

NO. 07-1311

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

-----  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
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**BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT,  
SUPPORTING REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

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

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## INTEREST OF *AMICUS CURIAE* AND INTRODUCTION<sup>1</sup>

The National Association of Criminal Defense Lawyers (“NACDL”) is the nation’s preeminent professional bar association of criminal defense attorneys. Founded in 1958, the Association has 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys, who are private lawyers, public defenders, and military defense counsel. They and the NACDL seek to ensure justice for those accused of committing crimes. NACDL has significant expertise in the area of forfeiture, having originally proposed the language now codified in 18 U.S.C. § 981(a)(2) that the District Court misinterpreted in this case.<sup>2</sup>

This case raises questions of acute interest to all accused individuals who seek to use expert witnesses in their defense, or who are subject to criminal forfeiture. Regarding experts, the District Court erred by assessing the Defendant’s notice of expert testimony under Federal Rule of Criminal Procedure 16(b)(1)(C) against the standard in Federal Rule of Evidence 702 rather than against Rule 16 itself. Without holding a hearing or considering lesser sanctions, the court imposed the most severe punishment possible – it banned the defense expert from testifying. Then, the District Court allowed two government experts – effectively unchallenged – to address the same issues the defense expert would have testified about. The District Court’s mistakes violated multiple rules,

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

<sup>2</sup> Further, one of the authors of this brief, NACDL Board Member David B. Smith, is a leading expert on forfeiture law, and is the author of *PROSECUTION AND DEFENSE OF FORFEITURE CASES* (2007).

precedents, and constitutional doctrines that protect a defendant’s ability to put forward a defense. As the Supreme Court has held, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). If this Court were to affirm the District Court’s rulings, defendants would be hamstrung in their ability to call experts in their defense. This would create an uneven playing field, especially in complex criminal trials such as white-collar cases, in which experts are increasingly important.

The District Court committed further error with regard to the issue of criminal forfeiture. The District Court ordered the Defendant to return *gross* proceeds of his alleged crimes, when the governing provision (18 U.S.C. § 981(a)(2)) authorizes only the more limited forfeiture of *net* proceeds. The NACDL helped to negotiate and draft this provision, and, therefore has a special interest in ensuring that courts apply it correctly. For all these reasons, the NACDL has a vital interest in the resolution of this case, and urges this Court to reverse the District Court.

## **ARGUMENT**

### **I. BY REFUSING TO ALLOW THE DEFENDANT TO CALL HIS EXPERT WITNESS, THE DISTRICT COURT OBSTRUCTED THE DEFENDANT’S RIGHT TO PUT ON A DEFENSE, AND, THEREBY VIOLATED HIS SIXTH AMENDMENT RIGHTS**

#### **A. Defendants’ Ability To Call Witnesses, Including Experts, Is Crucial To The Right To Put On A Defense**

As the Supreme Court’s pronouncement in *Chambers* demonstrates, defendants’ right to call witnesses is an integral part of the Sixth Amendment right to put on a defense. *Chambers* elaborates, “[t]he right of an accused in a criminal trial to due

process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” 410 U.S. at 294. *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“the Constitution guarantees criminal defendants a meaningful opportunity to present a *complete* defense”) (emphasis added, internal citation and quotation marks omitted); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the defendant’s “right to present his own witnesses” is “a fundamental element of due process of law”). Given its mission, the NACDL has a strong interest in protecting the right of defendants to call witnesses as guaranteed by the Sixth Amendment.

A defendant does not have an absolute right to present evidence and witnesses in support of his defense – he must do so within the limits of the judicial system, respecting the adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988). But courts may not apply trial rules “mechanistically to defeat the ends of justice.” *Chambers*, 410 U.S. at 302. “Restrictions on a criminal defendant’s rights . . . to present evidence ‘may not be arbitrary or disproportionate to the purposes they are designed to serve.’” *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (*quoting Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). *See also Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997) (“the state may not arbitrarily deny a defendant the ability to present testimony that is relevant and material and vital to the defense”). As the American Bar Association’s Standards for Criminal Justice makes clear, sanctions for discovery violations are appropriate, but “*subject to the defendant’s right to present a defense* and provided that the exclusion does not work an injustice either to the prosecution or to the defense.” ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, § 11-7.1(iii) (3d ed. 1996) 109 (emphasis

added). The ABA's Standards correctly takes account of the fact that, while following procedure is a bedrock principle of our justice system, criminal trials must focus on the ultimate goal of ensuring that justice is done, and injustice avoided.

**B. The District Court Violated Federal Criminal Procedure Rule 16(b)(1)(C) By Considering The Expert's Reliability, And By Then Imposing The Severest Sanction Possible Without A Hearing**

The District Court made three key errors with regard to Rule 16 that resulted in a violation of the Defendant's constitutional rights to put on his defense. While a given trial may do justice without achieving procedural perfection, the series of errors that the District Court committed here, however, undermines the verdict. First, the District Court held that the Rule 16(b)(1)(C) summary of his expert's opinion was insufficient because it did not establish that the expert was reliable, when in fact Rule 16(b)(1)(C) contains no such criterion. Second, the District Court imposed a sanction without holding a hearing on what sort of sanction (if any) was most appropriate. Compounding this error, the District Court proceeded to impose the harshest punishment available – total exclusion of the expert witness – when the governing authority reserves that sanction for egregious cases in which a party is improperly gaming the system for strategic advantage. Each of these errors deprived the Defendant of his right to put on his defense; taken together, they warrant reversal.

The text of Federal Rule of Criminal Procedure 16(b)(1)(C) demonstrates its narrow scope. It simply says that if a defendant requests discovery from the government about its experts, then the defendant must “describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.” While a mere “list of

topics” is not enough, “a summary of the expected testimony” will suffice. *United States v. Rettenberger*, 344 F.3d 702, 706 (7th Cir. 2003); *see also United States v. Barile*, 286 F.3d 749, 758, 760 (4th Cir. 2002) (“conclusions” are not enough, but “opinions” satisfy Rule 16).

The narrow scope of the rule accords with the experience of the NACDL’s members who routinely submit Rule 16 summaries to the government. The purpose of the rule is simply to give notice to the government. Should the government then object to an expert’s qualifications, a separate process exists to evaluate the expert and the bases for his opinions. That process, however, proceeds pursuant to the standards set forth in Federal Rule of Evidence 702 and in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 16 itself calls for no such inquiry. By grafting a Rule 702-*Daubert* analysis onto Rule 16’s bare-boned requirements, the District Court impermissibly interfered with the Defendant’s ability to present his defense.

The District Court’s error is all the more egregious because it did not even hold a *Daubert* hearing, or *any* sort of hearing, before sanctioning the Defendant. This violated the standards that would have applied if the Defendant had broken Rule 16 (which he did not). As the Commentary to the ABA Standards points out, “[w]here there is an alleged discovery violation, it is important that the trial court take all necessary evidence, and explain in detail the rationale for its decision to award or deny sanctions.” ABA STANDARDS at 111. Similarly, the Ninth Circuit requires “a district court, before excluding a defense witness’s testimony, to balance the countervailing interests in order to ensure that the exclusion complies with a criminal defendant’s Sixth Amendment

rights.” *United States v. Bahamonde*, 445 F.3d 1225, 1231 (9th Cir. 2006). And where the district court has “not weighed any factors militating against exclusion of the witness, the district court abused its discretion.” *Id.* at 1232. The District Court here has similarly abused its discretion. The NACDL’s members have extensive experience litigating cases and in accommodating the pressures to try cases as expeditiously as justice and the Constitution permit. However, here, the District Court ignored the crucial step of holding a simple hearing before imposing sanctions on the Defendant, and in so doing stepped over the constitutional line.

Further, the District Court seriously exceeded its authority by going so far as to *exclude* the Defendant’s expert without even considering lesser sanctions, such as a continuance to allow the Defendant to fix the alleged problem. As this Court emphasized just last year, exclusion of witnesses is an “extreme sanction.” *Short v. Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006). This Court further explained that “[i]t would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings.” *Id.* (internal citation and quotation marks omitted). Therefore, “[w]here the discovery violation is not willful, blatant or calculated gamesmanship, alternative sanctions are adequate and appropriate.” *Id.* (internal citation and quotation marks omitted). *See also Young v. Workman*, 383 F.3d 1233, 1239 (10th Cir. 2004) (“[w]here a party has failed to comply with a discovery request, and the failure is *willful and motivated by a desire to obtain a tactical advantage at trial*, then exclusion of the evidence is entirely consistent with the purposes of the Compulsory Process Clause of the Sixth Amendment”) (internal citation and quotation marks omitted, emphasis added).

Here, by contrast, no one has accused the Defendant of “a desire to obtain a tactical advantage.” The Commentary to the ABA Standards makes clear that exclusionary orders “should be issued only in *extreme* cases.” ABA STANDARDS at 113 (emphasis added). This plainly is not such a case.<sup>3</sup>

**C. By Excluding The Defendant’s Witness While Allowing The Government To Call Its Own Experts, The District Court Tainted The Integrity Of The Judicial Process**

Egregiously, after excluding the Defendant’s expert, the District Court nevertheless allowed two of the government’s experts to testify on precisely the same issues the defense expert would have testified on. Any criminal defense attorney would find it virtually impossible to properly defend a defendant under such conditions. The District Court’s ruling essentially guaranteed that the Defendant would have no sophisticated means to rebut the government’s case on topics vital to the case, namely, whether certain information was material and whether the Defendant was reasonable in his belief that the information was not.<sup>4</sup> Even beyond the normal caution that district courts should exercise when considering exclusion of defense experts, they should virtually *never* prevent defense experts from presenting evidence on topics about which the government’s experts will present evidence. Doing so unfairly cripples the defense.<sup>5</sup>

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<sup>3</sup> Even under *Daubert*, “rejection of expert testimony is the exception rather than the rule.” Cmte. Notes to 2000 Amendments, Federal Rule of Evidence 702.

<sup>4</sup> For a summary of the issues the expert would have testified about if allowed, *see* Brief of Defendant-Appellant at 39-42, 46-48.

<sup>5</sup> The District Court further harmed the Defendant, and so exacerbated the Sixth Amendment violation, by excluding expert testimony that spoke to the Defendant’s

“It is an abuse of discretion to exclude the otherwise admissible opinion of a party’s expert on a critical issue, while allowing the opinion of his adversary’s expert on the same issue.” *United States v. Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992) (internal citations and quotation marks omitted). *See also United States v. Sellers*, 566 F.2d 884, 886 (4th Cir. 1977) (holding that district courts must exercise their discretion to exclude witnesses “evenhandedly,” and that a district court failed to act appropriately when it banned the defense’s expert but allowed the government’s to testify).

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

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

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willfulness, given that the state of mind was an element of the offense. *See Cheek v. United States*, 498 U.S. 192, 203-04 (1991); Brief of Defendant-Appellant at 42-43.

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

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

Taken both individually and together, the District Court’s Rule 16 errors made it impossible for the Defendant to defend himself as the Constitution guarantees.

**II. BY ORDERING THE DEFENDANT TO FORFEIT GROSS PROCEEDS, THE DISTRICT COURT DISREGARDED THE TEXT AND INTENT OF 18 U.S.C. § 981(a)(2)**

In the sentencing phase of the trial, the District Court further erred by confusing the provisions of the governing criminal forfeiture statute, thereby ordering the Defendant to forfeit millions of dollars more than the law authorizes. The Brief of the Defendant-Appellant, at pages 54-57, offers an accurate explanation of the errors that the District Court made in applying the law, 18 U.S.C. § 981(a)(2). In short, the District Court applied a subpart meant to cover inherently *unlawful* activities (such as forgery, prostitution, and murder for hire) to this case, which, if the government’s allegations are accepted, actually involve *lawful* goods or services (a corporation’s stock) obtained in an illegal manner (that is, through alleged insider trading). *Compare* 18 U.S.C. §

981(a)(2)(A), which the District Court applied, *with* § 981(a)(2)(B), which in fact governs an insider trading case such as this one.

The NACDL (particularly, David B. Smith, a co-author of this brief) helped to negotiate and draft Section 981(a)(2). The NACDL here offers a short discussion of the legislative history of that provision, in order to provide this Court with further context of the legislative bargain that the text of the statute clearly embodies, and that the District Court misapplied.<sup>6</sup>

Prior to the 2000 enactment of the Civil Asset Forfeiture Reform Act (“CAFRA”), generally speaking, precedent was murky as to when the government could seek forfeiture of *gross* proceeds from criminal defendants. While the government had that ability in cases involving drugs and money laundering, it did not have statutory authority to seek *any* sort of forfeiture for the vast majority of crimes. Therefore, the United States Department of Justice had long sought to expand its forfeiture powers to a broader range of crimes.

In CAFRA, the Department *partially* achieved its goal, through the implementation of a compromise embodied in Section 981(a). Section 981(a)(1)(C) expanded the scope of crimes for which proceeds would be subject to forfeiture. But the provision differentiates among which sorts of crimes are subject to what type of forfeiture. For “cases involving illegal goods, illegal services, unlawful activities, and

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<sup>6</sup> Except as otherwise noted, the legislative history in this section of the brief is drawn from Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, § 5.03 (in forthcoming winter 2007 edition).

telemarketing and health care fraud schemes” forfeiture “is not limited to the net gain or profit realized from the offense.” 18 U.S.C. § 981(a)(2)(A). That is, these crimes are subject to forfeiture of gross proceeds.

But the Department of Justice did not obtain the right to seek forfeiture of gross proceeds in all cases. In return for the support of Senator Patrick Leahy and the NACDL and others, the legislation specifically *precludes* the government from seeking gross proceeds in certain cases. Section 981(a)(2)(B) provides that, “[i]n cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term ‘proceeds’ means the amount of money acquired through the illegal transaction resulting in the forfeiture, less the direct costs incurred in providing the goods or services.” That is, in cases such as the one at hand, where the defendant allegedly obtained a legal good through illegal means, the government could not seek gross proceeds, but rather could demand forfeiture of only net proceeds.

The compromise – forfeiture of gross proceeds for unlawful goods and activities, but more limited forfeiture for lawful goods and activities – was key to the law’s passage. Supporters of the law from both camps have made this clear. Stefan D. Cassella, who in 2000 was the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice, and also served as the principal drafter of the Department of Justice’s asset forfeiture legislative proposals, has written that the “compromise” now allows the government to make broader use of forfeiture than it could before. *See* Stefan D. Cassella, *The Civil Forfeiture Reform Act of 2000* (available at <http://tinyurl.com/25slk5>) at 24. Similarly, Senator Leahy, who was the Senate’s chief

sponsor of CAFRA and who worked closely with the NACDL and others in negotiating the law, stated that “[h]aving resolved this important matter [the definition of proceeds], the substitute amendment broadly extends the government’s authority to forfeit criminal proceeds under the civil asset forfeiture laws.” *See* Statement of Sen. Leahy, 146 Cong. Rec. S1761 (daily ed. Mar. 27, 2000).

As further proof of the importance of the compromise, it is helpful to consider that Congress included offenses involving “telemarketing and health care fraud schemes” in subpart (A), which calls for forfeiture of gross proceeds. These crimes might more naturally seem more akin to the crimes discussed in subpart (B). But the negotiators treated these crimes more harshly in large part because governing law *already* permitted forfeiture of gross proceeds for them. These two categories of crimes essentially serve as “exceptions” to subpart (B), and further demonstrate the careful balance that the negotiators struck when they agreed on the language that Congress then enacted as law.

By disregarding the clear language of the provisions, which embody the compromise discussed above, the District Court misapplied the governing law. This Court should correct the error.

## **CONCLUSION**

The judgment should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE WITH RULE 32**

I hereby certify in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) that this brief has been prepared within the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), and that this brief contains 3,299 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The number of words in this brief is no more than half of the maximum length authorized for a party's principal brief, pursuant to Federal Rules of Appellate Procedure 29(d) (stating that an amicus brief is limited to no more than one-half of the maximum length authorized for a principal brief) and 32 (a)(7)(B)(i) (stating 14,000 words is permissible for a principal brief).

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

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I hereby certify that:

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