CASE NO. _____
IN THE SUPREME COURT OF THE UNITED STATES

TERRIS CHANLEY BAKER	**PETITIONER**
v.	
UNITED STATES OF AMERICA	**RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether character evidence dated after the conclusion of a conspiracy is probative of knowledge under Federal Rule of Evidence 404(b)?

II. What procedure does the Sixth Amendment mandate a district court follow upon the government's denial of a defendant's request for a federal agent to testify at trial pursuant to regulations promulgated in accordance with *U.S. ex. Rel. Touhy v. Ragen*, 340 U.S. 462 (1951)?

III. Whether it is unconstitutionally coercive for a district court to state that it will take a defendant into custody if he continues to diligently pursue his request for new counsel?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Terris Chanley Baker

Respondent/Appellee/Plaintiff – United States of America

RELATED CASES

United States of America v. Terris Chanley Baker, et al., No. 4:20-cr-00342-BYP-2, U.S. District Court for the Northern District of Ohio. Judgment entered April 18, 2023.

United States of America v. Terris Chanley Baker, No. 23-3336, U.S. Court of Appeals for the Sixth Circuit. Judgment entered June 25, 2024.

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PETITION FOR WRIT OF CERTIORARI

Terris Chanley Baker, by court-appointed counsel, respectfully requests that a Writ of Certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States of America v. Terris Chanley Baker*, No. 23-3336, filed on June 25, 2024 and attached to this Petition as Appendix B.

OPINIONS BELOW

Mr. Baker's appeal to the Sixth Circuit Court of Appeals was taken from the Judgment entered following his convictions for conspiracy to commit offenses against the United States, aiding and abetting theft of government property, aiding and abetting false claims against the United States, and conspiracy to commit money laundering. *See* Appendix A. On June 25, 2024, the Sixth Circuit issued an unpublished opinion affirming Mr. Baker's conviction and sentence. *See* Appendix B. This petition for a writ of certiorari now follows.

JURISDICTION

The Sixth Circuit issued an unpublished opinion affirming Mr. Baker's convictions and sentence on June 25, 2024. *See* Appx. B. Mr. Baker invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI: "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 defense.

5 U.S.C. § 301. Departmental regulations: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

26 U.S.C. § 7805(a). Rules and regulations: "Authorization.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

STATEMENT OF THE CASE

In July 2020, Terris Chanley Baker and two co-defendants, Brandon R. Mace and Robert J. Rohrbaugh II, were indicted before the United States District Court for the Northern District of Ohio and charged with four counts: (1) conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371; (2) aiding and abetting theft of government property in violation of 18 U.S.C. §§ 641 and 2; (3) aiding and abetting false claims against the United States in violation of 18 U.S.C. §§ 287 and 2; and (4) conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). (R. 1, Indictment, PgID ## 2–25.)

Mr. Baker appeared before the district court on July 22, 2020, at which time he was granted pretrial release pursuant to a $25,000 unsecured bond. (R. 19, Appearance Bond; R. 20, Order Setting Conditions of Release.) Mr. Mace pled guilty to three counts of the Indictment on September 17, 2020. (R. 36, Plea Agreement.) On September 24, 2020, Mr. Baker was charged by Superseding Indictment of the same four counts as charged by the Indictment. (R. 37, Superseding Indictment, PgID ## 234–58.) Mr. Rohrbaugh was also charged with those same four counts, plus an additional fifth count. (*Id.* at PgID # 258–59.)

Count 1 alleged Mr. Baker to have participated in a conspiracy between January 2015 and September 2015 "(i) to file and cause to be filed with the IRS federal income tax returns containing false, fictitious, and fraudulent claims for tax

refunds in the names of various entities and (ii) to obtain and attempt to obtain by means of false claims fraudulent tax refund checks for the enrichment of the co-conspirators and others." (*Id.* at PgID # 235 ¶ 7.) Counts 2 and 3 charged Mr. Baker with aiding and abetting the presentation of an allegedly false, fictitious, and fraudulent tax refund check to a financial institution and receiving monies therefrom, each on July 15, 2015. (*Id.* at PgID ## 251–53, ¶¶ 12–15.) Count 4 alleged Mr. Baker to have participated in a conspiracy between June 2015 and April 2016 to launder the monetary proceeds derived from the allegedly false, fictitious, and fraudulent tax refund. (*Id.* at PgID ## 253–58, ¶¶ 14–16.)

On April 1, 2022, the United States filed a Federal Rule of Evidence 404(b) notice of intent to introduce "a consensually recorded conversation between [Mr. Baker and Mr. Mace], which occurred in November 2017[.]" (R. 88, Notice of Intent to Introduce Evidence Under 404(b), PgID # 769.) Though the call was recorded by Mr. Mace as a government informant nearly nineteen months after the conclusion of the second conspiracy alleged in the Superseding Indictment, the government alleged the call to constitute *res gestae* evidence and, alternatively, "highly probative" Rule 404(b) evidence. (*Id.* at PgID ## 769–72.)

Mr. Baker's joint jury trial with Mr. Rohrbaugh began on April 11, 2022 and lasted ten days. (R. 123–133, Transcripts of Jury Trial Proceedings.) At trial, defense counsel orally objected to the admissibility of the November 2017

recorded phone call. The district court overruled counsel's objection and permitted the call to be played into evidence on day four of trial. (R. 123, Transcript of Trial Day 1 of 10, at PgID ## 1740–43; R. 100, Order, at PgID # 928; R. 127, Transcript of Trial Day 4 of 10, at PgID ## 1363–65; R. 173, United States Sentencing Memorandum, at PgID #4242.)

On day six of trial, counsel for Mr. Rohrbaugh informed the Court that he was "trying to subpoena [Special Agent John O'Boyle] from the IRS" to testify about certain recordings presented at trial, the chain of custody of those recordings, and about actions taken by Mr. Mace as an informant. Counsel for Mr. Baker noted that an inquiry into these topics would also serve Mr. Baker's defensive interests. (R. 129, Transcript of Trial Day 6 of 10, at PgID # 3305–3308; *see* R. 130, Transcript of Trial Day 7 of 10, at PgID # 3514.) In opposition, the government argued that the defense had failed to provide a written affidavit in support of its subpoena of a governmental official as required by the Department of Justice's "*Touhy* regulations," promulgated under 28 CFR Ch. I, Pt 16, Subpart B, *et seq*. (R. 129, Transcript of Trial Day 6 of 10, at PgID. ## 3305–07.)

Although the district court later concluded that the defense had "made a proffer" as to the contents of the testimony it sought from Mr. O'Boyle, the DOJ declined to authorize Mr. O'Boyle to testify on procedural, evidentiary, and privilege grounds. (R. 130, Transcript of Trial Day 7 of 10, at PgID # 3510,

3555–58.) Upon the DOJ's denial, the district court did not conduct any further inquiry as to the propriety of the subpoena sought by the defense or whether the DOJ's denial was appropriate; it instead required the trial move forward without determining whether it would compel Mr. O'Boyle's testimony. (*See id.*)

On April 22, 2022, the jury found Mr. Baker guilty of all four counts charged in the Superseding Indictment. (R. 113, Jury Verdict Forms.) Mr. Baker was not taken into custody upon his conviction; he was instead permitted to remain on release until sentencing pursuant to the conditions of his unsecured bond. (R. 133. Transcript of Trial Day 10 of 10, at PgID ## 3835–36.) On March 28, 2023, eleven months later, defense counsel moved to withdraw. (R. 199, Motion to Withdraw as Counsel, at PgID # 4404.)

On April 6, 2023, Mr. Baker appeared before the court for sentencing. (R. 251, Transcript of Sentencing.) Though the court initiated a colloquy with Mr. Baker as to the basis for his request for new counsel, the district court warned Mr. Baker midway through its colloquy that if he required the court to determine whether he should be awarded new counsel, his bond would be revoked, he would immediately be taken into custody, and he would be required to reappear at the "next available scheduling for a sentencing," seemingly regardless of whether he was constitutionally entitled to new counsel. (R. 251, Transcript of Sentencing, at PgID ## 5462–63.) In response, Mr. Baker promptly withdrew his request for new

counsel; he was subsequently sentenced to 98 months of imprisonment. (R. 211, Judgment, at PgID # 4511.)

Mr. Baker appealed his convictions and sentencing to the Sixth Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3741. The Sixth Circuit affirmed Mr. Baker's conviction and sentencing by way of unpublished opinion on June 25, 2024. *See* Appx. B.

REASONS FOR GRANTING THE WRIT

I. Character evidence dated subsequent to the conclusion of a conspiracy is not probative of knowledge.

"Rule 404(b) provides that '[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.'" *United States v. Barnes*, 822 F.3d 914, 920 (6th Cir. 2016) (quoting Fed. R. Evid. 404(b).) "Such 'evidence may be admissible for another purpose,' however, 'such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" (*Id.* (citing Fed. R. Evid. 404(b)(2).)

In the Sixth Circuit, "[t]rial courts employ a three-part test to determine the admissibility of 404(b)(2) evidence. First, a court determines, subject to clear error review, "whether there is sufficient evidence that the crime, wrong, or other act took place." *Barnes*, 822 F.3d at 920 (citing *United States v. Mack*, 729 F.3d 594, 601 (6th Cir. 2013)). Second, a court determines, subject to de novo review,

"whether evidence of that conduct is offered for a proper purpose, *i.e.*, 'whether the evidence is probative of a material issue other than character.'" *Id.* In making this determination, a court must analyze whether "(1) 'the evidence is offered for an admissible purpose;' (2) the purpose is material, or 'in issue'; and (3) 'the evidence is probative with regard to the purpose for which it is offered.'" *United States v. Jaffal*, 79 F.4th 582 (6th Cir. 2023). Third, a court determines, subject to abuse of discretion review, "whether any risk of unfair prejudice substantially outweighs the evidence's probative value." *Id.*

Mr. Baker was charged with participating in two conspiracies, the final of which concluded in April 2016. (*See* R. 37, Superseding Indictment, PgID ## 234–53.) Nonetheless, both the district court and the Sixth Circuit concluded that Mr. Baker's November 2017 telephone call with a government informant was admissible as probative of whether Mr. Baker's knowledge of the charged conspiracies. (*See* R. 100, Order, at PgID # 928.) This conclusion was in contradiction with both Sixth Circuit precedent and the precedent of at least one other Circuit.

In *United States v. Cowart*, 90 F.3d 154, 158 (6th Cir. 1996), the Sixth Circuit analyzed in a drug trafficking conspiracy case whether the district court erred by admitting evidence that a defendant had been convicted for similar drug crimes subsequent to the conclusion of his charged conspiracy. Upon review, the

Sixth Circuit held the issue to have been waived but clarified that "rarely will an event that occurred subsequent to the charged crime be probative of motive, knowledge, or intent" of a conspiracy alleged to have concluded before the occurrence of the subsequent event. *Id.*

Similarly, in *United States v. Boyd*, 595 F.2d 125–26 (3d. Cir. 1978), the Third Circuit held that the district court had erred by admitting evidence of discussions between the defendant and an undercover agent that had occurred on three dates after the expiration of the conspiracy charged in the indictment. "The government's alternative theory of admissibility, which the court accepted, was that Goff's evidence of a [s]ubsequent crime is relevant to the existence of the [p]rior conspiracy to manufacture methamphetamine. The logic of showing prior intent or knowledge by proof of subsequent activity escapes us." *Id.* at 126.

On the other hand, the First Circuit in *United States v. Fields*, 871 F.2d 188, 197 (1st. Cir. 1989) held that "[e]vidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of an alleged conspirator, 'even though they might have occurred after the conspiracy ended.'" *See also United States v. Grady*, 88 F.4th 1246, 1258 (8th Cir. 2023) (holding post-conspiracy conduct to be probative of a defendant's knowledge and intent).

In its opinion denying Mr. Baker's appeal, the Sixth Circuit held that his November 2017 phone call with a government informant was admissible because he had placed his "knowledge at issue when claiming to be an unwitting participant in or a victim of the wrongdoing." (Appx. B, Panel Decision, at 8.) In support, the court cited *United States v. Jobson*, 102 F.3d 214, 221 (6th Cir. 1996) for the position that "prior bad acts are not admissible to prove defendant's knowledge unless defendant places his mental state at issue[.]" (*Id.*)

But the Sixth Circuit's citation to *Jobson* demonstrates the issue—that it failed to consider that the November 2017 phone call occurred subsequent to the charged conspiracy in analyzing whether the call was probative of an admissible purpose under Rule 404(b). This Court should grant certiorari to resolve the conflict between Circuits and give guidance on the topic of whether conduct that occurs subsequent to a charged conspiracy is probative of a defendant's prior knowledge.

II. The Sixth Amendment requires a district court to conduct a Sixth Amendment analysis when the government declines to permit a federal agent to testify pursuant to a *Touhy* regulation.

The Sixth Amendment provides that the "'accused shall enjoy the right' to, *inter alia*, 'have compulsory process for obtaining witnesses in his favor.'" U.S. Const. amend., VI. The Sixth Amendment is violated when the witness testimony

precluded from trial "would have been both material and favorable to [the] defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

Running parallel to the guarantees of the Sixth Amendment, however, "[f]ederal agencies are authorized by 5 U.S.C. § 301 to create regulations governing the conditions under which their employees may testify concerning their work." *United States v. Lyimo*, 574 F. App'x 667, 669 (6th Cir. Jul. 28, 2014). "Often called '*Touhy* regulations,' procedures for subpoenaing employees of government agencies are contained in the Code of Federal Regulations." *Id.* (referencing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)). A federal agency can decline to permit its employee to testify pursuant to the terms of its *Touhy* regulations; and a defendant cannot "raise his constitutional claims challenging the federal regulations" unless he first "attempt[s] to comply with the required procedures." *Lyimo*, 574 F. App'x at 671.

But where proper procedure has been followed, or where an attempt to follow proper procedure has been made, and the government nonetheless declines to permit a federal employee to testify at trial, "the [g]overnment's claim of privilege works in concert with the normal Sixth Amendment analysis. That is, '[o]nce a defendant demonstrates that a witness can provide testimony material to his defense, then the government's interest in its evidentiary privilege must give

way.'" *United States v. Ritchie*, 734 F. App'x 876, 879 (4th Cir. May 25, 2018) (citing *United States v. Rivera*, 412 F.3d 562, 569 (4th Cir. 2005).

"The proper course … 'is for the district court to order production of the evidence or the witness and leave the [g]overnment the choice of whether to comply with that order.'" *Id.* at 879 (quoting *United States v. Moussaoui*, 382 F.3d 453, 471 (4th Cir. 2004).) "If the evidence is material to the defense, then the government must provide the evidence or, in most cases, dismiss the prosecution." *Rivera*, 412 F.3d at 570; *see also United States v. Fuentes-Correa*, Crim. No. 13-71, 2013 WL 588892, at *4–5 (D.P.R. Feb. 13, 2013)("when the *Touhy* procedures are followed and the [g]overnment refuses to produce the requested material, the courts usually have analyzed the resulting motion to compel under Rule 17 or the substantive law of privilege[.]").

Mr. Baker attempted to comply with the applicable IRS and DOJ *Touhy* regulations. Despite having done so, the government declined to permit an IRS Special Agent to testify at trial, and the district court did not thereafter conduct any form of Sixth Amendment analysis to determine whether the testimony sought from the IRS Special Agent was material to the defense—but instead permitted the trial to proceed to jury deliberation without the testimony of the Special Agent. On appeal, the Sixth Circuit held that "[i]t might have been preferable for the district court to have analyzed the *Touhy* regulations, heard the parties' arguments

regarding defense counsel's compliance with them, and issued a formal ruling[,]" but that "it was not an abuse of discretion" for it to not have done so because Mr. Baker's counsel allegedly failed to place the court on sufficient notice of its need to do so. (Appx. B, Panel Decision, at 14.)

There is a dearth of case law from which defendants and lower courts can look to determine how to proceed once a defendant complies with a federal agency's *Touhy* regulations and the government thereafter declines to permit an agent to testify at trial. This lack of case law and guidance has left defendants vulnerable to Sixth Amendment violations and courts without the understanding of how to proceed once the government invokes *Touhy*. The intersection between *Touhy* regulations and the Sixth Amendment is ripe for review and this Court should take the opportunity to provide lower courts procedural guidance on this topic.

III. A district court abuses its discretion by stating that it will detain a defendant who asserts his Sixth Amendment right to counsel.

"Once a defendant brings 'any serious dissatisfaction with counsel to the attention of the district court,' the court has a duty to investigate into the source and nature of that dissatisfaction 'regardless of whether the attorney is court-appointed or privately retained.'" *United States v. Hudson*, 2023 WL 1463701, at *5 (6th Cir. Feb. 2, 2023) (quoting *Benitez v. United States*, 521 F.3d 625, 632, 634 (6th Cir. 2008)). A district court "may grant a motion to withdraw or for substitute

counsel if there is a showing of good cause upon such further inquiry." *Benitez*, 521 F.3d at 632, 634.

Mr. Baker had been released on bond during the entirety of his criminal prosecution. When Mr. Baker moved for new counsel at his sentencing, however, the district court cautioned that "if [it] were put the task of evaluating beyond the time [it had] spent on [his motion] already," it would remand Mr. Baker to custody, that he would possibly be required to hire his own attorney (despite being indigent), and that, regardless of whether he had a right to new counsel, his sentencing would be reset for "the next available scheduling[.]" (*See* R. 251, Transcript of Sentencing, at PgID ## 5462–63.) In doing so, the court involuntary compelled Mr. Baker into withdrawing his request, which inherently precluded him from fully executing his Sixth Amendment right to counsel.

In its opinion denying his appeal, the Sixth Circuit held that "the district court's statement that it would take him into custody if he maintained his desire for new counsel was not coercive. The district court was essentially informing Baker that he would be taken into custody that day either way." (Appx. B at 16.) In holding this way, the Sixth Circuit ruled that a district court's warning that it will take a defendant into custody were he to diligently continue to pursue his Sixth Amendments right to counsel to not constitute coercive conduct in violation of the Sixth Amendment. This conclusion of law is highly problematic and poses to

erode the Sixth Amendment in favor of district court efficiency. Fundamental fairness and the integrity and public reputation of our judicial system require this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Mr. Baker respectfully asks this Court to grant his petition for the issuance of a writ of certiorari for the purpose of vacating his convictions and sentence.

Respectfully submitted,

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