No. _____

In The
Supreme Court of the United States

JOSEPH L. SILVA,

Petitioner,

vs.

STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court may sanction the defense in a criminal case for failure to timely disclose an expert report by excluding the expert when there was no showing that the failure to disclose was done willfully for tactical advantage.

LIST OF PARTIES

The parties in this case are the Petitioner, Joseph L. Silva, and Respondent, the State of Maine.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Maine entered in this case October 23, 2012.

OPINIONS BELOW

The transcript of the trial court's hearing and bench ruling precluding the defense expert witness from testifying appears in the Appendix at App. 9. The decision of the Supreme Judicial Court of Maine affirming the petitioner's conviction appears in the Appendix at App. 1.

JURISDICTION

The Petitioner seeks review of the judgment of the Supreme Judicial Court of Maine affirming the Petitioner's conviction on October 23, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment limits on a trial court's ability to sanction violations of

discovery rules. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

PROCEDURAL RULE INVOLVED

The trial court precluded the defense's expert witness from testifying, holding that the defense did not timely comply with Maine Rule of Criminal Procedure 16A, which is reproduced below:

> **(a) Automatic Discovery.** Notice of Intention to Introduce Expert Testimony as to the Defendant's Mental State. If a defendant intends to introduce expert testimony as to the defendant's mental state, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve a notice of such intention upon the attorney for the state and file a copy with the clerk. Mental state testimony includes culpable state of mind, mental disease or defect, belief as to self-defense,

or any other mental state or condition of the defendant bearing upon the issue of criminal liability. The court may for cause shown allow late filing of the notice; if it does so, it may grant additional time to the parties to prepare for trial or may make such further order as may be appropriate. The notice is not admissible against the defendant.

(b) Discovery Upon Request.

(1) *Documents and Tangible Objects.* Upon the written request of the attorney for the state, the defendant shall, within a reasonable time, permit the attorney for the state to inspect and copy or photograph or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding.

(2) *Expert Witnesses.* Upon the written request of the attorney for the state, the defendant shall, within a reasonable time, furnish to the attorney for the state:

(A) A statement containing the name and address of any expert witness whom the defendant intends to call in any proceeding;

(B) A copy of any report or statement of an expert, including a report or results of physical or mental examinations and of scientific tests, experiments, or comparisons, which is within the defendant's possession or control

and which the defendant intends to introduce as evidence in any proceeding.

(3) *Notice of Alibi.* No less than 10 days before the date set for trial, the attorney for the state may serve upon the defendant or the defendant's attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the state proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served, and if the defendant intends to rely on the defense of alibi, not more than 5 days after service of such demand, the defendant shall serve upon the attorney for the state and file a notice of alibi which states the place which the defendant claims to have been at the time stated in the demand and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. Within 5 days thereafter, the attorney for the state shall file and serve the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the time and place stated in the demand. If the defendant fails to serve and file a notice of alibi after service of a demand, the court may take appropriate action. If the attorney for the state fails to serve and file a notice of witnesses, the court shall order compliance. The fact that a witness' name is on a notice furnished under this subdivision and that

the witness is not called shall not be commented upon at trial.

(4) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the defendant.

(5) *Continuing Duty to Disclose.* If matter which would have been furnished to the attorney for the state under this subdivision comes within the attorney for the defendant's possession or control after the attorney for the state has had access to similar matter, the attorney for the defendant shall promptly so inform the attorney for the state.

(6) *Protective Order.* Upon motion of the defendant, and for good cause shown, the court may make any order which justice requires.

(c) Discovery Pursuant to Court Order.

(1) *Order for Preparation of Report by Expert Witness.* If an expert witness whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the defendant serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

(2) *Order Permitting Discovery of the Person of the Defendant.*

(A) Upon motion and notice the court may order a defendant to:

(i) Appear in a line-up;

(ii) Speak for identification by witnesses to a crime;

(iii) Be fingerprinted, palmprinted, or footprinted;

(iv) Pose for photographs;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under the defendant's fingernails;

(vii) Permit the taking of samples of the defendant's biological materials, including but not limited to, blood, hair, saliva, fingernail clippings and materials obtainable by swab;

(viii) Provide specimens of the defendant's handwriting; and

(ix) Submit to a reasonable physical or medical inspection of the defendant's body.

(B) Reasonable notice of the time and place of any personal appearance of the defendant required for the foregoing purposes shall be given by the attorney for the state to the defendant and the defendant's attorney. Provision may be made for appearances for such purposes in an order by the court admitting

the defendant to bail or providing for the defendant's release.

(C) Definition. For purposes of this Rule, a defendant is a person against whom a criminal pleading has been filed.

(d) Sanctions for Noncompliance. If the defendant fails to comply with this rule, the court on motion of the attorney for the state or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the defendant to comply, granting the attorney for the state additional time or a continuance, relieving the attorney for the state from making a disclosure required by Rule 16, prohibiting the defendant from introducing specified evidence and charging the attorney for the defendant with contempt of court.

STATEMENT

The Petitioner, Joseph L. Silva, was convicted of gross sexual assault and two counts of aggravated assault of a woman he met on an internet dating site on November 22, 2009. *State v. Silva*, 2012 ME 120, ¶ 1-2, ___ A.2d ___ (Me. 2012). She reported the incident two days later and the Petitioner was arrested in early December 2009 and was subsequently indicted. *Id*. at ¶ 2.

During the course of the investigation, police analyzed the computers of both the Petitioner and the alleged victim. *Id*. at ¶ 6. The defense requested a copy of the alleged victim's hard drive so that its own computer expert could analyze both computers. *Id.* at ¶ 6. Discovery of the computer materials was timely provided, but the defense expert conducted no analysis immediately because the defendant was unable to pay her fee. *Id*.

Due to the delay in analyzing the computer material, the defense expert's report was not provided to the prosecution until five days before trial. *Id*. In a chamber's conference on this issue, the trial court concluded that the delay was attributable to the defendant's failure to pay his expert timely, saying, "It's your guy's fault that he didn't pay her." *Chambers Conf.: Motion for Sanctions & Motion to Exclude*, App. 17. The trial judge further agreed with the prosecution that this late notice created "an extreme difficulty because not only do I have to prepare but I have to have other arms of the system looking into this." *Id*. The prosecution presumably meant that its own expert would need to evaluate the work of the defense expert.

The trial court therefore granted the prosecution's motion to exclude. *Id.* at App. 18. The trial court made no finding that the delay was intentional or that defense counsel or the defendant had any tactical motive for the delay.

The Supreme Judicial Court of Maine affirmed the conviction, finding that precluding the defense expert from testifying was appropriate. *Silva*, 2012 ME 120, at ¶ 11. The Maine court's opinion did not consider lack of intentional misconduct, or absence of tactical motivation, for the delay in providing the expert's report. The court further did not consider the possibility of other remedies, such as a continuance, that would have satisfied the state's need to prepare its case in light of the late-disclosed information.

The Supreme Judicial Court concluded that a defense failure to timely comply with a disclosure requirement is sufficient by itself to justify precluding a witness. *Id*. at ¶ 11-12. The Court offered only the following in considering whether the trial court's sanction was appropriate:[1]

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[1] The Supreme Judicial Court also concluded that Silva "called the State's computer expert, whom he questioned extensively regarding the contents of both hard drives. Thus, Silva was able to elicit much, if not all, of the testimony he wanted the jury to hear." *Silva*, 2012 ME 120, at ¶ 12. The defense expert, however, stated in her report, regarding the Petitioner's computer: "Based on my experience and review of internet activity and emails pertaining to sexual content, violent or aggressive activities, I did not review any content that would cause alarm or depict need for concern." App. 26. Defense counsel did ask the state's expert about many of the issues he would have touched on with his own expert regarding the alleged victim's computer. For example, Defense counsel was able to elicit, through the State's expert, that emails had been deleted from the alleged victim's computer (Trial Transcript (TT) page 176, lines 3-5), that the alleged victim's computer had files pertaining to "fisting," which appeared to be pictures and web pages, in the

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> The [trial] court's determination that Silva did not fulfill his obligations pursuant to Rule 16A is supported by the record. The State received only a portion of the expert's report and the court apparently determined that even the portion Silva did provide was not produced within a reasonable time. *See State v. Allen*, 2006 ME 20, ¶ 14, 892 A.2d 447 (affirming the exclusion of an expert's report when "[t]he timing of the disclosure placed the State in a position where it had insufficient time to prepare a cross-examination of the doctor concerning her

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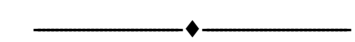
unallocated portion of the hard drive, (TT page 177-178), that the alleged victim's computer had visited a Craigslist ad that said, in part, "will pick one man with fisting experience" (TT page 179, lines 1-13), and that these emails and files in question had been found in the "unallocated" portion of the alleged victim's hard drive, which means that they had been deleted at some point (TT pages 176-177). Defense counsel did not, however, ask the state's expert if the state's expert shared the defense expert's characterization of the contents of the defendant's hard drive. If the state's expert did not regard the contents of the defendant's hard drive as innocuous, the defense would have been left with the state expert's harmful characterization, without the opportunity to offer his own expert's view of the innocuous characterization of the defendant's hard drive. The defense was therefore precluded from offering positive character evidence from the records of his computer activity. The Supreme Judicial Court of Maine doubtlessly spent little time on this issue as the rule it announced required no consideration of prejudice to the Petitioner. The court concluded that a late-disclosed expert was sufficient to exclude the expert's testimony. *Silva*, 2012 ME 120 ¶ 12. The court drew that conclusion before it even addressed the value the Petitioner's testimony would have added to his defense. *Id*.

> recent findings, the new methods she used in arriving at them, or to find and prepare witnesses to rebut this late evidence").

Id. at ¶ 12.

The Supreme Judicial Court did not even consider the absence of bad faith as a factor in determining whether the lower court's sanction was permissible in light of the Petitioner's Sixth Amendment right to present witnesses on his behalf. Courts around the country disagree on whether a witness may be precluded from testifying absent a finding that the defendant, or his counsel, intentionally delayed revealing information to obtain a tactical advantage. The Supreme Judicial Court of Maine has strongly staked out its position in this lower court conflict. The good or bad faith of the defendant, or his counsel, is not even relevant to the consideration.



REASONS FOR GRANTING THE WRIT

This Court in *Taylor v. Illinois*, 484 U.S. 400 (1988), recognized that a trial court *could* preclude a witness from testifying as a sanction for a defense failure to comply with discovery obligations. This Court, however, also recognized that "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases," *id*. at 413, but the Court did not establish factors or threshold criteria for determining when the "drastic sanction" of preclusion was permitted. *Id*. *Taylor* recognized a conflict between a

trial court's power to enforce discovery rules and the defendant's right to present his defense, but provided no guidance on how to strike that balance. *Id*. at 412-14. This Court subsequently recognized that "[w]e did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated," *Michigan v. Lucas*, 500 U.S. 145, 152 (1991), but again offered no test for determining when preclusion was permitted.

Lower courts have understandably drawn conflicting inferences from *Taylor*. Three federal circuits and at least seven states limit witness preclusion to cases involving intentional discovery violations calculated to gain tactical advantage.[2] Courts adopting this rule limit this sanction to willful discovery violations, the most culpable type of violations, for which *Taylor* expressly found preclusion to be appropriate. *Taylor*, 400 U.S. at 415. Four federal circuits and at least two states, including Maine, apply balancing tests and do not require willfulness as a pre-requisite for this drastic sanction.[3] Under these decisions, a

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[2] *Noble v. Kelly*, 246 F.3d 93, 100 n.3 (2d Cir. 2001); *Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997); *United States v. Peters*, 937 F.2d 1422, 1424 (9th Cir. 1991); *State v. Killean,* 901 P.2d 1228, 1239 (Ariz. App. 1995); *People v. Edwards*, 22 Cal. Rptr. 2d 3, 12 (Cal. App. 1993); *People v. Richards*, 795 P.2d 1343, 1346 (Colo. App. 1989); *Washington v. State*, 840 N.E.2d 873, 883 (Ind. App. 2006); *People v. Shriner*, 555 N.E.2d 1257, 1261 (Ill. App. 1990); *Houston v. State,* 531 So.2d 598, 612 (Miss. 1988); *White v. State*, 973 P.2d 306, 311 (Okla. Crim. App. 1998).

[3] *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988); *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995); *Young v. Workman*, 383

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defendant forfeits his Sixth Amendment right to present a witness for a less culpable violation of the rules of discovery. The decision of the Supreme Judicial Court of Maine found the preclusion of the defendant's expert witness appropriate as a sanction for a discovery violation without any finding of willfulness, or even consideration of its absence in a multifactored balancing test.

As this Court has frequently recognized, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).[4] This Court in *Taylor* recognized, however, that this right is not absolute, but *sometimes* can be limited as a result of failure to comply with discovery rules. *Taylor,* 484 U.S. at 413-15. The uncertainty left by *Taylor* therefore subjects defendants to deprivation of this fundamental right on the basis of very different criteria. A defendant's Sixth Amendment right to compulsory process is much more easily outweighed by the competing interest of enforcing procedural rules in some jurisdictions than it is in others. This fundamental right is therefore less robust for some defendants for reasons relating only to geography.

F.3d 1233 (10th Cir. 2004); *State v. Gillespie*, 638 S.E.2d 481, 486 (N.C. App. 2006).

[4] This Court in *United States v. Scheffer*, 523 U.S. 303, 326 nn.9-10 (1998) noted a number of instances in which the fundamental nature of this Sixth Amendment right had been recognized.

I. The Court's Doctrines Do Not Indicate When Preclusion is a Permissible Sanction

Taylor v. Illinois found preclusion of witnesses appropriate in a case involving a "willful violation" of state discovery rules. In *Taylor*, defense counsel asked, on the second day of trial, to add two names to the list of witnesses he had provided prior to trial. Illinois procedure required the defense to provide reasonable pretrial notice of defense witnesses. *Id*. at 403 n.5. Contrary to the attorney's contention that he had "just been informed about" the identity of one of the witnesses, the trial court concluded, after a hearing, that defense counsel was aware of these witnesses four months before trial and had met with the witness again two days before the trial began. *Id*. at 405. The trial court found this to be "a blatent [*sic*] violation of the discovery rules, willful violation of the rules." *Id*. The trial court also did not find the witness to be particularly reliable. *Id*.

The only issue before the Court in *Taylor* was whether the Sixth Amendment's Compulsory Process Clause absolutely precluded a witness from testifying, under any circumstances, as a sanction for the discovery violation. *Id*. at 402. Under the extreme circumstances of that case, the Court held that preclusion of the witness was appropriate despite a defendant's fundamental right to present witnesses in his defense. *Id*. at 415. The Court's opinion was quite narrow:

> A trial judge may certainly insist on an explanation for a party's failure to comply with

> a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission 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 purpose of the Compulsory Process Clause simply to exclude the witness' testimony.

Id.

Under the facts of *Taylor*, this Court found that "the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable" and concluded that "it is plain that this case fits into the category of willful misconduct for which the severest sanction is appropriate." *Id*. *Taylor* did not sanction preclusion as a sanction for every discovery violation, but made no effort to delineate those cases for which preclusion was appropriate from those cases for which it was not. The majority's opinion observed that "[i]t may well be true that alternative sanctions are adequate and appropriate in most cases." *Id*. at 413. The Court concluded, however, "it is neither necessary nor appropriate for us to attempt to guide the exercise of discretion in every possible case." *Id*. at 414.

Following *Taylor*, this Court was asked to consider whether a trial court must find a willful violation of a discovery order before precluding a witness from testifying and the Court declined, ruling on a

narrower ground. *Michigan v. Lucas*, 500 U.S. 145, 153 (1991). *Lucas* first observed that the Court "did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated." *Id*. at 152. *Lucas*, like *Taylor*, did not, however, identify any necessary criteria or factors to be considered in determining whether preclusion was constitutionally permitted. In *Lucas*, defense counsel failed to provide adequate notice of his intention to introduce evidence of an alleged rape victim's past sexual conduct. *Id*. at 146. The defendant argued that preclusion of this evidence was "an unconstitutional penalty in [his] case because the circumstances . . . were not nearly as egregious as those in *Taylor*." *Id*. at 153. The Court "express[ed] no opinion as to whether or not preclusion was justified in this case," limiting itself to the narrower issue before it, whether the Michigan Court of Appeals erred in concluding that it would always be error to preclude evidence of the victim's prior consensual contact with the defendant. *Id*.

Like *Taylor*, *Lucas* thus recognized that not all discovery violations permit a trial judge to preclude a witness' testimony, but offered no standard for delineating the constitutional limit on a court's power to sanction discovery violations.

II. Conflict in the Lower Courts

Courts have recognized the lack of guidance from this Court on this important issue that has produced a conflict in the lower court. The Fifth Circuit has

observed that "[t]he Supreme Court's decision in *Taylor* gives us little guidance for determining when the preclusion sanction is permissible." *United States v. Alexander*, 869 F.2d 808, 812 (5th Cir. 1989). *See also Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995) (observing that "*Taylor* itself appears to leave the question open" of whether willfulness is a requirement for the sanction of preclusion); *State v. Killean*, 915 P.2d 1225, 1226 (Ariz. 1996) (observing that under federal precedent, "it is not yet clear whether preclusion of defense evidence is constitutionally permitted absent a finding of bad faith or willful misconduct.").

The fact that lower courts are divided on this issue has been frequently observed. *Batchilly v. Nance*, No. 08 Civ. 7150 (GBD)(AJP), 2010 WL 1253921, at *27 (S.D.N.Y. April 2, 2010) (recognizing that contrary to apparent Second Circuit rule, "[s]everal circuits have interpreted *Taylor* to require a balancing test rather than a finding of "willful misconduct" as a prerequisite to preclusion."); *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995) ("Although some courts believe . . . that the exclusion of a witness or witnesses who would be helpful to the defendant is permissible only if the violation of the discovery order was deliberate, as it was in *Taylor* itself, other courts disagree."; *United States v. Portela*, 167 F.3d 687, 705 n.16 (1st Cir. 1999) (observing that "[s]ome circuits have explicitly held that, under *Taylor*, only willful discovery violations justify exclusion," but noting circuits arriving at different conclusion); *United States*

v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) (observing that some circuits require bad faith violation to exclude witness "while others seem to read *Taylor* as establishing a balancing test in which bad faith is a powerful factor."); *State v. Killean,* 901 P.2d 1228, 1238-39 (Ariz. App. 1995) ("Although there are a few cases in which courts have upheld the preclusion of a criminal defendant's vital evidence without a finding of bad faith or willful misconduct, there are sound reasons for adopting the majority position" requiring such a pre-requisite to the sanction.).

A. Three Circuits and at Least Seven States Permit Witness Preclusion Only for Willful Discovery Violations.

Courts requiring willfulness to justify precluding the testimony of witnesses either conclude that this Court intended to limit preclusions of witnesses to type of intentional violation involved in *Taylor* or that prudential considerations require such a rule.

A number of courts look to *Taylor* itself for this conclusion. The Ninth Circuit observed in *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) that as "no willful and blatant discovery violations occurred . . . application of the exclusionary sanction is impermissible." The court relied on the fact "the [Supreme] Court has upheld the drastic remedy of excluding a witness only in cases involving 'willful and blatant' discovery violations." *Id*. (citing *Taylor*, 484 U.S. at 416). The Court reasoned that *Taylor*

itself required a willful violation for this sanction to be applied.

> While recognizing that less drastic remedies than exclusion were available as sanctions, the Court held that if the explanation for a party's failure to comply with a discovery rule "reveals that the omission was willful and motivated by a desire to obtain a tactical advantage," it would be "entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony."

United States v. Peters, 937 F.2d 1422, 1424 (9th Cir. 1991) (quoting *Taylor*, 484 U.S. at 415). *See also Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997) (finding preclusion of witness absent finding of willful discovery violation contrary to Sixth Amendment but finding error harmless). *People v. Edwards*, 22 Cal. Rptr. 2d 3, 12 (Cal. App. 1993) ("We interpret [*Taylor* and *Lucas*] to instruct that preclusion sanctions may be imposed against a criminal defendant only for the most egregious [intentional] discovery abuse."); *White v. State,* 973 P.2d 306, 311 (Okla. Crim. App. 1998) ("Where the discovery violation is not willful, blatant, or calculated gamesmanship, alternative sanctions are adequate and appropriate."); *Washington v. State*, 840 N.E.2d 873, 883 (Ind. App. 2006) (finding witness preclusion absent a finding of willfulness error as "*Taylor* and *Baxter* [*v. State*, 522 N.E.2d 362 (Ind. 1988)] hold that when a defendant willfully or purposefully suppresses alibi evidence to gain a tactical advantage, the court can properly

exclude the proffered alibi testimony . . . "); *People v. Shriner,* 555 N.E.2d 1257, 1261 (Ill. App. 1990) (holding that in light of *Taylor*, "[a]bsent a showing of wilful and blatant violation . . . the exclusion of . . . alibi witness impinged on defendant's sixth amendment right to compulsory process. . . .").

A variety of courts have not solely relied on this Court's holding in *Taylor* to require an intentional violation to justify the remedy of preclusion. Given the severity of the preclusion sanction, the fact the defendant is punished for his lawyer's actions, and impact of preclusion on a defendant's Sixth Amendment right to present his defense, several courts have concluded that it should be reserved for the most egregious violations. The Arizona Court of Appeals succinctly offered this view in *State v. Killean*, 901 P.2d 1228, 1239 (Ariz. App. 1995):[5]

> When vital evidence is precluded as a sanction for a discovery violation, a litigant is vicariously punished for the wrongful conduct of counsel. Without question, this severe sanction may be appropriate in certain circumstances. But when the litigant whose vital evidence is precluded is *a criminal defendant,* the severity of this vicarious sanction intensifies because the defendant's

[5] The Arizona Supreme Court concluded that the discovery violation in *Killean* was willful and reversed the Court of Appeals on that ground, recognizing that its "disagreement with the court of appeals is a narrow one." *State v. Killean*, 915 P.2d 1225, 1226 (Ariz. 1996).

> liberty interest and constitutional right to present exculpatory evidence are implicated. This was eloquently expressed by Justice Brennan's dissent in *Taylor,* when he noted, "Deities may be able to visit the sins of the father on the son, but . . . courts should [not] be permitted to visit the sins of the lawyer on the innocent client." 484 U.S. at 433, 108 S.Ct. at 666 (Brennan, J., dissenting). In this context, it is understandable why the preclusion of a criminal defendant's evidence is an appropriate sanction for only the most egregious conduct.

(Emphasis in original). *See also People v. Richards*, 795 P.2d 1343, 1346 (Colo. App. 1989) (culpability of defense in the violation must be considered "because of the rights at stake. . . ."); *Houston v. State*, 531 So.2d 598, 612 (Miss. 1988) (in light of "serious due process problems," preclusion "ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage.").

Some courts require a willful violation but state the standard less categorically. They conclude that, as a general rule, witness preclusion is permitted only for intentional discovery violations, but they offer no test for evaluating when, and suggesting no circumstance under which, preclusion is appropriate for an unintentional violation. The Second Circuit, for instance, concluded that "where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony must be supported by a finding of some degree of willfulness in defense

counsel's violation of the applicable discovery rules." *Noble v. Kelly*, 246 F.3d 93, 100 n.3 (2d Cir. 2001). Only in the most unusual circumstances would the Second Circuit test not require an intentional violation to justify precluding the testimony of a defense witness. In *Noble*, the Second Circuit observed that granting the state a continuance would have been a sufficient remedy for the defense's failure to provide notice of an alibi until the close of the prosecution's case. *Id*. at 100. It would be difficult to imagine the circumstances when an unintended discovery violation would permit preclusion under this test.

The Mississippi Supreme Court similarly concluded that "[g]enerally, [preclusion of testimony] ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage." *Houston*, 531 So.2d at 612. The Colorado Court of Appeals stated a balancing test in *People v. Richards*, 795 P.2d 1343, 1346 (Colo. App. 1989) but concluded that "a less drastic sanction [than preclusion] is always available" and should be used except "when the violation of discovery arises out of conduct of a character and magnitude tantamount to 'sandbagging.'"

B. Four Circuits and at Least Two States Use a Balancing Test and Do Not Require Willful Misconduct as a Basis for Precluding a Witness as a Discovery Sanction.

Court rejecting a willfulness requirement for preclusion conclude that *Taylor* did nothing to limit the sanction to the facts for which the Court found the

sanction appropriate. The First, Tenth and D.C. Circuits conclude that *Taylor* itself recognizes that this factor is not required to impose the sanction. The Seventh Circuit concluded that this Court did not address the issue, but found that prudential considerations counsel against a single-factor test for determining the appropriateness of this discovery sanction.

In *Young v. Workman*, 383 F.3d 1233, 1239 (10th Cir. 2004), the Tenth Circuit concluded that "a specific finding of willfulness . . . is not required for exclusion to be justified as a sanction for discovery violations." *Young* concluded that while this Court "made it clear in *Taylor* that while willfulness and seeking tactical advantage justified exclusion, it was 'neither necessary nor appropriate . . . to attempt to draft a comprehensive set of standards to guide the exercise of [a court's] discretion [in ordering the exclusion of evidence] in every possible case.'" *Id.* at 1239 (quoting *Taylor*, 484 U.S. at 414, 108 S.Ct. at 646) (brackets in original).

The D.C. Circuit offered very similar reasoning for rejecting a willfulness requirement to justify this sanction.

> We think 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 relevant. While the court noted that the trial judge had found that "the discovery violation in this case was both willful and

> blatant", 484 U.S. at 416, 108 S.Ct. at 657, the opinion certainly did not say that such findings were essential.

United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992).

The First Circuit concluded that *Taylor* established a balancing test which would include consideration of the willfulness of the violation, but this factor was not dispositive.

> Although the *Taylor* Court declined to cast a mechanical standard to govern all possible cases, it established that, as a general matter, the trial judge (in deciding which sanction to impose) must weigh the defendant's right to compulsory process against the countervailing public interests: (1) the integrity of the adversary process, (2) the interest in the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process. *Taylor v. Illinois,* 108 S.Ct. at 655 & n. 19. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness *vel non* of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought. *Id.* at 655-56 & nn. 20-21.

Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988). *See also State v. Gillespie*, 638 S.E.2d 481, 486 (N.C. App. 2006) (adopting *Chappee* but placing great emphasis

on the lack of intentional violation to find preclusion of witness appropriate).

The Seventh Circuit similarly concluded that willfulness was not a requirement for the sanction of preclusion, but unlike the D.C. and Tenth Circuits did not conclude that this result was compelled or foreshadowed by *Taylor*. *Tyson v. Trigg*, 50 F.3d 436, 444-445 (7th Cir. 1995). *Tyson* concluded that *Taylor* left "open" the question of whether willfulness is a requirement for the sanction. *Id*. at 445. Prudential consideration, particularly in the context of a habeas corpus case, counseled against a willfulness prerequisite for sanction, the Seventh Circuit concluded:

> We do not think that a hard and fast rule to govern that case is feasible or desirable. Given the competing considerations identified above, the highly situation-specific character of the judgment that the trial judge is called upon to make in the hurly-burly of trial, the limited scope of federal habeas corpus, and (a closely related point) the desirability of avoiding continuous and heavy-handed federal judicial intervention in the conduct of state criminal trials, we do not consider it a proper office of a federal court in a habeas corpus proceeding to second-guess a discovery ruling unless we are convinced that it is, in the circumstances, unreasonable.

Id. at 445.

The opinion of the Supreme Judicial Court of Maine in the instant case did not require the trial

court to find a willful discovery violation to exclude the Petitioner's witness. The Supreme Judicial Court found a violation of the rules of discovery alone to be sufficient to justify this extreme sanction. *Silva*, 2012 ME 120, at ¶ 12.

CONCLUSION

This Court should grant the Petitioner's request for a Writ of Certiorari to the Supreme Judicial Court of Maine to resolve whether a court may exact the extreme sanction of witness preclusion for a good faith violation of rules of discovery.

Respectfully submitted,

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**Counsel of Record*

MAINE SUPREME
JUDICIAL COURT Reporter of Decisions
Decision: 2012 ME 120
Docket: Yor-11-575
Argued: September 13, 2012
Decided: October 23, 2012

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

STATE OF MAINE

v.

JOSEPH L. SILVA

GORMAN, J.

[¶1] Joseph L. Silva appeals from a judgment of conviction for gross sexual assault (Class A), 17-A M.R.S. § 253(1)(A) (2011), and two counts of aggravated assault (Class B), 17-A M.R.S. § 208(1)(A), (C) (2011), entered in the trial court (*Brodrick, J.*) on a jury verdict. Silva challenges the court's failure to sanction the State for what he asserts was a discovery violation and the court's exclusion of his computer expert from testifying at trial. We affirm the judgment.

I. BACKGROUND

[¶2] Silva assaulted the victim, whom he had met through a dating website, on November 22, 2009. She reported the assault two days later, and Silva was arrested in early December. The State did not

indict Silva on the charges of which he was ultimately convicted until April 6, 2010.[1]

[¶3] In January of 2010, the State provided Silva with automatic discovery pursuant to M.R. Crim. P. 16(a);[2] that discovery included an emergency room nurse's report referencing an item of evidence – the underpants the victim had worn at the time of the assault – that was not collected at the hospital or by police when the victim reported the crime.

[¶4] It was not until August of 2011, when the prosecutor was preparing for trial, that he realized the item had never been collected or analyzed. The victim had the item in her possession, but had washed the underpants one or more times in the months that had passed since the assault. Otherwise, there was no indication of where the item had been kept since 2009, what state it was in, or who else had access to it in those intervening two years. At the prosecutor's direction, police obtained the item of clothing.

[¶5] On September 12, 2011, the first morning of trial, Silva moved for sanctions against the State pursuant to M.R. Crim. P. 16(d), arguing that the

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[1] The court (*Fritzsche, J.*) granted the State's motion for the complaint to remain on the docket in which the State cited "the complexity of the investigation and the seriousness of the offenses charged" as its "good cause." *See* M.R. Crim. P. 48(b)(2).

[2] The State also agreed to provide any evidence discoverable pursuant to M.R. Crim. P. 16.

State violated its discovery obligation by failing to provide the underpants or a report about any analysis of it. Silva sought either an opportunity to have the underpants analyzed or a dismissal of the indictment. In a chambers conference, the prosecutor reported to the court that he had informed Silva, who was unrepresented at the time,[3] as soon as the underpants came into police custody in August of 2011.[4] The court denied Silva's motion, noting that, given the reference to the item in the nurse's report provided to Silva more than a year earlier, both attorneys had been remiss in overlooking it. The court declined to continue the matter given the "disgraceful" seventeen-month delay from indictment to trial.

[¶6] Just before the start of trial, the parties were also engaged in a discovery dispute regarding Silva's computer expert. During their investigation, police had obtained and analyzed both Silva's and the victim's computer hard drives to determine the content of their online communications. On Silva's motion, the court ordered the State to provide a copy of the victim's hard drive to Silva for analysis by Silva's

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[3] Silva was unrepresented for a period of about five months, until his attorney reentered his appearance eleven days before trial.

[4] During the chambers conference, both parties and the court appeared to believe that the item was already at the crime lab. There is no suggestion that the prosecutor's representation of that fact was anything other than a misunderstanding, and Silva conceded during oral argument that there was no suggestion of the State's bad faith in making that representation.

own expert. Silva's expert obtained that copy in March of 2011, but did not analyze it then because Silva was unable to pay her fee. After obtaining the copy a second time several days before the trial, the expert did analyze it. Five days before trial, Silva provided the State with a copy of the report his expert generated from that analysis, and three days before trial, Silva filed a designation naming the expert to testify. On the State's motion, the court excluded Silva's expert from trial after concluding that Silva failed to provide the State adequate notice. At trial, Silva called the State's computer expert as a witness, and questioned her extensively regarding the content of both computer drives.

[¶7] The jury found Silva guilty of all three counts, and the court entered a judgment on the verdict sentencing Silva to ten years in prison for the gross sexual assault count and seven years in prison for each of the aggravated assault counts, all to be served concurrently. The court also ordered Silva to pay restitution to the victim in the amount of $3192. After the court denied Silva's motion for a new trial, Silva appealed.

II. DISCUSSION

[¶8] Pursuant to M.R. Crim. P. 16 and a discovery order in this matter, the State was required to supply to Silva, inter alia, "[a]ny . . . tangible objects . . . which are material to the preparation of the defense or which the attorney for the state intends to

use as evidence in any proceeding" if those items are "within the attorney for the state's possession or control." M.R. Crim. P. 16(b)(1), (2)(A). Silva contends that the court erred in declining to sanction the State for withholding information concerning its possession of the victim's item of clothing until just days before trial, resulting in a deprivation of his due process rights. We afford the trial court substantial deference in overseeing the parties' discovery, and review its decisions on alleged discovery violations only for an abuse of discretion. *State v. Graham*, 2010 ME 60, ¶ 10, 998 A.2d 339. Only when the defendant can establish that the effect is so significant as to deprive him of a fair trial will we vacate on that basis. *State v. Gould*, 2012 ME 60, ¶ 24, 43 A.3d 952.

[¶9] The court denied Silva's motion to dismiss the indictment or continue the trial based primarily on the procedural history of the matter. Although the crimes had occurred in November of 2009, the State did not charge Silva until more than four months later, in April of 2010. Silva was arraigned on May 21, 2010, and the court ruled on discovery issues on August 13, 2010. Between September of 2010 and August of 2011, eight docket calls were scheduled – and continued – in the matter. In total, the period from indictment to trial spanned more than seventeen months. Silva himself was responsible for much of the delay in this matter, having moved to continue the matter at least seven times. The court appropriately considered these substantial delays in evaluating Silva's motion seeking yet another continuance of

the trial, and acted well within its discretion in denying Silva's motion for sanctions.

[¶10] In addition, the court's decision is supported on the merits. The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," when that suppression is prejudicial to the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see Gould*, 2012 ME 60, ¶¶ 22 n.4, 28, 43 A.3d 952. Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Gould*, 2012 ME 60, ¶¶ 22 n.4, 27, 43 A.3d 952 (quotation marks omitted) (determining that no discovery violation had occurred when the evidence in dispute was disclosed "as soon as that evidence was reasonably available" (quotation marks omitted)). Here, given the circumstances – namely, the lack of an adequate chain of custody and the probable inadmissibility of the evidence on that basis; the likelihood, given Silva's admission to consensual contact, that any testing of the underpants could well have inculpated, rather than exculpated, Silva; the fact that the underpants were not in the State's custody until a short time before trial; and Silva's own failure to follow up on the existence of the underpants, which was disclosed to him in a nurse's report as early as January of 2010 – we decline to conclude that the court's refusal to dismiss the

indictment or continue the matter deprived Silva of a fair trial.

[¶11] Neither did the court exceed its discretion in excluding Silva's computer expert. *See State v. Kelly*, 2000 ME 107, ¶ 15, 752 A.2d 188. Maine Rule of Criminal Procedure 16A required Silva to disclose to the State certain information regarding his own expert witness: "[T]he defendant shall, within a reasonable time, furnish to the attorney for the state" the name and address of the expert and a copy of "any report or statement of an expert . . . which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding." M.R. Crim. P. 16A(b)(2)(B).

[¶12] The court's determination that Silva did not fulfill his obligations pursuant to Rule 16A is supported by the record. The State received only a portion of the expert's report, and the court apparently determined that even the portion Silva did provide was not produced within a reasonable time. *See State v. Allen*, 2006 ME 20, ¶ 14, 892 A.2d 447 (affirming the exclusion of an expert's report when "[t]he timing of the disclosure placed the State in a position where it had insufficient time to prepare a cross-examination of the doctor concerning her recent findings, the new methods she used in arriving at them, or to find and prepare witnesses to rebut this late evidence"). Silva was also permitted to call as a witness the State's computer expert, whom he questioned extensively regarding the content of both hard drives. Thus, Silva was able to elicit much, if not all,

of the testimony he wanted the jury to hear. He has identified no evidence beyond that elicited from the State's expert that he had hoped to elicit from his own expert. Given that the delay in supplying the expert report to the State was due to Silva's own failure to pay his expert, that the information supplied to the State days before trial was not complete, and the substantial deference afforded the trial court in determining the admissibility of expert testimony, we decline to disturb the judgment on this basis.

The entry is:

Judgment affirmed.

On the briefs:

Lisa Chmelecki, Esq., Mark Peltier, Esq., and Luke Rioux, Esq., Fairfield and Associates, Lyman, for appellant Joseph L. Silva

Kathryn Slattery, District Attorney, and Anne Marie Pazar, Esq., Prosecutorial District #1, Alfred, for appellee State of Main

At Oral argument:

Lisa Chmelecki, Esq., for appellant Joseph J. Silva

Anne Marie Pazar, Esq., for appellee State of Main

STATE OF MAINE

YORK SS SUPERIOR COURT

CRIMINAL ACTION DOCKET NO. CR-09-2868
LAW COURT NO. YOR-11-575

STATE OF MAINE	**CHAMBERS CONFERENCE MOTION FOR SANCTIONS & MOTION TO EXCLUDE**
VS.	
JOSEPH L. SILVA, Defendant	

SEPTEMBER 12, 2011
ALFRED, MAINE

BEFORE:

WILLIAM S. BRODRICK, ACTIVE RETIRED JUSTICE

APPEARANCES:

ON BEHALF OF THE STATE:

THADDEUS W. WEST, ASSISTANT DISTRICT ATTORNEY

ON BEHALF OF THE DEFENDANT:

THOMAS J. GRECO, ESQ.
AMY L. FAIRFIELD, ESQ.

* * *

[11] So are there any other motions or is that –

MR. WEST: Well, there is a motion that I filed, Judge. And this is just a – it was a followup motion –

THE COURT: Right.

MR. WEST: – on the defense expert.

THE COURT: You have not had time to get ready?

MR. WEST: I haven't, Judge. I mean, I have got an incomplete report. It was provided noon, Wednesday.

She was fine –

To kind of provide the Court what I've tried to do, because you told me to try to get word in and I have been trying to get ready – she was interviewed late Friday eve – or early Friday evening, like 5, 6 o'clock in the evening. She was interviewed at that time. What I don't have is, I don't have her attachments that she references in this very brief synopsis that she provides us. I don't have a c.v on her. I don't have – I just haven't had an opportunity to deal with her because I [12] don't – I don't have a complete package.

THE COURT: Plus, you're trying to get ready for trial.

MR. WEST: Which I spent all weekend doing.

THE COURT: Once again, let's get the timeline on the record. This guy was indicted when?

MR. WEST: It should be referenced right there, Judge. You should see – it should be one the first –

THE COURT: April 6th, 2010.

MR. WEST: So – excuse me, April of 2010.

THE COURT: When did you get involved, Tom?

MR. GRECO: I don't know, Judge. I would have to look at any initial appearance. But I withdrew in March, I believe it was, because of the reasons I cited in my request to withdraw. I came back into the case, Judge, like the first week of September, when he came back into my office after coming here a few times on his own.

I will say that I made the expert's presence, as well as opportunity for questioning, known when we came before the Court on a discovery issue.

THE COURT: That was last week.

MR. WEST: Which brings up another whole problem.

MR. GRECO: Well, no, that was a while back, [13] Judge. That does – I gotcha. But it is sort of bifurcating the issues on why she can or cannot come in here. At a minimum I want this expert to be able to tell me what she found from the discovery that was

provided. She should be able to come in here and say: This is the disk. This is what they gave me from the disk, which was provided in discovery. Here's some areas that we believe are relevant. And then there was an issue – you know the other issue, Judge.

THE COURT: Well, she can't say what's relevant. She can say –

MR. GRECO: Yes, to me she can say that.

THE COURT: What she sees on the disk –

MR. GRECO: Yes.

THE COURT: – is that what you want her to do?

MR. GRECO: Absolutely. She should be able to testify the that.

THE COURT: This is your disk; right?

And does it differ from what his person sees?

MR. GRECO: Actually, his person sees a lot more. His person has the hard drive. I don't have the hard drive.

MR. WEST: You had the hard drive.

MR. GRECO: Well, I did and I didn't. But in any event he is right; we didn't analyze the hard drive [14] timely, I think, is the –

THE COURT: Well, you had it –

MR. GRECO: For – yes.

MR. WEST: Months.

MR. GRECO: Yeah. But it wasn't analyzed.

THE COURT: Well, let's get it on the record. When did they get the hard drive?

MR. WEST: The motion shows that they took the hard drive in – I believe it's March, Judge, of this year.

THE COURT: March 25th.

MR. WEST: Right. She goes up. She picks up the hard drive from the Crime Lab on March 25th. It is not returned to the PD until June of this year. The order states that she can have it for ten days. She can pick it up; she can have it for ten days; do her analysis; and then it can be turned back in.

THE COURT: She had it for 2 ½ months.

MR. WEST: She had it for 2 ½ months. Then it was turned in. Then she shows back up after Tom gets back involved, gets it back – although much to my dismay the police provide it to her. She then takes it into custody and has it again for a period of about seven or eight days and then returns it.

The problem was – the problem here, Judge, is [15] that, when we dealt with this issue with Justice Fritzsche, it was clear that what the State's concern was, is that we were trying to protect the privacy interest of the victim. This was a consent issue. She had given the State consent to search the computer; she had never provided consent to the defense to do

so. She objected to the defense looking at it. And it was the court's order that provided the defense an opportunity to look at the hard drive. And it was clear that what the State was trying to do was limit the ability of that hard drive to be out there in the public, uncontrolled. And this is a blatant violation.

The order went further to say, Judge, that even an incidental violation, I needed to be provided notice within a matter of days. And I was never provided notice by the defense's attorney by the expert, themselves, or the defendant, himself, when he began to represent him, pro se. So I mean –

THE COURT: So, when she had it from March 25th to June 30th, she did not examine it; right?

MR. GRECO: That's correct, Judge. In fact, we came in here before you and you ordered that the hard drive be provided to me; I get a copy of the hard drive. Then it wasn't provided. I had to file a motion to compel. The motion to compel went before Justice [16] Fritzsche and that's the order that Mr. West, Thad, is referencing. So you're right, Judge, she didn't analyze it.

THE COURT: That is because she wasn't paid; right?

MR. GRECO: That's right. And then I withdrew because I was having a problem there.

THE COURT: Yeah.

MR. GRECO: And then I came back into the case in September. And she tried to analyze the hard drive in compliance, at least time-wise, with that order and she did it in a much shorter period of time.

I just – from my perspective, other than the order, itself, I don't see where the harm is to the State. They have had that hard drive in their possession since Mr. Silva was arrested and his computer taken.

THE COURT: Why don't you put on the record – do you want to make an offer of proof as to what she would testify to?

MR. GRECO: Sure.

THE COURT: Go ahead.

MR. GRECO: Judge, if she had the hard drive?

THE COURT: No. You want her to come on and testify now; right?

MR. GRECO: Yeah. I want her to come on –

[17] THE COURT: After examining the State's disk; right?

MR. GRECO: I want her to come in for two purposes. I would love for her to come in and testify to her findings on the image of the hard drive that was provided to her.

THE COURT: I thought she didn't look at it.

MR. GRECO: She did the second time, which Thad was referencing as much to his sort of dismay and dissatisfaction.

MR. WEST: She was provided a second opportunity to look at it.

THE COURT: Oh.

MR. GRECO: She did look at it.

THE COURT: Right.

MR. GRECO: Excluding – and that's what I would like her to come and testify to –

THE COURT: Okay.

MR. GRECO: – because she can certainly reference areas where the State did not go into the hard drive as thoroughly as she did.

At a minimum I would like for her to come in and testify as to what was on the disk that was provided because I'm going to again suggest that the State did not go into that disk in those areas as thoroughly as she [18] did.

THE COURT: Well, what would she say?

MR. GRECO: She would say, for example, there was references to fisting movies. She would say, for example, there was referencing, that Ms. Gillis had out there, searching for men to fist her. And

that's on the discovery disk. As well as I think everyone was – everyone would say that the State, as well as my expert, would say there is no smoking gun. There is nothing in this – on this hard drive to say one way or the other whether Mr. Silva committed these offenses.

On top of that, the report from the lab suggests that there was a purging of things done by Ms. Gillis that my expert would find, if she was given the opportunity with the hard drive.

MR. WEST: Well, she had.

MR. GRECO: You're right.

MR. WEST: She has had months with that hard drive.

THE COURT: She did have an opportunity. She had 2 ½ months. It is your guy's fault that he didn't pay her.

MR. WEST: Judge, from my perspective, when you provide me such short notice that this lady is going to testify and what she is going to testify to, it creates [19] an extreme difficulty because not only do I have to prepare but I have to have other arms of the system looking into this. And we haven't had time to do that. And this is something that creates a problem. I'm entitled to fair notice.

THE COURT: Yeah, I agree.

MR. WEST: I didn't get it.

THE COURT: I agree.

The other thing is, from what I understand of the case, your guy does not say that it was, quote, fisting, end quote, by consent; right? He says there was no fisting.

MR. WEST: Right.

MR. GRECO: Correct. By him.

THE COURT: Well, you don't have any evidence of anybody else.

MR. GRECO: No.

THE COURT: Well, it seems to me your guy's problems are all of his own making.

So the motion to exclude is granted.

MR. WEST: All right. I guess maybe, Judge, what I would like to do is, I would like to chime in on jury selection questions then, moving on.

Well, is there any other –

THE COURT: Well, I have got.

[20] MR. WEST: – is there another motion in there?

THE COURT: I have got Tom's proposed voir dire.

MR. WEST: Did we get through all of the motions at this point?

THE COURT: Yeah, we did.

(Whereupon, at 9:41 a.m., the chambers conference concluded on the record.)

* * *

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-2009-2868

STATE OF MAINE)
v.)
JOSEPH SILVA)
Date of birth: 3/13/56)
Defendant)

WITNESSES FOR THE DEFENDANT

NOW COMES the Defendant, by and through counsel, and lists the following witnesses for trial.

1. Erin Miragliuolo
   Forensic DNA Analyst
   State of Maine
2. Judy Gosselin, CCFE
   Computer Analyst
   PO Box 4871
   Manchester, NH 03108
3. Rohit Patel
   Owner/Manager
   Days Inn
   Kittery, Maine

DATED at Biddeford, Maine this 6th day of September 2011.

/s/ Thomas J. Greco
Thomas J. Greco, Bar No. 7927
Attorney for Defendant

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-2009-2868

STATE OF MAINE)
)
v.) AMENDED
) WITNESSES FOR
JOSEPH SILVA) THE DEFENDANT
Date of birth: 3/13/56)
Defendant)

NOW COMES the Defendant, by and through counsel, and lists the following witnesses for trial.

1. Erin Miragliuolo
   Forensic DNA Analyst
   State of Maine
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   Computer Analyst
   PO Box 4871
   Manchester, NH 03108
3. Rohit Patel
   Owner/Manager
   Days Inn
   Kittery, Maine
4. Don Nason
   Private Investigator
   17 Frost Lane
   Concord, NH 03303

DATED at Biddeford, Maine this 9th day of September 2011.

/s/ Thomas J. Greco/[Illegible]
Thomas J. Greco, Bar No. 7927
Attorney for Defendant

[LOGO]

PO Box 4871 jag@jagdigsdeeper.com
Manchester, NH 03108 603-682-4568

*****ATTORNEY/CLIENT PRIVILEGED INFORMATION*****

DATE: **Tuesday, February 8, 2011**

TO: **Tom Greco, Esq**

FROM: **Judy Gosselin, CCFE**

SUBJECT: **Joseph Silva Hard Drive Analysis**

Purpose of Review: Alleged Sexual Assault
Identify/recover evidence that supports the alleged sexual assault of the victim by Mr. Joseph Silva. Alleged assault occurred on 11-22-09. It was reported to Police on 11-24-09.

Evidence: Copy of Image as provided by Dawn Ego of the Maine State Police Computer Crimes Unit. Computer forensic software used to analyze case –
Access Data's Forensic Tool Kit v 3.2
Guidance Software Encase v 6.16
Digital Detective – NetAnalysis v 1.5

Findings/Observations of Mr. Silva's Computer Hard Drive:

1. **Police Report, page 7, states "reference information that was once used to find the location of the file on the hard disk has been destroyed".**

"Destroyed" in a computer forensic environment typically means purposeful or malicious intent was utilized to permanently delete data beyond forensic recoverability. A "lost file" is a file that has no parent directory or folder which means that the folder in which it was created has been deleted and the file has no "parent", thus placing it in the "Lost" Folder.

In this case, neither applies. Files were deleted in what appears to be normal activity and not in attempt to conceal/overwrite activity.

2. **Victim alleges Mr. Silva "violently rapes her" – no activity or searches support violence or rape on Mr. Silva's hard drive.**

Mr. Silva's hard drive does have adult pictures (police report states women over age 50) nude, scantily clad, and male/females participating in sexual activity in the unallocated (deleted) area of the drive.

The alleged victim's hard drive, per the Police report, contains notable unallocated pictures on her hard drive which "depict anal sex, multiple partners, and the act of urinating on a person's head" . . . along with searches regarding "fisting".

3. **Ms. Gillis provided two email addresses she claims belonged to Mr. Silva – joclaw1895@yahoo.com and sgberet19@yahoo.com.**

Emails and registry files show "sgberet00", "sgberet19@aol.com", "sgberet19@hotmail.com", and joseph02780.

No evidence of joclaw1895 was located in the search of Mr. Silva's hard drive.

4. **In review of Mr. Silva's Internet Favorites, a detailed listing is provided under separate cover.**

   "Spank Wire" is the only one of 42 "Favorites" that pertains to adult or pornographic sites. No sites are violent in nature. No movies were noted in the Police report that appear relevant to the case. None of the "Favorites" have been deleted or encrypted.

5. **Police Report states "multiple URL's relate back to plentyoffish.com on Mr. Silva's hard drive".**

   Mr. Silva's "Plentyoffish" internet history indicate less than 1% of the total activity, with a few identified as cookies. (The report is 1231 pages in length)

   Page 4 of the Police Report states the alleged victim's hard drive had "various references to dating sights, such as: Boston Singles, Portsmouth Singles, Derry Dating, Jamaica Plain Dating, Merrimack Dating, Burlington Dating, Newburyport Dating, Milford Dating, Waltham Personals, Newton Dating, North Shore Matchmaking, and Wakefield Matchmaking". . . ." along with multiple images of males with plentyoffish.com logo.

6. Page 9 of the Police report mention cookies that relate to sexual content.

Cookies and their respective time stamps do not necessarily support the actual downloading and viewing of sexual sites noted. Dates and frequency of activity does not support obsessive review, of adult sites. Last selected Category in Yahoo! was "Romance" on 11/30/2009.

Based on the Police report, both hard drives – Mr. Silva's and the alleged victim – have references to "fisting".

7. Page 10 of the Police Report references one yahoo chat with the alleged victim.

In deleted files, there is one item of the alleged victim's email address. It is bzzbay2000@yahoo.com.

Summary

Based on my experience and review of internet activity and emails pertaining to sexual content, violent or aggressive activities, I did not review any content that would cause alarm or depict need for concern.

Recommended Next Steps: Review Ms. Gillis's computer hard drive

- **The Police Report states "Ms. Gillis reported that she was confused as to what an e-mail is" . . .**

  If she is confused as to what e-mail is, how was she knowledgeable enough as to how to remove a hard drive from a computer. If not her, who did it and why?

If she was confused as to what email is, how frequent is she a user of Instant Messaging, chat rooms, blogging, and Outlook Mail, as reported in the Police findings.

What do the multiple personal profiles on the various dating sites state of the alleged victim personal preferences, activities, desires, etc.?

How many user names and frequency of access is there at chat rooms, dating sites, blogs, etc.?

- **Police utilized Internet Evidence Finder, which attempts to recover up to 19 different types of Internet Chat artifacts. It states . . . "I located no chats that appear related to this case".**
- **Were any requests made to the ISP Provider Yahoo! for logs of both accounts? If not, why not?**
- **Why did Ms. Gillis not print out copies of the "chats" that were between Mr. Silva and herself for potential evidence, prior to deleting her "Plentyoffish" account and other internet chat activity? (But she removed the hard drive from the computer?)**
- **Why/when did Ms. Gillis empty her Yahoo! trash contents of potential evidence? Was this checked in the computer's registry for last access?**
- **Per the Police Report, it states, there were over 100 emails in her "Sent" file. Of these 100, how many are to Mr. Silva? How many to other males? What is the content and**

tone? Are there arrangements to "hookup" with other males?

- **Notable unallocated pictures of Ms. Gillis's computer included those that "depict anal sex, multiple partners, and the act of urinating on a person's head". However, no search engine searches refer to sexual deviancy, fetish's, and/or paraphelia's** [sic]**?**
- **No other internet searches were noted on the hard drive? Yet in the Internet History, there are yahoo! searches and people searches for "Joseph + Lawrence+Silva" + Chelmsford, MA" and "where do you report rape" in Google. Are there date/time stamps associated with these inquiries?**
- **The URL searches for Mr. Silva are dated 11-23-09 in the Police Report. Were there any prior to her meeting Mr. Silva for a date?**
- **How long has Ms. Gillis been participating on "Plentyoffish.com"?**
- **Though no "Favorites" were reported on Ms. Gillis' hard drive that relate to the case, what types of "Favorites" are there?**

Item to be aware of regarding Mr. Silva's computer:

- On Nov 23, 2009, there is an email on "Clean up you computer" from "Microsoft at Home". It's a "guide to a spotless computer". However, this email is consistent with other dates from the

same "Sender" regarding computer security and maintenance.

****** End of Report ******

[LOGO]

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*****ATTORNEY/CLIENT PRIVILEGED INFORMATION*****

DATE: September 7, 2011

TO: Tom Greco, Esq.
Williams-Greco, PA

FROM: Judith Gosselin, CFCE, CIPP

SUBJECT: State of ME v Joseph Silva/Analysis
CASE: of Mary Gillis's Hard Drive
ALFSC-2009-2868

Mary Gillis Hard Drive Analysis:

Purpose:

Identify/recover electronic evidence from Ms. Mary Gillis's computer hard drive regarding her internet activity and an alleged assault on November 22, 2009. The alleged assault was reported November 24, 2009 to Detective Steve Hamel, Kittery, ME Police Department.

Summary:

- Picked up Gillis hard drive from Detective Steve Hamel, Kittery Police Department on August 30, 2011.
- Same drive returned to Detective Steve Hamel on September 7, 2011.

- Applications used for analysis included Encase v1.6, FTK 3.1, NetAnalysis, and Internet Evidence Finder v4.
- "Specific Findings" on the ME State Police Forensic Synopsis Report by Dawn Ego of State Police were confirmed as noted in her report. Verified the integrity of the evidence files with no errors.
- Additional findings address search term results, Internet activity, emails, and other hard drive activity.

Search Terms Results – "fisting", "rape", "Silva"

- "Fisting" – results were all in the unallocated area of the drive (Attachment A). References show internet sites of
    - sexymoviegals.com/gals/fisting and "two models fisting"
    - floodedbuttholes.com/Busty secretary fucked"
    - wierd [sic] porno.com/fistingfuck video
    - sunporno.com/fisting and fucking
    - sexpornmaniac.com
    - Single brunette teen fisting pictures, gangbang fist anal, goupsex, handjobs, teen lesbians, gay
- "Rape" – all results were in the unallocated area of the drive. The Police Report (pg 5) for google search "where do you report rape" (pg 5) is noted. Also noted at the same date/time (11/23/2009 at 6:37-6:39PM) is the Google

search “if you were raped in Portsmouth”. (Attachment B)

- “Silva” – all search hits were deleted. Internet searches for the defendant were created during November 23, 3009 and November 27, 2009. They consisted of peoplefinders.com, search.aim.com, yellowbook.com, usa-people-search.com, intellius.com, LinkedIn. The geographic area search was Newburyport, Chelmsford, Taunton, and Lawrence, MA.
- Graphics show pictures relating to cars, dolls, dating sites with interests of men and women.

Internet Activity

- Internet History recovered amounted to 2,414 pages with dates starting on 4/18/2008. For this analysis, I targeted activity during November 2009 – 981 pages. Review of the details show user “mary” was active on dating sites with the following observations:
    - Craigslist, both national and international, were searched for “w4m”. Locations of inquiry – Alaska, Atlanta, Boston, Bangkok, Chicago, Orlando, Tampa, Honolulu, Seoul, Mexico, etc.
    - Matchmaking sites with pictures saved of both women and men.
    - Adult sites – adultfriendfinder, matchmaker, naughtyornice.com, spiceyorsweet.com, lonelywivesdatingclub.com, and others.

- Search for Suhomasderry.org "Minister's Schedules for 2009" was created on 11/29/2009.

- Defendant's Plentyoffish profile. (Attachment C)

- Plentyoffish and its forums were accessed after the November 22, 2009 date. On November 23, 2009 first login was at 4:55 PM to 6:46 PM. Then on 11/27/2009 at 1:59 PM to 2:02 PM.

Email Messages and the Defendant

- Ms. Gillis Email accounts associated with Ms. Gillis are – Bzzdbaygirl (match.com), bzzbay2000@yahoo.com, SpicyPeppers802 (adultfriendfinder.com)

- Fragments of the Email messages between Mary Gillis and Joseph Silva were located in the User Mary/Temp directories. (Attachment D)

Other:

- User "Mary" Favorites on the desktop consisted of 'Yahoo!', 'Plentyoffish', 'Daniel Webster Inn Features', 'Best Western Cold Spring, Plymouth, MA', job related, MSN, and Radio Station Guide.

- Mapquest search was done on 11/22/2009 at 10:30 AM from Derry NH address to Needham, MA address:

  2 Winter Hill Rd, Derry NH 03038 (Owned and Sold by Mary Gillis on 1/24/2007 (Now owned by Charles M Henry) to

155 Whitman Rd, Needham MA 02492
Appears to be a business address for TL Kirchman,

- Hard drive was defragged on 11/28/2009 at 9:43 PM.

Summary:

- All findings related to the Defendant were deleted and in the unallocated area of the drive.
- Ms. Gillis is a frequent user of "plentyoffish" and other on-line dating sites. Use continued after the alleged assault.
- As noted in the "Search Terms", there were many movies and references of "fisting" on Ms. Gillis' hard drive.

*** **End of Report** ***