No. 12-11003

IN THE

Supreme Court of the United States

ELLIOT HEATH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner.[1]

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advanc-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

ing the proper, efficient, and just administration of justice, including issues involving the constitutional rights of criminal defendants. In furtherance of this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

SUMMARY OF ARGUMENT

The Constitution, through both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, guarantees criminal defendants the right to present evidence in their favor. The trial court in this case, however, refused to allow the jury to hear expert defense evidence on the ground that it did not believe the evidence was "necessary"—*i.e.*, that it would not make a difference to the outcome of the trial. *Heath v. United States*, 26 A.3d 266, 273 n.9 (D.C. 2011). The government conceded on appeal that it was an error to summarily exclude that evidence. *Id.* at 273. But the government argued, and the court of appeals agreed, that this error did not implicate the defendant's constitutional rights because there was not a reasonable probability that the excluded evidence would have changed the jury's verdict. *Id.* at 275.

This petition for certiorari asks the Court to clarify whether the right to present relevant, material evidence in one's own defense is conditioned on a showing that such evidence is likely to affect the outcome of the trial. The court below concluded that a showing of prejudice was necessary because the erroneous exclusion of defense evidence is not itself a constitutional error. The petition argues—

correctly—that the right to present defense evidence is fundamental to the adversarial process, and that the violation of that right is *per se* unconstitutional.

As the petition demonstrates, the circuits are profoundly divided on the question presented. *See* Pet. for Cert., No. 12-11003 (filed June 25, 2013). The conflict in the lower courts is longstanding and ripe for review, and this case presents an ideal vehicle for this Court's consideration of the issue.

NACDL submits this *amicus* brief in support of the petition to emphasize two points. First, this issue is of great importance to criminal defendants. The ability to present evidence in one's defense is a fundamental right accorded to criminal defendants by the Constitution. It is not merely a means of ensuring that trials are generally fair; rather, it stands alongside the right to confront witnesses and the right to counsel of one's choosing as essential elements of a fair trial, the violation of which is necessarily unconstitutional. The right to present all relevant defense evidence affects the criminal trial in myriad ways. The petition identified several situations in which this issue arises, including when the government seeks to exclude defense evidence, when a law or evidentiary rule forbids or makes conditional the use of particular types of evidence, and when defendants seek continuances for the purpose of obtaining evidence. NACDL members have additionally encountered the issue when seeking to sever a co-defendant's trial for the purpose of allowing one co-defendant to testify on the other's behalf, when subpoenaing evidence over which sovereign or tribal immunity is claimed, and on appeal from rulings

that are alleged to have violated the right to present a defense.

Second, the issue is frequently recurring, warranting this Court's review now. There are hundreds of reported decisions in the eight circuits that have thus far taken a position on the question presented. There are many more in state courts, which have also adopted conflicting tests for violations of the right to compulsory process. And it is likely that there are many more cases in which the question has arisen but for which no published opinion resulted.

ARGUMENT

I. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE TO CRIMINAL DEFENDANTS

A. The Defense's Ability To Present Favorable Evidence Is Critical To Our Adversarial System

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Like the

right to counsel and the right to confront adverse witnesses, the right to present evidence in defense is "a fundamental element of due process of law." *Id.*

There are, of course, limits on the evidence that may be proffered by a criminal defendant. But this Court has emphasized that those limits must be aimed at ensuring that the evidence to be presented is relevant and probative; the Constitution does *not* permit exclusion of defense evidence simply because the government's case against the defendant appears to be strong. *See Holmes v. South Carolina*, 547 U.S. 319, 329 (2006) (rejecting a South Carolina evidentiary rule because "the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues"); *see also Washington*, 388 U.S. at 23 ("[T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.").

This is as it must be. Our criminal justice system places responsibility for weighing the strength of evidence for and against guilt in the hands of the jury. If evidence both relevant and material to the accused's defense can be withheld from the jury solely because the trial judge (or an appellate court, after

the fact) does not find that evidence persuasive as compared to the government's case, the jury's function is usurped.

B. The Question Presented By This Petition Arises In A Diverse Range Of Circumstances During Criminal Proceedings

The question presented by this case is one that lower courts must grapple with in numerous different contexts during criminal trials. The petition identifies four situations in which a defendant's constitutional right to present evidence is implicated: (1) when the government has moved to exclude defense evidence and the trial court is required to consider the defendant's constitutional right to present that evidence when deciding whether to grant the government's motion; (2) when the evidence the defense wishes to proffer is subject to an evidentiary rule that makes it generally inadmissible unless the defendant has a constitutional right to present it; (3) when the defense has requested a continuance of the trial on the basis that it requires additional time to obtain particular defense evidence, and the court must decide whether to grant the continuance; and (4) when the defense challenges an evidentiary rule excluding particular evidence on the ground that the defendant has a constitutional right to present a particular piece of evidence. *See* Pet. 12-13. NACDL's members, who represent defendants in criminal proceedings across the country, concur with the petition with respect to each of these situations.

NACDL members have also encountered several additional situations in which this question arises. First, the constitutional right to present defense evi-

dence impacts motions to sever that are premised on the desire to call a co-defendant as a defense witness. This occurs where, for example, the government seeks to try two individuals together on related charges, and one wishes to call the other to testify as a defense witness to corroborate an alibi, discredit specific government witnesses, or give firsthand evidence implicating an alternative suspect. If the co-defendant invokes his right not to testify in his own trial, but indicates a willingness to testify in a separate proceeding, then one or both of the defendants might seek a severance. Trial courts generally have substantial discretion when deciding whether to grant a severance, and whether the defendant's constitutional right to present a defense would be hampered absent a severance is a critical question informing the court's discretion. Defendants have had severance motions denied on the ground that the judge does not believe the co-defendant's evidence is of sufficient importance to be of constitutional magnitude, even where the evidence is both relevant and material to the defense being presented.

Second, the issue can arise when defense counsel attempts to subpoena information from federal agencies. Agencies that wish to avoid disclosure will often respond by removing to federal court and asserting that sovereign immunity prevents enforcement of the subpoena or that the defendant failed to comply with various federal regulations that prescribe additional procedures for subpoenas of government agencies. While it is not a settled question, there are indications that a constitutional right to present a defense could defeat such claims of immunity. *See, e.g.*, *United States v. Williams*, 170 F.3d 431, 434

(4th Cir. 1999) ("a state criminal defendant, aggrieved by the response of a federal law enforcement agency made under its regulations, may assert his constitutional claim to the investigative information before the district court"). A similar issue arises with respect to tribal immunity when a subpoena is addressed to a tribal entity. While there is some disagreement among the lower courts as to the circumstances in which a claim of tribal immunity can preclude enforcement of a subpoena, numerous courts have held that when a criminal defendant has a constitutional right to the information sought by the subpoena, it is a factor that strongly supports overriding tribal immunity and enforcing the subpoena. *See, e.g.*, *United States v. Juvenile Male 1*, 431 F. Supp. 2d 1012, 1018 (D. Ariz. 2006); *United States v. Velarde*, 40 F. Supp. 2d 1314, 1316-17 (D. N.M. 1999); *United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995).

Finally, the issue affects every appeal challenging a trial court's erroneous decision to exclude defense evidence, because it determines the standard of harmless error review to be applied. If the exclusion of evidence relevant to the defense is a constitutional error in itself, then an appellate court must reverse unless the government can demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). If, by contrast, the erroneous exclusion of defense evidence is a constitutional violation only if it prejudices the defendant's right to a fair trial, then the decision must be affirmed unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *See Kotteakos v. United*

States, 328 U.S. 750, 776 (1946). Because the *Kotteakos* standard is much easier for the government to satisfy than the *Chapman* standard, the decision whether exclusion of material defense evidence is constitutional (and thus subject to *Chapman* harmless error review) or non-constitutional (and subject to *Kotteakos* review) thus has a significant effect on the ability of defendants to obtain appellate relief from incorrect trial court rulings.

II. THE QUESTION PRESENTED IS FREQUENTLY RECURRING, WARRANTING THE COURT'S ATTENTION

The importance of the question is underscored by the frequency with which it arises. The petition notes that the District of Columbia alone has more than seventy published decisions addressing the question whether a defendant has a constitutional right to present a particular piece of evidence. That is not atypical: across the country, the issue has arisen in *hundreds* of reported decisions. The petition explains the deep 5-3 split in the circuits that have passed on the issue, and a review of the district and court of appeals cases in those circuits alone reveals the frequency with which the issue arises and the need for this Court's guidance.

The First Circuit has considered the scope of the right to compulsory process on at least ten occasions during the past decade. *See, e.g.*, *United States v. Sanabria*, 645 F.3d 505 (1st Cir. 2011) (exclusion of defense witness and limitations on cross-examination of government witness violated right to present defense and were not harmless error); *Brown v. Ruane*, 630 F.3d 62 (1st Cir. 2011) (holding

that even if trial court erred in excluding evidence, right to present a defense was not violated); *United States v. Cianci*, 378 F.3d 71, 107 (1st Cir. 2004) (applying plain-error standard because the constitutional objection to exclusion of defense evidence was not raised at trial).

The Second Circuit has similarly addressed the issue at least a dozen times in the past decade, and its district courts have done so more than one hundred times during the same period. Its jurisprudence in this area borrows the standard used in evaluating *Brady* violations: a constitutional violation occurs only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Agard v. Portuondo*, 117 F.3d 696, 705 (2d Cir. 1997), *rev'd on other grounds*, 526 U.S. 61 (2000) (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)); *see also Hawkins v. Costello*, 460 F.3d 238, 244 (2d Cir. 2006); *Justice v. Hoke*, 90 F.3d 43, 47 (2d Cir. 1996).

The Third Circuit has considered the scope of the compulsory process clause on at least ten occasions. *See, e.g.*, *United States v. Hoffecker*, 530 F.3d 137, 184-88 (3d Cir. 2008) (affirming, over objection on constitutional grounds, exclusion of several defense witnesses as sanction for discovery violations); *Virgin Islands v. Suarez*¸ 242 F. App'x 845, 849-50 (3d Cir. 2007) (exclusion of defense witness was not a constitutional violation because testimony would not have created reasonable doubt); *Gov't of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) (constitutional right to compulsory process was violated by government's failure to disclose that a wit-

ness favorable to the defense who had originally refused to testify was now willing to do so). District courts in the Third Circuit have similarly confronted this issue in several dozen cases. *See, e.g.*, *Mosby v. Gov't of the Virgin Islands*, Super. Ct. Crim. No. F1/1996, 2011 WL 4357301 (D.V.I. Sept. 16, 2011); *United States v. Bianchi*, 594 F. Supp. 2d 532 (E.D. Pa. 2009); *United States v. Bertoli*, 854 F. Supp. 975, 1082-87 (D.N.J. 1994), *aff'd in part on other grounds*, 40 F.3d 1384 (3rd Cir. 1994).

The Sixth Circuit has a particularly robust body of case law addressing the scope of the constitutional right to present a defense, having discussed the issue more than twenty separate times over the past decade. *See, e.g.*, *United States v. Hardy*, 586 F.3d 1040, 1045 (6th Cir. 2009) (exclusion of defense evidence is unconstitutional only if that evidence would have raised a reasonable doubt that did not otherwise exist); *United States v. Lucas*, 357 F.3d 599, 608-09 (6th Cir. 2004) (trial court's erroneous exclusion of relevant defense evidence was harmless because it did not impact the fairness of the trial); *Rockwell v. Yukins*, 341 F.3d 507 (6th Cir. 2003) (balancing the defendant's right to present a complete defense against state evidentiary rules that serve other interests, and affirming the trial court's exclusion of defense evidence).

The Seventh Circuit applies a similar standard to that used by the Sixth Circuit, and has confronted the issue on at least ten occasions over the past decade. *See, e.g., United States v. Parker*, 716 F.3d 999, 1010 (2013) ("A defendant's right to compulsory process is violated only when a court denies the defend-

ant an opportunity to secure the appearance at trial of a witness whose testimony would have been relevant and material to the defense." (internal quotations omitted)); *Harris v. Thompson*, 698 F.3d 609, 631 (7th Cir. 2012), *cert. denied*, 133 S.Ct. 2766 (2013) (holding that the correct materiality standard for compulsory process claims is whether "there is a reasonable probability the jury would have returned a different verdict" if the excluded evidence had been admitted).

At least twelve decisions from the Eighth Circuit have addressed this issue in the past decade. *See, e.g.*, *United States v. Head*, 707 F.3d 1026, 1032-33 (8th Cir. 2013) (trial court committed reversible error by excluding evidence proffered by the defense that, if believed by the jury, would have disproven one of the required elements of the crime); *United States v. Eagle*, 498 F.3d 885, 888-89 (8th Cir. 2007) (applying the *Chapman* harmless error standard and finding that exclusion of defense evidence was harmless beyond a reasonable doubt); *United States v. Janis*, 387 F.3d 682, 688-89 (8th Cir. 2004) (same). During the same period of time, the Ninth Circuit, which employs a similar standard, has addressed the scope of defendants' compulsory process rights in several dozen decisions. *See, e.g.*, *Celaya v. Ryan*, 497 F. App'x. 744 (9th Cir. 2012) (affirming grant of habeas relief because excluded evidence was vital to the defense and its exclusion had a substantial and injurious effect on the verdict); *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013) (holding that prior Supreme Court precedent established that the exclusion of trustworthy and material exculpatory evidence was a violation of the

Sixth Amendment right to present a defense); *United States v. Leal-Del Carmen*, 697 F.3d 964 (9th Cir. 2012) (government's deportation of defense witness violated the Sixth Amendment because it was done in bad faith and deprived the defendant of material and favorable evidence).

The Tenth Circuit has confronted the compulsory process issue at least twenty separate times in the past decade in the context of appeals from trial court decisions to exclude defense evidence. *See, e.g.*, *Davis v. Workman*, 695 F.3d 1060, 1079-81 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 1845 (2013) (affirming trial court's decision to exclude evidence because it was not, in the court of appeals' view, sufficiently important); *United States v. Solomon*, 399 F.3d 1231, 1239-40 (10th Cir. 2005) (affirming exclusion of proffered defense evidence on the ground that it would not have affected the trial's outcome); *Patton v. Mullin*, 425 F.3d 788, 798 (10th Cir. 2005) (affirming exclusion of defense evidence because the appellant did not establish that it created a reasonable doubt that did not otherwise exist). This jurisdiction has also developed a significant body of law relating to the severance of co-defendants' trials when one defendant wishes to call the other as a defense witness. *See, e.g.*, *United States v. Pursley*, 577 F.3d 1204, 1216-18 (10th Cir. 2009) (affirming trial court's denial of motion to sever co-defendants' trials because the court found that the testimony was not sufficiently exculpatory and the proposed witnesses were impeachable); *United States v. Rogers*, 925 F.2d 1285, 1287-88 (10th Cir. 1991) (affirming denial of motion to sever even though the defendant was prevented from presenting evidence that would have

been "significant in supporting [the] defense theory" because it was contradicted by several government witnesses).

Questions regarding the scope of the right to compulsory process have also arisen frequently in state courts, which—like their federal counterparts—are deeply divided on the correct standard to apply in resolving such claims. *See, e.g.*, *Krutsinger v. People*, 29 P.3d 1054, 1061 (Colo. 2009) (rejecting notion that "a finding of constitutional materiality [i]s a prerequisite to treating the trial court's evidentiary error as federal constitutional error" and asking instead "whether the trial court's evidentiary ruling, in and of itself, deprived the defendant of any meaningful opportunity to present a complete defense"); *People v. Steele*, 769 N.W.2d 256, 268 (Mich. Ct. App. 2009) (exclusion of evidence was not constitutional error because defendant "was not totally precluded" from presenting a defense); *State v. Kerchusky*, 67 P.3d 1283, 1288 (Idaho Ct. App. 2003) (excluded evidence not material and did not deprive defendant of his right to present a defense where it "would not have created a reasonable doubt in the minds of the jurors"); *State v. Smith*, 807 A.2d 500, 517 (Conn. App. 2002) ("If the improperly excluded evidence may have had a tendency to influence the judgment of the jury, its exclusion cannot be considered harmless."); *People v. McLaurin*, 703 N.E.2d 11, 26 (Ill. 1998) ("The pertinent inquiry with respect to materiality is not whether the evidence might have helped the defense but whether it is reasonably likely that the evidence would have affected the outcome of the case."); *State v. Schreuder*, 712 P.2d 264, 275 (Utah 1985) ("Testimony is material, and its exclu-

sion is therefore prejudicial, if there is a reasonable probability that its presence would affect the outcome of the trial."); *see also Potier v. State*, 68 S.W.3d 657, 663-64 (Tex. Crim. App. 2002) (acknowledging diversity of standards applied by the federal courts and holding that the excluded evidence did not meet any of those standards).

Finally, it is important to note that the cases discussed here likely represent only a small fraction of the total number in which this issue arises. Trial court decisions regarding the defendant's right to present a particular piece of evidence frequently do not yield a published opinion or an appeal. Many trial judges, particularly those who have a high-volume caseload or handle primarily less-serious charges, do not regularly issue written decisions on evidentiary issues, motions to sever, or requests for continuances. This tends to be particularly true of state courts, many of which also do not make available electronic records of all trial court proceedings even where written decisions are produced. Unless the trial court's ruling is later appealed, then, there will be no record that this issue arose. And there are numerous reasons that appeals are not taken from such decisions. A defendant may decide to plead guilty following an adverse evidentiary ruling from the bench, for example, or may decide that an appeal is not worthwhile because of previous unfavorable authority on this point in their jurisdiction. Moreover, some intermediate state appellate courts also do not make available for publication all of their decisions, and may not provide written reasons in all criminal appeals. It is thus likely that a survey of reported decisions significantly underestimates the

number of cases in which the constitutional right to present evidence in one's own defense is implicated.

CONCLUSION

For the foregoing reasons and those stated by the petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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