NO. _____

In The Supreme Court of the United States

CHRISTIAN DON'TAE HOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Douglas A. Steinberg
Counsel of Record
ATTORNEY AT LAW
107 North Payne Street
Alexandria, Virginia 22314
(703) 683-5328
dasteinberg@comcast.net

Counsel for Petitioner

Dated: July 12, 2019

THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

I. IT WAS ERROR FOR THE TRIAL COURT TO ADMIT THE APPELLANT'S POST-ARREST INTERVIEW WHEN THE GOVERNMENT VIOLATED HIS FIFTH AMENDMENT RIGHTS BY FORCIBLY USING HIS FINGER PRINTS TO ATTEMPT TO UNLOCK HIS CELLULAR PHONE.

II. IT WAS ERROR FOR THE TRIAL COURT TO DENY THE APPELLANT'S REQUEST, UNDER THE SIXTH AMENDMENT COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, TO INTERVIEW AND POTENTIALLY CALL HIS CO-DEFENDANT AS A WITNESS.

III. IT WAS ERROR FOR THE TRIAL COURT TO DENY THE INCLUSION OF THE DEFENSE REQUESTED JURY INSTRUCTION FOR MULTIPLE CONSPIRACIES.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States v. Abdul Bangura, No. 1:17-cr-00080-AJT, United States District Court for the Eastern District of Virginia. Judgment entered July 20, 2018.

TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that writ of certiorari issue to review judgement bellow.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at App. 1a to the petition and is unpublished.

The opinion of the United States district court appears at App. 13a to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals Affirmed the judgment of the district court on the following date: April 16th, 2019, and a copy of the order appears at App. 12a.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> 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 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.

U.S. CONST. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

> Sec. 1254. Courts of appeals; certiorari; certified questions
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This matter is a criminal case.

In this case, the Government pursued the federal charges against Mr. Hood in the United States District Court for the Eastern District of Virginia, Alexandria Division. The proceedings were initiated on April 13, 2017, a grand jury convening in the trial Court handed down a three count indictment charging Christian Don'tae Hood and Abdul Karim Bangura Jr., with (count 1) Conspiracy to engage in sex trafficking of a minor (18 U.S.C. §§ 1594(c) and 1591(a)) and (Count 2) sex trafficking of a minor (18 U.S.C. §§ 1591(a)(1), (b)(2), (c), 2). Only Mr. Abdul Karim Bangura Jr. was charged in the third count of transportation of a minor with intent to engage in prostitution (18 U.S.C. § 2423(a)).

An arrest warrant was issued as to Christian Don'tae Hood, Abdul Karim Bangura, Jr. subsequent to the Indictment. The defendant was arrested in the

Commonwealth of Virginia on April 14th, 2017, and appeared in the United States District Court for the Eastern District of Virginia; and detained without bond.

On May 5th, 2017, Mr. Hood was arraigned in District Court before the Honorable Anthony J. Trenga and pled not guilty to the charges and requested a jury trial. A motion's hearing was scheduled July 21st, 2017 and trial was set for August 8th, 2017.

On June 15th, 2017, a 4-count Superseding Indictment was handed down in this case, charging the defendant, Christian Don'tae Hood, with the same offenses as cited in the original Indictment and adding a fourth count related only to Mr. Abdul Karim Bangura Jr. *to-wit*; production of child pornography (18 U.S.C. § 2251(a)).

At a motions hearing on July 21st, 2017, the Defendant's pre-trial motion for suppression of evidence was denied.

A three trial commenced on August 8th, 2017, and concluded on August 10th. On the latter date, the jury returned a verdict of guilty as both counts in which the Defendant was charged. After the jury was polled and discharged, Judge Trenga scheduled a sentencing hearing for December 1st, 2017, and ordered a presentence investigation and report.

At the sentencing hearing, the Court ordered Mr. Hood serve a sentence in the United States Bureau of Prisons for a total term of one hundred and eighty months, with credit for time which consists of 180 months as to Ct. 1s and 180 months as to Ct. 2s, to run concurrently; a total of 10 years supervised release w/special conditions,

which consists of 10 years as to Ct. 1s and 10 years as to Ct. 2s, to run concurrently; $200 s/a ($100 as to each Count).

A timely notice of appeal was filed by Christian Don'tae Hood on December 8th.

Briefs were timely filed by the appellant and the appellee. Oral argument was held before a panel of the United States Court of Appeals for the Fourth Circuit on January 31st, 2019. The decision of the district court was affirmed in an unpublished decision on April 16th, 2019 by the United States Court of Appeals for the Fourth Circuit.

Mr. Hood is serving his term of incarceration for this offense.

REASONS FOR GRANTING THE PETITION

I. IT WAS ERROR FOR THE TRIAL COURT TO ADMIT THE APPELLANT'S POST-ARREST INTERVIEW WHEN THE GOVERNMENT VIOLATED HIS FIFTH AMENDMENT RIGHTS BY FORCIBLY USING HIS FINGER PRINTS TO ATTEMPT TO UNLOCK HIS CELLULAR PHONE

This issue appears to be a case of first impression for the Fourth Circuit Court of Appeals. As stated in the Statement of Facts *supra*, the Appellant was forced to place his finger on his cellular telephone*, to wit*, an Iphone 7 by law enforcement at the time of his arrest, and although the phone did not open, the Appellant was told of the results of the act. Latter in his interview, the Appellant gave incriminating information, such as the access code to his Iphone, thinking that the government was already had opened his phone.

The Government in its Response to the Motion to Suppress, tried to make the connection that taking of the finger print was the same as taking a physical specimen from a Defendant such as DNA swab or a fingerprint (for matching or identification)

The question before this Court is whether the act of unlocking the Iphone was testimonial in nature.

In general, the Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution provides the privilege to be free from self-incrimination, stating that "[n]o person ...shall be compelled in any criminal case to be a witness against himself."' The fundamental purpose of the Fifth Amendment is to preserve "an adversary system of criminal justice." *Garner v. United States*, 424 U.S. 648, 655 (1976). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Id.* at 655-56.

The issue of whether law enforcement can compel access to a locked phone is a relevant issue to the general public, due to the market penetration of these kinds of devices. *See* "Biometric authentication is the future of identification and security. Biometrics Research Group, Inc., has estimated that "over 90 million smartphones with biometric technology will be shipped in 2014." *See* Rawlson King, Mobile Commerce Will Drive Millions of Biometric Smartphone Shipments, Billions in Transactions, BIOMETRICUPDATE.COM (Sept. 13, 2013), http://www.biometricupdate.com/201309/mobile-commerce-will-drive-millions-of-biometric-smartphoneshipments-billions-in-transactions.

Furthermore, the Supreme Court of the United States has stated "modem cell phones ... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy," the Supreme Court explained that today's cell phones "are based on technology nearly inconceivable just a few decades ago when *Chimel* and *Robinson* were decided." *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2016). The *Riley* Court also stated that when a phone locks with encryption security features the phone becomes "all but 'unbreakable' unless police know the password." *Id.* at 2487.

The United States Court of Appeals for the Eleventh Circuit has considered self-incrimination in relation to encrypted documents. *See In Re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335 (11th Cir. 2012) The Eleventh Circuit held that the appellant's decryption and production of hard drive contents would be testimonial in nature and that, because the government could not show that the contents were a "foregone conclusion," the Fifth Amendment did apply. *Id.* at 1349. In, *In Re Grand Jury Subpoena*, the Government had subpoenaed the appellant to produce the decrypted contents of his hard drives, but the Appellant refused, invoking the Fifth Amendment. *Id.* at 1342 The Court said that the files themselves "were not testimonial in nature. However under *Fisher* and *Hubbell,* production was testimonial because the decryption password required the appellant to use "the contents of the mind" to produce information that could be incriminating. *Id.* at 1346. *See also United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) (The Court denied a Government subpoena to compel production of a computer password

because production would communicate a factual assertion to the government, which could reveal knowledge that might lead to incriminating evidence.).

In the instant case, the Northen District of Illinois has equated the finger print unlocking of an Iphone with compelling production of testimonial evidence. *See In re Application for a Search Warrant*, 236 F. Supp. 3d 1066, 1073 (N.D. Ill. 2017) (rejecting search warrant language compelling fingerprint unlock reasoning that "[w]ith a touch of a finger, a suspect is testifying that he or she has accessed the phone before, at a minimum, to set up the fingerprint password capabilities, and that he or she currently has some level of control over or relatively significant connection to the phone and its contents").

> "In the instant case, the government argues that the presentation of a fingerprint is not testimonial because under *Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988), "No be testimonial, an act must involve communication and `an accused communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.'" (Gvt. Mem. at 2.) Yet, the connection of the fingerprint to the electronic source that may hold contraband (in this case, suspected child pornography) does "explicitly or implicitly relate a factual assertion or disclose information." *Doe*, 670 F.3d at 1342. The connection between the fingerprint and Apple's biometric security system, shows a connection with the suspected contraband. By using a finger to unlock a phone's contents, a suspect is producing the contents on the phone. With a touch of a finger, a suspect is testifying that he or she has accessed the phone before, at a minimum, to set up the fingerprint password capabilities, and that he or she currently has some level of control over or relatively significant connection to the phone and its contents. The government cites United States v. Wade, for the proposition that the Fifth Amendment privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting. (Gvt. Mem. at 2) (citing *Wade*, 388 U.S. 218, 223, 87 S. Ct. 1926). This case, however, was decided in 1967, prior to the existence of cell phones, and in the context of utilizing fingerprinting solely for identification purposes. In the context of the Fifth Amendment, this Court finds these two starkly different scenarios: using a finger print to

> place someone at a particular location, or using a fingerprint to access a database of someone's most private information. The Wade court could not have anticipated the creation of the iPhone nor could it have anticipated that its holding would be applied in such a far-reaching manner. In fact, the Supreme Court has said "[t]he term `cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014). The societal concerns of privacy raised in Riley provide an important backdrop to the issue presented in the instant case. The *Riley* court recognized that the modern day cell phone, based in part on the personal and intimate information regularly stored on such devices, is subject to higher Fourth Amendment protections than other items that might be found on a person. *Id.* at 2485. The considerations informing the Court's Fourth Amendment analysis of a cell phone's role in modern day life, we believe raise Fifth Amendment concerns as well. We do not believe that a simple analogy that equates the limited protection afforded a fingerprint used for identification purposes to forced fingerprinting to unlock an Apple electronic device that potentially contains some of the most intimate details of an individual's life (and potentially provides direct access to contraband) is supported by Fifth Amendment jurisprudence.

Id. at 1074-1075

Furthermore, the act was additionally testimonial in nature, due to the fact that a successful unlocking of the Iphone would demonstrate access to the phone by the Appellant. The act of unlocking becomes a statement of the Appellant exercising dominion or control of the object. Establishment of such dominion and control of the phone undercut Defense arguments that the Government had not established whether the Appellant was using the phone or someone else (such as his bother *infra*.)

Since the Appellant was unaware that his phone did not unlock, he made several incriminating statements to law enforcement including the password to his phone. Since the attempted act by the government was a violation of the Appellant's

rights, the results of the interview which include the contents of the seized phone are "fruits of the poisonous tree" *See Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that when government did not have probable cause to justify the arrests, the Court should exclude all evidence found during the search because they are the "fruits" of an unlawful search).

II. IT WAS ERROR FOR THE TRIAL COURT TO DENY THE APPELLANT'S REQUEST, UNDER THE SIXTH AMENDMENT COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, TO INTERVIEW AND POTENTIALLY CALL HIS CO-DEFENDANT AS A WITNESS

At trial, after the Jury was empaneled, but before Opening argument; in a move that was a surprise to the Government and to the Defense; Abdul K. Bangura, Jr., the Appellant's brother and Co-defendant, pled to guilty to all counts with no agreement. Defense Counsel, for the obvious reason that Mr. Bangura's confessed conduct may cover conduct alleged to have been performed by the Appellant and furthermore Mr. Bangura's knowledge as to whether there was a conspiracy between the co-defendants and whether the Appellant was coordinating with his brother, or whether Mr. Bangura was acting independently; requested the Court to allow him the opportunity to interview Mr. Bangura and potential call him as a witness. During a break in the trial, Defense Counsel requested the Court to make both Mr. Bangura (who was in custody) and his Defense Counsel, available/present at Court. After hearing argument, regarding the Appellants requests, the Court denied to allowing Mr. Bangura being called or as a witness or being interviewed by the Defense, based on Mr. Bangura's Fifth Amendment rights.

In all criminal prosecutions a Defendant, has the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.

The Sixth Amendment guarantees the right of the accused "to have compulsory process for obtaining witnesses in his favor." The prosecutor has the power to compel witnesses to attend by using the police system at the government's disposal. Thus, the Sixth Amendment levels the playing field by allowing this same ability to the Defendant. *See Washington v. Texas*, 388 U.S. 14 (1967).

In the instant case, the Trial Court ruled that under *Mitchell v. United States*, 526 U.S. 314 (1999), that although Mr. Bangura had pled guilty, his Fifth Amendment right against self-incrimination prohibited even an interview by the Defense to find out/explore whether his testimony was exculpatory for the defendant The Government's case was that Mr. Bangura was acting under the direction of the Appellant who was not present for the prostitution acts. *See Government's opening Argument* "Now, the defendant's role in this sex trafficking scheme, it was more behind the scenes, but his brother played a role as well. His brother played a role to further the sex trafficking conspiracy, and that role was much more hands on." Defense Counsel was completely prohibited from asking Mr. Bangura any question as to whether he was acting independently or was being coordinated by his brother.

In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure

the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining witnesses in his favor." *Id.* at 867. This requirement that a witness must be in the "Defendant's favor" becomes an impossible "hurdle" for the Defense to cross when all communication is effectively shutdown by the Trial Court.

In other words, since Mr. Bangura elected "to fall on his own sword:, the question remains would "the size stroke of the sword" also be a shield for his brother, the Appellant, and due to the Trial Court's ruling, it is impossible for the Defense to know the answer to that question.

III. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO INCLUDE A DEFENSE REQUESTED JURY INSTRUCTION FOR MULTIPLE CONSPIRACIES

At trial, the Prosecution presented evidence that Mr. Bangura, the Appellant's brother, and other unindicted co-conspirators, including Julius Ravnall. There is no evidence presented by the Government that the Appellant had and communication or other connection to Julius Ravnall or any other unindicted co-conspirator.

The Defense requested that the Special Jury Instruction R be given to the Jury for consideration:

> CONSPIRACY: SINGLE OR MULTIPLE CONSPIRACIES
>
> Count one of the indictment charges that defendant _____ knowingly and intentionally entered into a conspiracy to commit _____.
>
> In order to sustain its burden of proof for this charge, the government must show that the single overall conspiracy alleged in count one of the indictment existed. Proof of separate or independent conspiracies are not sufficient.

> In determining whether or not any single conspiracy has been shown by the evidence in the case you must decide whether, common, master, or overall goals or objectives existed which served as a focal point for the efforts and actions of any members to the agreement. In arriving at this decision you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goals or objectives shown.
>
> A single conspiracy may involve various people at differing levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, however, the government need not prove that an alleged co-conspirator knew each of the other alleged members of the conspiracy nor need it establish that an alleged co-conspirator was aware of each of the transactions alleged in the indictment.
>
> Even if the evidence in the case shows that defendant _____ was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must acquit defendant _____ of this charge.
>
> Unless the government proves the existence of the single overall conspiracy described in the indictment beyond a reasonable doubt, you must acquit defendant _____ of this charge.

AUTHORITY: 2B O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31.09 (5th ed. 2000).

The Court denied the request.

The Defendant objects to the conviction for conspiracy to sex trafficking of a minor when the Government proved not one or a single conspiracy, but multiple conspiracies.

In cases where a defendant is charged with conspiracy, a district court must issue a "multiple conspiracies" instruction where the evidence supports a finding that

multiple conspiracies existed. *United States v. Bowens*, 224 F.3d 302, 307 (4th Cir. 2000).[1]

The lead case in this principal is *Kotteakos v. United States*, 328 U.S. 750, 767-69, 66 S. Ct. 1239, 1249-50, 90 L. Ed. 1557 (1946). In K*otteakos* stands for the principle that challenge to a jury verdict of guilty of the single conspiracy charged. The defendants in *Kotteakos* and its progeny alleged that the evidence at trial had shown the existence of two or more conspiracies and, thus, the proof of guilt of the single conspiracy charged was inadequate.

The prejudice to the defendant regarding the refusal of the trial Court to allow the multiple Conspiracies instruction is clear. The Government painted the Appellant as the "puppet master" controlling his brother and others actions throughout the case. What government failed to do is connect the dots to the Appellant.

The refusal to grant the requested jury instruction was reversible error.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner, Christian Hood, respectfully requests that this Court grant the petition for a writ of certiorari.

---

[1]*See United States v. Orozco-Prada*, 732 F.2d 1076, 1086 (2d Cir.), *cert. denied*, 469 U.S. 845, 105 S. Ct. 154, 83 L. Ed. 2d 92 (1984); *United States v. Winship*, 724 F.2d 1116, 1122 (5th Cir. 1984), *United States v. Thomas*, 586 F.2d 123, 131-32 (9th Cir. 1978); *United States v. Heath*, 580 F.2d 1011, 1022 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075, 99 S. Ct. 850, 59 L. Ed. 2d 42 (1979).

Respectfully Submitted

CHRISTIAN HOOD
BY COUNSEL

/s/ Douglas A. Steinberg
Douglas A. Steinberg
Counsel of Record
107 N. Payne Street
Alexandria, VA 22314
tel (703) 683-5328
fax (703) 684-1482
VSB # 39333

Date July 12, 2019