Case No. 24A_____

IN THE
Supreme Court of the United States

Roman Storm

Petitioner/Applicant,

v.

United States District Court for the
Southern District of New York

Respondent.

APPLICATION FOR STAY
PENDING PETITION FOR WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Second Circuit

WAYMAKER LLP
BRIAN E. KLEIN
Counsel of Record
KERI CURTIS AXEL
BECKY S. JAMES
KEVIN M. CASEY
VIVIANA ANDAZOLA MARQUEZ
bklein@waymakerlaw.com
515 S. Flower Street, Suite 3500
Los Angeles, California 90071
(424) 652-7800

HECKER FINK LLP
DAVID E. PATTON
350 Fifth Avenue, 63rd Floor
New York, NY 10118

Counsel for Applicant
ROMAN STORM

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

TREATISES

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

INTRODUCTION

In an unprecedented order, the district court (the Honorable Katherine Polk Failla of the Southern District of New York) directed a criminal defendant (Applicant Roman Storm) to disclose confidential defense information regarding his anticipated expert witnesses to the government in advance of trial. The district court made this order notwithstanding that Federal Rule of Criminal Procedure 16's plain terms only require such disclosure if the defense has requested such information from the government, and notwithstanding that Mr. Storm made no such request here. This Court's precedents make clear that the district court exceeded its authority by contravening the express terms of Rule 16. The Second Circuit denied Mr. Storm's petition for writ of mandamus, and the disclosures are now due on March 3, 2025.[1]

Mr. Storm respectfully requests that the Court grant, prior to March 3, 2025, a stay of the judgment pursuant to 28 U.S.C. § 2101(f) and Supreme

[1] The district court denied a stay of its October 10, 2024 order directing the disclosures (App. D, 4a), but the Second Circuit granted a stay of the order pending its consideration of Mr. Storm's mandamus petition (App. B, 2a). When the Second Circuit subsequently denied the mandamus petition (App. A, 1a), the stay was automatically lifted, and the district court ordered disclosures by March 3, 2025 (App. C, 3a).

Court Rule 23 pending this Court's disposition on his concurrently filed petitioner for writ of certiorari. Mr. Storm further requests that this Court make clear that the Second Circuit's stay of the district court's orders requiring defense disclosure of expert witness is reinstated.

A stay is necessary and warranted here because there is (1) a reasonable probability that certiorari will be granted, (2) a fair prospect that the decision below will be reversed, and (3) a likelihood of irreparable harm absent a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). The equities also favor Mr. Storm. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009).

First, there is a reasonable probability that certiorari will be granted. The district court's contravention of the Federal Rules of Criminal Procedure—promulgated by this Court and adopted by Congress—calls for the exercise of the Court's supervisory power (S. Ct. R. 10(a)) and also decided an important federal question in a way that conflicts with relevant decisions of this Court (S. Ct. R. 10(c)). The issue is important because it threatens to undermine the carefully constructed Federal Rules of Criminal Procedure and directly impacts the constitutional rights of defendants. It is also important for this Court to settle the proper standard for granting a mandamus petition where, as here, the right to the writ is "clear and

indisputable" under this Court's precedents, even if there is no circuit court authority directly on point.

Second, there is a fair prospect that the decision below will be reversed because this Court has previously made clear that district courts do not have the authority to contravene the Federal Rules of Criminal Procedure. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 426 (1996). The order compelling expert witness disclosures from Mr. Storm is in direct contravention of Rule 16's plain language and is plainly reversible.

Third, there is a likelihood of irreparable harm. Absent the stay, Mr. Storm will be forced to reveal confidential and constitutionally-protected information on March 3, 2025. Once revealed, it can never again be kept confidential. Indeed, the Second Circuit's issuance of an emergency stay evidences the likelihood of irreparable harm.

Finally, the equities favor a stay. Mr. Storm seeks nothing more than to enforce his rights under Rule 16 and the Constitution. But he will be prevented from meaningful review of this important issue if an immediate stay is not granted. For all these reasons, as discussed below, this application for a stay should be granted.

STATEMENT OF THE CASE

A. 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, and later 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)." (*See* SDNY Dkt. 79.) On September 25, 2024, the defense opposed the government's letter motion on the basis that the defense had not made a triggering request for expert witness disclosures as required for defense disclosure pursuant to Rule 16(b)(1)(C). (*See* SDNY Dkt. 82.)

The district court held a hearing on October 10, 2024. (SDNY Dkt. 86.) At the hearing, the government acknowledged that the issue was one of first impression and also acknowledged that "the specific aspects of Rule 16 that

require disclosures are triggered by defense request for disclosures." (Transcript of October 10, 2024 Oral Argument and Court's Oral Order ("Tr.") 8:10-13, 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 Federal Rule of Evidence 702 does not "trump" Rule 16. (Tr. 12:25-13:3.)

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. (Tr. 25:18-22; App. E, 11a.) The district court noted the "paucity of case law" on the issue and stated she had polled her colleagues in the Southern District of New York. (Tr. 21:15-19; App. E, 7a.) The court concluded that she had the "inherent power" to order pretrial disclosures and also referenced 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, 8a-11a.)

Mr. Storm requested a stay of the district court's order to allow the Second Circuit to consider a petition for writ of mandamus. (SDNY Dkt. 87.) The district court denied the request for a stay. (SDNY Dkt. 91; App. D, 4a.)

B. Mandamus Proceedings

Promptly after the district court's order, on October 16, 2024, Mr. Storm filed a petition for writ of mandamus in the Second Circuit. (*In Re: Roman Storm*, No. 24-2742 (2d Cir. October 17, 2024) ("2d Cir."); 2d Cir. Dkt. 1.) Mr. Storm argued that he had a clear and indisputable right to the writ because, pursuant to Supreme Court precedent, the district court had no authority to contravene Federal Rule of Criminal Procedure 16's plain directive. (*Id.*) Mr. Storm 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, Mr. Storm 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 on the administration of justice. (*Id.*)

Concurrently with his mandamus petition, Mr. Storm also asked for an immediate stay of the order requiring defense expert witness disclosures 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 a temporary stay pending decision on his petition by the motions panel. (2d Cir. Dkt. 21; App. B, 2a.) Accordingly, on November 1, 2024, the district court ordered that the case be

continued to April 14, 2025. The court agreed to set dates for expert witness disclosures, if necessary, following the Second Circuit's resolution of Mr. Storm's mandamus petition.

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

C. Further Proceedings in the District Court

Following the Second Circuit's order denying Mr. Storm's mandamus petition, Mr. Storm 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 (SDNY Dkt. 114; App. C, 3a). The district court did, however, adopt an alternative schedule proposed by the parties that requires the government to disclose its expert witness first, by February 17, 2025, and the defense then to disclose its expert witness information by March 3, 2025. (SDNY Dkt. 114; App. C, 3a.)

On January 31, 2025, Mr. Storm filed his petition for a writ of certiorari.

REASONS FOR GRANTING A STAY

The application satisfies the criteria for obtaining a stay pending the filing and disposition of a petition for a writ of certiorari. To obtain a stay, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Perry*, 558 U.S. at 190. In close cases "it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright*, 556 U.S. at 1402 (internal quotations omitted).

A. There Is a Reasonable Probability That Four Justices Will Consider the Issues Sufficiently Meritorious To Grant Certiorari

As discussed in Mr. Storm's certiorari petition, 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).

1. The district court's contravention of Rule 16 should not be sanctioned

Federal Rule of Criminal Procedure 16 is clear. The defendant's pretrial disclosure obligation as to expert witnesses is triggered only "***if***" the defense makes a request for expert witness disclosure from the government and the government complies with the request:

> **(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).

This Court has repeatedly held that district courts do not have the authority to contravene the Federal Rules of Criminal Procedure. *See, e.g.*, *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"); *Carlisle*, 517 U.S. 416, 426 (1996) ("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."); *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"). This Court has explained that even where "powerful policy arguments … both for and against greater flexibility with respect to [a Federal Rule of Criminal Procedure]" exist, "those policy questions must be resolved through the rule-making process and not by judicial decision." *United States v. Robinson*, 361 U.S. 220, 229 (1960).

The district court below read out of Rule 16 a fundamental piece of text and upset a carefully calibrated balance struck by Congress when it ordered Mr. Storm to make pretrial disclosures without a triggering request. Congress had serious constitutional concerns about ordering defense disclosures without such a triggering request. *See* Wright & Miller § 251 History and Policy Considerations, 2 Fed. Prac. & Proc. Crim. § 251, (4th ed.).

Although it appears no circuit court has addressed this issue, numerous district courts have acknowledged the reciprocal trigger built into Rule 16 and have rejected the proposition that they have authority to order the defense 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). This conflict created by the district court's order below reflects the need for this Court's guidance on this important issue of federal criminal procedure.

2. Clarity regarding the standard applicable to a "clear and indisputable" right to a writ of mandamus is needed

Additionally, there is a reasonable probability that four justices would agree to clarify that the right to a writ of mandamus is "clear and indisputable" notwithstanding the absence of circuit authority on point where, as here, both the Rule and 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 in the 20 years since *Cheney* and thus has offered little guidance on how and when these conditions are applied. 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, apparently based on the lack of circuit authority on point. This conclusion makes little sense when one of the other factors favoring mandamus review is, under this Courts' and other case law, whether the issue presented is novel. There is a reasonable probability that four Justices will grant certiorari to provide the lower appellate courts guidance on this issue. *See* S. Ct. R. 10(c) (certiorari warranted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

3. The issues presented are important

This Court has a unique interest in ensuring that the Federal Rules of Criminal Procedure are not abrogated by district court fiat. Moreover, the disregard of Rule 16 with respect to defense expert witness disclosures is particularly important because it raises serious constitutional concerns for

criminal defendants. Anticipated expert testimony can reveal confidential defense strategy, and the need for zealous advocacy on the part of defense counsel requires that defendants retain the right to keep this information confidential. This issue has become more acute as amendments to Rule 16 in 2022 now call for much more expansive expert witness disclosures, with the result that defendants forced to disclose such information will necessarily be forced to disclose major components of their defense. Moreover, this is a dangerous precedent for not only the defense expert witness disclosure issue presented here, but for other defense disclosure obligations under Rule 16 and for any other controlling rule a district court seeks to disregard in favor of obtaining their preferred policy outcomes.

It is also important that the improper order of expert witness disclosure be remediable by mandamus. As discussed below and in Mr. Storm's certiorari petition, the improper disclosure of confidential defense information cannot be remedied through post-judgment appeal. The Court's guidance on the mandamus standard in this and other contexts is important to ensure the availability of mandamus to remedy that which is otherwise irremediable.

4. This case presents a good vehicle for this Court's review

The issues were clearly briefed and argued to both the district court and the Second Circuit. And the fact that this case is being presented on a writ of mandamus gives the Court the opportunity to address an important point of mandamus law and also gives the Court an opportunity to address the propriety of expert witness disclosures in a context where the wrongful disclosure can still be prevented. For all these reasons, as more fully explained in Mr. Storm's certiorari petition, there is a reasonable probability that certiorari will be granted.

B. There Is a Fair Prospect That a Majority of the Court Will Vote To Reverse the Judgment Below Because the Arguments Advanced Are Plausible

A "fair prospect" that a majority of the court will vote to reverse the judgment below exists where the arguments advanced in the courts below are plausible. *See, e.g.*, *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) . The plausibility standard is easily met here.

As set forth above, existing Supreme Court authority is clear that district courts do not have the authority to contravene the Federal Rules of Criminal Procedure. Yet, that is precisely what the district court did here. Rule 16 only requires defense disclosures if the defense requests reciprocal

discovery from the government and the government complies. Neither the court's "inherent authority" nor any other source of law gave the court the power to disregard the careful balance of government and defense rights reflected in Rule 16.

The clarity of the issue is evidenced by the fact that no other published district court order has compelled the pretrial disclosure to the government of defense expert witness information in the absence of a triggering defense request and government compliance.

Moreover, the fact that the Second Circuit granted an emergency stay below and sought additional briefing and oral argument reflects the merit of the issue. One of the factors the Second Circuit considered in deciding to grant the stay was "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *S.E.C. v. Citigroup Glob. Mkts Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). Mr. Storm made that showing in the Second Circuit, and he makes it again in this Court.

Thus, there is certainly a "fair prospect" that the majority of this Court will vote to reverse.

C. Irreparable Harm Will Result from the Denial of a Stay

Mr. Storm will suffer irreparable harm through the disclosure of his confidential defense information if a stay is not granted. In determining whether to grant a stay, this Court considers whether the lower courts have

indicated they were "sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1204 (1972) (explaining that denials of stays in lower courts indicates lack of existence of potentially irreparable harm). The Second Circuit here ordered a stay after considering as a factor "whether the applicant will be irreparably injured absent a stay." *See Citigroup*, 673 F.3d at 162. This Court should reach the same conclusion.

Without a stay, Mr. Storm will be irreparably harmed when he is forced to disclose his experts on March 3, 2025. Under the district court's order, upon pain of having his expert witnesses excluded, Petitioner must reveal, among other things, "a complete statement of all opinions that [he] will elicit from the witness in [his] case-in-chief"—even from experts he may never call. *See* Fed. R. Crim. P. 16(b)(1)(C)(iii). Once his defense strategy is revealed, he cannot redress his injury either by his certiorari petition or in a post-judgment appeal. "[A] remedy after final judgment cannot unsay the confidential information that has been revealed." *In re City of New York,* 607 F.3d 923, 934 (2d Cir. 2010).

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.

D. While This Is Not a "Close Case," the Balance of Equities Favors Mr. Storm

The public interest lies in resolving the important question of whether a district court may contravene an explicit rule meant to safeguard constitutional rights and in resolving such question *before* the district court's order causes irreparable harm in a criminal proceeding where a defendant's liberty is at stake. As the Supreme Court explained in *Bank of Nova Scotia,*

addressing the importance to the public interest of a similar question presented: "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions" and that allowing otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." 487 U.S. at 254 (first quoting *Thomas v. Arn,* 474 U.S. 140, 148 (1985), then *United States v. Payner,* 447 U.S. 727, 737 (1980)) (internal quotations omitted).

The only arguable harm to the government from a stay would be a delay in the trial. But a speedy trial is of no value if it is not a fair trial. Forcing Mr. Storm to disclose his confidential defense strategy before trial would create a fundamentally unfair trial. If the trial is allowed to proceed with such a gross error infecting it, the end result would likely be a reversal and remand for a new trial (though such a remedy would be inadequate), and the ultimate trial would be delayed far longer than if the stay is granted and the issue is resolved now.

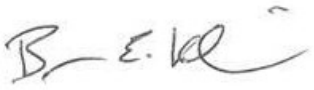
CONCLUSION

For all the foregoing reasons, Mr. Storm respectfully requests that the Court grant a stay of the Second Circuit's judgment denying mandamus relief, and reinstate the stay of the district court's disclosure orders, pending the Court's consideration of his certiorari petition.

DATED: January 31, 2025

Respectfully submitted,

WAYMAKER LLP

By: 

BRIAN E. KLEIN
Counsel of Record
KERI CURTIS AXEL
BECKY S. JAMES
KEVIN M. CASEY
VIVIANA ANDAZOLA MARQUEZ
bklein@waymakerlaw.com
515 S. Flower Street, Suite 3500
Los Angeles, California 90071
(424) 652-7800

HECKER FINK LLP
DAVID E. PATTON
350 Fifth Avenue, 63rd Floor
New York, NY 10118

Counsel for Applicant Roman Storm

APPENDIX

TABLE OF CONTENTS

Page

S.D.N.Y. – N.Y.C.
23-cr-430
Failla, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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.

Roman Storm, AKA Sealed Defendant 1,

Petitioner,

v. 24-2742

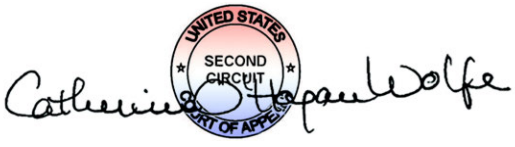
United States of America,

Respondent.

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:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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.

Roman Storm, AKA Sealed Defendant 1,

Petitioner,

v.

United States of America,

Respondent,

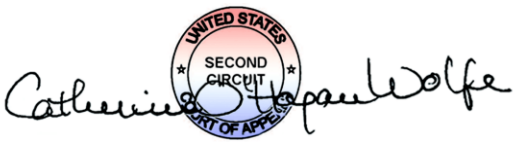
ORDER

Docket No. 24-2742

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:
Catherine O'Hagan Wolfe,
Clerk of Court



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.

Katherine Polk Failla

HON. KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

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.

Dated: October 17, 2024
New York, New York

SO ORDERED.

HON. KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

OAABSTOA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 23 Cr. 430 (KPF)

ROMAN STORM,

Defendant.

Oral Argument
----------x

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

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: NATHAN M. REHN II
KEVIN MOSLEY
BENJAMIN A. GIANFORTI
BEN ARAD
Assistant United States Attorneys

WAYMAKER, LLP
Attorneys for Defendant
BY: BRIAN E. KLEIN
KEVIN CASEY
KERI AXEL

HECKER FINK, LLP
Attorneys for Defendant
BY: DAVID E. PATTON

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

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

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

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

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

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

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

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

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