

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

**ROBERT LESLIE STENCIL,**  
*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**  
\_\_\_\_\_

**Joseph Bart Gilbert**  
*Counsel of Record*  
**TARLTON POLK, PLLC**  
**Post Office Box 1386**  
**Raleigh, NC 27602**  
**(919) 630-0286**  
**joebgilbert@yahoo.com**

*Counsel for Petitioner*

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## **QUESTION PRESENTED**

Whether due process is violated when a trial court denies a motion to sever the trial, resulting in prejudice to petitioner because an adversarial defendant becomes a second prosecutor and the evidence supports petitioner's position that he never intended to defraud, but instead created a legitimate business seeking to promote clean energy vehicles.

## **PARTIES TO THE PROCEEDING**

Petitioner, Robert Leslie Stencil was the defendant-appellant below.

Respondent, the United States of America was the plaintiff-appellee below.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

*United States v. Robert Leslie Stencil*, No. 20-4096, 4th Cir. (June 15, 2021)

(affirming district court's denial of motion to sever to trial); and

*United States v. Robert Leslie Stencil*, et al, No. 3:16-CR-221-MOC-DCK,

W.D.N.C. (Feb. 4, 2020) (denying motion to sever trials).

No other proceedings in federal or state trial or appellate courts, or in this Court, directly relate to this case within the meaning of the Court's Rule 14.1(b)(iii).

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner asks the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit and to address whether the Court should provide guidance to the lower courts to prevent unjust deprivations of due process when one defendant in a joint trial becomes a second prosecutor and causes the jury to incorrectly convict a legitimate business operator.

### **OPINIONS BELOW**

This case arises from the following proceedings:

*United States v. Robert Leslie Stencil*, No. 20-4096, 4th Cir. (June 15, 2021) (affirming district court's denial of motion to sever to trial); and *United States v. Robert Leslie Stencil*, et al, No. 3:16-CR-221-MOC-DCK, W.D.N.C. (Feb. 4, 2020) (denying motion to sever trials).

### **JURISDICTION**

The United States Court of Appeals for the Fourth Circuit entered its opinion on June 15, 2021. (App.1a). This petition is timely filed within 150 days of the court of appeals opinion affirming petitioner's judgment and sentence. *See* this Court's Rule 13.3 & Order Regarding Filing Deadlines (March 19, 2020) (Rescinded July 19, 2021).

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **INDIGENT STATUS**

The United States Court of Appeals for the Fourth Circuit appointed undersigned counsel of record for this appeal pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.



## CONSTITUTIONAL AND STATUTORY PROVISIONS

### **U.S. Const. amend. V**

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

### **18 U.S.C. § 2 Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

### **18 U.S.C. § 1341 Frauds and Swindles (Mail Fraud)**

Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . to sell . . . any . . . security . . . for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . . shall be fined under this title or imprisoned not more than 20 years, or both.

### **18 U.S.C. § 1343 Fraud by Wire, Radio, or Television**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

### **18 U.S.C. § 1349 Attempt and conspiracy**

Any person who attempts or conspires to commit any offense under this chapter [18 USCS §§ 1341 et seq.] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

### **18 U.S.C. § 1957 (Money Laundering, monetary transactions)**

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

### **18 U.S.C.S. § 3006A Adequate Representation of Defendants**

(c) Duration and substitution of appointments. -- A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance . . . through appeal.

## STATEMENT

### *PROCEDURAL HISTORY*

The district court sentenced petitioner to 135 months imprisonment after a jury trial that lasted for sixteen days. The district court denied petitioner's repeated requests to sever the trial before and throughout the trial. The court of appeals affirmed the conviction and sentence in an unpublished *per curiam* opinion.

App.1a.

### *FACTUAL BACKGROUND*

The government alleged that petitioner and codefendants sold worthless stock in order to defraud investors. Petitioner maintained that he had created a legitimate business called Niyato to manufacture and sell alternative fuel vehicles, but the government's intervention broke up the business during its capitalization phase and prevented petitioner from raising sufficient capital to move into the production phase.

After petitioner filed incorporation papers, codefendant Duke contacted him and offered his services as a capitalization expert. At trial, Duke aligned himself with the government and effectively became a second prosecutor, unbound by evidentiary rules limiting the government.

Petitioner had envisioned a business converting vehicles from gasoline engines to compressed natural gas and eventually electric powered vehicles. Petitioner visited the City of Lenoir, and Caldwell County, North Carolina several times seeking potential locations to convert vehicles and to obtain business grants.

Petitioner also obtained offers for economic incentives from the City of Compton, San Bernardino County, California, and the Nevada State Office of Economic Development. However, petitioner learned that raising capital is very difficult.

Duke and his partner contacted petitioner and agreed to raise funds for production but required a fifty percent commission. Petitioner knew little about fund raising and agreed. Duke and his partner recruited and supervised sales personnel, while petitioner sought business relationships and state and federal economic development programs for funds to enable vehicle production.

At trial, the government called salespersons who had previously agreed to plead guilty. The salespersons admitted that they had previously raised funds for other investment schemes, unrelated to Niyato and without petitioner's knowledge. The salespersons, hoping for reduced sentences, also testified that they withheld their commission rate from investors, because they believed investors would not send money had they known the commission rate.

The government also produced witnesses named in promotional materials as Niyato board members and alleged that promotional materials about the board members included materially false information.

The government called several investors, who explained their dealings with the salespersons, how they sent funds to invest and how they received stock certificates signed by petitioner in exchange for their funds. The government asked some investors if they would have invested had they known the commission rate was 50%, to which they responded they would not have done so.

Petitioner developed facts supporting his position through cross examination of government witnesses. Duke's cross examination conflated his own uncharged scams with Niyato's business and bolstered the government's suggestion that petitioner was the source of false information that sales personnel communicated to prospective investors.

Petitioner's case consisted mostly of cross-examination. He chose not to testify and called only two witnesses. Petitioner called an attorney who had helped Niyato with corporate registrations, SEC advice and drafting promotional documents. Petitioner also called a former FBI agent working as a private investigator and forensic accounting analyst. The former FBI agent testified as an expert witness to rebut the government's accounting expert. Petitioner's expert showed that items the government had labelled as personal expenses were in fact legitimate business expenses.

Petitioner's defense presented an alternative to the government's fraud theory. Petitioner's evidence showed all the steps he had taken to create a legitimate company and the many difficulties he had encountered as he attempted to move the company from startup to production.

Duke called witnesses adverse to the defense that the government had either chosen or had neglected to present during the government's case in chief. Duke cross-examined almost every witness: mostly to point out that they did not know Duke, then to repeat points the government would not have been allowed to otherwise repeat. Duke's witnesses also introduced critical testimony the government had failed to present.

Almost the entire last three days of the trial consisted of Duke's testimony and painted petitioner as unscrupulous, despite the fact that much previous testimony supported petitioner's position that he had intended to and had worked hard to operate a legitimate business. Duke also attacked petitioner's character through specific instances, something the government would not have been allowed to do, especially when petitioner had not testified. Because the trial was not severed, Duke abused his right to defend himself.

Petitioner was powerless to stop or counter Duke's devastating attacks, without trading his Constitutional rights to remain silent and to due process. Moreover, Duke's entire approach, made possible only by joining the two for one trial, presented petitioner with a cruel choice: to accept the improper attacks or to assume the burden of proof, which due process requires to remain with the government.

### **REASON FOR GRANTING THE WRIT**

In 1993, the Court held that mutually antagonistic defenses do not require trial severance as a matter of law. *Zafiro v. United States*, 506 U.S. 534 (1993). The Court stated, "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* at 539. The Court explained, "[s]uch a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant."

While Justice Stevens concurred in *Zafiro*'s result, he pointed out that denying separate trials in some cases could operate to reduce the burden on the prosecutor, by introducing what is in effect a second prosecutor, thus turning each codefendant into the other's most forceful adversary. *Zafiro* at 543-44 (Stevens, J, concurring in result).

Trying Duke and petitioner together prejudiced petitioner and violated his constitutional rights to due process and a fair trial. Duke's evidence during cross-examination of the government's witnesses, petitioner's witnesses, and especially during direct examination of witnesses Duke called (and Duke himself during his own testimony) harmed petitioner in five ways. First, Duke presented inadmissible evidence and testimony, and made improper arguments and commentary while questioning witnesses. Second, Duke presented inculpatory evidence not raised by the government. Third, Duke repeated inculpatory evidence presented by the government, which the government would not have been permitted to otherwise repeat. Fourth, Duke confused the jury by conflating unrelated investment sales to Niyato, thus causing the jury to convict petitioner. Fifth, Duke's questions during direct and cross-examination opened the door for the government to emphasize and repeat prejudicial evidence that the government would not have been able to do, had petitioner been tried without Duke.

Justice Stevens long ago recognized that the *Zafiro* decision would create the risk that district courts would impulsively deny motions to sever trials for defendants joined by indictment. His concurring opinion seemed to predict the

existence of this very case: one where a defendant faced an unfair trial and lost his rights to due process because a codefendant became the most forceful prosecutorial adversary. Moreover, Duke's participation in this trial enabled the government to enjoy the fruits of leading questions, improper evidence, character attacks, repetition, and innuendo, all in violation of the due process protections contained in the Constitution.

The Court should grant this petition to provide guidance to district and appellate courts and enable the lower courts to protect individual due process rights and avoid unjust joint trials where codefendants become another's most forceful adversary.

### **CONCLUSION**

The Court should grant this petition for writ of certiorari.

Respectfully submitted,

/s/ Joseph Bart Gilbert  
Joseph Bart Gilbert  
*Counsel of Record*  
Tarlton Polk, PLLC  
Post Office Box 1386  
Raleigh, NC 27602  
(919) 630-0286  
[joebgilbert@yahoo.com](mailto:joebgilbert@yahoo.com)

*Counsel for Petitioner*

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