No. 18-7972

In The
Supreme Court of the United States

VICTOR D. VICKERS, JR.,
*Petitioner*,

v.

STATE OF MISSOURI,
*Respondent.*

*On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District*

# BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONER, VICTOR D. VICKERS, JR.


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## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues.

The Institute is particularly interested in this case for two reasons. First, the decision of the Missouri Court of Appeals threatens citizens' Sixth Amendment right to present witnesses in their defense at a criminal trial generally. The Sixth Amendment violation is particularly acute where, as here, the excluded witness is an alibi witness. The testimony of this witness, if believed by the jury, would have resulted in the defendant's acquittal at trial. The state court's exclusion of the alibi witness on procedural grounds was contrary to the truth-seeking mission of the adversarial process, and should be reversed by the Court on this basis alone.

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[1] Counsel of record for all parties received notice at least ten days before the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a 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 made a monetary contribution to this brief's preparation or submission.

The second reason that the Institute is particularly concerned with this case is that this case involves a capital offense, the penalty for which is—in many jurisdictions—death. The precedents of the Court are clear that the right of a criminal defendant to a fair trial is of particular importance where, because of the potential for capital punishment, the consequences of an incorrect and unjust outcome are literally irreversible.[2]

Although the facts of this case are particularly egregious, the decision of the Missouri Court of Appeals is—unfortunately—not without precedent. At both the state and federal level, trial courts have previously excluded the testimony of defense witnesses for failure to provide timely notice of the witnesses to the prosecution, even though the procedural violation was not the result of a deliberate, willful, or tactical decision by a defendant or counsel. And the Missouri Court of Appeals is not alone among appellate courts, state and federal, that have affirmed such decisions, even in capital cases. In the absence of clear direction from the Court as to the limited circumstances under which it is appropriate to exclude such testimony, appeals courts at both the state and federal level have ruled on this issue in ways that are not only inconsistent with one another but with the spirit if not the letter of this Court's Sixth Amendment jurisprudence. Correcting this deprivation of defendants' rights to present witnesses—especially alibi witnesses—is critical to preventing continued violations of the Sixth

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[2] *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 85 (2008) (Stevens, J., concurring); *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., joined by Stevens and Souter, JJ., dissenting).

Amendment, and critical to the Institute's mission of protecting civil liberties and constitutional rights.

## PRELIMINARY STATEMENT

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (*citing Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). "Indeed, this right is an essential attribute of the adversary system itself." *Id.* This is particularly true with respect to alibi witnesses, who can establish actual innocence. *Cf. Sawyer v. Whitley*, 505 U.S. 333 (1992); *In re Davis*, 557 U.S. 952 (2009) (Stevens, J., joined by Ginsburg and Breyer, JJ., concurring).

More than three decades ago, in deciding *Taylor v. Illinois*, the Court considered whether exclusion of a witness for failure to timely comply with the notice requirements of a discovery rule violated the Constitution. That case did not involve an alibi witness. In addition, the trial court found a willful violation of a discovery rule by defense counsel in an attempt to gain a tactical advantage. While holding that the Sixth Amendment does not always preclude the exclusion of the witness, the Court also held that "alternative sanctions are adequate and appropriate in most cases." *Id.* at 413. At the time, the Court concluded, "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* at 414.

Amicus respectfully suggests the time has come for the Court to do what it declined to do in *Taylor*, and set standards for the exercise of that

discretion. Since *Taylor* was decided, both state and federal courts have misapplied *Taylor* to exclude witnesses in numerous cases where less severe and less prejudicial sanctions would have been "adequate and appropriate." *Id.* at 413. The discretion left open in *Taylor* has resulted in arbitrary application of the rules governing witness exclusion and widespread violations of the Sixth Amendment rights of those accused of committing crimes, including Petitioner in this case.

## ARGUMENT

### I. THE ACCUSED'S RIGHT TO PRESENT WITNESSES IS A "MOST FUNDAMENTAL RIGHT"

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Compulsory Process Clause goes beyond its plain language and guarantees an accused not only the right to subpoena witnesses but also to present testimony in his defense. *Washington v. Texas*, 388 U.S. 14, 19, 23 (1967). Indeed, "[t]he right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses." *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807). It is "basic in our system of jurisprudence" that the accused shall be afforded "an opportunity to be heard in his defense—a right to his day in court." *In re Oliver*, 333 U.S. 257, 273 (1948).

In fact, the Court has long recognized that "[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). It is because "[w]e have elected to employ an adversary system of criminal justice" that this right is most fundamental. *United States v. Nixon*, 418 U.S. 683, 709 (1974). A jury cannot reliably "decide where the truth lies" if the accused is denied "the right to present [his] version of the facts." *Washington*, 388 U.S. at 19. Thus, the Compulsory Process Clause

ensures the veracity of our adversarial justice system's search for truth. *See id.*

Due process also depends upon the Compulsory Process Clause: "The 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." *Chambers*, 410 U.S. at 294. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Nixon*, 418 U.S. at 709. In allowing the accused to present evidence in his defense, the Compulsory Process Clause ensures that juries charged with determining an accused's guilt or innocence make that determination in light of the fullest presentation of the facts. *See id.* Even well-settled and long accepted rules of procedure and evidence, such as the hearsay rule, must sometimes yield to the Compulsory Process Clause. *See Chambers*, 410 U.S. at 302.

Although the accused's fundamental right to present a defense is not unlimited, *Rock v. Arkansas*, 483 U.S. 44, 55 (1987), procedural rules that conflict with this right may not be applied "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. Rules of evidence and procedure exist to further, not hinder, the search for truth. *See id.* That search is best conducted by a jury that is permitted to hear "the testimony of all persons competent . . . who may seem to have knowledge of the facts in a case." *Washington*, 388 U.S. at 22 (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918)). Thus, states should not "enforce a mere procedural rule by denying a criminal defendant his constitutional right to present witnesses on his own behalf." *Braswell v. Florida*, 400

U.S. 873 (1970) (Black, J., joined by Brennan and Douglas, JJ., dissenting from denial of certiorari).

Acknowledging that constitutional rights should rarely bow to procedural rules, the Court has held that exclusion of an accused's witnesses is rarely a proper discovery sanction. *See Taylor*, 484 U.S. at 413. The Court's decision in *Taylor* stands for the proposition that "alternative sanctions are adequate and appropriate in most cases." *Id.* In *Taylor*, the Court acknowledged that exclusion is proper when it is necessary to ensure the "integrity of the adversary process" and prevent "prejudice to the truth-determining function." *Id.* at 414-15. But just as admitting unreliable evidence may impede the search for truth, so too does excluding reliable evidence merely because its disclosure did not conform to all procedural requirements. *See Washington*, 388 U.S. at 22 (holding exclusion of evidence undermined veracity of truth-seeking process); *see also Chambers*, 410 U.S. at 302 (same); *Rock*, 483 U.S. at 61 (same).

Where courts deny the accused the right to present witnesses in his defense for an uncalculated failure to follow procedural rules, "[a] simple rule of courtroom 'fairness' [is] misused to destroy a sacred constitutional right." *Braswell*, 400 U.S. at 873 (Black, J., dissenting). Indeed, "[a]ny improper abridgement of so fundamental a right [as] the very right to defend oneself converts the trial into a charade." *Hackett v. Mulcahy*, 493 F. Supp. 1329, 1335 (D. N.J. 1980) (reversing the trial court's exclusion of the defendant's alibi witness even though the defendant's notice of alibi was defective and untimely).

## II. PETITIONER'S FAILURE TO PROVIDE TIMELY NOTICE OF HIS ALIBI WITNESS WAS NOT THE RESULT OF A WILLFUL VIOLATION OR DONE FOR TACTICAL ADVANTAGE

As set forth in the opinion below, on the first day of trial, before *voir dire* examinations had begun, Petitioner advised the Court that he wished to present an alibi witness. (App. 15, Pet. 9). Petitioner was represented at trial by the Missouri State Public Defender. According to the Petition, Missouri's Public Defenders "suffer heavy workloads and cannot devote adequate time to defendants." (Pet. 4 n. 1). Petitioner's public defender was not able to speak with the alibi witness until the morning of the first day of trial. (App. 16, Pet. 3).[3] Defense counsel offered a continuance to give the prosecution additional time to investigate the alibi witness. (App. 17, Pet. 9).

The trial court denied Petitioner's motion to add the alibi witness and excluded the witness from testifying in Petitioner's defense, reasoning that to

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[3] The heavy workload of the Missouri Public Defenders leading to a lack of adequate time to devote to cases is well documented. "Judges, journalists, scholars and Missouri Bar presidents have written much about Missouri's chronic indigent defense crisis, all urging more money, more lawyers, more training, more resources." S. Obrien, *Strange Justice for Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent*, 61 St. Louis U.L.J. 725, 727 (2017).

As noted by the Missouri Supreme Court, "[t]he statewide public defender system . . . had the capacity last fiscal year to spend only 7.7 hours per case, including trial, appellate and capital cases." *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) (*en banc*).

not give notice of the alibi witness until the first day of trial would be "fundamentally unfair to the State." (App. 16, Pet. 4). The trial court did not make any finding that the failure to provide timely notice of the alibi witness was a willful violation or that it had been done to gain a tactical advantage. In focusing on what was supposedly "unfair to the State," the trial court gave short shrift to the even greater fundamental unfairness to the accused. The consequences to the State of "adequate and appropriate" alternatives to the exclusion of alibi witness testimony paled in comparison to the consequences that the accused suffered when the court excluded that testimony.

The adverse consequences of this exclusion were even more egregious because the prosecution's case against Petitioner was far from a compelling one. As set forth in the Petition, the State's star witness had made inconsistent statements about her eyewitness testimony. (Pet. 2-3, 10). Petitioner called a witness who contradicted the state's eyewitness' description of the suspects. Petitioner's alibi witness was prepared to testify that Petitioner was with the alibi witness at the time the crime was committed. (App. 16, Pet. 3-4). In short, it was a close case. The alibi witness, if allowed to testify, could have made the difference between a guilty verdict and an acquittal.

These facts stand in stark contrast to those in *Taylor*, where the Court held the defendant's Sixth Amendment rights were not violated when a defense witness was excluded. 484 U.S. 400. There, after the prosecution's two principal witnesses had testified, defense counsel moved to add two witnesses who had not previously been identified. One of the witnesses

never appeared. The trial court allowed the second witness to make an offer of proof, during which it became apparent that the witness had not actually seen the incident. Nor was he an alibi witness. Additionally, there were strong concerns, as found by the trial judge, that the proposed testimony was unreliable. *Id.* at 417. Finally, the trial court, in excluding the witness, stated, "I find this is a blatent [sic] violation of the discovery rules, willful violation of the rules." *Id.* at 405.

The Court ruled that it would not violate the Sixth Amendment to exclude a defense witness where the explanation for the discovery rule violation revealed "that the omission was willful and motivated by a desire to obtain a tactical advantage." *Id.* at 415. However, the Court also noted that "it may well be true that alternative sanctions are adequate and appropriate in most cases." *Id.* at 413.

Like many similar cases where defense witnesses have been excluded, this case is one where an alternative sanction would have been appropriate. For example, the trial court could have granted a short continuance to allow the prosecution to investigate the alibi and the alibi witness. Or it could have allowed the prosecution latitude on cross-examination of the alibi witness, including on the topic of why she was not identified earlier. Yet another option would have been to allow the prosecutor in closing argument to comment on the veracity of the witness in light of the late notice. *See, e.g.*, *Pulinario v. Goord*, 291 F. Supp. 2d 154, 179 (E.D.N.Y. 2003), *aff'd* 118 Fed. Appx. 554 (2d Cir. 2004). What was not "adequate and appropriate," however, was to exclude the crucial alibi witness from

testifying altogether. Notably, it does not appear that the trial court considered any such alternatives to exclusion. Certainly, the opinion below does not mention these or any other alternative sanctions. Indeed, the court below does not even cite *Taylor*. The discretion that *Taylor* left in the lower courts did not include the discretion to simply ignore the Court's Sixth Amendment jurisprudence.

## III. STATE COURTS AND LOWER FEDERAL COURTS HAVE MISAPPLIED *TAYLOR* TO EXCLUDE WITNESSES WHERE LESS SEVERE SANCTIONS WOULD BE ADEQUATE AND APPROPRIATE

All states have discovery rules that provide procedures for defendants to notify the prosecution of witnesses they intend to call at trial. Some rules, such as Rule 12.1 of the Federal Rules of Criminal Procedure, provide the procedures and time limits for a defendant to provide notice of an alibi defense, including the names of any alibi witnesses. Such rules, including Federal Rule of Criminal Procedure 12.1(e), typically provide that a court may exclude the testimony of any undisclosed alibi witnesses.

Procedural rules, however, cannot take precedence over the Constitution. As the Court held in *Taylor*, a defendant's Sixth Amendment rights must be considered before a court may exclude a defense witness, and sanctions other than witness preclusion are "adequate and appropriate in most cases." 484 U.S. at 413. But the Court declined to "draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* at 414. The Court went on to state that, in exercising its

discretion to impose sanctions for discovery violations, a trial court must consider the "fundamental character" of the accused's right to present witnesses in his favor as well as "countervailing public interests," such as the "presentation of reliable evidence" and the "truth-determining function of the trial process." *Id.* at 414-15.

Courts have inconsistently applied *Taylor* and failed to use the "alternative sanctions" that the Court noted would be "adequate and appropriate in most cases." *Taylor*, 484 U.S. at 413. Amicus respectfully urges that the Court should clarify its holding in *Taylor* by ruling that a defendant's willful misconduct is necessary to warrant the most extreme sanction of exclusion. Otherwise, courts will remain fragmented in their protection of an accused's most fundamental right. *See Chambers*, 410 U.S. at 302.

### A. Post-*Taylor*, Many Courts Have Improperly Excluded Evidence in Violation of the Compulsory Process Clause.

The Court "did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated." *Michigan v. Lucas*, 500 U.S. 145, 152 (1991). Yet in the 30 years since *Taylor*, courts have frequently applied the exclusionary sanction to non-tactical and inadvertent discovery violations. By now it is clear that courts are simply ignoring alternative sanctions that are "adequate and appropriate in most cases." *Id.* (*citing Taylor*, 484 U.S. at 414).

For example, in *Wade v. Herbert*, the Second Circuit upheld the trial court's exclusion of the

defendant's alibi witness because the defendant did not disclose the witness until the day before jury selection was set to begin. 391 F.3d 135, 138 (2d Cir. 2004). The defendant's attorney had just discovered the witness four days earlier, thus the late disclosure was not for the purpose of gaining a tactical advantage. *See id.* Moreover, the defense proposed a continuance to allow the prosecution to interview the witness, but the prosecutor declined. *Id.* at 139. Despite the availability of a continuance to cure any prejudice to the state, the trial court excluded the witness and, in doing so, denied the defendant his Sixth Amendment right to present a defense. *See id.* at 139.

Similarly, in *State v. Charbonneau*, the Georgia Supreme Court precluded the defendant from testifying as to his alibi because he did not file a notice of alibi as required under Georgia's discovery rules. 635 S.E.2d 759, 760 (Ga. 2006). The defendant did, however, inform investigators that he had an alibi, and the investigator investigated this claim. *Id.* at 760-61. Thus, the state was aware of the defendant's claimed alibi, making any prejudice minimal. *Id.* But, in upholding the trial court's exclusion of the defendant's alibi testimony, the court stated that "prejudice to the State, or lack thereof, or the availability of other remedies is irrelevant." *Id.*

In *Weeks v. McKune*, the defendant was charged with three rapes, and he provided notice of an alibi witness regarding the first rape. No. 05-3322-JTM, 2006 WL 1360395 at *3 (D. Kan. May 17, 2006). However, because the second alleged victim did not specify precisely what time the rape occurred, defense counsel did not designate the witness as an alibi

witness regarding the second rape. *Id.* When the witness began to testify that she was with the defendant around the time of the second rape, the prosecutor objected because the witness was designated as an alibi witness only as to the first rape. *Id.* The trial court upheld the objection, and the district court affirmed, even though the defense counsel's failure to designate the witness as an alibi witness as to the second rape was not tactical or willful. *See id.* at *3-4.

In *United States v. Ford*, the Seventh Circuit similarly precluded the defendant's exercise of his rights under the Compulsory Process Clause because of the failings of his attorney. 683 F.3d 761 (7th Cir. 2012). In this case, the defendant sought to introduce testimony that the defendant was not agitated two hours after the crime, thus he likely did not commit the crime. *Id.* at 763. Defense counsel did not consider this testimony alibi evidence, as the witness was not going to testify that the defendant was somewhere else at the time of the crime. *Id.* Thus, he did not provide the requisite notice under Federal Rule of Criminal Procedure 12.1(a). *Id.* at 764. Even though the failure to disclose the witness was not willful or tactical, the Seventh Circuit upheld the trial court's exclusion of the testimony, finding that it did constitute alibi evidence and therefore should have been disclosed. *Id.*

In *State v. Moore*, the Louisiana Court of Appeals upheld the trial court's refusal to allow the defendant's alibi witness to testify because the defendant failed to give timely notice of an alibi. No. 2009 KA 2186, 2010 WL 1838314 at *1 (La. Ct. App. May 7, 2010). Defense counsel did not learn of the

witness until *voir dire* had begun and, upon learning of the witness, counsel promptly notified the prosecutor and the court. *Id.* at *2. The court refused to allow the witnesses to testify, finding that the defendant failed to give "good cause warranting an exception to the notice requirement." *Id.*; *see also Coleman v. State*, 749 So.2d 1003, 1006 (Miss. 1999) (upholding the trial court's exclusion of the defendant's alibi witness where the defendant provided notice of his intent to call the witness when he first learned of the witness, about a week before trial).

And in *United States v. Jones*, the Eleventh Circuit upheld the trial court's exclusion of the defendant's alibi witness because the defendant provided late notice of his alibi defense, though trial had not yet begun. 456 Fed. Appx. 841, 844 (11th Cir. 2012) (unpublished table decision). The court did not find that the late disclosure was willful or tactical. Nevertheless, it upheld the trial court's exclusion of the defendant's alibi witness, citing potential prejudice to the prosecution. *Id.* at 845.

### B. Other Courts Have Considered and Properly Applied Less Extreme Sanctions When the Failure to Comply with Discovery Rules Was Not Tactical or Willful.

Following *Taylor*, some courts have used more caution in exercising their discretion to exclude defense witnesses. For example, in *Francis v. People*, the Virgin Islands Supreme Court reversed the lower court's exclusion of the defendant's alibi witnesses. 57 V.I. 201, 206 (V.I. 2012). In that case, defense

counsel's failure to disclose the witnesses was not tactical. Rather, it was based on a misunderstanding of the law. Counsel thought that the witnesses were impeachment, rather than alibi, witnesses because they could not attest that they had been with the defendant for the entire period over which the alleged crime took place. *Id.* at 207-08. Moreover, the prosecutor had notice that the witnesses would testify, as they were on the defendant's witness list, just not as alibi witnesses. *Id.* at 222. The court reversed the trial court's exclusion of the defendant's alibi witnesses, finding that under *Taylor,* exclusion was improper. *Id.*

In *United States v. Pomarleau*, the Court of Appeals for the Armed Forces found that the trial court erred in excluding the defendant's evidence without first conducting an inquiry to determine if a less severe sanction was proper. 57 M.J. 351, 363-64 (C.A.A.F. 2002). In that case, the trial court excluded some of the defense's expert witness evidence because the defendant failed to disclose the evidence prior to trial. *Id.* at 363. The court found, "[g]iven the significance of the excluded exhibits and testimony to appellant's case . . . the military judge was obligated to consider whether a less restrictive measure, such as a continuance, could have remedied any prejudice to the government under the circumstances." *Id.* at 364. The court properly reasoned that the exclusionary sanction "should be the last, not the first, remedy for discovery violations." *Id.* at 365 (Sullivan, C.J. concurring).

Further, the court's analysis in *Pulinario v. Goord* demonstrates that a continuance is not the only alternative to preclusion that is available as a

sanction for discovery violations. 291 F. Supp. 2d at 179. There, the defendant was suffering from rape trauma syndrome and thus lied to the prosecutor's psychiatrist. *Id.* at 160. As a sanction, the trial court refused to allow the defendant's psychiatric experts to testify about rape trauma syndrome and post-traumatic stress disorder. *Id.* at 160. On habeas review, the district court reversed the trial court's exclusionary sanction, finding it was "constitutionally disproportionate" to the defendant's violation. *Id.* at 179. The court held that a less severe sanction, such as allowing prosecutor's expert to revise his diagnosis or testify as to defendant's lies, specifically instructing the jury to consider the defendant's untruths, or allowing liberal cross-examination of the defense experts, would have prevented any prejudice to the state and imposed a proportionate sanction on the defendant while still protecting her Sixth Amendment right to present a defense. *Id.* at 179.

Other federal courts have also reversed state courts on habeas review where a defense witness was excluded in violation of the Sixth Amendment. In *Ferrell v. Wall*, the district court also found that the trial court's exclusion of the defendant's alibi witness was improper and that the trial court should have imposed a less severe sanction. 935 F. Supp. 422, 433 (D. R.I. 2013). In that case, the prosecutor had notice that the witness would testify, although the defendant's attorney did not fully disclose the extent of the alibi testimony because he mistakenly believed his colleague had provided that information to the prosecutor. *Id.* at 426-27. Defense counsel's failure to fully disclose the testimony violated Rhode Island's criminal discovery rules. *Id.* Because the defendant did not comply with these rules, the trial court

prevented the defendant from presenting alibi evidence. *Id.* Applying *Taylor*, the court reversed, finding that "[t]his is one of those cases where a sanction other than preclusion would have been 'adequate and appropriate' in order to uphold the [defendant's] Sixth Amendment rights." *Id.* at 433.

And in *Toney v. Miller*, the District Court ruled that the state trial court's exclusion of the defendant's two alibi witnesses violated his rights under the Compulsory Process Clause. 564 F. Supp. 2d 577, 584 (E.D. La. 2008). In so holding, the court alludes to the public defender's high case load. *Id.* Further, in finding minimal prejudice to the state in allowing the alibi witnesses to testify, the court noted that notice of the alibi witnesses was provided after the jury was selected but before trial began. *Id.* at 587-88.

These cases demonstrate the disparate treatment afforded to defendants who provide late notice of defense witnesses. The arbitrariness of the rulings when faced with substantially similar facts calls out for guidance from the Court, especially where an accused's most fundamental rights are at stake.

## IV. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THE COURT TO CLARIFY WHEN AN ALIBI WITNESS MAY NOT BE EXCLUDED FOR A DISCOVERY VIOLATION

In the three decades since the Court issued its decision in *Taylor*, state and federal courts have applied *Taylor* in an inconsistent and, indeed, arbitrary manner. These conflicting rulings have led

to some defendants being allowed to exercise their fundamental Sixth Amendment right to present witnesses in their defense, while other, similarly situated defendants are denied that same right.

This case presents the starkest example of a miscarriage of justice. First, the precluded witness was not merely tangential or cumulative to the defense. Rather, she was an alibi witness who would have testified that Petitioner could not have committed the crime because she was with him at the time.

Second, unlike *Taylor*, there is no evidence in the record to suggest that the alibi witness was unreliable or that her testimony was a recent falsification.

Third, as candidly stated in the Petition, the reason for the late notice was because Petitioner's Public Defense Counsel was overworked and unable to interview the alibi witness until the morning of the first day of trial. There is no suggestion that the late notice was a deliberate, willful, or tactical ploy.

Finally, the trial court does not appear to have considered alternative, less severe sanctions. Indeed, the decision below does not indicate that any analysis of alternatives was undertaken and does not even cite *Taylor*.

The ability to present witnesses in one's defense when a discovery violation occurs should not be left to the unfettered discretion of trial courts. Nor should an accused's ability to defend himself depend on whether he is represented by an overworked public

defender or has the resources to retain counsel who can devote adequate time to the case. Fundamental fairness demands that procedural rules not be allowed to override the Sixth Amendment in the absence of deliberate, willful, and tactically-motivated behavior. This is especially true where, as here, the defense witness is an alibi witness. Allowing exclusion of witnesses in these circumstances inevitably leads to the conviction of the innocent.

## CONCLUSION

This case presents an opportunity for the Court not only to correct an individual miscarriage of justice but to articulate a standard for the exclusion of evidence offered in violation of a procedural rule that recognizes the supremacy of the Sixth Amendment's guarantee of the right to a fair trial. Accordingly, Amicus The Rutherford Institute urges the Court to grant the Petition for Certiorari.

Respectfully submitted,

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