Case No. 24-

IN THE

Supreme Court of the United States

Roman Storm

Petitioner,

v.

United States District Court for the Southern District of New York

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a district court may rely on its "inherent power" to contravene an express provision of Federal Rule of Criminal Procedure Rule 16, where this Court has repeatedly held that the Federal Rules are as "binding as statutes" and district courts have no power to circumvent them.

II. Whether the right to a writ of mandamus is "clear and indisputable," under *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004), where the district court's order violates settled Supreme Court precedent, even where no circuit Court of Appeals previously has been asked to apply that precedent to the federal rule at issue.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Roman Storm, and Respondent is the United States District Court for the Southern District of New York. The United States of America brought this prosecution in the Respondent district court and acted as the respondent in the Second Circuit mandamus proceedings. Petitioner Roman Storm was the defendant in the district court and the petitioner in the Second Circuit mandamus proceedings. Co-defendant Roman Semenov was named in the original indictment, though not in the superseding indictment, and he has not made an appearance in the district court; Mr. Semenov was not a party to the mandamus proceedings in the Second Circuit.

STATEMENT OF RELATED PROCEEDINGS

- *United States of America v. Roman Storm,* No. 1:23-cr-00430-KPF, U.S. District Court for the Southern District of New York. No judgment yet entered; order under review entered October 10, 2024.

- *In re: Roman Storm,* No. 24-2742, United States Court of Appeals for the Second Circuit. Judgment entered November 15, 2024.

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JURISDICTION

The Second Circuit's order denying Petitioner's Petition for Writ of Mandamus was entered on November 15, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Fed. R Crim. P. 16(b):

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Documents and Objects*. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests*. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses*.

(i) Duty to Disclose. At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in- chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or

- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;

- the bases and reasons for them;

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and

- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or

- has previously provided under (B) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must supplement or correct the defendant's disclosures in accordance with (c).

INTRODUCTION

Although this Court has repeatedly held that the Federal Rules of Criminal Procedure are as binding as statutes and may not be contravened by a district court, the district court below disregarded the expert disclosure procedures set forth in Federal Rule of Criminal Procedure 16 ("Rule 16"). Instead, it relied on its "inherent authority" and Federal Rule of Criminal Procedure 57(b) ("Rule 57(b)") to order the defendant, Petitioner Roman Storm, to make detailed pretrial expert disclosures that reveal critical aspects of his defense theory. This Court should grant certiorari and reverse the Second Circuit's denial of mandamus relief to address this judicial overreach that results in significant prejudice and make clear that other district courts should not adopt the district court's error here.

Federal Rule of Criminal Procedure 16 is clear. Defense disclosures—including of expert witness information which is at issue here—are only required when the defense has requested reciprocal discovery from the government. In the absence of such a triggering request, the defense is under no obligation to disclose its confidential defense information to the government before trial. This reciprocal framing was intentional and well-considered by the Judiciary and Congress. Nevertheless, the district court here ordered defense disclosure of expert witness information, even though the defense had made no triggering request for such information. In doing so, the district court effectively read the reciprocal

obligation out of the rule. Under this Court's precedent, to do so was beyond the district court's authority, and usurps the role of Congress and this Court in adopting the Federal Rules of Criminal Procedure.

All other district courts that have opined on the issue have recognized as much and, contrary to the district court here, have expressly declined to order defense expert witness disclosures to the government when the defense has made no triggering request of the government. And no appellate court has addressed this issue for that reason. The district court's decision in this case creates a troubling split in authority. The decision also leaves Petitioner and any similarly situated defendants without a remedy on appeal because the disclosure, once made, cannot be unmade. Allowing the decision to stand will embolden the government to request and other courts to order such disclosures even when they are not permitted under the Federal Rules.

This Court is in a unique position to opine about the proper implementation of the Federal Rules of Criminal Procedure, as this Court itself promulgates the rules. This Court should grant certiorari in this case to make clear the binding nature of the Federal Rules on the district courts and to address an important and recurring issue of federal criminal procedure.

A subsidiary issue in this case which also calls for the grant of certiorari concerns the standard by which mandamus is adjudicated. Citing this Court's holding

in *Cheney*, the Second Circuit denied defendant mandamus relief, finding that the defendant's right to a writ of mandamus was not "clear and indisputable." (App. A, 1a-2a.) While the Second Circuit did not further explain, it likely relied upon the government's argument that the right to relief was not clear because there was no previous Second Circuit authority on point. But this misapprehends the "clear and indisputable" prong of the *Cheney* test, which can certainly be met here given this Court's repeated holdings constraining district courts from varying from the Federal Rules. The holding here puts a criminal defendant in a catch-22: if there is no binding circuit authority on point, he cannot meet the second *Cheney* prong, but the Second Circuit's interpretation of the third *Cheney* prong also requires a defendant to show that the issue is novel and significant, which likely cannot be met where there is Second Circuit precedent on point. Given this inconsistency, the Second Circuit cannot properly have construed the *Cheney* standard, and this Court should grant certiorari to provide guidance.

These issues warrant this Court's review. Maintaining the confidentiality of defense strategy is an important issue that goes to the heart of the right to counsel in criminal cases and the need for zealous advocacy in our adversarial system. Enforcement of the careful balance struck in Rule 16 is therefore critical. Equally important is the need for immediate review through mandamus. Without immediate review, the defense would be forced to disclose confidential defense strategy and would never be able

to "undisclose" it, even if successful on a later appeal. This Court should grant certiorari to address these important issues.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Roman Storm, a software developer and naturalized U.S. citizen, was born in Kazakhstan. In 1996, and following the collapse of the Soviet Union, he and his family relocated to Russia. His family was poor and conditions were difficult, but he earned good grades and admittance into a university, all the while developing a passion for computers and technology.

In 2008, he emigrated to the United States. As a newly arrived immigrant appreciative of the opportunities afforded here, Mr. Storm rebuilt his life from scratch, working low-wage jobs while taking community college computer science courses. He was always drawn to the tech industry, and he held multiple IT jobs at various well-respected technology companies, including Amazon.

In or around 2014, Mr. Storm learned about and became interested in cryptocurrency as a new instrument of finance. He recognized the promise of cryptocurrency but also was aware of a significant concern about a lack of privacy in the transactions. Specifically, while the identity of whoever controls a certain digital wallet address is not revealed on the blockchain, the complete transactional history of a given address is publicly viewable forever as part of

the blockchain's history. This creates significant privacy concerns for legitimate users that are not present if a person uses fiat (*e.g.,* a bank and U.S. dollars) to engage in a transaction. For instance, an individual may want to donate cryptocurrency to a political cause without exposing themselves to potential harassment by the cause's opponents (*e.g.,* a Russian donating to a Ukrainian charity). As another example, an individual holding significant amounts of cryptocurrency may want to shield themselves from scams or other attempts to defraud them.

In response to this concern, Mr. Storm, together with two business partners, developed "Tornado Cash," a software protocol that provides a privacy solution for cryptocurrency transactions. In short, a Tornado Cash smart contract permits someone to deposit cryptocurrency tokens to the smart contract from one address and withdraw the same to a different address without having any connection between the two addresses recorded on the blockchain.

Once a smart contract is deployed, it receives a unique address and can be viewed and used by any user without the need for an intermediary, but because smart contracts are, by default, "immutable," they cannot be removed or updated by anyone—even its creators—once they have been deployed. And because they are open-sourced, anyone can review the underlying code and deploy a similar—or, indeed, identical—version.

In 2022, Treasury Department's Office of Foreign Assets Control ("OFAC") sanctioned Tornado Cash,

naming it as a specially designated national ("SDN"), based on alleged use of the protocol by individuals associated with North Korea. The OFAC sanctions were challenged in two federal court cases. In the first such case, the Fifth Circuit recently held that the sanctions were unlawful on the basis that the Tornado Cash smart contracts were not "property" because they were immutable and therefore the founders, including Mr. Storm, had no ability to control the allegedly violative transactions. *Van Loon v. Dep't of the Treasury*, 122 F.4th 549, 565 (5th Cir. 2024) A second similar challenge is currently on appeal before the Eleventh Circuit. (*See Coin Center et al. v. Yellen et al.*, Case No. 3:22-cv-20375 (N.D. Fla.), No. 23-13698 (11th Cir.).)

Shortly after the OFAC sanctions were issued, one of the other co-founders of Tornado Cash was arrested in the Netherlands, and Mr. Storm learned he was under investigation in the United States based on his development of Tornado Cash. Despite his full cooperation with the government, Mr. Storm was arrested in August 2023, but he was released on bail and remains out of custody.

B. District Court Proceedings

On August 21, 2023, the government filed its indictment against Mr. Storm, alleging three counts of conspiracy: (1) money laundering; (2) operating an unlicensed money transmitting business; and (3) violating the International Emergency Economic Powers Act. (*United States v. Roman Storm*, No. 23 Cr. 430 (KPF) (S.D.N.Y. Aug. 21, 2023) ("SDNY");

SDNY Dkt 1.) Mr. Storm pled not guilty to all three charges. (SDNY Dkt. 6.) Trial was initially scheduled for September 23, 2024 but was subsequently continued to December 2, 2024. (SDNY Dkt. 17, 67.)

On September 18, 2024, the government submitted a letter motion requesting, among other things, that the court "order the parties to produce expert disclosures substantively consistent with the notice required by Federal Rules of Criminal Procedure 16(a)(1)(G) and 16(b)(1)(C)." (SDNY Dkt. 79.) On September 25, 2024, the defense opposed the government's letter motion, including its request to order the defense to make expert disclosures under Rule 16, on the basis that the defense had not made a triggering request for expert witness disclosures. (SDNY Dkt. 82.)

On October 10, 2024, the district court gathered the parties to resolve the parties' pretrial disputes. (SDNY Dkt. 86.) At the hearing, the government acknowledged that "the issue of the Court ordering pretrial expert disclosures is, as far as we can tell, an issue of first impression, not just in this district, but in this Circuit." (Transcript of October 10, 2024 Oral Argument and Court's Oral Order ("Tr."), 8:10-13.) The government also acknowledged that "the specific aspects of Rule 16 that require disclosures are triggered by defense request for disclosures." (Tr. 11:15-17.) Nevertheless, the government argued that the court could order pretrial defense disclosure of expert witness information based on the "underlying purpose" of Rule 16 and as part of its "gatekeeping authority" under Federal Rule of Evidence 702. (Tr.

11:17-12:8.) The defense objected, noting that Rule 16 was clear that the pretrial disclosure of defense expert witness information is triggered only upon defense request and that Rule 702 does not "trump" Rule 16. (Tr. 12:25-13:3.)

The district court dismissed the defense's right to preserve the confidentiality of its defense strategy as "gamesmanship" and "parlor tricks." (Tr. 24:12-16; 27:12-18; App. E, 17a.) The court noted the "paucity of case law" on the issue and stated that she had polled her colleagues in the Southern District of New York. (Tr. 21:15-19; App. E, 12a.) The court explained that she considered the "majority view" of her colleagues that she had the "inherent power" to order pretrial disclosures and also considered her authority under Federal Rule of Criminal Procedure 57 and the Federal Rules of Evidence. (Tr. 22:18-23; 23:14-24:8; 24:22-25:6; App. E, 12a-15a.) Concluding that she had the authority to do so under one or more of these sources, the district court ordered the parties to exchange initial expert witness disclosures by November 4, 2024 and rebuttal expert disclosures by November 11, 2024. (Tr. 25:18-22; App. E, 15a-16a.) In issuing this pretrial disclosure order, the district court acted in contravention of Rule 16's plain language, this Court's precedent, and existing district court analysis.

No court of appeals has squarely addressed the issue; in part because the issue is so undebatable that no district court had ruled as the district court here did,

and in part because there is virtually no mechanism for defendants to raise the issue on appeal.

C. Mandamus Proceedings

Promptly after the district court's order, Petitioner filed a Petition for Writ of Mandamus in the Second Circuit on October 16, 2024. (*In Re: Roman Storm*, No. 24-2742 (2d Cir. October 17, 2024) ("2d Cir."); 2d Cir. Dkt. 1.) Petitioner argued that he had a clear and indisputable right to the writ because the district court had no authority to contravene Rule 16's plain directive that the defense may only be required to disclose expert witness information ***if*** the defense has first made a triggering request for such discovery from the government and the government has complied.

Petitioner also argued that he had no other adequate means to obtain relief because the disclosure of confidential defense strategy mandated by the district court's order could not be remedied on appeal from final judgment. (*Id.*) Finally, Petitioner argued that a writ was appropriate under the circumstances because of the novelty and significance of the issue, the lack of other adequate means to obtain relief, and the benefit of providing guidance on the issue to the administration of justice. (*Id.*)

Meanwhile, Petitioner asked the district court for a stay of the order, which it denied. (SDNY Dkt. 91; App. D, 8a-9a.) Then, concurrently with his mandamus petition, Petitioner asked the Second Circuit for an immediate stay of the order pending

resolution of his mandamus petition. (2d Cir. Dkt. 6.) The government filed an opposition to the motion for stay. (2d Cir. Dkt. 19.) On October 29, 2024, the Second Circuit granted Petitioner's request for a stay on a temporary basis (2d Cir. Dkt. 21; App. B, 3a-4a.), and the defense therefore did not make expert witness disclosures. Instead, on November 1, 2024, pursuant to the parties' agreement, the district court ordered that the case be continued from its December 2024 trial date to April 14, 2025. The court agreed to set dates for expert witness disclosures, if necessary, following the Second Circuit's resolution of Petitioner's mandamus petition.

The Second Circuit ordered a response to the mandamus petition from the government, which was filed on November 5, 2024. (2d Cir. Dkt. 35.) The Second Circuit ordered and heard oral argument on the petition on November 12, 2024. On November 15, 2024, the Second Circuit denied Petitioner's mandamus petition, stating that he had not established a "clear and indisputable right" to the writ. (2d Cir. Dkt. 49; App. A, 1a-2a.)

D. Further Proceedings in the District Court

Following the Second Circuit's order denying Petitioner's mandamus petition, Petitioner requested that the district court conduct an *in camera* review of the expert witness information before ordering its disclosure to the government. (SDNY Dkt. 111.) The government opposed this request (SDNY Dkt. 113), and the district court denied the request on December

23, 2025 (SDNY Dkt. 114; App. C, 5a-7a). The district court did, however, adopt an alternative schedule that requires the government to disclose its expert witness information by February 17, 2025, and the defense to disclose its expert witness information by March 3, 2025. (SDNY Dkt. 114; App. C, 5a-7a.)

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Make Clear That District Courts Lack Inherent Authority To Contravene Federal Rule of Criminal Procedure 16 by Ordering Defense Pretrial Expert Witness Disclosures When the Defendant Has Not First Requested Disclosure of the Government's Experts

The district court's order requiring disclosure of defense expert witness information is in direct contravention of Federal Rule of Criminal Procedure 16, which requires such disclosure only if the defense has made a triggering request for the same information from the government and the government has complied. This Court has made clear that district courts do not have the authority to contravene the Federal Rules of Criminal Procedure. For this reason, other courts have consistently held that district courts have no authority to order defense disclosures to the government as were ordered here.

This Court should grant certiorari to resolve this issue and clarify that district courts do not have inherent authority to vary from the plain text of Rule 16. The district court's refusal to follow the Federal

Rules of Criminal Procedure calls for an exercise of the Court's supervisory power under Supreme Court Rule 10(a), especially because the rules were promulgated pursuant to the Court's "supervisory authority over the administration of criminal justice in the federal courts." *McNabb v. United States*, 318 U.S. 332, 341 (1943). Certiorari is also warranted under Supreme Court Rule 10(c) because the district court's unprecedented order, which the Second Circuit allowed to stand, "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c) .

A. Federal Rule of Criminal Procedure 16 Is Clear

Rule 16 requires defendants to make pre-trial expert disclosures only if they first request such disclosure from the government and the government complies with the request. The Rule provides:

> **(b) Defendant's Disclosure.**
>
> **(1) Information Subject to Disclosure**.
> * * *
>
> **(C) Expert Witnesses.**
>
> **(i) Duty to Disclose.** At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant

> intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, ***if***:
>
> • the defendant requests disclosure under (a)(1)(G) and the government complies; or
>
> • the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

Fed. R. Crim. P. 16 (emphasis added).

The presence of this reciprocal discovery trigger in Rule 16 was no accident: it represents a careful balancing by Congress. In fact, the legislative history of Rule 16 reflects that Congress initially contemplated requiring defendants to provide expert disclosure but instead crafted Rule 16 as a reciprocal obligation to assuage constitutional concerns. "The House bill had changed this for constitutional reasons—requiring a defendant, upon request, to give the prosecution material that may be incriminating raises very serious 5th Amendment problems. These problems are overcome by making discovery reciprocal." *See* 121 Cong. Rec. H7859-7865 (daily ed. July 30, 1975) (PDF).

As one of the leading federal practice commentators noted:

> When the Advisory Committee began work on the amendments that were ultimately adopted in 1975, it concluded that the government should be given an unconditional access to discovery. Proposed Rule 16(b), as drafted by the Advisory Committee and approved by the Supreme Court in 1974, took this approach. ***The House of Representatives, troubled by constitutional doubts, revised the rule to give the government a right of discovery only if defendant has requested and obtained similar discovery.*** Although the Senate accepted the Advisory Committee's proposal for unconditional discovery, the Conference Committee adopted the House provisions and it is in this form that what is now Rule 16(b) became effective December 1, 1975.

Wright & Miller § 251, History and Policy Considerations, 2 Fed. Prac. & Proc. Crim. § 251 (4th ed) (footnotes omitted) (emphasis added). Although the Rule was amended in 1993 and then again in 2022, the reciprocal trigger remained. As the Advisory Committee explained, "Like other provisions in Rule 16, subdivision (a)(1)(E) requires the government to disclose information regarding its expert witnesses if the defendant first requests the information. Once the requested information is provided, the government is entitled, under (b)(1)(C)

to reciprocal discovery of the same information from the defendant." Fed. R. Crim. P. 16, Advisory Committee's Note to 1993 Amendment.

The history of the rule thus confirms the most straightforward reading of the text—that defendants are only required to sacrifice otherwise confidential and constitutionally-protected information if they choose to trigger the reciprocal obligations of Rule 16. If they choose not to make such a request, disclosure is not required. This reflects the intentional balance struck by Congress.

Applying the plain text of the rule, numerous courts have found the government's right to pretrial disclosure of defense expert witness information to be conditioned on a defense request and the government's compliance with it. *See, e.g., United States v. Crinel,* No. CR 15-61, 2016 WL 5779778, at *1 (E.D. La. Oct. 4, 2016) ("a prerequisite to any obligation of a defendant to provide discovery under Rule 16(b)(1) is that the defendant had requested discovery and the government has complied."); *United States v. Burke,* No. 3:12-CR-318-D, 2015 WL 1931327, at *3 (N.D. Tex. Apr. 29, 2015) ("[The defendants] are permitted to rely, however, on the government's alleged failure to produce discovery within the scope of Rule 16(a)(1)(e) when opposing the government's request for reciprocal discovery under Rule 16(b)(1)(A)."); *United States v. Antoine*, No. CR 10-229, 2012 WL 3279207, at *3 (W.D. Pa. Aug. 9, 2012) ("The [d]efendants sought disclosure pursuant to Fed. R. Crim. P. 16(a)(1)(G) and the [g]overnment

has complied with this discovery request. Therefore, it is entitled to the requested pretrial, reciprocal discovery from the [d]efendants pursuant to Fed. R. Crim. P. 16(b)(1)(C)(i)."); *United States v. De Leon-Navarro,* No. 10-CR-188A SR, 2012 WL 2254630, at *7 (W.D.N.Y. June 15, 2012) ("Since the defendant has moved pursuant to Rule 16(a)(1) of the Federal Rules of Criminal Procedure for similar materials and information, the government is entitled to reciprocal discovery pursuant to Rule 16(b)(1).").

Indeed, the cases further reflect that the government has itself relied on the reciprocal nature of the rule to avoid pretrial expert disclosure. Courts therefore have found the government has no obligation to provide expert disclosure if the defense does not request it. *See, e.g., United States v. Johnson,* 228 F.3d 920, 924 (8th Cir. 2000); *United States v. Salerno,* 108 F.3d 730, 743 (7th Cir.1997).

In short, there is no doubt that, under Rule 16, any defense pretrial expert witness disclosure obligation is conditional on the defendant's request and the government's compliance with such request.

B. This Court's Precedents Make Clear That the District Court Had No Authority To Contravene Rule 16

The district court committed a clear and indisputable error in ordering pretrial disclosure of defense expert witnesses in the absence of a request for government expert witness disclosures. Recognizing that Mr. Storm had not made a request for government expert

discovery under Rule 16, and that therefore the rule provided no authority to order him to make expert disclosures, the district court premised its disclosure order on its "inherent authority" and Rule 57(b). This Court has made clear, however, that neither source of authority permits a district court to contravene or contradict statutes or rules. *See Carlisle v. United States,* 517 U.S. 416, 425-28 (1996). The district court's view, if adopted, would read out of Rule 16 a fundamental piece of text and upset Congress's carefully calibrated balance.

Neither Rule 57(b) nor any inherent authority permits the district court to circumvent Rule 16. Rule 57(b) provides in relevant part:

> **(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.

As this Court explained in *Carlisle,* a district court exceeds its Rule 57(b) authority when it makes an order that is "not consistent" with an express provision of another Federal Rule of Criminal Procedure. *See* 517 U.S. at 425 (court had no authority under Rule 57(b) to excuse untimely filing of Rule 29 motion because it was inconsistent with Rule's express provision of a 7-day time limit).

A district court's "inherent authority" is subject to the same constraint. *Id.* at 426 ("Whatever the scope of this 'inherent power,' . . . it does not include the power

to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure."); *Dietz v. Bouldin,* 579 U.S. 40, 45 (2016) ("the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute"); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988) ("a federal court may not invoke supervisory power to circumvent the … Federal Rule[s] of Criminal Procedure"). As the Court noted in *Bank of Nova Scotia*:

> In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). Nevertheless, it is well established that "[e]ven a sensible and efficient use of the supervisory power ... is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 471–472, 88 L.Ed.2d 435 (1985). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737, 100 S.Ct. 2439, 2447, 65 L.Ed.2d 468 (1980).

487 U.S. at 254. This Court went on to explain that the Federal Rules of Criminal Procedure, which are promulgated by this Court and adopted by Congress, are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." *Id.* at 255.

The district court also posited that it had authority to order discovery under the Federal Rules of Evidence. As an initial matter, the evidentiary rules address admissibility, not the timing or substance of expert disclosures. Moreover, the district court conflated two questions: first, whether a district court has the authority as a gatekeeper to evaluate Petitioner's contemplated expert testimony before those experts testify (yes); and second, whether a court has the inherent authority, contrary to the language of Rule 16, to order Petitioner to make pretrial disclosures to the government of expert opinions which may or may not be offered into evidence (no). Petitioner does not deny the district court's authority—and responsibility—to evaluate the experts he presents in his defense. Petitioner does, however, take issue with a district court's authority to order him to disclose information he chose not to place within the government's reach before trial, a choice intentionally given to him by this Court and Congress.

Because Rule 16 expressly provides a procedure for the possible exchange of expert witness information, which is expressly conditioned on a reciprocal request

for government expert witness disclosures and the government's compliance therewith, its procedures were binding on the district court. Under this Court's precedents, the district court had no authority to contravene it.

C. Other District Courts Have Concluded They Lack Authority To Order Pretrial Disclosure of Defense Expert Witnesses in the Absence of a Triggering Request

As far as Petitioner is aware, no circuit court has addressed whether a district court has inherent authority to contravene Rule 16 by ordering pretrial expert witness disclosure in the absence of a reciprocal demand and compliance. This is because no district court has ever claimed such authority. Numerous district courts have acknowledged the reciprocal trigger built into Rule 16, however, and have rejected the proposition that they have authority to order the parties to make disclosures in the absence of a defense triggering request. *See United States v. Thompson*, No. CR19-159-RSL, 2022 WL 841133, at *1-2 (W.D. Wash. Mar. 21, 2022); *United States v. Harwin*, No. 2:20-CV-115-JLB-MRM, 2021 WL 5707579, at *2 (M.D. Fla. Oct. 29, 2021); *United States v. Penn*, No. 20-CV-00152-PAB, 2021 WL 4868439, at *1 (D. Colo. Oct. 19, 2021); *United States v. Dailey*, 155 F.R.D. 18, 21 (D.R.I. 1994).

In *Harwin,* the government sought pretrial review of the defendant's expert because, much like the government argued here, it would "be difficult and time consuming to qualify an economic expert in the

middle of trial outside the presence of the jury" and that it "is better done prior to trial." 2021 WL 5707579, at *2 (internal quotations omitted). The district court there denied the request because the court's "gatekeeping function" under *Daubert* did not justify requiring defense pretrial disclosure in contravention of Rule 16. *Id*. The court explained:

> [I]f Congress believed that "disclosures as to expert witnesses creates a unique situation that mandates providing the government with such information," [it] "could have easily carved out an exception in Rule 16 as to expert[s]." (Doc. 114-1 at 3.) Even more, there are constitutional implications to compelling such criminal discovery. See, e.g., *Wardius v. Oregon*, 412 U.S. 470 (1973); *United States v. Bump*, 605 F.2d 548, 552 (10th Cir. 1979) (finding disclosures pursuant to Rule 16(b) constitutional in part because "the prosecutor's right of discovery arises only after the defendant seeks discovery of similar evidence from the government").

Id.

In *Thompson*, the district court rejected the government's argument that Rule 16 "does not control the court's discretion to manage trial procedures or exercise its expert witness gatekeeping function under Fed. R. Evid. 702, *Daubert* […], and *Kumho*." ,

2022 WL 841133, at *1. Instead, the court held that Rule 16 is "controlling law" setting forth "not only the content of discovery, but the conditions under which it must be disclosed." *Id.* at *2.

In *Dailey*, the defendant challenged a uniform discovery order which made Rule 16 pretrial disclosures, including expert disclosures, automatic without first triggering reciprocal discovery obligations. 155 F.R.D. at 20-21. The district court held that the court lacked authority for the order under Rule 57(b):

> Rule 16 clearly provides the procedure for pretrial discovery in criminal cases. Thus, any local rule may not be inconsistent with Rule 16. Because the Standard Order is inconsistent with Rule 16, this court has no authority to require Mr. Dailey to provide discovery in any manner other than that described in Rule 16.

Id. at 21. Relevant to the government's arguments here, the court also rejected the government's claims that the court has an inherent authority to: 1) "regulate discovery and manage its calendar" by authorizing pretrial discovery not specifically provided for under Rule 16; and 2) "order and supervise discovery in a criminal case above and beyond any of the mentioned rules." *Id.* (quoting *United States v. Williams,* 792 F. Supp. 1120, 1123 (S.D. Ind. 1992)). Indeed, the district court concluded that there was "'no authority for the proposition that

a court has inherent authority to compel a defendant to provide pretrial discovery which is not specifically authorized in Rule 16,'" *id.* (quoting *United States v. Layton,* 90 F.R.D. 520, 523 (N.D. Cal. 1981), and found that the automatic Rule 16 disclosures were "*in contradiction of* Rule 16." *Id.* (emphasis in original).

Petitioner is aware of no published district court decision ordering, as the district court did here, the pretrial disclosure to the government of defense expert witness information in the absence of a triggering defense request and government compliance. The government cited only one decision in support of its position, *United States v. Impastato*, 535 F. Supp. 2d 732 (E.D. La. 2008). But there, the district court ordered defendant to disclose only the *identity* and *subject matter* of any potential expert witnesses *in camera* to the court, after which it would order reciprocal discovery *only if* it found that "the witness's testimony [was] of such nature that immediate disclosure to the [g]overnment [was] warranted in order to facilitate the efficient operation of the trial." *Id.* at 743-44. The *Impastato* court, in fact, first recognized that "only [the Federal Rules of Criminal Procedure] can impose the duty of disclosure on defendants, regardless of the authority of the judge." *Id.* at 743. Further, the *Impastato* court recognized that any procedure it adopted "must be crafted in a way that respects the fact that the

[d]efendant has no obligation to present a defense until the [g]overnment has established its case." *Id.*[1]

The district court's order is in direct contravention of Rule 16 and this Court's case law. This Court should grant certiorari to make clear that district courts have no authority to so contravene Rule 16.

II. This Court Should Also Grant Certiorari To Clarify That There Is a "Clear and Indisputable" Right to a Writ of Mandamus Under *Cheney* Notwithstanding the Absence of Controlling Circuit Authority Where, as Here, This Court's Precedents Are Clear

This Court has held that three conditions must be satisfied for the Court to issue a writ of mandamus: (1) the petitioner must "have no other adequate means to attain the [requested] relief;"(2) the petitioner must demonstrate that the "right to issuance of the writ is clear and indisputable;" and (3) the issuing court "must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-381 (2004)). However, this Court has not revisited the mandamus standard

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[1] Petitioner has identified one other case in which a district court ordered *in camera* review of defense expert reports. *See United States v. Nacchio*, 555 F.3d 1234, 1238 n.2 (10th Cir. 2009) (McConnel, J. dissenting) (citing *United States v. Poulsen,* No. 06–129 (S.D.Ohio September 28, 2007), where defendants were ordered to submit expert reports *in camera* to prevent the government from getting "an unjustified preview of Defendant's litigation strategy").

in the 20 years since *Cheney* and thus has offered little guidance on how and when these conditions are applied, resulting in the courts of appeals issuing conflicting opinions. In this case, the Second Circuit erred in its finding that Petitioner's right to the writ was not clear and indisputable, despite the Supreme Court authority described above. This Court should grant certiorari to provide the lower appellate courts guidance on this issue. *See* S. Ct. R. 10(a) (conflicting courts of appeals decisions), (c) (settle important question of federal law).

For all the reasons discussed above, Petitioner's right to a writ is clear and indisputable. Rule 16(b)(1)(C) is clear—a defendant has no obligation to disclose expert witness information unless he has first requested such information from the government and the government has complied. This Court has been equally clear that district courts have no authority to contravene the Federal Rules of Criminal Procedure. *See, e.g., Carlisle,* 517 U.S. at 425-28.

Nevertheless, the Second Circuit denied the writ on the sole ground that the right to a writ was not clear and indisputable.[2] (2d Cir. Dkt. 49; App. A, 1a-2a.)

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[2] The other two *Cheney* elements are easily satisfied here. For reasons discussed in Section III below, there are no other adequate means of relief because the district court's order forces the disclosure of confidential defense strategy, which cannot be remedied on appeal. A writ is also appropriate under the circumstances because the issue presented is concededly novel, and for reasons also discussed in Section III below, is highly significant.

While not stated, it appears the Second Circuit may have been persuaded by the government's misplaced argument that no federal appellate court had previously adopted Petitioner's argument. (*See* 2d Cir. Dkt. 35, at 9.) Of course, it is not surprising that no appellate court had issued such a decision: before this case, there had never been any doubt that Rule 16 meant what it said. Significantly, no federal appellate court has ever rejected Petitioner's argument either, while the Supreme Court and numerous appellate courts have confirmed that the Federal Rules of Criminal Procedure have the force of law and cannot be circumvented under any inherent power or Rule 57(b). In addition, as discussed above, district courts have (until now) uniformly refused to order pretrial disclosures to the government of expert witness information in the absence of a triggering request by the defense.

Imposing a rule that there must be prior circuit authority on point for the right to a writ to be clear and indisputable would be ironic because courts also find that writ relief is appropriate to resolve "novel and significant" questions of law. *See, e.g., S.E.C. v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010); *In re City of New York,* 607 F.3d 923, 939 (2d Cir. 2010); *see also Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964) (mandamus relief appropriate to review "first of its kind" order). It is difficult to conceive how parties could ever establish a right to writ relief if they are simultaneously required to show both controlling authority on point and a "novel" question of law.

The courts of appeal have issued conflicting opinions on this issue. The Ninth Circuit has recognized precisely the dilemma outlined above and has held that "the necessary 'clear error' factor does not require that the issue be one as to which there is established precedent." *Perry v. Schwarzenegger,* 591 F.3d 1147, 1159 (9th Cir. 2010).[3] That court has also held that the "clear error" standard is "met even without controlling precedent" where, as here, "the plain text of the statute prohibits the course taken by the district court." *In re Kirkland,* 75 F.4th 1030, 1041 (9th Cir. 2023).

The Fifth Circuit, on the other hand, has troublingly stated that a mandamus petitioner's theory about the scope of a Federal Rule of Civil Procedure was not "clearly established" where there was no "controlling authority in support of it." *In re Jefferson Parish,* 81 F.4th 403, 409 (5th Cir. 2023). In that case, unlike here, neither the text of the rule nor this Court's authorities supported the petitioner's position. Nevertheless, the Fifth Circuit's insistence on "controlling authority" indicates that the courts of appeals have been inconsistent in their approach.

This Court should grant certiorari to clarify that a "clear and indisputable" right to writ relief does not require that there be controlling circuit authority on

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[3] The Ninth Circuit applies a five-factor test for mandamus review. *Perry,* 591 F.3d at 1156. The third factor, that there be a "clear error" corresponds to the second *Cheney* factor that the right to the writ be "clear and indisputable." *See id.*

point. Where, as here, there is clear statutory and Supreme Court authority supporting the outcome, a petitioner should be deemed to have shown a "clear and indisputable" right to the writ.

III. The Issues Presented Are Important

A. Enforcing Rule 16's Conditional Requirement for Defense Disclosures Is Important To Preserve Judicial Integrity and Protect Constitutional Rights

Whether a district court may order defense disclosures in contravention of Rule 16 is an important issue for the Court to address. The Federal Rules of Criminal Procedure are promulgated by this Court and adopted by Congress. This Court should emphasize to district courts the limits of their authority and that they must defer to Congress's judgment. It is not for the lower courts to rewrite Rule 16 or any other federal rule or procedure. *See, e.g., Bank of Nova Scotia,* 487 U.S. at 254; *see also United States v. Robinson*, 361 U.S. 220, 229 (1960) (even where "powerful policy arguments … both for and against greater flexibility" with respect to a Federal Rule of Criminal Procedure exist, "that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision").

The issue has become more acute and is arising more frequently because of the 2022 amendments to Rule 16. While those amendments did not change the

conditional and reciprocal nature of expert disclosures, they do require more expansive disclosures than had previously been required in criminal cases. The rule now requires, among other things, "a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief" and "the bases and reasons for them." Fed. R. Crim. P. 16(b)(1)(C)(iii). These requirements reveal more defense strategy than the prior versions of Rule 16, and for this reason, the government is making new challenges to the conditional nature of the rule and can be expected to continue to do so until this Court addresses the issue.

Indeed, in its letter brief below, the government indicated that it was regularly engaging in the practice of demanding pretrial expert witness disclosures. (SDNY Dkt. 113.) While it is unclear whether the government has yet succeeded in obtaining compelled disclosures in other cases, it is clear the district court's order in this case will empower the government to ask district courts to circumvent Rule 16 to order defense disclosures. In fact, based on the district court's own statement that she had polled other district court judges who agreed with her views on a district court's inherent authority to order disclosures, it is likely that other judges will follow this district court's lead to improperly order such pretrial disclosures. (Tr. 21:15-19; App. E, 12a.)

Beyond that, it is not just expert witness disclosures at issue here. Rule 16 provides similar reciprocal discovery procedures for documents and objects and

reports of examinations and tests. Fed. R. Crim. P. 16(b)(1)(A), (B). If a district court has the authority to order pretrial disclosure of expert witness information under Rule 16(b)(1)(C) in the absence of a triggering request to the government, then the court would also have authority to order the pretrial production of documents and objects and reports of examinations and tests, even where the defense has chosen not to waive its rights under the rule. This would have widespread consequences for virtually all federal criminal prosecutions.

To require such disclosures even when no triggering request has been made implicates serious constitutional concerns. As the legislative history reflects, requiring defense disclosures can implicate the Fifth Amendment's privilege against self-incrimination. *See* 121 Cong. Rec. H7859-7865 (daily ed. July 30, 1975) (PDF). The conditional nature of the rule was carefully crafted to ameliorate this concern by preserving defendants' rights to choose either to make disclosures or to remain silent.

Moreover, where, as here, the parties' respective cases depend largely on expert testimony, a thorough view into the defense's potential expert testimony and opinions gives the government a full picture of how the defense plans to defend the case. As this Court has recognized, such a breach of the confidentiality of defense strategy implicates the Sixth Amendment. *See Weatherford v. Bursey,* 429 U.S. 545, 553-58 (1977) (recognizing Sixth Amendment implications from revelation of confidential defense strategy but

finding no Sixth Amendment violation where there was, among other things, "no communication of defense strategy to the prosecution"); *see also United States v. Chandler,* 56 F.4th 27, 36-40 (2d Cir. 2022), *cert. denied,* 143 S. Ct. 1791 (2023) (recognizing Sixth Amendment issue in revelation of trial strategy but concluding, on plain error review, that defendant had not established Sixth Amendment violation where informant was not acting for government and information regarding trial strategy did not come from attorney). Where there has been purposeful invasion and the communication of confidential defense strategy, courts have found a Sixth Amendment infringement. *See, e.g., United States v. Danielson,* 325 F.3d 1054, 1066-74 (9th Cir. 2003) (defendant raised valid Sixth Amendment claim when informant repeatedly conveyed confidential defense trial strategy, including defendant's decision whether to testify and nature of his defense, to prosecution).

As this Court and others have observed, maintaining the confidentiality of defense strategy is an essential part of the adversarial process, which is fundamental to our system of justice:

> The Sixth Amendment is meant to assure fairness in the adversary criminal process. *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best

> promote the ultimate objective that the guilty be convicted and the innocent go free." *Id*. at 655, 104 S.Ct. 2039 (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). Because this "very premise" is the foundation of the rights secured by the Sixth Amendment, where the Sixth Amendment is violated, "a serious risk of injustice infects the trial itself." *Id*. at 656, 104 S.Ct. 2039 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)).

Danielson, 325 F.3d at 1066.

The district court's concern about "gamesmanship" by the defense was thus misplaced. (App. E, 17a.) The defense is simply asking for enforcement of the Federal Rules of Criminal Procedure, to which it is entitled. Those rules protect, as they should, the confidentiality of defense strategy. To do anything less than seeking the full protection of that confidentiality would be to abandon the zealous advocacy required of constitutionally effective counsel.

Finally, this Court's own precedents underscore why the case is important. The issue of the scope of a district court's authority is one this Court has repeatedly taken up. *See Dietz,* 579 U.S. at 45; *Carlisle,* 517 U.S. at 425-28; *Bank of Nova Scotia,* 487 U.S. at 254. This Court should intervene swiftly to

correct the district court's judicial usurpation of legislative authority.

B. Mandamus Review Is Essential To Preserve Important Defense Rights in the Interests of Justice

Preserving the confidentiality of defense strategy is also why allowing review of defense disclosure orders by writ of mandamus is so critical. The Second Circuit's misapprehension of the "clear and indisputable" prong of *Cheney* will leave defendants with no way to preserve the confidentiality of their defense strategy.

To understand the significance of this issue, it is important to understand that, under the district court's order, the defense will be forced to disclose all expert witnesses it ***might*** call at trial and give a detailed summary of testimony they ***might*** give. But often the defense does not end up calling all potential defense witnesses and indeed may elect, after hearing the government's case, not to call any experts, or even any witnesses, at all. For example, the government may not call all of its proposed experts or may narrow the set of issues on which they testify. The defense will frequently tailor its expert evidence to meet what the government presents, as it is entitled to do. That may mean calling fewer or no expert witnesses or narrowing the issues on which they testify. If the district court imposes a pretrial disclosure order, as was done here, the defendant is forced to disclose to the government far more defense information than he ultimately may use at trial. If the defendant is

convicted and prevails on appeal based on the improper disclosure of defense strategy, then on retrial, there would be no way to have a fair trial with no such improper government advantage because the government would already have knowledge of the defense strategy. The bell of defense strategy, once rung, can never be unrung.[4]

Furthermore, it would be impossible following trial to determine what impact such an improper government

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[4] Because of the ineffectiveness of the appeal remedy, lower courts have repeatedly issued writs to prevent the disclosure of confidential information. *See, e.g., In re Roman Catholic Diocese of Albany, New York,* 745 F.3d 30, 33, 35-37 (2d Cir. 2014) (disclosure of potential sexual abuse by priests was harm not adequately remediable after judgment); *In re The City of New York,* 607 F.3d 923, 934 (2d Cir. 2010) (disclosure of confidential police reports not adequately remediable after final judgment); *In re von Bulow,* 828 F.2d at 98-99 (no other adequate means to remedy revelation of attorney-client privileged communications); *see also, e.g., In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1305 (Fed. Cir. 2006) (issuing writ to prevent disclosure of work product protected information); *In re E.E.O.C.*, 207 F. App'x 426, 434-35 (5th Cir. 2006) (issuing writ to prevent disclosure of work product protected information); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 866 (3d Cir. 1994) (issuing writ of mandamus to prevent disclosure of work product protected information); *In re Burlington N., Inc.*, 822 F.2d 518, 522-23, 534 (5th Cir. 1987) (conditionally issuing writ to prevent disclosure of potentially privileged information, including under the work product privilege). As the Second Circuit observed in *In re City of New York,* "a remedy after final judgment cannot unsay the confidential information that has been revealed." 607 F.3d at 934 (internal quotation marks omitted).

advantage had. The government would likely argue it had none, but the defense would be powerless to rebut such a contention without delving into the confidential deliberative process and work product of the government's attorneys. Thus, the usual reasons for awaiting final judgment for appeal—the development of a record that may demonstrate prejudice—do not apply here. Simply put, there will be no record a defendant can cite to demonstrate prejudice, because such record would not be available to him.

Thus, it is critical for review of this issue to be made by mandamus. The Second Circuit's erroneous denial of mandamus relief based on the supposed absence of a "clear and indisputable" right to the writ would foreclose any effective remedy to Petitioner and the multitude of other defendants likely to be subjected to erroneous disclosure requirements. This Court should step in now to provide clarity and prevent errors that cannot be adequately cured on appeal.

IV. This Case Provides an Excellent Vehicle for This Court's Review

This case is well positioned for this Court to review the important issues presented in this petition. The substantive question presented was fully preserved in both the district court and the Second Circuit. Petitioner vigorously opposed pretrial disclosure of his potential expert witness information and promptly sought mandamus review to prevent such disclosure. Thus, there is no issue of waiver or forfeiture that would impede this Court's review.

Moreover, this certiorari petition has been timely presented to prevent the erroneous disclosure of confidential defense strategy. No expert witness disclosures have yet been made, so this Court is in the perfect position to prevent the illegal disclosure before it is made. Simultaneously with this certiorari petition, Petitioner is requesting a stay to forestall the district court's order requiring disclosure. With such a stay in place, this Court will have time to consider this petition and issue a meaningful ruling preventing disclosure. Conversely, if the issue were to be presented after disclosure, there would be no way for this Court to provide effective relief. And if this issue were presented in a direct appeal from final judgment, there would be no way for this Court to tease out what the prejudice to the defense was because it will be impossible to discern what advantage the prosecution may have gained based on the improper disclosure.

The posture of this case, following denial of a writ of mandamus, also gives this Court the opportunity to address the important question of whether mandamus review may be denied simply due to the absence of circuit authority on point. This Court should take the opportunity to make clear that mandamus review is available whenever, as here, the right to relief is "clear and indisputable" and to guard against irreversible prejudice such as occurs in the case of improper disclosure orders.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Storm's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-2742

ROMAN STORM, AKA SEALED DEFENDANT 1,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed November 15, 2024

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of November, two thousand twenty-four.

Present: Reena Raggi,
Myrna Pérez,
Maria Araújo Kahn,
Circuit Judges.

Appendix A

Petitioner, through counsel, has filed a petition for a writ of mandamus, which the New York Council of Criminal Defense Lawyers supports in an amicus brief.

It is ORDERED that the petition is DENIED because the petitioner has not demonstrated that his right to the writ is clear and indisputable. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381 (2004). It is further ORDERED that all other pending motions are DENIED as moot.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 24-2742

ROMAN STORM, AKA SEALED DEFENDANT 1,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed October 29, 2024

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand twenty-four.

Before: Beth Robinson,
Circuit Judge.

Petitioner Roman Storm moves for a stay of the district court's order entered on October 10, 2024, pending

this Court's determination of his mandamus petition. He also requests expedited review of his mandamus petition.

IT IS HEREBY ORDERED that the motion is granted to the following extent. Storm's mandamus petition is REFERRED to the next available three-judge motions panel. The Court grants a temporary stay of the district court's October 10, 2024 order pending decision by the motions panel.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 23, 2024

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

23 CR.430 (KPF)

UNITED STATES,

v.

ROMAN STORM.

ORDER

Signed December 19, 2024
Filed December 23, 2024

The Court has reviewed Defendant Roman Storm's request that certain expert disclosures be submitted *ex parte* and *in camera* (Dkt. #111), and the Government's submission in opposition (Dkt. #113). To begin, the Court rejects the Government's arguments that Mr. Storm's request should be viewed as an untimely or improper motion for reconsideration. While it is true that Mr. Storm did not offer this alternative position initially, the Court accepts that the position was not crystallized until Mr. Storm had heard from both this Court and the Second Circuit.

That said, the Court believes that the Government has the better of the substantive arguments and denies the defense's request. As evidenced by its ruling on Mr. Storm's initial application, the Court's principal concerns have been for itself and the jury; to that end, the Court set a disclosure schedule that ensured that admissible evidence was presented in a timely, efficient, and fair manner, with appropriate respect for the Court's ability to control its trial docket and the jury's time. Given the extremely technical nature of the underlying facts, the Court believes that the obligations it has with respect to ascertaining the adequacy of expert disclosures and determining the propriety (and content) of a *Daubert* hearing are best accomplished if the disclosures are made to the Court and the current prosecution team simultaneously, and not to the Court *ex parte* or to a separate "taint team" of prosecutors.

Accordingly, Mr. Storm's motion for disclosure of expert information *ex parte* and *in camera* is denied, and the Clerk of Court is directed to terminate the motion pending at docket entry 111.

In consequence, the Court adopts the second of the proposed schedules with the following dates:

- **February 17, 2025**: Government provides 404(b) and expert notice; defense provides advice of counsel notice;

- **March 3, 2025**: Defense provides expert disclosure;

- **March 10, 2025**: Rebuttal expert disclosures;

- **March 17, 2025**: Requests to charge, *voir dire*, motions *in limine*, and *Daubert* motions;

- **March 24, 2025**: Oppositions to motions *in limine* and *Daubert* motions;

- **March 26, 2025**: Government provides 3500 material to the defense;

- **March 31, 2025**: Exhibit and witness lists;

- **April 8, 2025**: Final pretrial conference, to take place at 3:00 p.m. in Courtroom 618 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York.

Dated: December 23, 2024
New York, New York

SO ORDERED.

/s/_____
HON. KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 17, 2024

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

23 CR.430 (KPF)

UNITED STATES,

v.

ROMAN STORM.

ORDER

Filed October 17, 2024

The Court has reviewed the parties' submissions in connection with Defendant Roman Storm's motion for a stay (Dkt. #87, 89), and understands that Mr. Storm can seek, and should seek, expedited treatment of his mandamus petition from the Second Circuit. Given that, the Court hereby DENIES Mr. Storm's motion for a stay without prejudice to its renewal on or after **October 31, 2024**.

The Clerk of Court is directed to terminate the pending motion at docket entry 87. And, in accordance with the Court's October 10, 2024, oral decision (Dkt. #88), the Clerk of Court is further directed to terminate the pending motions at docket entries 79 and 80.

Appendix D

Dated: October 17, 2024
New York, New York

SO ORDERED.

/s/
HON. KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

APPENDIX E — EXCERPT OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 10, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

23 Cr. 430 (KPF)

UNITED STATES OF AMERICA,

v.

ROMAN STORM,

Defendant.

ORAL ARGUMENT

New York, N.Y.
October 10, 2024 4:00 p.m.

Before: HON. KATHERINE POLK FAILLA,
District Judge

* * *

[20] negotiate something with the government. We will continue to try to do so. To be clear, we're not giving up on that front, so I don't know if they change their mind on this call. But maybe after this hearing we all have time to think about it, we'll be able to reach a resolution. That's what happened in the Thompson case that was referenced in both our briefs.

THE COURT: I'm familiar with Thompson. Mr. Klein, let me be more precise, sir, excuse me. I think I was being a little bit too oblique. I have in front of me an oral decision resolving the parties' dispute about Rule 16. I can give it, or I cannot give it because the parties are going to continue to negotiate it. If you're not today comfortable making a commitment or continuing to negotiate with the government regarding the disclosure in accordance with the current version of Rule 16 in terms of the content, then I can proceed with the oral decision, or I can give you more of a chance to speak. The reason I'm asking, sir, is we were getting along so well for a few minutes there, and I do believe ultimately this trial is better if the parties can negotiate it. But I want to give you that option, but if that's where you are, then I'll give my decision.

MR. KLEIN: Your Honor, that's where we are.

THE COURT: That's an answer and that is fine. Then let me do this, please. Just give me a moment. I have notes, but I have notes that I'm sort of annotating in light of the [21] discussions we've been having today. And I just want to be sure that they've not been rendered dated by our discussions today. Okay. I'll ask for everyone's attention. I'll ask you to please mute your lines, and I will beg your indulgence as I read this into the record. My intention this afternoon is not to read into the record a lot of the applicable case law and statutes and rules. I know the parties know what they are. I don't think they aid the transcript to have me read them word for word into the record, so I'll make reference to them, and I'll be incorporating some of them by reference.

So I begin by thanking you, and I guess I have more to thank you for than when we started this conversation because at least part of this motion seems to have resolved itself, although I'll talk about that in a little while. So thanks for that. Let me tell you also that in anticipation of this decision, the way that I approached it given the paucity of case law in the issue was to reach out to a rather large number of my colleagues here in the Southern District to discuss the parties' competing views on these issues. And I actually received a fair amount of feedback from my colleagues which was great for me. And I analogize it—again, this is the appellate lawyer in me—to like a mini *en banc* of Southern District judges on these areas.

And as to some of the issues I'm going to discuss, there was sort of a universal consensus. As to others, what [22] I'm going to outline is my position in the majority view. I'll also let the parties know that I engaged in extensive conversations with Judge Subramanian, who if you're wondering was much less sanguine about the conduct of the Eisenberg trial than defense counsel recalls; and who really would have preferred to hashed out these issues in full in advance of trial rather than mid-trial. But I also had a very lengthy and very helpful chat with Judge Liman, who's just a very smart man as all of you know who did a lot of work on the advice of counsel defense in the Ray case, but also had a lot of things to say about Rule 16. So my decision today involved and incorporates the wisdom of those two judges and the others judges with whom I've spoken.

So I understand and you understand that the rules at issue here include Federal Rule of Criminal Procedure 16, in particular Subsections (a)(1)(G) and (b)(1)(C). I've looked at the advisory committee notes, in particular the advisory committee notes, the 1997 and 2022 amendments. The parties, at least the government, has suggested that Federal Rule of Criminal Procedure 57 might assist me in its Subsection B. And I've looked at the Federal Rules of Evidence, and I focused mostly on Rule 104, Rule 403, Rule 702, and some of the others in the 700 series. And the parties know what the parties' positions are with respect to the timing of expert disclosures. And I do and I want to underscore I appreciate everyone's [23] efforts to come to a holistic agreement on these issues because it takes up less of everyone's time. And so really I to appreciate that. And I also do appreciate the opportunity this afternoon to speak with the parties about what they really were intending to do and what their thoughts were.

As I suggested in my conversations with Mr. Klein, I don't condition Rule 3500 material and the advice of counsel defense. I don't condition Rule 3500 material and expert witness disclosures. I think that that's a little bit different, but I understand his position on it. I have looked at, as I mentioned, the case on the issue, the *Thompson* case and the Impastato case that were cited to me, although *Impastato* predates it. I did reach out to a number of my colleagues. And I'll tell you that the majority of the colleagues who responded to me actually were agreed or believed that I had the authority under my inherent power to set a timetable for disclosure. And let me just put that a little bit differently. These

judges felt that while Rule 16 set forth the content of the disclosures and a mechanism for ensuring the fairness of pretrial disclosures, that there came a point in the trial process where the Court's inherent power to control the progress of the trial, the Court's concerns about not wasting jury time, the Court's need to schedule a pretrial as distinguished from mid-trial hearings interest the calculus. The belief was that the trial judge's duty to [24] control the trial process so that the jury can render a just verdict allowed the Court and indeed required the Court to set schedules so that admissible evidence was presented in a timely and efficient manner.

One of my colleagues wrote back to me and said specifically, we can't let gamesmanship trump justice. And so I thought about my inherent powers, and I would love to just very easily say that these judges are correct. I also know that the advisory committee notes at least suggest that a criminal defendant could not strategically avoid his or her obligation to make timely disclosures by avoiding actions that trigger disclosure obligations until trial. And by the way as a parenthetical here, I can't believe that the rules committee which was seeking to enhance the detail and the timeliness of disclosures would have enshrined or wanted to enshrine such gamesmanship. But there's language in the advisory committee notes that suggest that I can order disclosures in order to ensure enforceable deadlines. And that seems to me that I have that power even where one of the parties was seeking to delay triggering—that party being the defense—seeking to delay triggering the disclosure obligation. But that's where we are. If it turns out that my colleagues are

wrong, and I don't have the inherent power to overcome the triggering import of Rule 16, let me say this: I absolutely have other sources of authority to obtain this information. And here I agree with [25] the arguments that the government is making today about my ability under the Federal Rules of Evidence. And to me that includes Federal Rules of Evidence 104 which obligates me to decide certain preliminary questions of admissibility where such hearings are often conducted prior to trial so that the parties and the Court can understand the ground rules. I also think that Rule 702 and the *Kumho Tire Daubert* line of cases do require me to make preliminary findings regarding the qualification of experts, the relevance of their testimony, and the reliability of their testimony. So I do believe I have the authority to resolve these Rule 702 issues prior to trial. And the fact that the disclosures that would have to be made to satisfy Rule 702 and Daubert, the fact that they're essentially if they're not very similar to or identical to, they're very close to what's specified in Rule 16 does not foreclose me from ordering such a disclosure pretrial.

As a result, I am including expert witness disclosures within the existing trial schedule. Anyone seeking to present expert testimony at trial must present disclosures in accordance with the current version of Rule 16 on or before November 4. Any rebuttal disclosures or request for *Daubert* motions will be submitted on or before November 11, and we'll hold the *Daubert* hearing at or in the same week as the final pretrial conference on November 19. I say possibly in the same week because I don't know what the parties are going to be [26] submitting

to me, so I don't know whether this can all be done in one afternoon or requires multiple afternoons. I have here really thoughtful stuff about the advice of counsel defense, but I'll stop because the parties have made agreements on it. I'll just say this, please, and I'm sure that this is just me being unnecessarily worried. When I'm using the term "advice of counsel defense," what I'm really speaking about are two things. And one of them is the formal advice of counsel defense that's noted in cases like *Bilzerian* and that requires certain disclosures by the defense and certain findings by the court before such a defense can be raised.

But I'm also talking about cases in which someone is arguing that the presence of lawyers or their participation in meetings might impact a defendant's intent. So when I'm asking for advice of counsel disclosures on or before October 28, what I'm really talking about is any reference to counsel being present, being in the room, and any arguments that you make from that. I just say that because while I'm familiar, very familiar with the advice of counsel defense, I've had instances in which litigants have wanted to just do this variant of advice of counsel. And I've read a recent decision from Judge Kaplan in the *Bankman-Fried* litigation. And there contained at 2023 WL 6392718 and 2024 WL 477043. And I take his point about the, perhaps the near co-extensiveness of both formal and informal advice of counsel. But I'm really telling you this [27] because I don't want to be surprised at trial. So if we're going to talk about lawyers, please tell me before trial. All right.

Let me just say this one other thing. And, you know, I wrote this earlier today before we had this very congenial conversation. So I'm going to just give this to you and hope that it is already dated even as I say it. Here's what I wrote. I'm ending with this thought, which like a few others I've expressed this afternoon may not be something that anyone asked for. This case is an interesting case. This is an important case, and I'm just one person thinking about this. I think it's a triable case. My concern about this most recent round of motion practice is that the parties are planning to engage in a trial by ambush in the hopes of either gaining some advantage from the jury or gaining some advantage from me by making it more difficult for their advisory to respond. And my thought to you here is that I don't think you need to engage in litigation with parlor tricks.

And I'll say on this point that if you make life a little bit more difficult for your adversary, if you give them less time to look at something, I care less about that. What I really care about is that you're not going to give me enough time to think about these issues, and you're not going to give me enough time to arrive at a correct decision on your applications. I also actually don't think that late breaking [28] changes in strategy or gotcha moments actually really help anyone for trial fortune turn around. It didn't work for Mr. Bankman-Fried for instance. I'm asking you to play well with each other as best you can. And I'm asking you to spend maybe a little bit less time on strategic thinking and a little more time on the substance of the case. But perhaps today is the conversation we needed to air things out. Perhaps today we realize we can work together, and

we can focus on the really important substantive issues that are going to take place in this trial. And that really is my hope. But for now, I resolve the motions that I have in front of me. I don't think there are open issues. But, Mr. Rehn, let me ask you now if there are from your perspective?

MR. REHN: Not from our perspective at this time, your Honor. Thank you.

THE COURT: Okay. And, Mr. Klein, any from your perspective at this time?

MR. KLEIN: No, your Honor.

THE COURT: Okay. Then I will let you go forth and continue to prepare for this trial. I am assuming that we are having a trial on December 2nd. You'll of course let me know if that changes.

Thank you all very much. Thank you. Genuinely, thank you for the comprehensiveness of your submissions, and for the argument that you made to me which I really feel covered the

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