RECORD NO._____

In The
Supreme Court of The United States

ERIC JORDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ruth J. Vernet
RUTH J. VERNET, ESQ, LLC
31 Wood Lane
Rockville, MD 20850
(301) 251-9500
ruthv@vernetlaw.com

*Counsel of Record for Petitioner
Eric Jordan

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

QUESTIONS PRESENTED

1. After denying severance in a criminal case, the trial court granted a request by the accused's codefendant to prohibit the accused from testifying about details that were exculpatory to the accused but prejudicial to his codefendant. Does the order constitute an impermissible limitation on the accused's right to testify in his own behalf as set forth in *Rock v. Arkansas*?

2. Law enforcement uses cell site location information to track and reconstruct the location and movements of cell phone users over extended periods of time. Does the Fourth Amendment require law enforcement to obtain a warrant to acquire this information?

PARTIES TO THE PROCEEDING

An additional party in the proceeding in the court whose judgment is the subject of the petition is Aaron Graham.

The United States of America is the respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTION

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Eric Jordan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1 - 134) published at 796 F.3d 332 (4th Cir. 2015). The *en banc* opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 135 - 200) is reported at 824 F.3d 421 (4th Cir. 2016).

JURISDICTION

On May 31, 2016, the *en banc* United States Court of Appeals for the Fourth Circuit issued its opinion and judgment. The Chief Justice extended the time for the filing of a petition for a writ of certiorari to and including October 28, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> The Due Process Clause of the Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.
>
> The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Following a 2012 jury trial in the United States District Court for the District of Maryland, 49-year-old Eric Jordan was found guilty of conspiracy to violate the Hobbs Act and substantive Hobbs Act robberies (by aiding and abetting), in violation of 18 U.S.C. §1951; possessing and brandishing a firearm in furtherance of a crime of violence (by aiding and abetting), in violation of 18 U.S.C. § 924(c); being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); and possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). He was sentenced to 72 years (864 months).

1. This case arose from a series of six armed robberies. The government alleged that Petitioner Jordan's co-defendant, Aaron Graham, committed all six robberies, including a jewelry store, a convenience store, a Shell station, and two fast food restaurants. Jordan was charged with aiding and abetting the last three of the robberies: the government alleged that Jordan was an unarmed participant in the Shell station robbery which occurred near his apartment on February 1, 2011, and that he was the getaway driver for Graham in two fast food restaurant robberies on February 5, 2011. Jordan also was charged with Hobbs Act conspiracy and three counts of aiding and abetting the use and brandishing of a firearm. Jordan denied involvement in any of the robberies. Pet. App. 10.

Mr. Jordan and his codefendant filed pretrial motions for severance. Graham argued that severance was required because at trial Jordan was expected to exonerate himself by implicating Graham, which he claimed was tantamount to having "prosecutors on either side of us, one on each side of us, the government

pointing at us and Mr. Jordan pointing at us as well." Pet. App. 270. The motions were denied because there was no *Bruton* issue, and because "the right to severance requires more than finger pointing, that is, more than a showing that a co-defendant intends to exculpate himself by inculpating a co-defendant." Pet. App. 201, 271, 279.

At the request of the court, on the morning of trial Petitioner Jordan's attorney confirmed that his client would testify that he had not participated in the robberies, that he had not knowingly stored weapons in the closet of his apartment, and that his testimony would implicate his codefendant. Jordan's version of events included the following details:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Pet. App. 223-225.

[1] Jordan was not charged with the jewelry store robbery, but it was included in the government's description of the conspiracy charge against him. Pet. App. 259.

At that point Petitioner Jordan's codefendant renewed his motion for severance, again arguing that it was "unfair" to require him to go to trial with a co-defendant who was a "second prosecution force." Pet. App. 246-247, 256. The government responded that Jordan need not be permitted to "fill the prosecutor's bowl." The court then issued an oral ruling that Jordan was prohibited from testifying about the proffered events.[2] Pet. App. 997, 223-225, 261-263. At the request of the prosecutor, the court also ruled that Jordan would not be allowed to "name names" of the individuals who had come to his nearby apartment on the night of the Shell station robbery:

> MR. BLOCK: . . . One final point regarding the content of Mr. Jordan's testimony, . . . and I anticipate he would testify to something similar today, he indicated that the weapons found in his apartment were stashed there by other individuals, and he didn't know that they were present, and that the clothing that was used that was worn in the Shell station robbery had been left there by someone else.
>
> THE COURT: All right.
>
> MR. BLOCK: And I just – in order to avoid a problem on the stand, I think that testimony is appropriate as long as Mr. Jordan doesn't name names, by which I mean he doesn't say Aaron Graham came over wearing that jacket, but –
>
> * * *
>
> THE COURT: You can cross-examine him on those kind of facts, but obviously, particularly we're not going to name names, we're not going to name the name of Mr. Graham.

Pet. App. 226-227.

[2] Jordan was allowed to say that he met Graham on Stricker Street, but he wasn't allowed to say that it was because of a drug transaction.

2. The government's case against Jordan was entirely circumstantial. No witness identified Jordan as a participant in any robbery, and the victim of the Shell station robbery exculpated Jordan.[3] The most incriminating evidence against Jordan was a weapon and jackets tied to the Shell station robbery that were found in the closet of Jordan's apartment, cell phone records showing calls between Jordan and Graham, and the fact that Jordan was driving Graham's truck shortly after the second fast food restaurant robbery.

Prior to taking the stand Jordan was admonished by the court to comply with the pretrial restrictions that had been imposed on his testimony. As he testified, Jordan described events that had transpired between himself and his codefendant during the time of the robberies without referring to prohibited details, explaining that "much of the stuff I obviously can't say." Pet. App. 228. Jordan testified that he did not participate in any robberies and, in compliance with the court's prohibition against mentioning a drug transaction, stated that on the day of the fast food robberies he met Graham on Stricker Street to "do their little business." Pet. App. 75. When he attempted to explain how [redacted] on the night of the Shell station robbery, he was chastised to confine his remarks only to his own conduct. *Id.* The judge also admonished him not to ask questions if he was confused because "we're being very careful." Pet. App. 230.

[3] Graham, who did not testify, was identified at trial by several robbery victims.

During cross-examination the prosecutor questioned Jordan about events that included details excluded by the court. Jordan was prohibited from mentioning [redacted], but the prosecutor pressed him to describe the nature of his relationship with Graham. When the government challenged Jordan's motivation for [redacted], he was unable to respond without mentioning his codefendant, for which the prosecutor accused him of deliberately attempting to cause a mistrial. The court again admonished Jordan to comply with the restrictions that had been imposed. Pet. App. 230.

During closing arguments the prosecutor referred to the absence of the prohibited details when arguing to the jury that Jordan's version of events was untrue. The government took advantage of the prohibition against explaining how incriminating evidence was placed by others in Jordan's apartment to challenge as incredible the possibility that "somebody that Mr. Jordan doesn't know . . . just a bunch of men" hid weapons and jackets in his closet. Pet. App. 211. The government also used the fact that Jordan was prohibited from explaining the circumstances of his prior inconsistent statement to argue that the jury shouldn't believe any of his testimony, and that Jordan's only motivation for making the earlier statement was to "concoct some fabrication that he thought would get him off the hook."

The prosecutor then chastised Jordan for testifying under oath:

> And think about the arrogance, the arrogance for this man *to come into court*, after having told the government one story several months ago, *to swear an oath* and tell you a completely different, completely unbelievable physically impossible story, and expect you to buy it. Think about the arrogance that that demonstrates.

Pet. App. 204-205, 220. (emphasis supplied).

3. On appeal Jordan challenged the district court's restrictions on his testimony as a denial of his due process rights under the Fifth and Sixth Amendments. Pet. App. 72.[4] Jordan argued that the limitations imposed on his testimony, combined with the prosecutor's improper comments, violated his right to testify and effectively prevented him from providing a complete defense as set forth in *Rock v. Arkansas*, 483 U.S. 44 (1987).

In a published opinion, the Fourth Circuit disagreed and held that there was no constitutional violation because the narrative that Jordan gave at trial was an adequate substitute for his version of events. Pet. App. 74. Citing *Chambers v. Mississippi, Rock v. Arkansas*, and *Taylor v. Illinois*, the court held that the type of restrictions imposed by the district court were not arbitrary because they prevented "unfair prejudice" to Jordan's codefendant and permitted "a fair joint trial between the defendants." Pet. App. 76, 81. The Fourth Circuit evaluated Jordan's proffer against the government's evidence and decided that the district court's ruling was correct because the testimony's probative value to Jordan was outweighed by the danger of unfair prejudice to Graham. The court also stated that the government's evidence had "disproved" Jordan's version of events and rejected Jordan's argument that the excluded testimony was essential to prove lack of knowledge or intent. Pet. App. 77. The court agreed that the prosecutor's cross-examination questions were

[4] Jordan raised other arguments as well, including the district court's admission of testimonial and documentary evidence relating to cell site location information ("CSLI") recorded by his cell phone provider. The CSLI issue is addressed in part II.

improper, but did not address the government's comments to the jury about Jordan's "arrogance" for choosing to testify under oath. Pet. App. 78.

REASONS FOR GRANTING THE PETITION

This Court held in *Rock v. Arkansas* that the accused in a criminal case has a fundamental right "to present his version of events in his own words." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). Although this Court has acknowledged that the rights of an accused "may, in appropriate cases, bow to other legitimate interests in the criminal trial process," it has never suggested that a codefendant's wish to avoid prejudicial evidence is a reason to prohibit an accused from testifying about events that were material to his defense. Yet the Fourth Circuit did just that in this case when it held that there is no constitutional violation when a trial court orders an accused to limit his testimony to an alternate "narrative" that omits competent and exculpatory evidence merely because it is prejudicial to his codefendant. Pet. App. 74.

The Fourth Circuit's published opinion in this case supports a radical and unprecedented view of what constitutes a "legitimate interest" sufficient to limit the fundamental constitutional rights of an accused, and challenges other long standing legal principles promulgated by this Court and adhered to by every other Circuit, such as whether an accused may testify against his alleged coconspirators, and the meaning of "unfair prejudice." The Fourth Circuit's interpretation of this Court's ruling in *Rock* gives a green light to codefendants and the government alike that they are free to sculpt the contours of an accomplice's version of events to fit their

own objectives. From a practical perspective, the ruling provides a powerful disincentive for an accused to reveal any information to the court about his defense that is not specifically required by law.

This circumstantial case presents an ideal vehicle for examination of these issues because there were no *Bruton* concerns, the defendant was the only witness to the excluded evidence, and the Fourth Circuit did not dispute that the testimony was otherwise admissible.

SUMMARY OF THE ARGUMENT

The published decision of the Fourth Circuit constitutes an unprecedented limitation on the right of an accused to present a defense as set forth in *Rock v. Arkansas* and its progeny. The court held that a "narrative" is an adequate substitute for *Rock*'s holding that an accused has a "right to present his own version of events in his own words," and justified this departure from the norm with equally unprecedented reasoning: that a codefendant's desire to avoid prejudicial evidence is a legitimate basis for limiting an accused's right to testify in his own defense. The premise of the court's reasoning –that it is "unfair" for an accused to give testimony that implicates his codefendant- challenges the universally accepted definition of "unfair prejudice" described in *Old Chief v. United States* and the longstanding principle acknowledged in *Zafiro v. United States* that a defendant may testify against his codefendant. Additionally, the Fourth Circuit's *de novo* assessment of the evidence under Federal Rule of Evidence 403 as its method of evaluating the

Petitioner's constitutional claim is inconsistent with *Holmes v. South Carolina* and *Sprint/United Mgmt. Co. v. Mendelsohn.*

The accused's right to testify in his own defense is a mainstay of the constitutional guarantee of due process. Accomplice testimony is a mainstay of our criminal justice system. The Fourth Circuit's opinion challenges both.

I. THE FOURTH CIRCUIT'S DECISION AUTHORIZES A LIMITATION ON AN ACCUSED'S RIGHT TO TESTIFY THAT IS UNPRECEDECENTED AND INCONSISTENT WITH THE ESTABLISHED CASELAW OF THIS COURT.

A. The Fourth Circuit's Published Opinion Directly Conflicts With The Holding In *Rock v. Arkansas* That A Defendant Has A Right To Testify To His Own Version Of Events In His Own Words

A defendant in a criminal case has the fundamental right under the Constitution to take the witness stand and testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44 (1987). To this end, a trial court may not impose a rule that permits the accused to take the stand, but arbitrarily excludes portions of his testimony. *Id*. at 55. This virtually "unfettered" right of the accused "to present his own version of events in his own words" is consistent with

> the conviction of our time . . . that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the court.

Id. at 54, quoting *Washington v. State of Texas*, 388 U.S. 14, 22 (1967) (internal citations omitted). The right stems from this Court's recognition that "the most important witness for the defense in many criminal cases is the defendant himself."

Id. at 52. An accused's interest in testifying in his own defense is "particularly significant, as it is the defendant who is the target of any criminal prosecution. *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998), citing *Rock,* supra, at 52.

The Fourth Circuit decided that the restrictions imposed on Jordan's testimony did not deprive him of his right to testify in his own defense because he was allowed to substitute a "full narrative" for the details that were excluded from his testimony. Pet. App. 75. This reasoning directly conflicts with the holding of *Rock v. Arkansas*. Putting aside for a moment the issue of whether there was any "legitimate basis" for the court to impose restrictions in the first place (see discussion, *infra*), nothing in the precedent of this Court or any other circuit suggests that a sanitized "narrative" that excludes first hand, relevant, competent, and exculpatory factual evidence from the testimony of an accused is the constitutional equivalent of telling the jury "his own version of events in his own words." See, e.g., *United States v. Carter*, 491 F.2d 625, 629 (5th. Cir. 1974) ("surrogate explanation" imposed by trial court was inadequate because it "lacked the coherence and continuity that would have been possible in a straightforward recitation of his story."); *United States v. Scott*, 909 F.2d 488, n. 1 (11th Cir. 1990) (*Rock v. Arkansas* settled the question of whether defendant has right to tell story in his own words.)

To the contrary, *Rock* itself involved an unconstitutional exclusion of some, not all, of a defendant's testimony.[5] Petitioner's case is even more compelling because, unlike in *Rock*, the appellate court does not dispute the competence of the excluded testimony. Moreover, *Roc*k emphasizes that the constitutional implications of imposing restrictions on an accused's testimony are even stronger where, as here, the court's ruling "deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts." *U.S. v. Scheffer*, 523 U.S. at 315 (explaining *Rock's* holding and reasoning), citing *Rock v. Arkansas*, 483 U.S. at 57; *accord*, *U.S. v. Peak*, 856 F.2d 825 (7th Cir. 1988) (When erroneously excluded evidence would have been the only or primary evidence in support of or in opposition to a claim or defense, its exclusion is deemed to have had a substantial effect on the jury).

B. The Fourth Circuit's Published Opinion Invites District Courts To Disregard The Fundamental Principles Of *Rock* And Its Progeny.

1. In The Fourth Circuit The Principles Of *Rock v. Arkansas* Are Now Subject To A Codefendant's Desire To Avoid Prejudicial Evidence.

The rights of an accused "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, supra, at 55, quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The accused "does

[5] The issue in *Rock* was not whether the accused had been unconstitutionally prevented from taking the stand to testify in her own defense. The only significant testimony that Ms. Rock was barred from giving, because she recalled it only after hypnosis, was that "she did not have her finger on the trigger and that the gun went off when her husband hit her arm." *Rock, supra,* at *56.*

not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) "But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock,* supra at 56.

The Fourth Circuit did not dispute the Petitioner's claim that the testimony excluded by the trial court was relevant, competent and exculpatory. Pet. App. 71-79. Instead the Fourth Circuit stated, without elaboration, that the restrictions on Jordan's right to testify were not arbitrary because their purpose was "to prevent prejudice to Graham and to permit a fair joint trial between the defendants." Therefore, it is now the law in the Fourth Circuit that a codefendant has a "legitimate interest" in preventing an accused accomplice from taking the stand and implicating him at trial with material, fact based, first hand testimony, a position that is directly in conflict with *Rock, Taylor* and every sister circuit.

2. The Fourth Circuit's Justification For Restricting Jordan's Testimony Is Not Consistent With Any "Legitimate Interest" Exception Identified By This Court Or Any Sister Circuit

Federal courts have identified a very narrow range of "legitimate interests" that are sufficient to limit the rights of an accused to present relevant evidence in his own defense, and even fewer (if any) that permit limitations on the accused's right to testify in his own defense.

The most often applied example is codified in the so-called "rape shield" rules of Federal Rule of Evidence 412 and most states, which bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991) (Privacy rights of rape victims are sufficiently important to justify some limitations on the accused's right to confrontation.); Fed. R. Evid. 412. Courts also have a legitimate interest in ensuring the orderly and efficient administration of justice, and therefore have the power to impose reasonable sanctions for a defendant's failure to comply with notice and discovery rules. *Michigan v. Lucas*, 500 U.S. at 149-153. And a rule excluding expert testimony of polygraph evidence in military trials serves

> several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.

U.S. v. Scheffer, 523 U.S. at 308.

Even where this Court has identified a "legitimate interest" that may justify limiting a defendant's ability to call certain other witnesses, it has steadfastly guarded the accused's right to testify in his own defense. For example, the *Scheffer* court explicitly distinguished *Rock* on the basis that there "the *defendant* was unable to testify about certain relevant facts . . ." *Id.* at 315 (italics added). In *Scheffer*, the jury

> heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence. . . Moreover, in contrast to the rule at issue in *Rock*, [this Rule] did not prohibit the respondent from

> testifying on his own behalf; he freely exercised his choice to convey his version of the facts . . .

Id. Even the "rape-shield" rule by its own terms does not apply to "evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412; see *U.S. v. Bear Stops*, 997 F.2d 45, 455 (8th Cir. 1993) (where version of evidence allowed was so sanitized that it was insufficient to support the purpose for which it was offered, impact of rule was "disproportionate" to the legitimate interests it was designed to serve); and *U.S. v. Begay*, 937 F.2d 515 (10th Cir. 1991) (defendant's Sixth Amendment rights were violated where court excluded critical evidence of alternate explanation for forensic findings.)

3. The Fourth Circuit's Holding That It Is "Unfair" For An Accused To Implicate His Codefendant Conflicts With This Court's Decisions In *Old Chief* and *Zafiro*.

The Fourth Circuit does not claim that the limitations imposed on the accused's testimony fit within any of the "legitimate interests" previously identified by this Court. Instead, the court posits, without elaboration, that the restrictions were necessary "to prevent unfair prejudice to Graham." At the heart of the court's opinion is the presumption that the prejudicial nature of an accomplice-accused's testimony renders it "unfair" to his codefendant, who therefore has a legitimate interest in excluding it from the jury. This is a false premise. There is no precedent in the Federal Rules of Evidence, or in this or any federal appellate court for the notion that a codefendant has a right to restrict the testimony of his alleged accomplice –or any witness, for that matter- merely because that witness' testimony implicates him or is otherwise prejudicial to his defense.

a. The Fourth Circuit's opinion challenges the universally held distinction between "prejudice" and "unfair prejudice."

It is well settled that damage to a defendant's case is not a legitimate basis for excluding probative evidence:

> "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."

Old Chief v. United States, 519 U.S. 172, 180 (1977).[6] "Virtually all evidence is prejudicial or it isn't material. The prejudice must be unfair." *Id*. at 193 (O'Connor, J., dissenting) (quoting *Dollar v. Long Mfg., N.C., Inc*., 561 F.2d 613, 618 (5th Cir. 1977), cert. denied, 435 U.S. 996 (1978). So, the Committee Notes to Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860.

At trial Petitioner Jordan sought to testify about events that he had actually observed, and was available for cross-examination about the details of those events. The Fourth Circuit conceded that the excluded testimony held some exculpatory value for Jordan, but decided that it should nevertheless be excluded out of fairness to his codefendant. This new standard challenges the decision of this Court that "a fair trial does not include the right to exclude relevant and competent evidence." *Zafiro v. United States*, 506 U.S. 534 (1993). Furthermore, it is accepted in most

[6] See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, *Weinstein's Evidence* ¶ 403[03](1996)(discussing the meaning of "unfair prejudice" under Rule 403).

circuits –including the Fourth Circuit-- that "finger-pointing" between defendants is not a basis for severance, so it is illogical to decide that the same type of evidence is so unfair as to justify placing limitations on a defendant's fundamental constitutional right to testify. *United States v. Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991), affirmed, 506 U.S. 534 (1993).

b. The Fourth Circuit's decision challenges the universally accepted principle that a defendant may testify against his codefendant.

In this case it was the source of the prejudicial testimony –what Jordan's codefendant labeled a "second prosecution force"—that rendered it "unfair" and therefore subject to exclusion. But suppose Jordan were testifying as a witness for the prosecution, instead of on his own behalf? It is common practice in our criminal justice system for the government to call a witness who is an accessory to the crime for which the defendant is charged and have that witness testify under a plea bargain. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987); *U.S. v. Hunte*, 193 F.3d 173, 175 (3rd Cir., 1999). This is based on the long-standing rule that

> [t]he acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment.

2 Wharton, *Criminal Evidence* § 430 (12th ed. 1955). See also, *U.S. v. Soto*, 780 F.3d 689 (6th Circ. 2015) (Testimony by coconspirators alone can be sufficient to prove the existence of a conspiracy.) As this Court stated in *Zafiro v. United States*:

> A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.

Zafiro v. United States, 506 U.S. 534 (1993).

The Fourth Circuit's decision turns this long-standing principle on its head. If an accused who exercises his constitutional right to testify in his own defense is not allowed to describe events that implicate his codefendant -to "fill the prosecutor's bowl," as the government described it— it follows that the same limitation could be imposed on a government witness called to testify against his former codefendant. Similarly, it is an absurd rule that permits a defendant who cooperates with the government to testify against his codefendant, but prohibits him from doing so if he testifies in his own defense. [7]

1. The Fourth Circuit's *De Novo* Application Of Federal Rule Of Evidence 403 Contradicts The Language Of The Rule And Decisions Of This Court

The Fourth Circuit explicitly invoked the weighing test of Federal Rule Of Evidence 403[8] when it decided that the district court's exclusion of Petitioner

---

[7] In *Washington v. Texas*, this Court noted the absurdity of a rule which allowed the State to call an accused accomplice to testify against a defendant, but denied the defendant the right to call that same witness on his own behalf. *Washington v. State of Texas*, 388 U.S. 14, 24 (1967) (Harlan, J., concurring). See also, *Rosen v. United States*, 245 U.S. 467 (1918) (accused may not be denied right to put on the stand any witness who is physically and mentally capable of testifying to events that he personally observed, and whose testimony would have been material and relevant to the defense.)

[8] Federal Rule of Evidence 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair

Jordan's testimony was not arbitrary because the "risk of unfair prejudice to Graham outweighed the probative value of any of [Jordan's] testimony" Pet. App. 76. Aside from the issue of whether the prejudice to Graham was "unfair," the district court did not rely on Rule 403 as a basis for exclusion of the testimony. The judge never mentioned Rule 403, and there is no evidence in the record that he "weighed" the evidence in connection with his decision. The "weighing" of the value of Jordan's testimony began in the Fourth Circuit.

There is no legal authority for a federal appellate court to initiate its own evaluation of any evidence under Rule 403, much less the testimony of an accused, when the district court has not done so. Questions of relevance and prejudice are for the district court to determine in the first instance because they require an "on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008). Where a district court does not articulate a basis for an order that limits the constitutional rights of an accused, explicitly and on the record, the circuit should have hold that exclusion of the accused's testimony was arbitrary. *Id.* at 387.

> prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed.R.Evid. 403.

A. The Fourth Circuit's Unprecedented Approval Of A Substitute "Narrative" In Place Of The Accused's Complete Testimony Conflicts With This Court's Rulings In *Crane* That The Accused Has A Right To Present A Complete Defense

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984) (citations omitted). A "complete defense," said a unanimous Court, includes evidence that is "central to the defendant's claim of innocence." *Id.* That means that the defendant in this case, who was charged with aiding and abetting, had a right to present evidence of lack of knowledge or intent. See *Rosemond v. United States*, 134 S.Ct. 1240 (2014) (government must prove knowledge and intent to establish the offense of aiding and abetting).[9]

1. The Fourth Circuit's Decision Conflicts With Cases Holding That The Accused Has A Right To Present Evidence Of Lack Of Knowledge Or Intent.

A defendant has a due process right to present evidence favorable to himself on an element that must be proven to convict him. *Clark v. Arizona*, 548 U.S. 735, 769 (2006). In this case the restrictions prevented Jordan –*the only witness to the excluded evidence*— from testifying to facts about which he had personal knowledge

[9] *Rosemond* was decided while Jordan's appeal was pending but after briefs had already been filed. Jordan's Petition for Rehearing on the issue of whether the jury instructions complied with *Rosemond*'s advance knowledge standard was denied.

and which would have explained his relationship with Graham, the presence without Jordan's permission of incriminating items in the closet of his apartment, his reasons for being with Graham on February 5th, and the circumstances of his prior inconsistent statement. The government prosecuted Jordan under an aiding and abetting theory, so the restricted testimony was relevant not only to Jordan's credibility, it was the crux of his defense. [10]

"Whether the exclusion of [evidence] violate[s] [a defendant's] right to present a defense depends upon whether the omitted evidence[,] evaluated in the context of the entire record[,] creates a reasonable doubt that did not otherwise exist." *United States v. Rivera*, 799 F.3d 180, 191 (2nd Cir., 2015) (alterations in original) (internal quotations omitted). The government's reliance on the excluded evidentiary details as the basis for impeaching a hog-tied defendant in cross-examination and closing arguments belies the Fourth Circuit's conclusion that a "narrative" is an adequate substitution for an accused's own testimony under *Rock v. Arkansas*. The Fourth Circuit's opinion acknowledges that the prosecutor's comments were improper, but its ignores the heart of the problem: a "narrative" omits details and therefore unfairly erodes the accused's credibility.

[10] The government initially claimed that Jordan was present but unarmed at the Shell station robbery. After the government's witness to the robbery testified at trial that the unarmed robber was much younger and shorter than Jordan, the prosecutor revised his theory and argued to the jury that even if Jordan were not present at the robbery he should be found guilty of aiding and abetting the armed robbery (and the related § 924 (c) charges) based on the evidence found in his apartment.

2. The Fourth Circuit's *De Novo* Analytical Approach Conflicts With This Court's Decision In *Holmes* And Disregards The Principles Established In *Darden.*

The Fourth Circuit does not dispute that the evidence excluded from Jordan's testimony was relevant, but sidesteps *Crane v. Kentucky* and concludes that Jordan's testimony wasn't essential because the government proved that it wasn't true. Opinion 76-77. But the question of whether or not a defendant was deprived of the opportunity to present evidence that is central to his claim of innocence does not turn on an appellate court's *de novo* assessment of whether or not the jury would find the evidence believable. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006). Such logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that the defendant has no reason to present evidence of his lack of knowledge or intent. And where the credibility of the prosecution's witnesses or the reliability of its evidence was not conceded, "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact. . . The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 330-331. That analytical imbalance is even more striking where, as here, the appellate court –after acknowledging that the prosecutor's cross-

examination was improper-- completely overlooked his disparaging comments about Petitioner's "arrogance" in exercising his right to testify in his own defense. Prosecutorial comments of this nature implicate the "specific rights of the accused," and the Fourth Circuit should have addressed them in the context of Petitioner's claim that he was effectively denied his constitutional right to testify in his own defense. *C.f., Darden v. Wainwright*, 477 U.S. 168, 181-182 (1986) (inquiry is whether prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); and *Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (*Darden* is clearly established federal law.)

B. The Fourth Circuit's Decision Will Promote Inefficiency In The Criminal Justice System.

The Federal Rules of Criminal Procedure state that a defendant must give notice of an alibi defense, an insanity defense, and a public-authority defense. Fed.R.Crim.Proc. 12.1-12.3. A defendant who proposes to introduce evidence covered by the "rape-shield" rule must file a timely motion and provide appropriate notice. Fed.R.Evid. 412.

There is no requirement that a defendant give notice as to whether or not he will take the stand. In this case, motions for severance that addressed "finger pointing" between the defendants had already been litigated and there were no *Bruton* issues, so the information provided about Jordan's testimony in response to the court's request was a mere courtesy intended to assist the court in its efficient management of the trial schedule. Unfortunately, that courtesy led to a pretrial order that restricted important testimony of the accused in matters where he was

the only witness, and may have resulted in an effective life sentence for the defendant.

Efficiency, effectiveness, and fairness are central goals for the administration of criminal justice in the United States. The reciprocal relationships of the judge, prosecutor and defense attorney have a significant impact on the efficient operation of the judicial process. George Cole, Bureau of Justice Statistics, *Performance Measures for the Trial Courts, Prosecution and Public Defense*, NCJ 143505 (October 1993) (on file with author), *available at* https://www.bjs.gov/content/pub/pdf/pmcjs.pdf . The Fourth Circuit's decision has the potential to change the paradigm for whether and how responsible defendant-stakeholders should respond to future requests from the court regarding a defendant's intention to testify in cases where a codefendant is involved.

I. THE FOURTH AMENDMENT REQUIRES LAW ENFORCEMENT TO OBTAIN A WARRANT TO ACQUIRE EXTENDED PERIODS OF CELL SITE LOCATION INFORMATION.

Although the Fourth Circuit denied Mr. Jordan's claims that restrictions placed on his testimony violated his rights under the Fifth and Sixth Amendments, a divided panel decided that the government obtained evidence of Mr. Jordan's historic cell site location information (CSLI) in violation of the Fourth Amendment. Pet. App. 14-15. The government's petition for rehearing on the CSLI issue was granted, and the *en banc* court reversed the decision of the panel. Pet. App. 135-140.

Petitioner hereby adopts and incorporates herein the arguments contained in the *Petition for Writ of Certiorari* filed by Aaron Graham, Case No. 16-6308.

CONCLUSION

This case presents a direct challenge to this Court's decision in *Rock v. Arkansas* that the accused has a fundamental constitutional right to present his own version of events in his own words. This Court should grant the petition to provide needed guidance.

Respectfully submitted,

RUTH J. VERNET
Ruth J. Vernet Esq., LLC
31 Wood Lane
Rockville, MD 20850
(301)251-9500
ruthv@vernetlaw.com

Attorney for Petitioner