decision that directly violates them. The District Court in this case made precisely such a decision by allowing *two* government experts to testify on a vitally important issue, while at the same time preventing the Defendant from putting on even one of his own. Integrity, fairness, and truth cannot abide such an uneven playing field in a criminal trial.

III. THE DISTRICT COURT ERRONEOUSLY REQUIRED THE DEFENDANT TO BEAR THE BURDEN OF REQUESTING AN EVIDENTIARY HEARING

Contrary to the assumptions of the district court and the panel dissent, *Daubert* issues are routinely addressed for the first time—and resolved—at the *voir dire* stage. In the words of this Court:

> The district court may . . . satisfy its gatekeeper role [under *Daubert*] when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion so long as the court has sufficient evidence to perform the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

Goebel v. Denver & Rio Grande W. R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000) (internal quotation marks omitted). Other courts of appeals have also so held. *See, e.g.*, *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002) ("As the Ninth Circuit has determined, although the *Daubert* Court stated that the inquiry is a preliminary one, to be made at the outset, this does not mean that it must be made in a separate, pretrial hearing,

outside the presence of the jury.") (internal quotation marks and brackets omitted); *United States v. Conn*, 297 F.3d 548, 557 (7th Cir. 2002) ("Had the defense had * * * concerns about the quality of [the prosecution witness's] training, the quantity of his experience, or the methodology that he employed in reaching his assessment * * *, it could have raised those questions during voir dire."); *United States v. Alatorre*, 222 F3d 1098, 1104 (9th Cir. 2000) ("Here the court adopted a practical procedure, well within its discretion, when it allowed [the defendant] to explore [the prosecution witness's] qualifications and the basis for his testimony at trial via voir dire and then, following voir dire, rejected his renewed objections to the testimony * * * ."); *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App'x 450, 452 (5th Cir. 2005) ("After plaintiffs presented their fact witnesses, they offered their damages expert * * * * [Defendant] renewed its *Daubert* objection, and after a complete proffer and extended *voir dire* examination, the court sustained the objection and excluded [the expert] from testifying."); *United States v. Jimenez*, 111 F.3d 139 (table), 1997 WL 173912, at *1 (9th Cir. Apr. 3, 1997) (" Defense counsel conducted extensive voir dire of the [government's] expert * * *, which gave the district court a sufficient basis from which to make the preliminary assessment required by *Daubert*.").

Given the prevalence of the practice of addressing *Daubert* issues at *voir dire*, the panel majority correctly held that the District Court erred in placing the burden on the Defendant to affirmatively request an evidentiary hearing. Moreover, even assuming that the District Court could have imposed such a burden on the Defendant, it clearly deprived

him of his right to present a defense by failing to provide him any notice that it would not follow this usual practice and intended to hold him to such a standard.

Furthermore, even where the admissibility of expert testimony is not dealt with during *voir dire*, the proponent of such evidence is provided at least some opportunity to be heard before a ruling on admissibility is made. The sequence of events in such cases is as follows: Upon review of the Rule 16 summary produced by a party, the other party requests, or the court *sua sponte* orders, a *Daubert* hearing. At that hearing, the proponent of the expert testimony is provided an opportunity to respond to any objections to or questions about the proffered testimony by presenting evidence and argument. Indeed, on occasion a court will review such evidence *in camera* in order to ensure that the other side does not use the *Daubert* proceeding to obtain advance notice (to which it is not entitled) of its adversary's case. Only *after* the proponent of the witness has had such an opportunity to be heard does the court determine whether his proffered expert testimony is admissible.

In this case, however, the Defendant was neither notified of nor permitted to participate in the admissibility determination. Under these circumstances, he cannot be subjected to the draconian sanction of complete exclusion on the unprecedented and unfounded presumption that he somehow knew that he was required either to request a *Daubert* hearing or forgo entirely any opportunity to address the District Court's concerns regarding his expert's methodology.

IV. THE DISTRICT COURT'S ERRORS CONSTITUTE AN ABUSE OF DISCRETION REQUIRING A NEW TRIAL

This case has broad implications. Criminal defendants in cases large and small encounter *Daubert* questions. Indeed, while *Daubert* issues are prevalent in complex financial cases, they regularly arise in more "ordinary" criminal cases as well. A holding that places the onus of requesting a *Daubert* hearing on criminal defendants may in fact subject to greatest peril not white-collar defendants like Mr. Nacchio but, rather, the poorest and most unsophisticated defendants. There is no sound reason to change the rules in this way.

This case is a perfect illustration of the perils posed by the District Court's approach: Taken both individually and together, the District Court's errors made it impossible for the Defendant to defend himself as the Constitution guarantees. Those errors infected the entire course of the trial. Accordingly, the only remedy is remand for a new trial.

CONCLUSION

The panel decision reversing the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) that this brief has been prepared within the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), and that this brief contains 3,263 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The number of words in this brief is no more than half of the maximum length authorized for a party's principal brief, pursuant to Federal Rules of Appellate Procedure 29(d) (stating that an amicus brief is limited to no more than one-half of the maximum length authorized for a principal brief) and 32(a)(7)(B)(i) (stating that 14,000 words is permissible for a principal brief).

I further certify that this brief complies with the typeface requirements of 10th Circuit Rule 32(a), because this brief was prepared using Microsoft Word 2002 in 13-point Times New Roman font.

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