No. _____

In The

Supreme Court of the United States

ZACHARIAS CHRISTOPHER LEE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THE FOURTH CIRCUIT'S DECISION FINDING REASONABLENESS IN THE SENTENCE IMPOSED BY THE DISTRICT COURT IS CONTRARY TO THE FIFTH AMENDMENT DUE PROCESS CLAUSE FOR IT DEPRIVES PETITIONER OF LIBERTY WITHOUT DUE PROCESS BY OPEN AND NOTORIOUS MANIPULATION OF DISCOVERY INFORMATION AND USE OF A CONFIDENTIAL SENTENCING DOCUMENT AGAINST THE DEFENDANT.

II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THE SIXTH AMENDMENT WHICH REQUIRES DEFENDANTS TO: HAVE IMPARTIALITY; HAVE COMPULSORY PROCESS; BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; AND HAVE ASSISTANCE OF COUNSEL.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Zacharias Christopher Lee and the United States of America.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit affirmed the Petitioner's conviction and sentence on September 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

1. **The Fifth Amendment to the United States Constitution provides as follow:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **The Sixth Amendment to the United States Constitution provides as follow:**

> In all criminal prosecution 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 witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his [defense].

STATEMENT OF THE CASE

Petitioner, Zacharias Christopher Lee ("Lee") is the sole defendant named in a one-count Bill of Indictment filed in the Western District of North Carolina, Charlotte Division, on June 20, 2018. Lee was charged with and subsequently convicted of Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1).

Lee expressly accepted responsibility for possession of the firearm. In the Presentence Investigation Report ("PSR") Lee received a three-point reduction in offense level for acceptance of responsibility, U.S.S.G. § 3E1.1(a). See, (App.146, 147.) Lee filed objections to the PSR denying possession of the firearms in connection with another felony, U.S.S.G. § 2K2(b)(6)(B). Lee had a resulting criminal history category of IV; his total offense level was set at 19. See, (App. 147.) That projected a United States Sentencing Guidelines (U.S.SG.) range for imprisonment at a minimum of 46 months to a maximum of 57 months. (App. 153.) The government contested the objections of Lee and his reduction for acceptance of responsibility. The government made no mention of the third person by name. The sentencing recital was framed as if Lee was the only one who could have assisted Hopkins, the admitted thief, with the larceny of the "approximately four" stolen guns. See, (brief of appellee 2, 9.) and (App. 164).

There are discrepancies between the following: the testimony of the testifying taskforce agent; a fire department report; the law enforcement report; and discovery images. JA 119-122. A report lists Hopkins as wearing a red hooded sweatshirt and blue jeans. JA 119. A report lists Lowery as wearing a "grey hoodie" with blue

sleeves and hood. See, (App. 120.) And the taskforce agent's original testimony is congruent with Hopkins wearing a red hooded sweatshirt and blue jeans. JA 119. The person questioning the witness on direct examination was allowed to change said witness' testimony, notwithstanding timely objection from Lee.

At the time of his arrest, Lee was sitting in a parked car with two other Black males at approximately 7:00 a.m., on March 26, 2018. Minutes later uniformed members of the Charlotte-Mecklenburg Police Department ("CMPD"), in marked police cruisers, responded to a call for a suspicious vehicle check. They discovered three young men in the parked car. Lee was in the driver's seat; he was apprehended at the scene. (App. 17, 118, 122.) The other two individuals fled on foot to successfully elude arrest on March 26, 2018. They are Dalton Hopkins who was seated in the back seat and Janard "Johnson" Lowery. (App. 119.) Lowery was in the front passenger seat wearing a gray hooded sweatshirt. (App. 118.) Janard Lowery gave a responding officer the fictitious surname of Johnson. (App. 122.) Lee, a felon, was found to be in possession of a firearm, located under the car after he placed it there. (App. 122.) A total of two firearms were located about the car that day. The second gun was located in the back seat where Hopkins sat before exiting the car. (App. 122.) The firearms were taken from fire stations throughout Charlotte, North Carolina, during an approximately 24-hour period. Reportedly, a total of four or approximately four firearms were stolen. However, only two were recovered from the vehicle check when Lee was arrested. See (App. 76, 174.) Lowery fled with a backpack. JA 122. See (App. 76.)

Lee had large visible holes, identifying marks on his blue jeans. (App. 117, 125.) At sentencing the government called one witness, Detective Riggs of CMPD to testify concerning identification. He was not a responding officer to any of the crime scenes. There was no direct testimony that the witness saw Lee at the fire stations. (App. 72.) Detective Riggs' knowledge was based on: reading his fellow officers' reports; reviewing videos and his memory. (App. 59, 60, 66, 72-73.) Detective Riggs was not specific as to identifying details of the personal features of the suspects or their clothing. He testified to seeing two Black males with similar clothing. From viewing the videos he remembers seeing two Black males; one of them wearing a red hooded sweatshirt, blue jeans and white tennis shoes. The second Black male was wearing a hooded sweatshirt and what appeared to be blue jeans. (App. 60.)

The Charlotte Fire Department report lists the clothing and a description: a Nomex fire hood which was Carolina blue in color; face exposed and brown boots. (App 121.)

The district court believed the detective made a positive identification of the suspects based on similar clothing, the identical stolen firearms and damage to the right front end of the motor vehicle. JA 79, 80, 84, 117.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S DECISION FINDING REASONABLENESS IN THE SENTENCE IMPOSED BY THE DISTRICT COURT IS CONTRARY TO THE FIFTH AMENDMENT DUE PROCESS CLAUSE FOR IT DEPRIVES PETITIONER OF LIBERTY WITHOUT DUE PROCESS BY OPEN AND NOTORIOUS MANIPULATION OF DISCOVERY INFORMATION AND USE OF A CONFIDENTIAL SENTENCING DOCUMENT AGAINST THE DEFENDANT.

Faith in the System Rests on Immutable Facts Being Consistent for All

Zacharias Christopher Lee petitions this Court for redress of the Fourth Circuit's decision dated November 17, 2020. The reasons are based on the following grounds: a lack of procedural and substantive due process. The soundness of the criminal justice system rests on the public having complete faith in the collection, dissemination and recognition of tangible information as being genuine. "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Clear identification of color of clothing is not a discretionary matter. That particular fact relied on by the district court to render the sentence in this matter was altered in open court. The ends of criminal justice would be defeated if judgments were to be founded on partial or speculative presentation of facts. *Id.*

The district court referenced approximately four stolen firearms. See, (App. 91.) To enhance, the Guidelines requires four or more, U.S.S.G. § 2 K2.1(b)(1)(A).

See, (App. 146.) The Panel Decision focused on the fact that the district court would render the same ruling, which is tantamount to saying identity does not matter. That is questionable because comprehensive information was submitted to the sentencing court on January 2, 2020, which objectively refutes the inserted testimony of the prosecutor on December 17, 2019. See, (App. 108, 119.) On January 16, 2020, the criminal judgment was published. There were three individuals at the arrest scene and only two suspects are said to have been involved in the "other related felony;" exact identification is paramount in this case. (App. 118.)

A preliminary issue is the use of a non-codefendant's PSR. Hopkins, a defendant in another case, admitted he was at the scene of the larcenist behavior. We know that because the district court used Hopkins' confidential PSR without prior notice to Lee. Privately selected parts of Hopkins's PSR should not have been read and used by the sentencing court against Lee's. As such the Fourth Circuit was without adequate factual findings for effective appellate review. *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995). Specifically, Hopkins's PSR could not have been: subpoenaed by Lee; seen by Lee; objected to by Lee; nor accepted by Lee, due to the privilege of confidentiality owed to Hopkins and his attorney. The principal function of the PSR is to assist the district court in imposing an appropriate sentence on the criminal defendant who is the subject of the report. *United States v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996). "In both civil and criminal cases the courts have been very reluctant to give third parties access to the presentence report prepared for some other individual or individuals...[a]ccordingly, the courts have typically required some showing of special

need before they will allow a third party to obtain a copy of a presentence report." *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 12, 108 S. Ct. 1606, 1613, 100 L. Ed. 2d 1 (1988). If the court does rely on another person's PSR it must summarize the information and give the defendant a reasonable opportunity to comment. Fed. R. Crim. P. 32(c)(3)(A). Lee was ambushed at the sentencing hearing with sparse information about Hopkins' PSR. He was not given a reasonable opportunity to review the document and then respond to its content.

Apparently, the sentencing court believed Hopkins' PSR was privileged. When ground for asserting executive privilege as to subpoenaed materials sought for use in criminal trial is based only on generalized interest in confidentiality, it cannot prevail over fundamental demands of due process of law in fair administration of criminal justice. *Nixon* at 713. Lee contends the sentencing court's adoption of the confidential document for use against him lacked the safeguards of constitutional due process. The district court actions place Lee in a situation wherein he was blindly contesting information, only, the sentencing court and the government had access to before the hearing. Therefore, Lee's sentencing courts findings are contrary to the rudimentary practice of due process and traditional notions of fairness.

Pervasive and Subtle Presumptions Wrongly Superseded Safeguards in this Matter

Lee denies involvement in any larceny. Neither the district court nor the government explained why the other suspect, Lowery, could not have been Hopkins' partner in the larcenies. Identity is material in this matter and positive

identification is paramount for it increased Lee's term of imprisonment, pursuant to U.S.S.G. § 2K2.1(b)(6)(B) of the Guidelines in addition to the three-point increase for allegedly not accepting responsibility, U.S.S.G. §§ 3E1.1(a) and U.S.S.G. §§ 3E1.1(b). A deferential abuse-of-discretion standard should have deduced error in the approximation of the number of firearms and in the color of clothing worn. Therefore, a failure in the affirming decision indicates a flaw in the algorithm or calculation of the reviewing process. The optics makes it appears like the reviewing court just reflexively treated the sentencing decision as procedurally sound. This show of presumption is antithetical to the seminal decisions on sentencing. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 589, 597 (2007), *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

Government's Burden of Preponderance
Was Not Carried logically yet Legally it was Sufficient
and that is an Example of Pervasive and Subtle Presumptions

Additionally, a defendant has a right to have the government prove its case at all critical stages in the process. *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967). The sentencing hearing is a critical state of the process. *Lafler v.Cooper*, 566 U.S. 156, 180, 132 S. Ct. 1376, 1394, 182 L. Ed. 2d 398 (2012). The district court should have offered Lee the ability to confront Hopkins. That opportunity was necessary once the sentencing court intended to impute Hopkins' assertions in his PSR against Lee. After all, Hopkins is a felon who was not crossed examined and had good reason to conceal the actions of a third individual, his friend Lowery. See, (App. 67, 77.) Meaning identification should not be left to the discretion of the Court, especially when it contradicts law enforcement's

genuine testimony. See, (App. 63-64.) The presiding Court is never a witness in a matter it is hearing. When appropriate the district court is allowed to supplement evidence by judicial notice. Said fact must be common knowledge in the community, like immutable constants in life or a past factual event.

There is error in the district court's factual findings, because there is a primary distinction between the color red and the color blue. The report listed Dalton Hopkins as wearing a red hooded sweatshirt and blue jeans. See, (App. 119.) However, over objection by the defense, the prosecutor was allowed to summarily change what was written in the police report via live testimony. See, (App. 63-64, 119.) The arbiter's factual and legal findings were contrary to common knowledge and established moniker for colors. In the district court's ruling on the post sentencing motion, the sentencing court never addressed the revelation of the police report. See, (App. 126.) The matter was resolved by stating the district court was without authority to do so because of the ruling in a 2010 case, *State v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010). JA.126. Lee finds this Court's ruling in 2017 to be instructive. The decision highlighted that fairness in the trial process would not take a backseat to a trier of fact reliance on predisposition. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 879, 197 L. Ed. 2d 107, 85 WSLW4071 (2017). This Court found the Sixth Amendment interests are more profound than the long standing no-impeachment rule. Lee likens *Pena-Rodriguez* to this case because Sixth Amendment interests should take priority over the faulty evidentiary ruling of the sentencing court and a bar the change of color by the government. JA.63. To the extent the district court was not aware traditional notions of fairness outranks extraneous information, this Court

should take a look at the full record of this case. Lee posits the entire legal system will be more fully informed when jurors and judges are careful in limiting deliberations to the information from the witness stand.

The Process in this Matter was not what was Due to Petitioner

The government failed to call: law enforcement with knowledge of the situation, the responding officers. Officer Riggs the only witness for the government left his notes. See, (App. 66.) The government failed to give the district court a comprehensive view of the facts. The district court failed to rule on a more comprehensive view of the fact. Therefore, the Panel decision does not adequately address the issues in this matter. In this matter due process under the law means reliance on a fair hearing before deprivation of liberty. Fundamental fairness means inconsistent testimony, approximately four firearms and blue versus red, should be weeded out by the arbiter of the facts for being less than a preponderance of sufficient evidence.

Appellant Should be able to Rely on Facts Supplied by the Government

In this matter color difference clearly demonstrates faulty factual finding of the district court and coercion of the police witness, yet the Fourth Circuit affirmed the sentencing court by stating Lee continued to deny the truth. (per curiam opinion at p.5.) However, the history of this matter indicates the truth is based on what the prosecution deems it to be. The history of this case demonstrates the government's truth is based on shoddy investigation and no follow-up investigation. Even giving the government the benefit of the doubt, that they were ignorant of the discrepancy between red and blue in the report; they had knowledge to correct the faulty supposition when the taskforce officer testified according to the fact in the report. Additionally, the government could have

acceded to the sentiments in the post sentencing motion. See, (App. 108.) The government has failed to acknowledge the truthful revelation.

Lee relying on the police report is not tantamount to shirking responsibility. A petitioner's counsel may proffer good faith legal arguments. Using discovery provided by law enforcement is not a failure to accept responsibility. If that is the appropriate practice going forward then the practical effect is an evisceration of the seminal ruling in *Brady v. Maryland,* (infra) regarding dissemination of exculpatory information. The government should not circulate to the defense, ostensibly favorable information for the accused, that the government believes is false. In this matter the government should have extrapolated that the petitioner would have been accused of contemptuous behavior when he relied on said information to object to the Guidelines enhancements. Fundamental fairness is not allowing a tautology wherein the government has a win-win situation to the defense's lose-lose situation.

II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THE SIXTH AMENDMENT WHICH REQUIRES DEFENDANTS TO: HAVE IMPARTIALITY; HAVE COMPULSORY PROCESS; BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; AND HAVE ASSISTANCE OF COUNSEL.

Reliance on Discovery was Misconstrued as Refuting Acceptance of Responsibility

The government distributed information that suspect number two of three, Dalton Hopkins, was seen wearing a red hooded sweatshirt and blue jeans about the time of the crime. See, (App. 119.) There is no general constitutional right to discovery in a criminal case. *United States v. Caro,* 597 F.3d 608 (4th Cir. 2010). *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct.1194, 10 L. Ed. 2d 215 (1963). However,

once discovery has been disseminated the recipient should be able to rely on its accuracy. In this matter Lee relied on discovery information to his detriment. The government changed the identifying colors listed in the police report via a testifying taskforce agent, of what Dalton Hopkins was wearing, from red to blue. Lee relied upon the information in the police report to contest identification and ultimately his presence at the "other felony." See, (App. 63-64, 119.) The district court rule against petitioner in the face of obvious information to show Lee was not fabricating what was in the police report. The sentencing court's ruling is not supported by the record. "A finding is clearly erroneous if it is illogical, implausible, or without support in the record." *United States v. Sanmina Corporation*, 968 F.3d 1107, 1116, (9th Cir. 2020) citing *United States v. Graf,* 610 F.3d 114, 1157 (9th Cir. 2010). Lee believes the evidence is in his favor; hence, the government should not have achieved the threshold of preponderance. The ruling was against Lee and also contrary to established basic human understanding. Therefore, additional back test or review is necessary to find the flaw in the system.

Federal indictments typically are the products of months if not years of investigation and surveillance. It is usual for district courts to believe the government has a deep understanding of the facts of the case being prosecuted. Hence, it may be rational to give the government attorney the benefit of the doubt vis-à-vis a testifying officer. So when a prosecutor corrects a witness the attorney is assumed to be accurate.

Here is a second fringe benefit for the government. The government did not submit into evidence: affidavits; photographs; video images or even sales receipts demonstrating four or more firearms were in fact stolen. The government's oral

assertion regarding tangible information was sufficient. Therefore the district court was left to surmise that the party closest to the jury box was accurate again. Lasting remnants of: the inertia of the presumption of reasonableness at the appellate level is propelling this faulty ruling. It is difficult to argue no such vestiges of presumption exist when the system failed to catch abject errors like the: numbers of persons at a crime scene; numbers of firearms taken from multiple crime scenes; and color discrepancies in suspects' clothing. Subliminal impartiality is ubiquitous in general society. However, when direct evidence of such is apparent and egregious, in the courtroom setting, we should screen it out of our system of jurisprudence.

Lee's reliance on federal discovery was misconstrued as refuting acceptance of responsibility. "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazards of surprise concerning refutation of the very pieces of evidence which he disclosed to the State. *Wardius v. Oregon*, 412 U.S. 470, 476, 93 S. Ct. 2208, 2213, 37 L. Ed. 2d 82 (1973). The Oregon state due process clause of its own force does not require state to adopt discovery procedures for the benefit of criminal defendants, but in the absence of a strong showing of state interests to the contrary, any discovery procedure adopted must be a two-way street. *Wardius* is instructive that reciprocal discovery is required by fundamental fairness. *Wardius* also rebukes the abject unfairness of subjecting a party to surprise morphing of the evidence. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in

which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for (a rule) which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id.* 2211- 2212, citing *Williams v. Florida*, 399 U.S. 78, 82, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). In *Williams* this Court emphasized, the constitutionality of such rules might depend on the reciprocity to the parties. This Court in *Wardius* held in the absence of fair notice, to the defense, due process could not consistently be achieved. In the matter at hand, it was a surprise to Lee that colors diametrically opposed like red and blue would be accepted as interchangeable at a sentencing hearing.

The action of the government at the sentencing hearing is antithetical to due process. Color is what the prosecutor prompted or coerced the testifying witness to alter. Hence, the government ignored the fact that the report was not formally revised to show the true color the government believes it should be. See, (App. 64.) Lee was ambushed by the surprising revelation from the witness stand. Regardless of the limited application of the rules of evidence at a sentencing hearing, we should not move the proverbial goal post i.e., the fundamental tenet of notice and opportunity to be heard, in order to appease the prosecution. Such execution would result in an abomination of due process.

Secondly, the ruling placed Lee in the precarious position to prove a statement or theory to be wrong or false when the government will invariably have

the last binding word. Thus the government may always adjust "static" facts once the data has been relied on by a defendant, to contort them to work against the same defendant. Lee is in a poker game wherein the prosecution has an absolute right to always conceal their cards until played. Given the lenient application of the rules of evidence during sentencing hearings, a defendant has a low probability of demonstrating abuse. Subsequently, the unbalanced poker game is perpetuated, unintentionally, at the appellate level by the presumption of reasonableness. Sentences within the advisory guideline range are presumptively reasonable. *Gall v. United States*, 552 U.S. 38, 40, 128 S. Ct. 589, 591 (2007), *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007).

By way of explanation Lee posits the appearance of partiality is vivid when one side is allowed to be selective with the facts. Here, only two firearms were recovered from the vehicle check. Lowery fled with a backpack. JA 122. The government's recital of the facts fails to mention that the two additional firearms should have been at the scene of the vehicle check; perhaps because that information is bad for the government. Remember, the government's theory is no break occurred in the over 24 hours of alleged criminal behavior. Therefore all firearms reported stolen should have been at the scene when Lee was arrested on March 26, 2018. However, the government is benefiting from the "one continuous chain of event theory," to support the claim Lee was at the fire-station larcenies. To the extent the government is correct; it is implicit that Lowery had the two additional firearms in the backpack he fled with. Therefore, Lowery had actual

possession and control over the firearms he stole for the purposes of resale. JA 122. The opposite view is at least one break occurred in the approximately 24-hour escapade. Hopkins and Lowery stole the firearms. They then engaged Lee in order to make a sale to him from one of the guns in his backpack. As social beings the three scurried-off to a neutral place to socialize, brag and boast. Lee was not present at the scene of the crime, though he might have known the firearm he purchased was stolen. Being a mere purchaser for value Lee did not have actual possession of the stash of weapons, Lowery was in possession of them. Upon the arrival of the police Lee attempted to get hid of his firearm; Lowery fled with the backpack. In either iteration, the story is hazy and gray as to who did what. Lee contends to deduce a viable narrative that is pure white or jet black is demonstrating superior knowledge and perception or abject partiality. This is akin to supplementing facts not interpreting facts on the part of the government. The prosecution led the witness to alter his testimony. That simple act imputed malice into an innocuous reliance on police document.

Acceptance of Responsibility in Other Jurisdictions

While the Fourth Circuit did not grant Lee the relief he requested other appellate courts might have. The several circuits' nonuniform application of this policy should now be encapsulated in case law by this Court. This way Lee's fate would not be left to the discretion of the prosecutor. The government's failure to disclose the fact that the heroin found in the defendant's bedroom was actually owned by his cousin was error. *United States v. Johnson,* 592 F.3d 164 (D.C. Cir.

2010). Case was remanded for the court to make a determination whether the allegation that the government's chief witness, a DEA agent, had falsified a report in another case should have been made known to the defendant under *Brady*. *United States v. Dimas*, 3 F.3d 1015 (7th Cir. 1993) (per curiam). The facts are similar to Lee's issues; therefore the results should be the same.

In this matter the prosecution sought successfully to deny admission of the favorable information. Thus a *Brady* violation is afoot. Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution. A witness's good faith does not render a *Brady* violation any less material. *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996). Similar to the facts of *Brady*, the trial court passed upon admissibility of evidence which figured into issue of guilt. In this matter the evidence influenced punishment, due to Lee's supposed involvement in the other felonies. For the district court found Lee was present at the other felonies, before voiding Lee's acceptance of responsibly which had been established by the United States Probation Officer. See, (App. 146-147.)

Again, Petitioner maintains the several circuits show contempt to such manipulation of evidence. It was error for the government not to disclose to the defense the fact that one of the government's witnesses had been threatened, since that fact would have been relevant to the credibility of the witness. *United States v. O'Conner*, 64 F.3d 355 (8th Cir. 1995) (per curiam). It is the Food and Drug

Administration's duty in a criminal trial to disclose the contents of Investigational New Drug applications that bear on the safety of the drug a defendant is charged with unlawfully dispensing. *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995). Case remanded to the district court to conduct an in *camera* inspection and make appropriate findings as to whether the PSR of the government witness contained any *Brady* or *Giglio* material. *United States v. Carreon*, 11 F.3d 1225 (5th Cir. 1994). Lee contents there is no finding of reasonableness of like sentences in other circuits and to be consistent his sentence should be overruled.

Presumption of Reasonableness should not be Warped

The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma *Patterson v. New York*, 432 U.S. 197, 227, 97 S. Ct. 2319, 2335, 53 L. Ed. 2d 281 (1977). The glaring error is that the report list Hopkins as wearing a red hooded sweatshirt and blue jeans. See. (App. 119.) The color is contrary to the final evidence proffered by the government at sentencing. Additional facts came to light after the sentencing hearing. See (App. 108-133.) The prosecution witness was allowed to change his testimony while on the witness stand. Yet, the Fourth Circuit admonished Lee for proffering adulterated information. (Unpublished Opinion p.5.) And according to the Fourth Circuit because he maintains this denial, his sentence is rightfully affirmed. The presumption of reasonableness doctrine of *Gall* and *Rita* is not a safe haven for flawed sentences. If the empirical evidence was not blatantly apparent this case

would be frivolous. Because the empirical evidence is exceedingly obvious, this case is an awakening of how a presumption may be used to obfuscate reality and stymie due process.

The government's position is to continue to advocate for the temporary and selective manipulation of these colors at selected times. Those initiated in law view the action rightfully as antithetical to due process. Fundamentally, it is unfair to be given the privilege to: create a police report; disseminate said police report knowing other would rely on it. Then at a future date shirk the duty to revise or supplement said police report of any discrepancy. However, appear in court and use tenor or tone to ask a witness the same question until said witness complies with the questioner's "correct" answer.

Lee agrees that "federal judges should be accorded ample discretion in determining how best to conduct the voir dire" and in the instant situation, sentencing hearing, and other matters closely fettered to specific facts of the case. *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981). *United States v. Barber*, 80 F.3d 964, 967 (4th Cir. 1996) (noting that voir dire "must be committed to the good judgment of the trial judge whose immediate perception determines what questions are appropriate for ferreting out relevant prejudices"(internal quotations omitted)). *Caro* at 614. Lee's contention regards the recourse for him, because difference between the color red and the color blue is dispositive in identifying an individual. Notwithstanding the ruling the sentencing court made which was subsequently affirmed by the Fourth Circuit, a mistake

regarding color of clothing is of great import. No matter a prosecutor's outstanding history with knowledge of the facts of their case, a judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual. *Flowers v Mississippi*, 139 S. Ct. 2228, 2244, 204 L. Ed. 2d 638 (2019). The issue is that the difference and significance is blatantly obvious to most observers except for the prosecutor and judge. In this matter the district court might have been influenced by Hopkins' PSR which he gleaned information from before the date of the sentencing hearing. The district court could have been so influenced by the extraneous confidential document that relevant evidentiary data in the instant case was drowned out by the sentencing court's prior readings. It is well settled impartiality is demonstrated when a jury deliberates only on matters appropriately entered into evidence. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 879. Lee contends Impartiality is demonstrated when the hearing judge make its rulings based on a significant and determinative "extrajudicial factor." *Liteky v. United States*, 510 U.S. 540, 554-555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994). An extrajudicial source is not the only basis to demonstrate bias or prejudice. A ruling might be so extreme as to display clear pervasive bias. *Davis v. Board of School Comm'rs of Mobile County*, 517 F.2d 1044, 1051 (CA5 1975), Cert. denied, 425 U.S. 944, 96 S. Ct. 1685, 48 L.E d. 2d 188 (1976).) In this matter the determinative information was a PSR of a defendant named in another bill of indictment. To keep hallowed the constitutional intent of the framers of the United States Constitution we must be vigilant that all defendants shall receive the same

level of due process. In practice the theory might not always come to fruition. However, when the discrepancies are tantamount to reversing the colors of our flag, the blue background of the white stars are now red and the red stripes are now blue, such a sea-change should be met with opposition from all corners of the judicial system.

The Ruling will Negatively Influence the Attorney-client Relationship

To aid in the pursuit of impartiality an officer of the court has a duty to be forthright with the sentencing court when presenting live testimony. Secondly, Petitioner has a right to be silent even with his own defense attorney. The current affirmed decision pressures Petitioner to be a witness against himself vis-à-vis with his attorney and also the government. The result of the lower courts' ruling indicates the duty to be forthright was placed on Petitioner and the government was absolved of its responsibility to be candid with the district court.

The errant ruling creates a paradigm shift and initiates a divergence in the attorney-client relationship for it places pressure on defense counsel to be a fact-finder between him and his client. This notion creates uncertainty in the application of the privilege. "The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussion will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is

little better than no privilege at all. *Upjohn Company v. United States*, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this matter the Fourth Circuit's decision is unreasonable for it cannot withstand a constitutional critique.

During a video recorded police sting-operation a prosecutor may view an actual crime in progress. A criminal defense attorney is never at the scene of the crime while it is taking place. They rely on police reports, body-worn-camera video or statements from witnesses, including defendant. Secrecy is the privilege of the defendant. In an appointed matter there might be no time to overcome lack of trust, so defendant may never disclose full details. The beauty of our system is, the government has the burden of proof in a criminal trial. To that aim it places the burden on a large national investigative conglomerate of agencies under the DOJ banner. They are able to gather, sieve through, and decide what to disseminate into the stream of discovery.

The crux of the matter concerns whether the accused in a criminal matter can maintain his right of confidentiality and still enjoy the benefits of his right to counsel. All rulings in the instant matter tend to support the idea that counsel should not have taken a position based on the discovery evidence. It implies counsel should have demanded disclosure of Lee's secret on whether he was at the scene or not, in order to lodge an argument against the guideline enhancements. "The right to counsel "has been accorded... not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 145, 126 S. Ct. 2557, 2562, 165 L. Ed. 2d 409 (2006). citing *Mickens v.*

Taylor, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). If so, the probability of Lee obtaining a fair sentence as compared to a non-defendant, like Hopkins, who asserts an implausible narrative, is low. If a trial is unfair the Sixth Amendment has been violated. Hopkins and the government purport as if what happened to the other two alleged firearms and the backpack worn by Lowery at the scene before he fled played no role in counting up to four weapons. Yet the premise of their contention is for over 24 hours the three did not change clothing or stop at any other place. If so then Lowery should have the other two stolen firearms. Federal cooperating witnesses and the government should not be given deference in framing nonsensical fact-patterns at hearings.

The sentencing court should have assessed the credibility of the prosecutor and her reason for striking law enforcement testimony and inserted her own. *Lamon v. Boatwright*, 467 F.3d 1097, 1101 (7th Cir. 2006). Otherwise the government is allowed to warp its own witness's narrative with illogic regarding identifying colors.

Prudence by the government attorney would have complied with the current constitutional requirement of notice and opportunity. The irony of this case is Lee was first rewarded for acceptance of responsibility then punished for his reliance on what the government put forth as being reliable evidence. Normally such acclaim by the government about its discovery evidence is taken as empirical data. In this case the government assertion is reliable until it does not suit the government's purpose. Lee is left with the impression he has to play fair and the government

does not. The time line of relevant tenets is as follows: color confirmation-the dawn of time (blood is red and the sky is blue); due process-Kings John's Magna Carta; attorney-client privilege-Sixteenth Century; then the Model Code of Evidence (circa 1942) Federal Rules of Evidence – circa1968 codified in 1975. Hence, the lenient evidentiary standard of sentencing is not as long-standing nor does it out rank the visual difference in color or the attorney-client privilege.

The Fourth Circuit's position of unmitigated reliance on the presumption of reasonableness doctrine is tantamount to the old way of viewing the sentencing guidelines as mandatory. The blind adherence to a presumption of reasonableness in the face of: approximately four guns; and cajoled witness testimony that is contrary to a police report, is a skewed view of impartiality. If this Court adopts the lower courts' ruling it will send a message to both parties that the government may game the system and proffer unreliable testimony to the sentencing court.

The height of double-standard is to seemingly condone witness influencing while punitively sanctioning a defendant for relying on what the law enforcement gave to him and then his counsel relied on it. This type of separate but equal system is did not work for Lee.

CONCLUSION

Uniformity is necessary to guarantee constitutional protections at the sentencing phase of non-capital defendants. Otherwise we have a system wherein the government may move the target once a defendant has made his mark. At present the history of this case reveals a system wherein defendants are in a precarious situation for their fate rest on whether the government will change

evidence at the sentencing hearing. And whether the district court will use evidence they had neither notice of nor opportunity to prepare a defense against.

Based on the foregoing reasons, arguments and authorities, Petitioner hereby respectfully requests the Supreme Court to grant a *writ of certiorari*, and reverse the judgment and sentence in this case.

Respectfully submitted,
This 16th day of April 2021

By Counsel

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