No. 25-5900

IN THE SUPREME COURT OF THE UNITED STATES

LATISHA ANDERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

D. John Sauer-Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW,
Washington, D.C. 20530
(202) [redacted]
Email: [redacted]@usdoj.gov

Denzil H. Forrester
Attorney for Petitioner
3325 Washburn Avenue, Ste. 103
Charlotte, NC 28205
(704) 632-9992
denzilfesq@aol.com

TABLE OF CONTENTS

Page

Statutes and Other Authorities:

TABLE OF AUTHORITIES Page

INTRODUCTION

This Court should grant Certiorari review under Supreme Court Rule 10(a) because the Fourth Circuit: (1) entered a ruling in conflict with the Fifth Circuit on an important matter, *See* Pet. 1, 27 and (2) that ruling is in conflict with a finding the Fourth Circuit made in a companion case to this instant matter, as to the same or similar testimony from two non-defendant witnesses. Petitioner finds that to be, "far departed from the accepted and usual course of judicial proceedings." Facially, it is antithetical to federalism for the lower court's findings to supersede the federal circuit court's dicta on the same matter. Therefore, this Court's supervisory power is requested.

In its Memorandum the United States, Respondent, characterizes this petition as being tantamount to the issues in *Hunter v. United States*, cert. granted, No. 24-1063 (Oct. 10, 2025). That summary would minimize the magnitude of the issues of this instant matter. *Anderson* and *Hunter* are similar regarding exceptions to appellate waivers. *Anderson* seeks to enforce one of the current exceptions to appellate waivers, i.e., prosecutorial misconduct, while *Hunter* seeks to expand the limits of the waivers. The crux of *Anderson*, this instant matter, concerns deep seeded fundamental constitutional issues including the following: a violation of the equal protection clause by reverse incorporation under the Fifth Amendment, specifically foreseeable consequential damages from a breach of contract such as in the seminal case English case of, *Hadley and Anor v. Baxendale and Ors*, 156 Eng. Rep. 145 (1854). In the instant matter the Government held Petitioner responsible for the fallout from her alleged breach and not its own actual breach of the plea

agreement. Notwithstanding, the Government acknowledges that Petitioner admitted she had been confused and denied lying during her testimony at codefendant's trial. *See* Pet. 12.

The intent of the parties regarding prosecutorial misconduct is clear to litigants familiar with Federal Rules of Criminal Procedure Rule 32. No extrinsic sources were necessary to interpret the language of the plea agreement. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 135 S.Ct. 926, 190 L.Ed.2d 809 (2015). By inverse inferences the context of the provision should have been understood. The Government is not allowed to manipulate testimony by cross-examination of Petitioner or of its own law enforcement witness.

Another fundamental constitutional concern in this matter touches on judicial review as in the seminal case of *Marbury v. Madison*, (1803). In this case the Federal Circuit Court failed to recognize the issue of federalism, nor did it attempt to interpret the contractual disagreement between the parties, i.e., breach of the plea waiver by the Government. The only breach recognized by the Fourth Circuit was allegedly by the Petitioner.

The precise issues of *Hunter*, concern, expanding the infringement on personal right to take medication and the procedural challenges regarding, a written judgment. In short, a ruling in *Hunter* might not be broad enough to give justice to the constitutional pain experienced by this Petitioner. Therefore, this matter should not be held in abeyance pending the outcome of the *Hunter* resolution.

ARGUMENT: Petitioner's Risk Of Prolonged Imprisonment Demands Legal Representation

Prosecutorial Misconduct Is A Provision In the Plea Agreement

Petitioner posits, a threshold issue and a prerequisite to the subject of the veracity of a testifying witness in this matter, is that every defendant with a risk of imprisonment has a right to legal counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. *Alabama v. Shelton*, 534 U.S. 654- 655, 122 S.Ct. 1764-1765, 152 L.Ed.2d 888. (2002). Here, Petitioner was in a similar situation to the defendant in *Shelton*. In this matter Petitioner's sentence was increased based on her testimony in a hearing she was not represented by counsel. A hearing in which the Government acknowledges it was plausible for Petitioner to be confused. *See* Pet. 12.

Petitioner views the impact of the poor performance by a prosecutor as one of multiple instances of misconduct. And such less-than-best practice impacted Petitioner's liberty interest, in the same manner a defense attorney's negligence might harm a client's case. The presumption of prejudice from attorney's deficient performance that costs a defendant an appeal applies regardless of whether defendant signed an appeal waiver. *Garza v. Idaho*, 586 U.S. 232, 139 S.Ct. 738; 203 L.Ed.2d 77 (2019). It is undisputed that prosecutorial misconduct is an exception to the appellate waiver in the plea agreement that Petitioner and the Government

signed. The issue for this Court is whether the Fourth Circuit may summarily shirk its duty to review a controversy based on that issue. Petitioner contends at a minimum the extent to which the Government may argue its conduct at trial and during the sentencing phase was not abusive, foreseeable or vindictive should be limited. Petitioner contends it was a failure in interpretive latitude by the district court to construe Petitioner's testimony as obstructive. Petitioner's maintains that those errors make this case ripe for appellate review.

A Receding Tide Exposes The Truth And Naked Swimmers

Petitioner was summoned by her codefendant's counsel into a remote trial of her codefendant by a subpoena duces tecum. That power comes from the judicial powers and is delegated to attorneys for them to issue binding orders to conduct the function of their job, to compel competent evidence for hearings. In the Federal Rules of Criminal Procedure, Rule 17, "we recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive, the President of the United States. Even so, in *Clinton* we found that the risk of harassment was not "serious" because federal courts have the tools to deter and, and where necessary, dismiss vexatious civil suits." *Trump v. Vance*, 591 U.S. 786, 806, 140 S.Ct. 2412, 2428 , 207 L.Ed 2d 907 (2020). Presidents are subject to subpoena. *Clinton v. Jones, 520* U.S. 681, 704, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997). While the Executive Branch has natural protection from subpoena due to international affairs or security risk, the indigent defendant does not. Such defendants are subject to harassment and abuse, and not

just in theory. The fact of this matter demonstrates that the Petitioner was used by Mr. Watkins' defense attorney then subjected to abusive compound questions by the Government at the trial of Kenneth Watkins. *United States v. Kenneth Watkins,* 111 F.4th 300 (4th Cir.2024). Petitioner's answers, though similar to the "purported corroborative testimony made by two separate witnesses," were then weaponized against her by the district court to enhance her sentence. *See* Pet.6. However, according to case law the Fifth Circuit would have recognized this occurrence and ruled it as judicial error. *See* Pet.7.

"Federal court may enjoin state officials to conform their conduct to federal law. *Ex parte Young*, 209 U.S. 123, 155-156, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The summary denial of Petitioner's request at the Fourth Circuit demonstrates to this Court that contrary to *Ex parte Young*, there was a failure in the federal courts that facially may not be addressed by even with a positive holding for the petitioner in *Hunter*. This instant case is comprised of the power struggle of competing judicial forces. Here the same storyline is seen as a mischaracterization by the Government but as "purported corroborative testimony" by the federal circuit. Had it not been for the fortuitous findings in Kenneth Watkins' appeal, this Petitioner would not have seen a receding of the proverbial tide. The findings in that case, by the Fourth Circuit exposed to trial counsel, the naked truth that both the Government and the district court were aware of the plausibility of the trial testimony of the Petitioner.

Similar to the landmark opinion in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), this Court held, States retained the "sovereign" power to tax

person and entities within their jurisdiction, but this power is subordinate to and may be controlled by the constitution of the United States. Noting the potency of the taxing power right, without limit or control is essentially a power to destroy and the State's power to tax had to give way to Congress's authority to charter the bank. The Petitioner finds this to be instructive, that the district courts plenary power at the trial level is subordinate to the power of the federal circuit courts as established by Congress via the Evarts Act of 1891 and by Article III of the Constitution. Though the district court may have relevance and expertise to the facts, due to closeness, as a federally chartered bank might be situated in a state; however, that relevance and expertise is subordinate to the findings and decisions of the federal circuit court. *Trump v. Vance*, at 830.

Because the admissibility of evidence is a matter of law, it falls under the discretionary function of the district court. However, that discretion prohibits the arbitrary application of rules to exclude material evidence of the defense. *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987).

The source of sentencing information is plenary. The running standard of review, presumption of reasonableness, relies on competent evidence at trial and at the sentencing phase. Because the Supreme Court generally assumes that state courts and prosecutors will observe constitutional limitations. *Trump v. Vance*, at 806, citing *Dombrowski v. Pfister*, 380 U.S. 479, 484, 85 S.Ct. 1116, 14 L.Ed.2d22 (1965). At the local level Judges should have the relevant information and expertise to ascertain the basic equation of a single drug transaction versus that of multiple

drug transactions. *Trump v. Vance*, at 823. Here law enforcement discovered Petitioner with both drugs and money. Neither the Government nor the district court pondered that discrepancy. Petitioner was to pay for the drugs with money; however, she had money and drugs on her person when stopped. Petitioner was under surveillance up to the time of her arrested, yet she had $4,500.00 on her person and drugs in her car. If a transaction is limited to one conspiracy the money is exchange for the drugs. The calling to the stand of a witness by the Government who either never knew or had forgotten the facts could not have cured the discrepancy in the shoddy drugs and money algorithm. The detective had to rely on eye contact from the prosecution's table for answers to defense counsel's questions. The facts coming to light from the Fourth Circuit in the Kenneth Watkins' appeal revealed the Government was in breach of the plea agreement well before the sentencing hearing.

However, the Government's own undisputed revelations is the bane of its theory of the case. The Government's own evidence is that Petitioner was caught with both drugs in the Versace box and $4,500.00 from Mr. Watkins during a law enforcement traffic stop on her return trip to Charlotte, North Carolina. The traffic-stop was orchestrated by case agents. Then at trial two witnesses testified, a black male in a red sports car gave a Versace box to Petitioner at a gas station. Subsequently, the proverbial tide receded when the federal circuit found the two non-defendants' testimony to be "purported corroborative testimony." The point is, this petition is distinguished from many other appellate waiver cases. Therefore,

simply remanding it back to the circuit for disposition without addressing the brightline prosecutorial violation would be an injustice because we see a reluctance on the part of the Government and the lower courts to self-regulate much less recognize when less than stellar practice is afoot. That is partially because of the standard of review which incentivizes overreliance on the findings of the district court.

The Fourth Circuit's position of 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 prosecutorial and judicial errors is a skewed view of impartiality. If this Court adopts the lower court's ruling it will send a message to both parties that the Government may cleverly manipulate the system and proffer unreliable testimony to the sentencing court. A proposition that is entirely unconstitutional. Hence, this petition for certiorari should be granted.

The Fifth and Sixth Amendment Are of Import to Petitioner's Case.

Currently, we exist in a system wherein a presumption of reasonableness cloaks all federal criminal sentences within Guidelines range. *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). The Respondent's Memorandum for the United States in its brevity seems to call for the status quo, no change to Petitioner's sentence. That would be detrimental to others similarly situated, who would suffer under the resultant mindset. In the future a district court might perceive trial testimony as obstructive, while in a companion case, reviewing similar testimony, the

federal circuit might reach a diametrically opposed finding of purported credibility. That juxtaposition would be disparaging to federalism. An appellate court's directives, like gravity, should flow downward to the lower courts. The Fifth Circuit differs from the Fourth Circuit and does not accept breach of the plea agreement as in this instant matter. *See* Pet.7.

In theory, a federal circuit court usually defers to the district courts on factual matters. The presumption of reasonableness relies on the good faith belief in the district courts to be able to perceive what is in front of it. That is because the district court is close to the relevant information and should be familiar with factual matters of a case. Afterall, before a case reaches indictment, the district courts and magistrate courts can listen to testimony before signing search warrants and the same courts preside over bond hearing via the federal magistrates. Therefore, when the far and distant, from the facts, federal circuit feels comfortable making a conclusion, it signals something is near axiomatic if not crystal clear to the federal circuit. In this matter, it indicates Petitioner's version came with the same amount of purported credibility as the other two witnesses. If any violation of discretion is detected, an abuse-of-discretion standard applies to appellate review of sentencing. *Gall v. United States*, 552 U.S. 38, 39 128 S.Ct. 586, 590, 169 L.Ed.2d 445 (2007).

Another area that is ripe for Supreme Court review is establishing a brightline regarding whether subpoenaed unrepresented defendants should be subjected to compound questions. Those are questions which are inherently complex and have an intrinsic risk of an increase in a defendant's potential sentence. There is a nook or

gap in Federal Rule of Criminal Procedure 17, which creates a convenient loophole for prosecutors. These defendants may appear in court without the assistance of legal counsel. The Government is cognizant that financially, it is less costly to punish these individuals for alleged perjurious testimony. They are temporarily unrepresented defendants awaiting sentencing. At times they are reluctantly subpoenaed to a codefendant's trial. If a prosecutor alleges discrepancy, and an accommodating district court finds specious corroborative support, an enhanced sentence will be pronounced, for those defendants. Whereas if the alleged perjury is from a non-indicted witness, the cost of a new trial or separate hearing is relatively exorbitant compared to a defendant already awaiting sentencing. A defendant indicted for perjury has the right to legal counsel. A subpoenaed defendant awaiting sentencing does not even have an attorney to remind her of the option to invoke her Fifth Amendment right, to be silent. A precedent from this Court would instruct that it is mandatory that subpoenaed defendants awaiting sentencing have defense counsel who may lodge objections to question on cross-examination. Here, the Government's cross examination was weaponized against the Petitioner at her subsequent sentencing hearing.

There should be no serious argument from the Respondent that the Government should avoid subornation of unreliable testimony from its witnesses. On that issue alone the Petitioner's signed waiver of her right to appeal should be voided because of the misconduct of the Government.

After noticing that the Fouth Circuit affirmed the credibility of two other

witnesses with similar storyline to that of Petitioner's the Government had the opportunity to withdraw its opposition to Petitioner's appeal, it did not. "It is true enough that when the Government reneges on a plea deal, the integrity of the system may be called into questions." *Puckett v. United States*, 556 U.S. 129, 142-143, 129 S.Ct. 1423, 1433, 173 L.Ed.2d 266 (2009). Petitioner now respectfully requests of this Court to acknowledge that there is a deviation in the natural order when in the same circuit, the district court and the circuit court are at odds on the same storyline. This is antithetical to a presumption of reasonableness, for it demonstrates no matter how unreasonable a ruling from the district court is, many defendants will still carry the detriment to their liberty interests. A system wherein this Petitioner remains under the control of the Bureau of Prisons, and all others with unclean hands are living some form of a regular life, is unconstitutional.

CONCLUSION

The Fourth Circuit's finding in Kenneth Watkin's appeal, undermines the integrity of the ruling at Petitioner's sentencing hearing. For the sake of federalism, this Court should grant this petition.

Denzil Forrester

Respectfully submitted
Attorney for Petitioner

D. John Sauer-Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW,
Washington, D.C. 20530
(202) [redacted]
Email: [redacted]@usdoj.gov

Denzil H. Forrester
Attorney for Petitioner
3325 Washburn Avenue, Ste. 103
Charlotte, NC 28205
(704) 632-9992
denzilfesq@aol.com