

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term 2018

Charles MENSAH,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent*

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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Appointed pursuant to 18 USC § 3006A

QUESTIONS PRESENTED

- 1) Does the trial court's refusal to grant a conspiracy defendant severance violate the Due Process Clause of the Fifth Amendment when the Government's case against the hub co-defendant includes both inflammatory ethnic character evidence and otherwise inadmissible witness bolstering?
- 2) Does the Due Process Clause of the Fifth Amendment allow a trial court to refuse to instruct the Jury on the fundamental meaning of "Beyond a Reasonable Doubt"?

Parties to the Proceeding

The Parties to the Proceeding are Petitioner Charles Mensah and Respondent, the United States of America.

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The petitioner, Charles Mensah respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on 26 March 2019.

OPINIONS BELOW

The unpublished per curiam opinion of the Court of Appeals for the Fourth Circuit in case Number 18-4160 was decided on 26 March 2019; the opinion, notice of judgment and mandate are reprinted in the appendix. Pet. App. 0001-0008.

JURISDICTION

This case arises out of an indictment in the United States District Court for the District of Maryland. The District Court had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. On 9 February 2018, the District Court sentenced Appellant Mensah upon a jury verdict of guilty to Count 1 (18 USC § 1349 /1344 - Conspiracy to Commit Bank Fraud), and substantive Count 7 (18 USC § 1344 – Bank Fraud). The convictions and sentence constituted a final judgment. Appellant timely noted an appeal. The United States Court of Appeals for the Fourth Circuit exercised review pursuant to 28 U.S.C. § 1291, affirming the conviction on 26 March 2019. This petition has been filed within 90 days of the order. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

Statutes Involved

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or 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 or public danger; nor shall any person be subject for the same offense 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.

Federal Rule of Criminal Procedure 14 Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Federal Rule of Evidence 403 Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rule of Evidence 404
Character Evidence; Crimes or Other Acts

(a) Character Evidence. (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

Preliminary Statement

There are very few cases that present even one issue requiring resolution by the Supreme Court. This case presents instances of two systemic flaws that both impact the fundamental ability of a jury to achieve justice in a criminal case.

The Federal Rules of Criminal Procedure and associated decisional law on Joinder and Severance reflect the needs of society and the judiciary for efficiency; however, efficient conviction in violation of a defendant's due process rights is constitutionally prohibited.

Petitioner is a native of Ghana. During his federal prosecution for fraud, the Jury was subjected to otherwise inadmissible testimony through witnesses and recorded statements of Petitioner's co-defendant, about the rampantly fraudulent nature of people from West Africa. Further, the only witness accusing

Petitioner of knowingly participating in the conspiracy was bolstered as a truthful witness by testimony of multiple witnesses who were cooperating against the hub-conspirator co-defendant. None of the bolstering evidence was relevant or admissible against Petitioner; however, it could not help but taint the decision-making ability of the Jury. The Supreme Court has previously ruled that questions of severance are within the discretion of the trial court (*Zafiro v. United States*, 506 U.S. 534 (1993)); however, this case presents a circumstance where the Court needs to further explain the Due Process limitations on prejudicial joinder that must inform the trial court's exercise of discretion.

The decision-making ability of the Jury was further impaired by the trial court refusal of Petitioner's request to give an instruction on the meaning of "Proof Beyond a Reasonable Doubt". While this Court has previously ruled that the Constitution neither prohibits, nor requires, trial courts from giving an instruction defining reasonable doubt (*Victor v. Nebraska*, 511 U.S. 1 (1994)), that ruling has created a conflict among the Circuits. The "presumption of innocence" and the requirement of "Proof Beyond a Reasonable Doubt" are fundamentally rooted principles in our constitutional values. Due Process is uniformly understood to

require jury instruction on the elements of crimes to ensure that Juries understand the meaning of the component parts of the crimes that have been charged against a Defendant. In a contrast that defies logical understanding, on the central standard of proof component of Due Process; there is no such uniform requirement for jury instruction. The Fifth, Sixth, Ninth and Eleventh Circuits, provide standard jury instructions on the meaning of Proof Beyond a Reasonable Doubt; while in the Fourth Circuit, the instruction is prohibited, even when requested. That conflict among the Circuits fundamentally impacts the ability of Juries to consistently render Due Process and Justice; and, presents an important question that only the Supreme Court can resolve.

Statement of the Case

The Government charged Issah Mohammed and Mohammed Kwaning [“Kwaning”] with a conspiracy to transport stolen motor vehicles beginning in January of 2013 and extending through May of 2014. Starting in March of 2014, Issah Mohammed and Kwaning added bank and wire fraud to their criminal activity and eventually involved other individuals in the scheme, many of them willing

participants. According to Issah Mohammed's testimony at trial, Kwaning would somewhere procure fraudulent checks or wires for deposit at a bank, and Issah Mohammed would recruit individuals to open accounts to receive the deposit. The fraudulent deposit would be made, and money would be withdrawn until the fraud was detected and the account was closed. According to Issah Mohammed, the proceeds would be split among the account holder (unless that transaction had been done without using a third-party account holder), Issah Mohammed, Kwaning and the unknown party who provided the fraudulent instrument to Kwaning.

Issah Mohammed and Kwaning are originally from Ghana and, prior to their arrests, members of the Ghana ex-patriot community in Maryland. Issah Mohammed held himself out to be a businessman, trading in used automobiles for export to Africa.

Petitioner, Charles Mensah, came to the United States seeking asylum in May of 2013. He was initially detained in the state of Washington; but, Petitioner was ultimately granted asylum and became a lawful permanent resident. In November 2014, he moved to New York City. After settling in New York, Charles Mensah came into contact through social media with Issah Mohammed, an individual who he believed he might know from his youth in Ghana.

Issah Mohammed knew that Petitioner Charles Mensah had been a mechanic in Ghana and told Petitioner that if he came to Maryland, Issah Mohammed could help him open a garage. Petitioner ended up traveling to Maryland, where, under Issah Mohammed's guidance, he completed registration to establish a Maryland business. Issah Mohammed further directed and assisted Petitioner to open four different bank accounts in the name of that business. Issah Mohammed then orchestrated the use of each of the accounts for fraudulent deposits to be made as a part of his fraud scheme. Ultimately, Charles Mensah learned of the likely fraudulent activity in the accounts and had no further bank account activity with Issah Mohammed. Charles Mensah was later surprised when told of the arrest of Issah Mohammed by a mutual friend; but some time after Issah Mohammed's arrest, when agents arrested Petitioner, they testified that he did not seem surprised.

Severance

Petitioner Charles Mensah moved for severance prior to trial on the basis that witnesses relevant to the prosecution of the hub conspirator would be irrelevant and improperly prejudicial in his own prosecution; however, the trial court denied the motion.

At trial, the Government called two confidential informant witnesses, Mohammed Dicko and Babatunde Famojuro, to establish Defendant Kwaning's knowledge and participation in the alleged conspiracy. The Jury was presented recorded conversations of each of the witnesses with Kwaning. The recorded Kwaning conversation with Mohamed Dicko specifically included ethnic characterizations that persons from West African countries were prone to engaging in fraud and those characterizations were further adopted by Mohamed Dicko on the stand. The Kwaning conversation with Babatunde Famojuro furthered the ethnic generalization of West Africans by his own acknowledged life history and his explanation of terms within the recorded conversation with Defendant Kwaning. Finally, the ethnic generalization for lack of candor by West Africans was further exacerbated by argument in the Government's closing.

Mohamed Dicko ("Dicko") testified that he had been born in West Africa, came to the United States under a petition for asylum, acquired convictions in the United States, avoided removal by becoming a confidential informant and had received approximately \$50,000.00 between 2001 and 2015 for his services as an informant. He then testified about interactions that he conducted, as a confidential informant, with Defendant Kwaning. Dicko stated

that in his first telephone conversation with Kwaning, he noted Defendant Kwaning as having a French African accent. That fact became important as he later elaborated that people from French African nations had a propensity for fraud. The theme was revisited during his cross-examination by counsel for Kwaning and again on redirect. During Defendant Kwaning's re-cross exam, Dicko stated that when he had referred to "Nigerians", he used the term to refer to illegal activity. While the Government may argue that Petitioner is from Ghana and not a Nigerian, the witness Dicko sufficiently confounded the terms "Nigerian" and people of West African decent to make them functionally equivalent to the jury.

Babatunde Famojuro ("Famojuro") testified that he was born in Nigeria, came to the United States on a Green Card, became a United States Citizen, acquired a theft conviction, incurred a theft prosecution in another event and became a confidential informant as a result of a proffer session conducted in that case. He indicated that he knew Defendant Kwaning (as "Kofi") and agreed as part of his confidential informant role to contact Kwaning through social media to establish a meeting. The meeting was recorded. While the accents of the speakers cannot be discerned from the printed record, Famojuro characterized the language being spoken as

“Pidgin English” – a combination of African dialect and the English language. In the context of the trial, Famojuro was an important presence and further burnished the generalized image of persons from West Africa as being prone to participate in theft and fraud. Famojuro’s testimony was a walk-through of the recording of his conversation with Kwaning, and his interpretation of how Kwaning described his fraud activity, occasionally interpreting words like “Walhalla”, “house”, “carry” and “wey”.

Petitioner’s trial was further tainted by the Government continuing the theme of people of West African being fraudsters in its closing. Calling the jury’s attention back to Dicko and Famojuro and weaving in the other witnesses, the Government argued that if the witness was not asked just the right question, there would not be a meaningful answer. Counsel then analogized those witnesses to his children’s reticence in answering questions, “So I guess in that way my children are like West African fraudsters.”

Failure to sever Petitioner’s trial also allowed impermissible witness bolstering. Issah Mohammed was central to the Government’s case against Petitioner; **he was the only one** who testified that Petitioner knew that he was aiding a fraudulent conspiracy. A big part of Issah Mohammed’s testimony was that all

the alleged account holder participants operated under the same conditions. The course of events pertaining to each of the other charged account holders were relevant and admissible to proving the case against Kwaning; however, they were not relevant to Petitioner's guilt or innocence. Nonetheless, by having Issah Mohammed testify to the events surrounding the other charged account holders, and then having the account holders testify consistently with Issah Mohammed, the Government bolstered Issah Mohammed's credibility.

Issah Mohammed testified that he told Francis Oseifosu how the fraudulent account scheme worked. Francis Oseifosu was called as a witness and validated that Issah Mohammed told him how the scheme worked prior to his engaging in it.

Issah Mohammed testified that he told Sandra Badu how the fraudulent account scheme worked. Sandra Badu was called as a witness and validated that Issah Mohammed told her how the scheme worked prior to her engaging in it.

When Issah Mohammed testified that Petitioner had asked about the source of the money that came to his accounts, Issah Mohammed's credibility was bolstered by cooperating co-defendant witnesses testifying in the case against the hub co-defendant that

Issah Mohammed had told them about the fraudulent source of the funds deposited in their accounts prior to their involvement in the fraud.

Beyond a Reasonable Doubt

At the close of evidence, Petitioner Charles Mensah requested a Jury Instruction on the meaning of proof “Beyond a Reasonable Doubt”. Pursuant to Fourth Circuit decisional law, the district court denied the motion. The Jury then found Petitioner guilty on each of the counts in which he was charged.

Petitioner filed a Motion for Judgment of Acquittal, or in the alternative New Trial on the basis that he had been denied a fair trial through prejudicial joinder; however, both motions were denied, and the case proceeded to sentencing. At sentencing, Petitioner further challenged the fraud loss amount attributed to him; however, that challenge was rejected.

Petitioner Mensah was sentenced to 30 months confinement on each count of conviction, with the sentences to run concurrently and to be followed by a period of three years supervised release, also to run concurrently. Additionally, Petitioner was ordered to pay \$229,717.30 in restitution.

Reasons for Granting the Petition

The Opinion below conflicts with the precedent of the Supreme Court with respect to the need for severance when joinder creates legally cognizable prejudice to a Defendant. Further, the Opinion below preserves the conflict amongst the Circuits with respect to a Defendant's Due Process right to have the meaning of "beyond a reasonable doubt" defined to the Jury. Either conflict presents an important opportunity for the Supreme Court to address the Due Process rights of Defendants. Both questions should be accepted for review.

- I. **Due Process requires that the legally cognizable prejudice created by the joint-trial admission of prejudicial evidence otherwise inadmissible against a Defendant serve as the basis for severance by the trial court when requested by the Defendant.**

Due Process dictates that a Defendant should be granted severance where there is a serious risk that a joint trial would compromise a specific trial right [and] prevent the jury from making a reliable judgment about guilt or innocence. See *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). The Supreme Court has found impermissible prejudice where evidence that is probative of a defendant's guilt but technically

admissible only against a codefendant. See *Bruton v. United States*, 391 U. S. 123 (1968). Here, the Court confronts evidence that was 1) admissible only against a codefendant; 2) that was not probative of Petitioner's guilt; and 3) likely to be highly prejudicial to the Jury's ability to assess the Government's case against Petitioner.

Federal Rule of Evidence 403 calls for the exclusion even of relevant evidence for a variety of reasons:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: **unfair prejudice, confusing the issues, misleading the jury**, undue delay, wasting time, or needlessly presenting cumulative evidence. F.R.E. 403 (emphasis added)

The denial of Petitioner's right to trial by an impartial jury was caused by massive amounts of evidence that were admissible against co-defendant, hub-conspirator Mohammed Kwaning, but were not relevant to Petitioner's case. Even if the evidence was marginally relevant, it caused unfair prejudice, confused the issues and misled the jury.

The risk of prejudice under the circumstances presented was extremely high, yet Petitioner's motions for severance and

post-trial relief from joinder were both denied. In addition to failing to adhere to this Court's teachings in *Zafiro v. United States*, id., the decision below further conflicts with pre-existing decisional law from the Fifth Circuit that improper Government Witness bolstering through other witnesses constitutes reversible error. *U.S. v. Whitaker*, 619 F.2d 1142 (5th Cir, 1980).

The Fourth Circuit's failure to properly apply the Supreme Court precedent on severance and the conflict between the decision below and existing case law from the Fifth Circuit, both call for a grant of certiorari to clarify the Due Process requirements on the law on severance.

II. Due Process requires that a trial court must, if requested by a Defendant, instruct the Jury on the meaning of proof "Beyond a Reasonable Doubt".

While recognizing the central importance of "Proof Beyond a Reasonable Doubt" as the core value of due process in a criminal trial (see *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), the Supreme Court has held that the

Constitution neither prohibits trial courts from defining reasonable doubt, nor requires them to do so. *Victor v. Nebraska*, 511 U.S.1 (1994). Unfortunately, the prior failure of the Supreme Court to create a consistent regime has allowed a conflict in the Circuits that places Defendants in markedly different positions with respect to their fundamental right to have the jury instructed upon the meaning of Proof Beyond a Reasonable Doubt. Certiorari should be granted to remedy the conflict among the Circuits with respect to Defendants' Due Process Rights.

In the Fourth Circuit, "although the district court may define reasonable doubt to a jury . . . the district court is not required to do so. *United States v. Walton*, 207 F.3d 694, 696-97 (4th Cir. 2000) (en banc); see also *United States v. Williams*, 152 F.3d 294, 298 (4th Cir. 1998) ("The trial court is not required to define reasonable doubt as a matter of course so long as the jury is instructed that a defendant's guilt must be proven beyond a reasonable doubt."). *United States v. Lighty*, 616 F.3d 321 at 380 (4th Cir. 2010, internal quotation marks omitted.) The Fourth Circuit has explained, "Not requiring such an instruction is based on this Circuit's belief that attempting to explain the words beyond a reasonable doubt is more dangerous than leaving a jury to wrestle with only the words

themselves.” *United States v. Hornsby*, 666 F.3d 296, 310-311 (4th Cir. 2012). However, the failure to instruct leaves juries to guess what “Proof Beyond a Reasonable Doubt” may be. Is it a higher, or lower, standard than proof beyond a preponderance of the evidence? Does it require clear and convincing evidence, something more, or something less? How, exactly, is a jury in the Fourth Circuit to guess the meaning of the “Beyond a Reasonable Doubt” standard that, in the words of the Supreme Court, “plays a vital role in the American scheme of criminal procedure [because it] is a prime instrument for reducing the risk of convictions resting on factual error”? *Cage v. Louisiana*, 498 U.S. 39, 40-41, 111 S. Ct. 328 (1990) (per curium) (citations omitted); See also *Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S. Ct. 1444 (1968); *Sullivan v. Louisiana*, 508 U.S. 275, 277-278, 113 S.Ct. 2078 (1993).

In the Fifth Circuit the jury is instructed as follows:

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify]. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the Sixth Circuit, the jury is instructed:

. . . (4) The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

In the Ninth Circuit, the jury is instructed that:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not

required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

The Eleventh Circuit instructs:

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Each of the Circuits requiring an instruction upon the meaning of "Proof Beyond a Reasonable Doubt" has sought to fulfill

the proper role of the courts in a criminal case by determining the law and defining legal standards for the jury.

In other contexts, even ***the Fourth Circuit*** has recognized that **“it is the responsibility-- and the duty -- of the court to state to the jury the meaning and applicability of the appropriate law**, leaving to the jury the task of determining the facts which may or may not bring the challenged conduct within the scope of the court's instruction as to the law.” *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) (citations omitted, emphasis added); *United States v. Wilson*, 133 F.3d 251, 265-6 (4th Cir. 1997). There are “no circumstances which would shift this burden from the court to the jury, where the jury judgment would be influenced, if not made, on the basis of the usual pattern of conflicting ... opinions” of fellow jurors’ view of the law. Id.

Leaving a jury to determine the meaning of “proof beyond a reasonable doubt” abdicates the constitutional responsibility of the trial court and leaves the distinct possibility of an erroneous understanding of the standard. “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty.... the jury verdict required by the Sixth Amendment is a jury

verdict of guilty beyond a reasonable doubt.” *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993). For this reason, when a jury instruction incorrectly defines “beyond a reasonable doubt” “a defendant’s Sixth Amendment right to jury trial is denied” and the verdict must be reversed. *Id.* A jury instruction that erroneously defines reasonable doubt is never harmless and must always invalidate the convictions. *Id.*; *Cage v. Louisiana*, 498 U.S. 39, 41; Cf. *Victor v. Nebraska*, *supra*, (in reviewing a state court’s definition of reasonable doubt the Supreme Court’s inquiry was limited to whether taken as a whole “there is a reasonable likelihood that the jury applied the reasonable doubt standard in an unconstitutional manner.”)

The danger of leaving twelve jurors to their own uninformed perceptions of the meaning of “Beyond a Reasonable Doubt” is that they may likely employ an unconstitutional understanding of the term. **“If a jury can choose between “alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside.”** See, e. g., *Stromberg v. California*, 283 U.S. 359 (1931); *Leary v. United States*, 395 U.S. 6, 31-32(1969); *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979); *California v. Roy*,

519 U.S. 2, 6-8 (1996). Therefore, an unconstitutional understanding of “beyond a reasonable doubt” applied by a jury in Petitioner’s trial would result in an unconstitutional verdict.

The refusal of the trial court to provide the requested instruction on the meaning of proof “Beyond a Reasonable Doubt” left the potential for the uninstructed Jurors in Petitioner’s trial to have applied an unconstitutional understanding of “Beyond a Reasonable Doubt”. That

circumstance could not occur in any of the Circuits that require a Jury Instruction on the meaning of Beyond a Reasonable Doubt.

The Supreme Court should grant certiorari to create uniformity in a fundamental element of Due Process for Defendants facing criminal charges across the Circuits.

CONCLUSION

For the foregoing reasons, Petitioner, Charles Mensah, respectfully prays that the Court grant certiorari as to both issues and reverse the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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