No. 26-2048

In the Supreme Court of the United States

AVERY FORD, PETITIONER,

V.

UNITED STATES OF AMERICA, RESPONDENT.

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

BRIEF FOR THE RESPONDENT

4R

QUESTIONS PRESENTED

1. Whether the search condition in Ford's probation agreement and the presence of reasonable suspicion, established by the tipster's information and Detective Mandel's corroboration, gave police authority to search Ford's home pursuant to the Fourth Amendment.
2. Whether the district court constitutionally excluded Walter from testifying on behalf of Ford under the Sixth Amendment Compulsory Process Clause when Ford's counsel violated the district court's discovery order by disclosing Walter four days before trial, 24 days after the witness list was due.

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STATEMENT OF FACTS

It is undisputed that Petitioner Avery Ford was on active probation for a violent crime when police found an illegal firearm in her home. In December 2019, Ford pled guilty in state court to felony assault with force likely to cause great bodily injury. *See* R. at 17. The court sentenced her to four years of probation. *Id.* Ford signed her probation agreement, noting that she read and agreed to all conditions of probation. *Id.* at 18. Her probation agreement contained the relevant condition: "allow a law enforcement officer access to your home when requested." *Id.*

In June 2021, an anonymous tip reported to the Pacifica Alta Police Department that they were Avery's friend, and had seen a gun in her apartment. *See id.* Avery's friend provided more details: that Avery was on probation, bought an illegal firearm in the neighboring state, brought the gun back and now kept it in a kitchen drawer. *See id.*

Detective Russ Mandel checked up on the tipster's information. He looked on the Franciscana Law Enforcement Telecommunications System ("FLETS"), a database that contains all criminal justice information for the state of Franciscana. *See id.* He found that there was only one active probationer in the state with the first name Avery: Petitioner Ford. *See id.* To be sure, Detective Mandel contacted Ford's probation officer, and she confirmed that Ford was on active probation, compliant with probation check-ins, and subject to "standard" probation terms. *Id.*

Knowing that the standard probation conditions included the requirement that Ford allow police officers access to her home, Detective Mandel and his partner James Mericle went to Ford's apartment. *See id.* at 18. Ford allowed them into her apartment. *See id.* at 19. Once in her kitchen, they opened a drawer that stored knives. *See id.* Detective Mericle observed a wooden box in the cabinet, with a basket of cutlery atop it. *See id.* He removed the basket and found an un serialized, unregistered polymer handgun inside the wooden box. *See id.* He then placed Ford under arrest for

possession of a firearm. *See id.* After arrest, Ford was charged, obtained counsel, and opted for a jury trial.

The district court issued a pre-trial scheduling order, with trial set for December 1, 2022. *See id.* at 22–26. On November 1, 2022, 30 days before trial and in accordance with the district court's pre-trial scheduling order, the government and Ford disclosed witnesses they intended to call at trial. *See id.* at 6, 22. Ford disclosed that she was going to testify herself and would call her landlord. *See id.* at 6. Her theory at trial was that she did not knowingly possess the firearm, but that it belonged to a prior tenant that had moved out two days prior to Ford.

On November 24, only four days before trial and 24 days after the witness disclosure deadline, Ford disclosed a third witness, Rafael Walter. *See id.* at 6, 22. Ford claimed Walter was a prior building employee who would testify that he had "knowledge relevant to the condition of Ms. Ford's unit and items left behind by prior tenants." *Id.* at 6. When asked to explain Ford's late disclosure, Ford's counsel claimed that Walter had only "recently been located" and that "Ford's counsel had not appreciated the relevant of his testimony until just before trial." *Id.* at 7. He further explained that no notice had been given to the government and that Mr. Walter had not produced a statement. *Id.* It was undisputed that Ford's disclosure violated the discovery order. *Id.*

At the motion in limine hearing on November 25, the government objected to the addition of Walter on three grounds: (1) the late disclosure violated the district court's order; (2) the summary of testimony provided was vague and inadequate; and (3) the late disclose prejudiced the government, depriving it the opportunity to meaningfully investigate, interview, or prepare impeachment evidence against Walter. *See id.* at 6.

The district court agreed with the government. It excluded Walter's testimony as a sanction for violating the pre-trial order, explaining that "Ms. Ford's eleventh-hour disclosure violated my

discovery order and that late disclosure causes the government significant prejudice as they would be forced to proceed to trial with the highest burden of proof in our legal system without adequate time to prepare." *Id.* at 7. It further warned that allowing Ford to violate the order with no consequences "would undercut the force and effect of my own orders and the orders of other judicial officers." *Id.*

The district court also expressed skepticism as to Ford's rationale for counsel's late disclosure. It correctly noted that "Ms. Ford's counsel should have known about Mr. Walter earlier" as he was a former building employee, especially given the fact that the defense planned to call the landlord as a witness and therefore had spoken to building employees. *Id.* Before concluding the order, the district court briefly discussed defense counsel's underlying reason for the late disclosure, writing "this seems like, to me, a simple lack of diligence on the part of Ms. Ford's counsel but one that has consequences." *Id.*

Ford was convicted at trial. *See id.* She appealed to the Thirteenth Circuit, which held that Ford's motion to suppress the gun was properly denied, but reversed and remanded on account of her Sixth Amendment claim. *See id.* at 11, 14.

SUMMARY OF ARGUMENT

The government has a duty to maintain public safety. Because a person on probation is assumed to be more likely to commit a crime, this duty is heightened when a person suspected of criminal activity is on probation. *See United States v. Knights*, 534 U.S. 112, 120 (2001). Ford's status as a probationer therefore provided the government with a legitimate interest in verifying her suspected criminal conduct. The search of Ford's home was constitutional under the Fourth Amendment for three reasons:

- The standard for law enforcement to search a probationer's home is reasonable suspicion. The tipster's information and Detective Mandel's corroboration established reasonable suspicion to search Ford's home.
- The probation agreement contained a search condition.
- The reasoning of *Samson* applies to probationers, such that the police were allowed to search Ford's home even without a search condition or reasonable suspicion.

Therefore, the District Court was correct to deny Ford's motion to suppress, and Respondent respectfully requests this court affirm the Thirteenth Circuit's decision on the Fourth Amendment issue.

The government and judicial system also have an interest in protecting the integrity of the adversarial process. And while criminal defendants have a Sixth Amendment right to Compulsory Process, this right does not automatically outweigh the countervailing public interest in protecting the adversarial system. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988). One such situation in which the balance weighs in favor of the public interest is when defendants violate court orders, such as discovery orders. There are circumstances in which a court is justified in excluding a defense witness as a sanction for violating a discovery order notwithstanding the defendant's Sixth Amendment rights. *See id.* at 418. The district court's exclusion of Walter due to Ford's late disclosure was constitutional under the Sixth Amendment for two reasons:

- *Taylor* does not require courts to find that a discovery violation was done willfully or in bad faith. Requiring such a finding would undermine the factors described in *Taylor* and the Court expressly rejected creating a blanket rule in favor of judicial discretion.

- Applying *Taylor*, Walter was properly excluded because Ford's late disclosure, given Ford's theory at trial, made Walter presumptively unreliable and allowing Walter to testify would have caused unfair prejudice and delay.

Respondent respectfully requests that this Court reverse the Thirteenth Circuit's decision below with respect to Ford's Sixth Amendment claim or, in the alternative, remand for further fact finding consistent with the *Taylor* factors.

ARGUMENT

I. The Search of Ford's Home was Constitutional Under the Fourth Amendment.

The government has a legitimate interest in keeping the public safe from crime. *See United States v. Knights*, 534 U.S. 112, 120 (2001). And because probationers are assumed "more likely than others to violate the law," this Court has given the government more leeway on the standard to search a probationer. *See id.* That standard only requires reasonable suspicion. *See id.* at 121. Because the tipster here was a friend of Ford's, provided the police a significant amount of information, and witnessed firsthand the weapon in Ford's home, their information was reliable. *See* R. at 17. Detective Mandel's inquiry to narrow down Ford's identity was corroboration of the tipster's information, and he had enough information to establish reasonable suspicion. *See id.*

Although reasonable suspicion was sufficient on its own to allow law enforcement to search Ford's home, the language at issue in Ford's probation agreement constituted a search condition. *See id.* at 18. The word "access" implies entry and use of a space, which both allow for a search. What's more, the proper lens to determine whether the relevant language was a search clause is from the government's perspective, rather than an analysis of Ford's consent; and Ford providing access to her home was sufficient. The agreement providing access to law enforcement, rather than a probation officer, also bolsters the fact that this is a search condition. Finally, even if neither a search condition nor reasonable suspicion was present here, this Court's reasoning in

Samson v. California, 547 U.S. 843 (2006), applies to make the search constitutional because probationers have a diminished privacy right.

For a motion to suppress, this Court reviews the legal conclusions *de novo*, and the factual findings for clear error. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

A. There was Reasonable Suspicion for the Detectives to Search Ford's Home, which is Sufficient Regardless of the Presence of a Search Condition in the Probation Agreement.

United States v. Knights is the seminal case discussing the appropriate standard that law enforcement must have prior to searching a probationer's home. This Court held that reasonable suspicion is the right standard, as it properly balances the government's and probationer's interests. *See Knights*, 534 U.S. at 121. The probation agreement in the *Knights* case included a search clause, *id.* at 114, and subsequently, Circuits are split as to whether a search clause was a factor of the *Knights* Court's balancing test, or a threshold question to the Court's decision to settle on the reasonable suspicion standard. *See United States v. Keith*, 375 F.3d 346 (5th Cir. 2004), *cert denied*, 543 U.S. 950 (2004); *United States v. Carter*, 566 F.3d 970 (11th Cir. 2009); *United States v. Hill*, 776 F.3d 243 (4th Cir. 2015). If this Court finds that the language of the probation agreement here did not amount to a search clause, it would have the opportunity to clarify the Circuit court's disagreement on the proper standard absent a search clause, as this is an unsettled question before this Court. But the Court need not decide that issue in this case, because Ford's probation agreement *does* contain a search clause, and therefore *Knights* requires that reasonable suspicion is the standard. *See* R. at 18; *Knights*, 534 U.S. at 121. The search of Ford's home was constitutional under the Fourth Amendment because the information from the tipster, and Detective Mandel's subsequent corroboration, amounted to reasonable suspicion of criminal conduct. *See* R. at 18.

1. Reasonable Suspicion is the Standard to Assess the Constitutionality of a Police Search of a Probationer's Home.

To search a probationer's home, the police must have reasonable suspicion of criminal conduct. *See Knights*, 534 U.S. at 121. The probation agreement in *Knights* stated that the defendant must submit to search at any time by any probation or law enforcement officer. *See id.* at 114. The defendant, along with his friend, was a potential suspect for arson. *See id.* at 114–115. A detective observed items in the friend's truck bed, which was parked outside of the defendant's apartment, that could indicate participation in arson. *See id.* at 115. This provided the officer with information that he relied on in his decision to search the defendant's apartment without a warrant. *See id.* This Court provided that the appropriate standard to examine the information the government had prior to its search of the defendant's apartment was reasonable suspicion. *See id.* at 121.

To assess the reasonableness of a search, this Court in *Knights* required a balancing test: the degree of intrusion on a person's privacy, against the degree of importance the search imposes on a legitimate government interest. *See id.* at 118. The defendant's status as a probationer implicated the degree of privacy he could expect, diminishing it below the everyday person's reasonable expectation of privacy. *Id.* The Court in *Knights* highlighted that the government's interest was legitimate because probationers have higher recidivism rates, and a higher likelihood to violate the law. *See id.* at 120. In balancing these two, the Court found that the appropriate standard necessary to allow search of a probationer's home is reasonable suspicion. *See id.* at 121.

This Court has only addressed the appropriate standard to search a probationer's home in a case where the relevant probation agreement contained a search condition. *See id.* at 114 (probation condition requiring the probationer to submit to search at any time); *Griffin v. Wisconsin*, 483 U.S. 868, 870–71 (1987) (state regulation permitting probation officers to search

a probationer's home). Circuits are split on how to interpret *Knights*: as considering the search condition in a balancing test that leads to the standard of reasonable suspicion, or as requiring a search condition as a threshold question to reach the standard of reasonable suspicion. *See* Taylor S. Rothman, *Fourth Amendment Rights of Probationers: The Lack of Explicit Probation Conditions and Warrantless Searches*, 2016 U. Chi. Legal F. 839, 841 (2016). The majority of Circuits, the Fifth and Eleventh, interpret *Knights* to require reasonable suspicion regardless of a search condition, ultimately seeing the search condition as a factor in *Knights*. *See United States v. Keith*, 375 F.3d 346 (5th Cir. 2004), *cert. denied*, 543 U.S. 950 (2004); *United States v. Carter*, 566 F.3d 970 (11th Cir. 2009). The Fourth Circuit, standing alone, interpreted *Knights* to make a search condition dispositive, and therefore applied the higher standard of probable cause to search a probationer's home who is not subjected to a search condition. *See United States v. Hill*, 776 F.3d 243 (4th Cir. 2015).

The Fifth and Eleventh Circuits have the right interpretation. The Eleventh Circuit deduced *Knights* to create the requirement of a balancing test to determine the Fourth Amendment standard, rather than requiring a search clause. *See Carter*, 566 F.3d at 974–75. In *United States v. Carter*, the defendant was subject to a probation agreement that required him to "submit to visits by the probation officer at his home." *Id.* at 974. The defendant's probation officer planned a warrantless home search based on his belief that the probationer's new lifestyle must have been funded by illegitimate business. *See id.* at 972. The Eleventh Circuit, applying the balancing test from *Knights*, found that although the probation agreement did not contain the same language as the search condition as in *Knights*, the condition in *Carter* requiring the defendant to open his home to his probation officer diminished his privacy. *See id.* at 974. Further, the government's interest outweighed the defendant's diminished privacy right, and the court held that reasonable suspicion

was the right standard for the search. *See id.* at 975. The Fifth Circuit similarly upheld the search of a probationer's home in *Keith* by relying on "the core reasoning of the [Supreme] Court" in *Knights*: striking a balance between a probationer's privacy rights and the government's need to maintain its probation system. *See Keith*, 375 F.3d at 350.

The single Circuit on the other side of the split misinterprets *Knights*. The Fourth Circuit in *Hill* found that the search condition in *Knights* was dispositive to this Court holding that reasonable suspicion is the appropriate standard. *See Hill*, 776 F.3d at 249. Yet this interpretation ignores that this Court in *Knights* emphasized that a court should consider the totality of circumstances. *Knights*, 534 U.S. at 118. Although it is true that this Court in *Knights* found the search condition a "salient circumstance" in the balancing test, it was just that: one factor of the analysis. *Id.* The search condition informed the analysis of the probationer's expectation of privacy, but it was not the only thing that diminished that expectation, as the mere status of being a probationer reduces the liberties they are entitled to. *See id.* at 119; *see also*, *Griffin*, 483 U.S. at 874 (finding that probationers "do not enjoy the absolute liberty to which every citizen is entitled, but only … conditional liberty properly dependent on observance of special probation restrictions."). Requiring only reasonable suspicion, regardless of a search clause, is consistent with this Court's test set forth in *Knights*, and aligns with the majority of Circuits on the issue.

2. The Tip from Ford's Friend, and the Identification Corroboration from Detective Mandel, Supplied Enough Information to Establish Reasonable Suspicion.

A law enforcement officer has reasonable suspicion when there is a "particularized and objective basis for suspecting the [accused] of criminal activity." *Navarette v. California*, 572 U.S. 393, 396 (2014). To assess reasonable suspicion, this Court considers the totality of the circumstances. *See id.* at 396. This Court has examined reasonable suspicion supplied by an

anonymous tipster in three relevant cases: *Alabama v. White*, *Florida v. J.L.*, and *Navarette v. California*. These cases outline the type of information and police corroboration that can provide reasonable suspicion, such that a subsequent search is valid under the Fourth Amendment.

In *Alabama v. White*, 496 U.S. 325 (1990), this Court found that the information provided identifying criminal conduct was enough for reasonable suspicion, and upheld the police's search of the defendant. *See* 496 U.S. at 327. An anonymous tipster called the police to report an upcoming crime. *See id.* The tipster shared the suspect's full name, the make and color of the car the suspect would be driving, where from and to she would drive, and a description of the bag she would carry. *See id.* The police corroborated the information by going to the departure location, and observing the suspect enter the car that the tipster described and drive the most direct route to the destination the tipster provided. *See id.* This Court held that while an anonymous tip is insufficient on its own to establish reasonable suspicion, police corroboration can move such information across that line. *See id.* at 329. But this Court also emphasized that not every detail from the informant must be corroborated to satisfy the threshold of reasonable suspicion. *See id.* at 331. What's more, the amount of information and the reliability of that information must complement each other: the high amount of information from the tipster in *White* outweighed the low reliability of the anonymous tipster. *See id.* But the tipster's information being about the suspect's future movements also supported their reliability. *See id.* at 332.

In contrast, this Court found there was insufficient information provided by the tipster in *Florida v. J.L.*, 529 U.S. 266 (2000), to establish reasonable suspicion. 529 U.S. at 271. An anonymous tipster called the police to report that a "young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268. Two police officers went to the bus stop and observed three black men, one of which wore a plaid shirt. *See id.* An officer approached

the man in the plaid shirt, frisked him, and found a gun on his person. *See id.* Unlike in *White*, this Court found that the information in *J.L.* was not enough to establish reasonable suspicion. *See id.* at 271. It provided three reasons that the tip was insufficient that all spoke to reliability: the tipster gave no predictive information that could be tested by police, the tipster was completely anonymous, and the tipster did not explain how they obtained the relevant information about the defendant. *See id.* The Court emphasized that the reliability of criminal conduct is more important than the reliability of an identification. *See id.* at 272 (finding that although the tipster's information was sufficient to identify the defendant at the scene, it was not reliable in sourcing the information about the gun).

In *Navarette v. California*, 572 U.S. 393 (2014), the final case on the issue, this Court held the tipster's information was sufficient for reasonable suspicion. 572 U.S. at 404. An anonymous tipster called the police to report the defendant was driving recklessly. *See id.* at 395. The tipster shared that the driver ran them off the road, then provided police with the location, and the make, color, and license plate of the driver's car. *See id.* Though there was no predictive information, which solidified reasonable suspicion in *White* and barred such a finding in *J.L.*, this Court found the information reliable because the tipster provided an eyewitness account of the crime. *See id.* at 399. When acknowledging that the "indicia present here are different from those we found sufficient in *White*" the court emphasized that "there is more than one way to demonstrate a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 404.

The information in this case more closely resembles *White* and *Navarette* than *J.L.* The *White* court emphasized the need for the amount of information to outweigh any reliability issues from not knowing the tipster's identity. *See White*, 496 U.S. at 330. Like the tipster in *White* who

provided a notable amount of information, the tipster here shared a significant amount of information: that (1) a person named Avery (2) who is on probation (3) bought an illegal firearm (4) in New Nevada (5) then brought it back (6) and is keeping it in her home (7) in the kitchen drawer. *See id.* at 327; R. at 18. That level of information, like the level provided in *White*, indicates reliability. *See id.* Moreover, the police need not corroborate every piece of information provided by the tipster for it to be reliable, pursuant to *White*. 496 U.S. at 327. The police here looked through the FLETS database, where they could identify all active probationers in the state. *See* R. at 18. They discovered that there was only one person in the system named Avery. *See id.* They went on to contact her probation officer, who "confirmed [she] was: (1) on active probation; (2) fully compliant with check-ins; and (3) subject to the "standard terms of probation." *Id.* As such, the police corroborated multiple pieces of information received by the tipster, and that is enough for reasonable suspicion here.

Here, the tipster's eyewitness account of the criminal activity made the information sufficiently reliable. While some of the rationale from *White* relied on the tipster providing predictions of the defendant's conduct, future oriented information as the basis for finding reliability is not dispositive. *See White*, 496 U.S. at 332. Like in *Navarette*, where the tipster did not provide any predictive information, the tipster here did not provide information that suggested Ford's future plans. *See Navarette*, 572 U.S. at 399; R. at 18. Yet, in *Navarette*, this Court still found reasonable suspicion because it found the tipster's information reliable where they observed the criminal conduct firsthand, and that is the case here too. *See id.* The tipster here shared that they saw the gun while in Ford's home, which makes them an eyewitness, and more reliable. *See id.*

The facts here can be distinguished from those in *J.L.* that presented issues causing this Court not to find reasonable suspicion. The level of anonymity is pertinent. While in *J.L.*, the Court took issue with the fact that the tipster was so unknown that it was unclear how they had knowledge about the suspect's criminal conduct, in this case, the tipster identified themself as a friend of Ford. *See J.L.*, 529 U.S. at 271; R. at 18. As such, the tipster had a foundation for their information that was lacking in *J.L. See id.* Another issue in *J.L.* that is cured here is the ease of observation of the crime. In *J.L.*, the tipster reported on information they saw while in public, such that it did not indicate any insider information. *See J.L.*, 529 U.S. at 271–72. But here, the tipster saw Ford's gun while inside of the residence – which is not something easily observable in the way this Court found unreliable in *J.L. See id.*; R. at 18. Finally, this case is discernible because of the shifting roles of the tipster and the police officer as to who supplies information regarding identification versus criminal activity. In *J.L.,* the tipster provided much information to identify the suspect, but not enough information to indicate knowledge of concealed criminal activity, and the police corroboration involved much more certification of criminal conduct. *See J.L.*, 529 U.S. at 268, 272. But here, the tipster provided a significant amount of information indicating Ford's criminal conduct regarding purchasing and concealing the firearm, and the police corroboration involved confirming Ford's identity. *See* R. at 18. Because this tipster here had a high degree of reliability as to the criminal conduct, it is enough for reasonable suspicion.

For all of these reasons, the tipster's information and Detective Mandel's corroboration in this case were sufficient for reasonable suspicion of criminal conduct. As such, Detective Mericle's search in Ford's home was constitutional under the Fourth Amendment.

B. The Language of Ford's Probation Agreement does Constitute a Search Condition.

Although reasonable suspicion is enough on its own to make the search of Ford's home constitutional, Ford's probation agreement also serves as a basis for a search: it allows for law enforcement to access her home. *See* R. at 18. Ford's contention that this does not constitute a search condition is mistaken. The noun 'access' is defined as "the ability, right, or permission to approach, *enter*, speak with, or *use*." *Access*, Dictionary.com, https://www.dictionary.com/browse/access (last visited January 31, 2026) (emphasis added). Cornell Law School's Legal Information Institute also defines access as "the right to *use*." *Access*, Cornell Law School: Legal Information Institute, https://www.law.cornell.edu/wex/access (last visited January 31, 2026) (emphasis added). The potential to "use" a space brings the word access into the realm of a search, as use indicates an ability to apply one's own purpose to the space. *Use*, Dictionary.com, http://dictionary.com/browse/use (last visited January 31, 2026). But even if this Court should decide that "use" is not a part of defining access, the right to "enter" still makes the relevant language of the probation agreement a search clause. This Court discussed the protection of a person's home from police entry in the Fourth Amendment context in *Lange v. California*, 594 U.S. 295, 303 (2021). It proclaimed that the Amendment "draws a firm line at the entrance to the house. What lies behind that line is of course not inviolable." *Id.* This indicates that access to a home is part of the search of the home, and once the police have the authority to enter one's home, there is no longer an absolute protection from a search.

Here, the relevant part of the probation agreement reads that Ford must "allow a law enforcement officer access to [her] home when requested." R. at 18. Based on the definition of access contemplating "use," the police should be able to not only enter, but to use Ford's home in a manner that might include entering the kitchen and opening drawers. *See Access*,

Dictionary.com, https://www.dictionary.com/browse/access (last visited January 31, 2026). The Detectives had authority to cross the Fourth Amendment threshold of entry based on the probation agreement. R. at 18; *Lange*, 594 U.S. at 303. For these reasons, despite the probation agreement not expressly containing the word 'search,' it constituted a search condition that made the Detectives' conduct inside Ford's home legal.

What's more, the premise that the probation agreement must have had express language indicating a search condition incorrectly places the inquiry into Fourth Amendment consent doctrine. This Court in *Knights* provided that the search condition should not be examined through a consent lens. *See Knights*, 534 U.S. at 118. Rather, it said that the conclusion of reasonableness for the search in *Knights* is based on the general Fourth Amendment totality of the circumstances test, which includes consideration of what the agreement says about searches. *See id.* So what would make the relevant language here a search clause is whether it gives law enforcement authority to search, not whether it provided the probationer with an opportunity to consent to a search condition.

The probation agreement here did give law enforcement authority to search Ford's home. The government engages in a Fourth Amendment search, such that it must comply with reasonableness standards, when it contravenes an individual's reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). This Court has considered the privacy expectation surrounding property that was once protected from a government search yet became unprotected based on the defendant's conduct in *California v. Greenwood*. 486 U.S. 35, 37 (1988) (finding that there was no expectation of privacy for garbage the defendant placed on the curb outside of their home). The *Greenwood* decision rested mostly on access: because the defendant allowed access to their trash to the public, they no longer had a reasonable expectation that the government would

not search their trash. *See id.* at 40. As such, providing access to property that was once considered protected against government intrusion can be grounds for reducing one's privacy interest to allow for a search. *See id.* Here, the probation agreement provided that Ford gave law enforcement access to her home, and therefore she no longer had the heightened privacy interest that would typically protect her home from any government search. *See* R. at 17. Thus, the agreement gave the detectives Fourth Amendment authority to search.

Finally, the probation agreement lends itself to a search clause because of who it allows access to: law enforcement, not a probation officer. The probation agreement in *Knights* provided that the defendant was subject to search "by any probation officer *or* law enforcement officer." *Knights*, 534 U.S. at 114 (emphasis added). In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court also differentiates law enforcement from a probation officer. A probation officer is not "the police officer who normally conducts searches against the ordinary citizen." *Id.* at 876. The probation officer is charged with both "protecting the public interest" and "hav[ing] in mind the welfare of the probationer." *Id.* As such, a condition allowing access to one's home for law enforcement, but not a probation officer, is more likely to result in a diminishing privacy interest because it gives access to those police officers who typically search under the Fourth Amendment. Here, law enforcement officers were responding on suspicion that Ford engaged in a crime. *See* R. at 18. They had no reason otherwise to conduct a home visit, as they are not involved in Ford's regular probation compliance, evidenced by the fact that they contacted Ford's probation officer to confirm whether Ford was in compliance. *See id.* The language of this probation agreement allowed the detectives here to access Ford's home, and that is enough to reduce Ford's privacy expectations inside her home. *See id.* Because the word access contemplates use and diminishes a probationer's privacy expectations, and the probation condition here was specific to law

enforcement rather than a probation officer, the probation agreement language constituted a search condition.

C. Even if the Probation Agreement did not Contain a Search Condition and the Information was Insufficient to Establish Reasonable Suspicion, the Reasoning of *Samson* Applies to Allow the Search of Ford's Home.

If this Court finds that the probation agreement did not contain a search clause and that there was no reasonable suspicion to search, that does not end the inquiry into the constitutionality of the search. The relevant cases examining probationers' Fourth Amendment rights leave a gap in the law: it is undecided in this Court whether law enforcement can search a probationer without a search clause and reasonable suspicion. *See Samson v. California*, 547 U.S. 843, 850 (2006). In *Samson*, this court noticed this gap in *Knights* and made a determination on the issue in the parole context. *See* 547 U.S. at 850. The defendant in *Samson* was on parole when an officer searched him, without any suspicion or an express parole condition, and found drugs. *See id.* at 846–47. The Court upheld the suspicion-less search of the parolee because of the parolee's diminished privacy right. *See id.* at 851.

Because probationers too have a diminished privacy right under the Fourth Amendment, *see* 483 U.S. at 874, they too should be subject to suspicion-less searches. While it is true that this Court has found that parolees have a lesser expectation of privacy than probationers, *see* 547 U.S. at 850, probationers' privacy rights are low enough to extend the holding of *Samson*. Probation conditions can include: "requiring probationers to avoid commission of other crimes; to pursue employment; to avoid certain occupations, places, and people; to spend evenings or weekends in prison; and to avoid narcotics or excessive use of alcohol." *See id.* Probationers' liberty status is conditioned on compliance with their probation agreement, *see id.*, and probationers are subject to supervision that serves to ensure their compliance. *See id.* at 875.

Because probationers' privacy rights are diminished, to ensure they comply with conditions and to keep the community safe, they should be subject to suspicion-less searches like parolees found in *Samson*. As such, even if Ford's probation condition here did not contain a search clause, and the tipster and detective's corroboration was insufficient to establish reasonable suspicion, Ford's status as a probationer on its own was enough to lawfully search under the Fourth Amendment.

* * *

In conclusion: reasonable suspicion is the standard for a probationer search, and that standard was met here. The tipster's information and Detective Mandel's corroboration provided enough to warrant a search of Ford's home based on suspicion of criminal conduct. While that is sufficient alone, the fact that Ford's probation agreement contained a search condition further weighs the balancing test in favor of allowing this search. And even without the search condition or reasonable suspicion, this Court may apply the reasoning of *Samson* to uphold the search of Ford's home. For these reasons, the search of Ford's home was lawful under the Fourth Amendment. Respondent respectfully asks this Court to affirm the lower court on the Fourth Amendment issue and find that the motion to suppress was correctly denied.

II. Excluding Walter's Testimony Did Not Violate the Defendant's Sixth Amendment Right to Compulsory Process.

The Sixth Amendment provides in part that criminal defendants "shall enjoy the right…to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Compulsory Process Clause gives criminal defendants the right to compel discovery and present evidence in their defense. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). While this right is "a fundamental element of due process of law," it is not "free from the legitimate demands of the adversarial system." *Washington*, 388 U.S. at 19; *United States v. Nobles*, 422 U.S. 225, 241

(1975). One such demand is following court orders. *See Nobles*, 422 U.S. at 241. When a trial court sanctioned a criminal defendant that violated the court's discovery order, this Court held in *Taylor v. Illinois* that "the mere invocation of [the Sixth Amendment right to Compulsory Process] cannot automatically and invariably outweigh countervailing public interests." 484 U.S. 400, 414 (1988). In doing so, the Court established that exclusion of a witness may be an appropriate remedy when a defendant violates a discovery order. *Id.* at 414–15 (establishing factors for courts to consider when excluding a criminal defendant's witness as a sanction for violating a discovery order). Here, Ford violated the district court's discovery order by introducing a new witness with only four days before trial. *See* R. at 6. Therefore, the trial court did not violate Ford's Sixth Amendment right to Compulsory Process by excluding Walter's testimony and the lower court should be reversed.

A. *Taylor v. Illinois* Does Not Require a Willful Discovery Violation to Justify an Exclusion Sanction.

The Thirteenth Circuit erroneously held that *Taylor v. Illinois* requires "a finding of willfulness to justify the exclusion of a defense witness as a sanction for violating the discovery order." R. at 13. This reading is inconsistent with the text of *Taylor* and strays from the majority of Circuit courts, which do not read *Taylor* to require a finding of willfulness or bad faith to justify exclusion.

In *Taylor v. Illinois,* the defendant appealed his attempted-murder conviction on the grounds that the lower court violated his Sixth Amendment right to compulsory process when it excluded a witness who was presented to the court in violation of a discovery order. 484 U.S. at 401–07. There, the prosecution requested a list of defense witnesses "well in advance of trial." *Id.* at 403. But two days into trial, and after the prosecution's key witnesses had already testified, the defendant's counsel made a motion to amend his discovery answer and introduce two more

witnesses. *See id.* One witness appeared the following day to testify before the judge. *See id.* at 404. After listening to the newly introduced witness's testimony, the trial court excluded his testimony, noting the "blatant" discovery violation and doubting the credibility of the witness. *See id.* at 405. The Illinois appellate court affirmed the exclusion. *See id.* at 406.

On appeal, this Court affirmed the exclusion and rejected the defendant's reading of the Sixth Amendment which barred any exclusion of a defense witness as a sanction. *See id.* at 410. Rather than "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case," the Court established a balancing test, weighing public interest against the defendant's Sixth Amendment right to present a defense. *Id*. at 414. To determine the public interest, the Court provided a list of factors aimed to protect the integrity of the adversarial system including "the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414–15.

The Court also considered the importance of discovery, and the gatekeeping role discovery rules play in ensuring reliable evidence is presented at trial. *Taylor*, 484 U.S. at 411–12 ("Discovery, like cross examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony."). Because these rules are central to the truth-seeking function, the Court found that even the most severe sanction for a violation is justified where alternative sanctions "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Id.* at 413. And, when a new witness is discovered in violation of these rules, the truth-seeking function is threatened. *See id.* at 414. It is therefore "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed." *Id.*

After the Court discussed the constitutional and practical implications of discovery sanctions against criminal defendants, it applied its balancing test to the facts in *Taylor*. *Id.* at 415. It analyzed the likelihood that Taylor's counsel fabricated the evidence, the late disclosure's prejudice to the government, and prejudice to the judiciary. *Id.* at 415–18. The Court noted that discovery violations, which is referred to as "this kind of conduct," threatened the adversarial system. *Id.* at 416. Because the attorney in *Taylor* willfully violated the discovery rules with a desire to gain a tactical advantage, the Court concluded that exclusion there was justified. *See id.* at 418.

Circuits are split as to whether *Taylor requires* a finding that the defendant's discovery violation was "willful and motivated by a desire to obtain a tactical advantage" to justify an exclusion sanction, or rather that it plays a role in analyzing the constitutionality of an exclusion sanction. *Id.* at 415.

The majority of authorities correctly interpret Taylor to create a balancing test using willful misconduct by the defense as a factor, but not a threshold requirement. *E.g. United States v. Pancholi*, 148 F.4th 382 (6th Cir. 2025); *Young v. Workman*, 383 F.3d 1233 (10th Cir. 2004); *United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992); *United States v. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003) ("This court has never restricted the application of the sanction of exclusion to discovery violations that are willful or intended to gain a tactical advantage."). These courts provide two main reasons for this interpretation: the discussion of informative factors throughout *Taylor*, and *Taylor*'s express rejection of creating a hard-and-fast rule.

First, the quantity of varying factors discussed by *Taylor* suggest that willfulness is a consideration rather than a threshold for sanctions. *See Pancholi,* 148 F.4th at 391; *Johnson*, 970 F.2d at 911. *Taylor* lists a variety of considerations for determining constitutionally permissible

sanctions, with the defense counsel's explanation for the discovery violation being only one of several. *See Johnson*, 970 F.2d at 911. The D.C. Circuit in *Johnson* correctly wrote that "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors." *Id.*

In addition, these courts correctly highlight that Taylor "did not hold that willfulness is required in every case." *Pancholi*, 148 F.4th at 390. This is an appropriate reading of Taylor: it disclaims the need for a blanket rule. *Id.* at 390–91. The Court expressly rejected the need to "attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case," casting doubt on any reading that places a requirement for any particular factor to control. *Taylor*, 484 U.S. at 414; *see Pancholi*, 148 F.4th at 390. Instead, the Court noted the importance of willfulness in *Taylor*, finding that preclusion based on the conduct there was "entirely consistent" with the Compulsory Process Clause. *See Taylor*, 484 U.S. at 415. Again, the presence of misconduct in *Taylor* was informative, but not conclusive: the Court's concerns related back to the overarching themes of reliable evidence, fairness and efficiency, and the potential for prejudice against the truth-determining function. *See id.* 414–15. The presence of willfulness there resulted in little need to consider all the factors in full, however the Court made a point of including a variety of considerations. This allows future courts, faced with differing factual scenarios, to apply the *Taylor* factors with or without an explicit finding of willful misconduct.

Alternatively, the Second and Ninth Circuits have held that willful misconduct and bad faith are required to warrant a preclusion sanction. *E.g. Escalera v. Coombe*, 852 F.2d 45 (2d Cir. 1988); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991).

Escalera was one of the first cases to address and apply the *Taylor* decision. In doing so, the Second Circuit misstated the importance of a court's analysis into the motivation of the discovery violator in *Taylor*. *See Escalera*, 852 F.2d at 48. Specifically, the Second Circuit wrote that a court "*must*" assess the defense counsel's explanation while *Taylor* actually held that a court "*may*" request an explanation to base its decision for sanctions. *Compare Escalera*, 852 F.2d at 48 (emphasis added) *with Taylor*, 484 U.S. at 415 (emphasis added). After this misstep, the court went on to cite the now often called upon language from *Taylor*: "If the attorney's explanation reveals that the [failure] was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the [Compulsory Process] Clause simply to exclude the [proffered] witness' testimony." *Escalera*, 852 F.2d at 48 (citing *Taylor*, 484, U.S. at 415) (internal quotations omitted); *see also Noble v. Kelly*, 246 F.3d 93, 99 (2d. Cir. 2001); *Peters*, 937 F.2d at 1424. Similarly, the Ninth Circuit made conclusory statements regarding *Taylor* to find that only willful and blatant discovery violations will justify an exclusion sanction. *Peters*, 937 F.2d at 1426. It cited *Taylor* only twice and ignored the factors listed throughout the opinion. *See id.* Instead it concluded, without further examination, that the *Taylor* Court "upheld the drastic remedy of excluding a witness only in cases involving willful and blatant discovery violations." *Id.* (internal quotations omitted).

The best reading of *Taylor* does not require a finding of willful misconduct because *Taylor*'s stated interest in protecting the adversarial process is not only threatened by willful discovery violations. *Taylor*, 484 U.S. at 414–15. As such, this Court should adopt a reading consistent with the majority of Circuits, which note *Taylor*'s extensive discussion of factors and

express rejection of creating a blanket rule: *Taylor* does not require a finding of willfulness to justify excluding a defense witness when the defense violates a discovery order.

B. Applying the *Taylor* Factors, The District Court Properly Excluded Walter's Testimony as The Balancing Test Weighs in Favor of the Public Interest.

Under Federal Rule of Criminal Procedure 16(b)(2), if a party fails to comply with the rules of discovery, a trial court may "prohibit that party from introducing the undisclosed evidence." Fed. R. Crim. P. 16(b)(2). The propriety of exclusion under the *Taylor* factors is a legal question which should be reviewed de novo. *See United States v. Portela*, 167 F.3d 687, 705 (1st Cir. 1999) ("Application of the *Taylor* factors is a legal question which we review de novo.") (internal citation omitted); *see also United States v. Lloyd*, 10 F.3d 1197, 1216 (6th Cir. 1993) ("We review the district court's evidentiary rulings, involving an alleged violation of Sixth Amendment rights, under a de novo standard of review.").

Under *Taylor*, a trial court should weigh "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor" against the "countervailing public interest" when imposing an exclusion sanction. 484 U.S. at 414. Such factors that inform the public interest assessment relate to the integrity of the adversarial process: "the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414–15. The Court also reasoned that the party's explanation for a discovery violation and ease of compliance with a discovery order are informative. *Id.* at 415.

Here, the exclusion sanction was justified because Ford's late disclosure demonstrated Walter is an unreliable witness, and allowing Walter to testify would have caused unfair prejudice to the government and significantly delayed the trial process.

1. Walter is an Unreliable Witness.

When determining whether an exclusion sanction is proper, courts consider the likelihood that the evidence is reliable. *See Taylor*, 484 U.S. at 414, 417 (explaining the importance of rejecting unreliable evidence to the integrity of the adversarial system and using the record to determine whether "witnesses are being found that weren't really there"). This Court need not conclude that evidence was deliberately fabricated, but rather weigh the likelihood that the evidence is unreliable. *See United States v. Hamilton*, 128 F.3d 996, 1002 (6th Cir. 1997) ("Although the likelihood of fabrication is one of the factors to consider under the analysis in *Taylor*, an explicit finding of fabrication is not essential in order to exclude exculpatory evidence."). Further, the rejection of unreliable evidence protects the integrity of the truth-seeking function of courts by "protecting the trial process from the pollution of perjured testimony." *Taylor*, 484 U.S. at 417. There are several factors that contribute to a finding of reliability, including the timing of the disclosure, the party's explanation for the late disclosure, and the ease of compliance with the discovery order.

i. Late Disclosures Have a Presumption of Unreliability After *Taylor*.

The timing of the disclosure is relevant and contributes to a finding that exclusion was proper. The Court in *Taylor* established a *presumption* that there is "something suspect about a defense witness who is not identified until after the 11th hour has passed." *Taylor*, 484 U.S. at 414. Here, Ford's disclosure occurred well after the discovery deadline: 24 days late. R. at 6, 22. This was only four days before trial was set to begin. As the district court noted, this was past the "11th hour" that the Court in *Taylor* instructed courts to "presume" to be suspicious. R. at 7; *Taylor*, 484 U.S. at 414.

ii. Ford's Explanation for the Late Disclosure is Weak.

Next, courts consider the rationale behind the discovery violation. Courts may conclude that the attorney was motivated by "the desire to obtain a tactical advantage," *Taylor*, 484 U.S. at 415, however overt bad faith is not the only consideration. Other courts have looked at the circumstances surrounding the late disclosure to assess the reasonableness of the defense counsel's explanation. *Johnson v. Burt*, No. 2:18-cv-12329, 2020 U.S. Dist. LEXIS 117594 (Mich. E. Dis. Ct. 2020). For example, in *Johnson*, the defendant, on petition for writ of habeas corpus, argued that the lower court violated his Sixth Amendment right to Compulsory Process by excluding a defense witness. 2020 U.S. Dist. LEXIS 117594, at *1–8. There, the defendant learned of a witness before the due date of the witness list, but did not disclose them until the first day of trial. *See id.* at *10. The court upheld the exclusion and noted that given the alleged importance of the witness's testimony, it was "inexplicable" why there was a delay in disclosure. *Id.* at *14. The court there wrote "given the fact that the importance of Mr. Ross's proposed testimony to the defense should have been apparent when defense counsel learned about him prior to trial, counsel could easily have included Ross's name in his witness list but chose not to do so." *Id.* at *14–15.

Here, Ford's counsel's stated reason for the late disclosure was that counsel did not "appreciate" Walter's testimony until days before trial. R. at 7. Given that Walter intended to testify as to the status of Ford's apartment upon her move in, it is suspect that the importance would not be realized until just before trial. *Id.* This is because Walter's testimony was essential to Ford's theory at trial. Like in *Johnson*, where the importance of the witness should have been obvious and the court was ultimately able to infer something suspect about the witness himself, here, the late disclosure conflicts with Ford's stated trial theory and this Court should reject the sudden disclosure. *See Johnson*, 2020 U.S. Dist. LEXIS 117594 at *10; R. at 7.

iii. Ford Could Have Easily Complied with the Discovery Order.

Finally, courts consider the ease of compliance with the discovery order to weigh the credibility of evidence. *See e.g. Taylor*, 484 U.S. at 415–16; *Pancholi*, 148 F.4th at 392–93; *United States v. Ramos-Gonzalez*, 775 F.3d 483, 495–96 (1st Cir. 2015) (remanded for sentencing; otherwise affirmed). In *Ramos-Gonzalez*, the defendant was convicted on a drug trafficking charge. In compliance with Federal Rule of Criminal Procedure 12, the defendant identified one alibi witness before trial who would testify that the defendant was with her and two other individuals at the beach on the day of the crime. *See* 775 F.3d at 495–96. But on the third day of trial, the defendant sought to introduce an additional "corroborating witness," one of the individuals who was at the beach. *See id.* The trial court denied the request and the First Circuit found no error on this conclusion. *See id.* at 496 ("All told, this issue is not a close call."). The court centered its analysis on two factors: ease of compliance with the discovery order and the likelihood of fabricated testimony. *See id.* Because the defendant was well aware of the individuals he could have called, but waited to do so until the trial began, the court found no error in excluding the surprise-witness's testimony. *Id.*

Ford's counsel here had ample opportunity to comply with the discovery order. Defense counsel here, like in *Ramos-Gonzalez*, had sufficient knowledge of potential witnesses prior to trial to at least put the government on notice. *See* 775 F.3d at 496. As the district court correctly noted, Ford had interviewed and investigated building employees prior to the discovery deadline, and even disclosed the building manager as a witness. R. at 7. In addition, Walter was identified before the ultimate disclosure was made, and could have been named sooner. *Id.* These facts cast doubt on the reliability of Walter's testimony.

2. Allowing Walter to Testify Would Have Caused Unfair Prejudice and Delay.

Ford's late disclosure in violation of the discovery order would have prejudiced the government and caused delay to the trial schedule in contravention of the principles outlined in *Taylor*. *See Taylor*, 484 U.S. at 414–15 (instructing courts to consider "the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process.").

First, *Taylor* instructs courts to consider prejudice to the government when examining the merits of an exclusion sanction. *See Taylor*, 484 U.S. at 416–17. For example, in *Pancholi,* the Sixth Circuit found sufficient prejudice to the government when a new witness was disclosed during trial. *See generally* 148 F.4th. There, the government already knew of the individual because she was an unindicted co-conspirator, but had not prepared for them to be called as a witness. *Id.* at 393. Even still, the court found that the late disclosure caused prejudice to the government as they did not have a meaningful opportunity to rebut her testimony after they concluded their case-in-chief. *See id.* at 393–94. Here, while the government had more time to collect rebuttal evidence than in *Pancholi*, it knew less about the witness at the time of disclosure: in fact, the government here knew nothing of Walter; had no notice that he was being sought out or found; and did not have a statement beyond what Ford's counsel disclosed at the motion-in-limine hearing to begin their research. R. at 6–7.

To Respondent's knowledge, neither *Taylor* nor any subsequent case law on the issue requires that the discovery violation take place during trial to justify excluding the witness or testimony; the inquiry is consistently framed around the late disclosure's prejudicial impact. For example, in *Ferensic v. Birkett*, the Sixth Circuit overturned the exclusion of the defense's expert witness who submitted their expert report prior to trial but in violation of a discovery order. 501

F.3d 469, 478 (6th Cir. 2007). There, the defense was instructed to provide a copy of their expert report to the prosecution two months before trial, but the report was not produced until 11 days before trial. *Id.* The district court excluded the expert witness as a sanction, despite the government not alleging any prejudice to their case due to the late disclosure. *See id.* In fact, the expert had been identified on defense counsel's witness list, which was produced ten months before trial. *See id.* at 477. The Sixth Circuit cited the numerous examples in the record of the prosecution "explicitly disavow[ing]" prejudice, diminishing the need for the extreme sanction. *Id.* at 478. The Sixth Circuit held that "here, a less severe sanction was appropriate or, at the very least, should have been considered by the trial judge." *Id.*

While Ford's disclosure also happened prior to trial, the surrounding circumstances differ sharply from *Ferensic.* Unlike *Ferensic*, where the government expressly stated that they were not prejudiced by the delay, here, the government promptly objected on the grounds of prejudice. *See id.* at 478; R. at 6. Further, in *Ferensic*, the expert witness was known to the government: he had been disclosed well before trial, and was also a recurring expert witness that the government was familiar with. *See Ferensic*, 501 F.2d at 477 ("The unlikelihood that the prosecution would have called its own witness is further underscored by Dr. Shulman's testimony at the evidentiary hearing that, during the more than 20 times that he has testified as an expert on eyewitness identifications, not once has his testimony been countered by an opposing expert.") (internal quotations omitted). The government here had no prior knowledge of Walter, and the government immediately raised the prejudicial impact and delay imposed by rebutting an additional witness shortly before trial. R. at 6. While the prejudicial impact may grow the later the disclosure, *see Pancholi,* 148 F.4th at 393, the prejudice to the government remains and should be weighed similarly whether the disclosure happened shortly before or during trial.

Finally, Ford's late disclosure would have delayed the trial, which would threaten the "efficient administration of justice." *Taylor*, 484 U.S. at 415. The court in *Pancholi* noted that delay, particularly in a jury trial, is "a serious matter." 148 F.4th at 393. In *Pancholi*, the Sixth Circuit excluded the testimony of the defendant's unindicted co-conspirator. *See id.* The witness had recently fired her counsel, and the court noted the delay that would be imposed by waiting for the witness to obtain new counsel and prepare to testify. *Id.* The trial here similarly risked being delayed had the district court allowed Walter to testify. Only four days from trial, Walter had not given a statement, and yet the government would have been expected to conduct a meaningful investigation in that time. R. at 6–7. Or, the court would have been forced to alter the trial schedule. As this was a jury trial, causing further delay to rebut a surprise witness is outside the "public interest" the *Taylor* Court sought to protect. R. at 8; *Taylor*, 484 U.S. at 414; *see Pancholi*, 148 F.4th at 393–94.

Applying all the *Taylor* factors, the late disclosure, combined with defense counsel's weak explanation, the prejudice, and delay to the trial that would have been imposed upon the district court had Walter been allowed to testify all suggest that Walter's testimony was properly excluded. Therefore, Ford's Sixth Amendment rights were not violated by the exclusion sanction and the Thirteenth Circuit should be reversed.

C. Even if *Taylor* Does Require A Finding of Willfulness, There Are Not Enough Facts in the Record to Hold for Ford.

If this Court follows the minority of Circuits to find *Taylor* requires willfulness to warrant an exclusion sanction, or is unpersuaded that the record provides a sufficient basis to uphold the exclusion sanction, it should still reverse the Thirteenth Circuit's holding remand for further fact finding.

In applying *Taylor*, the Second Circuit, which requires a finding of bad-faith to justify witness exclusion, has required a clear factual finding of intent on the part of the attorney. *See Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (remanded for fact-finding consistent with the *Taylor* factors). There, the district court judge wrote in his opinion that the attorney's "apparent bad faith – or, at least, the absence of a good excuse – was evident," but the court found that this finding "alone is not enough." *Id.* It instead required more evidence that fit squarely into the categories enumerated in *Taylor*. *Id.* ("The absence of a good excuse is not necessarily commensurate with "willful" conduct and it is not readily clear whether Escalera's attorney was, in fact, motivated by a desire to obtain a tactical advantage.")

Here, while the district court explored the prejudice caused by Ford's late disclosure, the court did not speak to the credibility of Walter's testimony, nor dig deeper into Ford's counsel's motivations. R. at 7 ("This seems like, to me, a simple lack of diligence…"). Without more, the district court's opinion as to Ford's counsel's motive is similar to *Escalera*. *See Escalera*, 852 F.2d at 48. The statement was conclusory and could be bolstered by further fact finding to determine whether there was willful conduct. For example, it is not clear in the record when exactly Ford's counsel came to know of Walter, located Walter, nor how he was located or what exactly he would testify to beyond a vague statement as to his knowledge of Ford's apartment. R. at 6. These facts would be informative as to whether Ford's counsel sought to gain a tactical advantage through the late disclosure. *See Taylor*, 484 U.S. at 417 (finding an "inference that [defense counsel] was deliberately seeking a tactical advantage" when the defendant's attorney contacted the excluded witness the week before trial; did not notify the prosecution that he would be called to testify until well into the trial; and amended his witness list on the first day of trial but failed to identify the excluded witness).

If this Court cannot find for the Respondent on this record alone, the case should be remanded for further factual investigation consistent with the factors listed in *Taylor*.

* * *

In conclusion, the Court's finding in *Taylor* does not require a finding of willful misconduct to justify an exclusion sanction under the Sixth Amendment Compulsory Process Clause, but rather creates a balancing test. This reading aligns with the majority of Circuits, which all agree that the presence of factors in *Taylor* and the Court's express rejection of creating a blanket rule support the finding that willfulness is not a required finding. In this case, the district court was justified in excluding Walter as a sanction for Ford's violation of the discovery order. This is because Ford's late disclosure occurred only four days before trial, despite Ford's counsel knowing of Walter earlier. Further, Ford's counsel's explanation was weak, the late disclosure would have prejudiced the government, and a continuance would have delayed the trial. For these reasons, this Court should reverse the Thirteenth Circuit on the Sixth Amendment claim.

CONCLUSION

For the reasons presented herein, Respondent respectfully asks this court to affirm the Thirteenth Circuit's holding on the Fourth Amendment question, and reverse on the Sixth Amendment question.

Respectfully submitted,

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February 13, 2026