No. 17-1225

IN THE

Supreme Court of the United States

AMY P. CAMPANELLI, PETITIONER,

v.

ILLINOIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Amy P. Campanelli, the public defender of Cook County, refused to represent defendant Salimah Cole, asserting a potential conflict of interest based solely on the fact that separate assistant defenders already represented Cole's five codefendants, and that this multiple representation allegedly was prohibited by Rules 1.7 and 1.10 of Illinois's Rules of Professional Conduct of 2010. After the state trial judge rejected her contentions, petitioner sought and obtained an adjudication of friendly contempt to challenge the circuit court's interpretation of the 2010 Rules and its finding that petitioner failed to allege a potential conflict.

The Supreme Court of Illinois rejected petitioner's proposed construction of the 2010 Rules. Because petitioner's conflict argument depended on her erroneous interpretation of the 2010 Rules, and she presented no other evidence of a potential conflict warranting appointment of separate counsel, the court affirmed. Finally, although it found that the contempt finding was "valid," the court vacated the judgment of contempt and the accompanying sanction order, and declined to order petitioner to represent Cole.

The question presented is:

Does multiple representation of codefendants by separate assistant public defenders in the same office establish a per se conflict of interest under the Sixth Amendment?

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LEGAL RULES INVOLVED

The Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010) provide, in relevant part, as follows:

Rule 1.7: Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client

represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Rule 1.10: Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. . . .

STATEMENT

Trial court proceedings

1. In March 2016, Salimah Cole and five codefendants were charged with first-degree murder, armed robbery, aggravated kidnaping, aggravated arson, and possession of a stolen motor vehicle. Pet. App. 2a–3a.[1] After Cole informed the trial court that she could not afford private counsel, the court stated that it would appoint the public defender to represent her. Pet. App. 3a.

2. Petitioner, the public defender of Cook County, refused the appointment. *Ibid.*; see C98–118 ("Notice of Intent to Refuse Appointment and Request Appointment of Counsel Other than the Public Defender of Cook County"). Petitioner asserted that a potential conflict of interest existed because assistant defenders already represented Cole's five codefendants and that such multiple representation was prohibited by Rules 1.7 and 1.10 of Illinois's Rules of Professional Conduct of 2010. 5/10/16 R8; C103, 109. The trial court rejected petitioner's assertions: the "mere fact that there is representation of many of the codefendants in this matter does not inherently mean that there is a conflict of interest." *Id.* at R16–18. Petitioner asked the court to hold her in friendly

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[1] "Pet. __" refers to the petition for a writ of certiorari; "Pet. App. __" refers to the petition's appendix; "[Date]R_" refers to the non-consecutively paginated report of proceedings; and "C_" refers to the consecutively paginated common law record.

contempt so that she could appeal the court's ruling. *Ibid.* The trial court took that matter under advisement and asked petitioner to put in writing the basis for her refusal to represent Cole. *Ibid.*

Petitioner then filed a pleading styled "Basis for Refusing Appointment Where a Conflict of Interest in Representation Exists." C182–187. At the ensuing hearing, petitioner again maintained that under Illinois's 2010 Rules of Professional Conduct she could not represent more than one codefendant because of the potential conflict. Pet. App. 5a–6a. Petitioner conceded that separate attorneys from different divisions of her office represented Cole's codefendants and that the attorneys reported to separate supervisors; however, she argued, their separate supervisors "might" report to the same deputy director, and ultimately all attorneys report to her. Pet. App. 6a. Petitioner further acknowledged that her office has a "multiple defender division for multiple offender cases," but she maintained that "she was in conflict even in those cases," *id.*, because the Rules of Professional Conduct do not "allow for . . . a wall to eliminate conflicts of interest within the same law firm," 5/19/16 R14.

The trial court reiterated that as public defender petitioner was sworn to represent an indigent defendant unless the court found that the defendant's rights would be prejudiced. Pet. App. 7a. Because the court had not found that Cole's rights would be prejudiced, petitioner's refusal to represent Cole was

contumacious. *Id.* Petitioner maintained that a contempt finding was the only way to have a higher court "answer the question about the new rules of professional conduct" and their effect on "multiple defendant cases." 5/19/16 R18. The court appointed private counsel to represent Cole and continued the matter for a determination on petitioner's request for a finding of friendly contempt. Pet. App. 7a.

At the next hearing, petitioner again stated that she was "in conflict" in representing the sixth defendant in a six-defendant murder case because in her view she was also representing the five codefendants. Pet. App. 8a. Petitioner again conceded that separate attorneys represented the five codefendants, but maintained that under 55 Ill. Comp. Stat. 5/3-4006 (2016), she was the attorney for every client represented by her office and that her office was a law firm. 6/15/16 R7-8; Pet. App. 8a. Petitioner persisted in her refusal to represent Cole "specifically based upon Rule 1.7." 6/15/16 R12.

3. Finding that petitioner's refusal was "without basis" and that Cole would suffer no prejudice from petitioner's appointment, the court found petitioner in direct civil contempt. Pet. App. 8a. Petitioner thanked the court, stating that she needed a higher court to answer whether "[she is] a law firm, to tell [her] if the Rules of Professional Conduct that the Illinois Supreme Courts [*sic*] handed down in 2010 finds that I am in conflict every time I represent more than one client on a case. Because that is exactly what comment

23 to Rule 1.7 says." 6/15/16 R12–13. The court fined petitioner $250 per day until she purged herself of the contempt by accepting representation of Cole or she was otherwise discharged by due process of law. Pet. App. 9a; see C205-207 (Order). Petitioner appealed, and enforcement of the $250 daily fine was immediately stayed. C224.

Illinois Supreme Court proceedings

4. On appeal to the Supreme Court of Illinois, petitioner reiterated her argument that representation of more than one defendant in a multiple defendant case presents a conflict of interest for the office of the public defender. Pet. App. 10a. Relying on Rule 1.10, petitioner maintained that representation by the public defender's office is tantamount to representation by a single attorney. Petitioner acknowledged that the Illinois Supreme Court held in *People v. Robinson*, 402 N.E.2d 157 (Ill. 1979), that the public defender's office is not a law firm, but maintained that *Robinson* was not controlling because it predated the enactment of the 2010 Rules of Professional Conduct, and that the public defender's office was a law firm under the plain language of new Rule 1.10. Pet. App. 13a.

The court rejected petitioner's argument, finding "no basis to declare that *Robinson* is no longer good law or that Rule 1.10 now includes the office of public defender within its definition of law firms for purposes of a conflict of interest." Pet. App. 15a. The court also

refused petitioner's request to overrule *Robinson*, pointing out that the plain meaning of "firm" in Rule 1.10 "necessarily excludes public defender offices from its definition." Pet. App. 16a.

The court also found no merit in petitioner's contention that Rule 1.7 bars the public defender from representing multiple codefendants. Pet. App. 18a. Because Rule 1.7 addressed the representation of multiple defendants by a single attorney, the "mere fact that codefendants in a case are represented by separate members of the public defender's office does not violate Rule 1.7." Pet. App. 19a–20a. Rather, in such circumstances, "a case-by-case inquiry is contemplated whereby it is determined whether any facts peculiar to the case preclude the representation of competing interests by separate members of the public defender's office." Pet. App. 20a (internal quotations and citation omitted).

The court also rejected petitioner's argument that, under 55 Ill. Comp. Stat. 5/3-4006 and *Burnette v. Terrell*, 905 N.E.2d 816 (Ill. 2009), multiple representation of codefendants always violates Rule 1.7 because, as the public defender, she is counsel to all of the clients her office represents. The court reasoned that although petitioner oversees the 518 assistant defenders in her employ, it is the assistant defenders who provide the legal services to the defendants, and petitioner's remote supervisory authority "is insufficient grounds, in and of itself, to disqualify the entire office from representing codefendants." Pet.

App. 22a. The court noted that Cole's codefendants were represented by the public defender's "Multiple Defendant Division," whose website described the assistants in that division as "very experienced" attorneys who "act independently of other divisions in the office to prevent any effects from a conflict between Public Defender clients." Pet. App. 26a.

Petitioner thus failed to show a potential conflict justifying appointment of outside counsel. Instead, petitioner argued that she "need only allege a conflict of interest, without more, in order to withdraw from representation." Pet. App. 24a. "At best," the court stated, "[petitioner's] claims of conflict are based upon mere speculation that joint representation of codefendants by assistant public defenders will, at some point, result in a conflict." Pet. App. 29a. Accordingly, the court affirmed the trial court's finding that the risk of conflict was too remote to warrant appointment of separate counsel. *Ibid.*

5. At the same time, however, the state supreme court "vacate[d] the order of the trial court holding [petitioner] in contempt and vacate[d] the award of sanctions[.]" Pet. App. 30a. Despite finding the contempt and sanction to have been "valid," the court vacated them because petitioner's contempt was motivated "solely to permit an appeal of the issue of multiple representation of defendants in light of the 2010 revisions to the Illinois Rules of Professional Conduct." *Ibid.* The court further held that appointed counsel would continue to represent Cole in the

underlying criminal case and declined to order petitioner to represent Cole. *Ibid.*

REASONS FOR DENYING THE PETITION

I. The Decision Below Rests on the Illinois Supreme Court's Interpretation of Illinois Law.

Petitioner asks this Court to decide whether the Sixth Amendment erects a per se barrier to representation of multiple codefendants by a single public defender's office. Pet. i. But the state courts did not address that question. Petitioner accepted an adjudication of friendly contempt "solely to permit an appeal of the issue of multiple representation of defendants in light of the 2010 revisions to the Illinois Rules of Professional Conduct." Pet. App. 30a. In other words, she sought—and received—an authoritative determination from the Illinois Supreme Court of the scope and nature of her own ethical obligations as a member of the Illinois bar. *See Mickens v. Taylor*, 535 U.S. 162, 176 (2002) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel") (quoting *Nix v. Whiteside*, 475 U.S. 157, 165 (1986)).

Consistent with that objective, petitioner's Sixth Amendment argument in state court was not only relatively undeveloped but entirely contingent upon her construction of state law. Specifically, she argued that under Illinois Supreme Court Rule of Professional

Conduct 1.7 and 55 Ill. Comp. Stat. 5/3-4006 (2016) she was counsel for every defendant her office represented, and that therefore state law forced her to violate her clients' Sixth Amendment rights in multiple-defendant cases. Pet. App. 12a–13a; Brief and Supporting Appendix for Contemnor-Appellant Amy P. Campanelli at 32–36, *People v. Cole*, 2017 IL 120997. But the Illinois Supreme Court rejected these state-law premises, holding that petitioner was not counsel for every defendant her office represented, Pet. App. 20a–22a, and that her office was not a "firm" under Rule 1.10, Pet. App. 15a–16a.

Petitioner did not argue that *as a matter of federal constitutional law* she personally serves as counsel to each defendant in every multiple-defendant case handled by her office, regardless of how state law defines such terms as "attorney" and "firm." Not surprisingly, then, the Illinois Supreme Court did not address that freestanding federal question. Instead, to the extent it reached petitioner's Sixth Amendment argument, it treated it as contingent on her state-law claims. See Pet. App. 26a–27a ("Although Campanelli contends that the multiple defendant division itself is always in conflict, that assertion is based upon her argument that the office of the Cook County public defender is a law firm, as well as her argument that she is the appointed counsel to all the defendants her office represents.").

"[O]rdinarily, this Court does not decide questions not raised or involved in the lower court."

Youakim v. Miller, 425 U.S. 231, 234 (1976) (*per curiam*); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (*per curiam*) (same). Certiorari review is unwarranted because the question presented here was not addressed in state court.[2]

II. This Case Implicates No Split of Authority on Any Constitutional Issue.

Because the state court decided state-law issues, this case does not contribute to any conflict of authority on any federal constitutional issue. According to petitioner, Illinois law holds that "forcing an indigent criminal defendant to be represented by an attorney from a single, centrally managed public defender's office that also represents adverse codefendants is consistent with the Sixth Amendment," Pet. 9–10, and is thus "at odds with" the law of Florida, Pennsylvania, and Florida, whose courts have allegedly concluded that "the Sixth Amendment requires treating a public defender's office as a firm," Pet. 11. But petitioner's conflict argument depends upon a misstatement of the Illinois Supreme Court's holding; as discussed, that court merely rejected petitioner's interpretation of state law, and did not reach the question she now presents. Moreover, as a factual matter, Cole was never "forc[ed] . . . to be represented by an attorney from a single,

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[2] For the same reason, the arguments of petitioner's amici, which rest on the Sixth Amendment and other federal constitutional provisions, are inapposite.

centrally managed public defender's office," for the public defender's office never represented Cole: petitioner refused to represent Cole, the trial court appointed private counsel, and the Illinois Supreme Court held that it would not require petitioner to represent Cole.

In any event, petitioner fails to establish that any conflict rests on federal constitutional grounds. Contrary to her assertion, petitioner's best case, *Bouie v. State*, 559 So.2d 1113 (Fla. 1990), did not hold that "the Sixth Amendment requires treating a public defender's office as a firm." Pet. 11. Rather, *Bouie* merely cited a Florida intermediate appellate decision, *Turner v. State*, 340 So.2d 132 (Fla. 2d DCA 1976), for the proposition that, "as a general rule, a public defender's office is the functional equivalent of a law firm" and that "[d]ifferent attorneys in the same public defender's office cannot represent defendants with conflicting interests." 559 So.2d at 1115. In turn, *Turner* expressed the "view" that "the public defender's office of a given circuit [is] a 'firm'" under Canon 5 of the Florida Code of Professional Responsibility. 340 So.2d at 133. At bottom, then, *Bouie*'s holding rests upon the Florida appellate court's construction of a Florida disciplinary rule, not the Sixth Amendment.

Petitioner's Pennsylvania case, *Commonwealth v. Westbrook*, 400 A.2d 160, 162 (Pa. 1979), merely found that the rationale of *Commonwealth v. Via*, 316 A.2d 895 (Pa. 1974), "as it concerned public defenders being

considered as one law firm, is equally applicable to the question of conflict of interest in multiple representations." *Via* had held that the court would "not view the failure to raise a claim of incompetency as a waiver where an individual in the subsequent proceedings is represented by the same counsel or one of his associates," 316 A.2d at 898, not that the Sixth Amendment requires a public defender's office to be treated as a firm. And the Supreme Court of Louisiana's statement in *State v. Connolly* is dicta relegated to a footnote in its decision on the distinct issue of the propriety of a judge's recusal. 930 So.2d 951, 954 n.1 (La. 2006).

Petitioner's Georgia case, *Williams v. State*, 807 S.E.2d 418 (Ga. 2017), bears discussion for its similarity to the Illinois Supreme Court's holding here. The Supreme Court of Georgia held that representation of codefendants by a single public defender office did not "automatically create[] a disqualifying conflict of interest." *Id.* at 424. Rather, "the trial court must determine if, because of the imputed joint representation, 'an impermissible conflict of interest exists and cannot be overcome.'" *Ibid.* (quoting *Formal Advisory Opinion No. 10-1*, 744 S.E.2d 798 (Ga. 2013)). "Put another way, the imputed conflict rule" of the Georgia Rules of Professional Conduct "does not become relevant or applicable until *after* an impermissible conflict of interest . . . has been represented to exist by counsel without contrary findings by the trial court." *Ibid.* (emphasis in original;

citation and internal quotation marks omitted). Because *Williams* is consistent with the Illinois Supreme Court's decision here, and because petitioner concedes that her remaining cases do not "explicitly acknowledg[e] the Sixth Amendment implications of their decisions," Pet. 13, petitioner fails to establish any conflict of constitutional dimension.

Cases permitting representation of codefendants by a single public defender's office also generally do not rest on an interpretation of the Sixth Amendment. *See*, *e.g.*, *Anderson v. Commissioner of Correction*, 127 Conn. App. 538, 551 (2011), *aff'd*, 308 Conn. 456, 462 (2013) (holding that separate attorneys from a public defender's office are not treated as a "firm" for imputed disqualification purposes, and that this rule is based on state ethics rules, not Sixth Amendment principles); *People* v. *Shari*, 204 P.3d 453 (Colo. 2009) (addressing conflict issue through lens of state rules of professional conduct).

At most, then, petitioner demonstrates that state high courts reach different results when construing their respective rules of professional conduct. Significantly, none of petitioner's cases hold—and petitioner has never argued—that the rules governing imputation of conflicts are of federal constitutional dimension. Thus, even if petitioner can show that state ethical rules conflict, she fails to establish that this conflict has any federal constitutional basis.

III. This Case Is a Poor Vehicle for Deciding the Question Presented.

This case presents an especially poor vehicle for deciding the question presented, for two interrelated reasons. *First*, there is a serious question whether petitioner retains a concrete stake in the outcome. The basis for petitioner's decision to accept a contempt citation was her assertion that being required to represent Cole would cause her to violate the Illinois Rules of Professional Conduct of 2010. *See*, *e.g.*, Pet. App. 7a. But in fact petitioner was never required to represent Cole, and the Illinois Supreme Court has made clear that she will not be required to represent Cole in this matter in the future. Pet. App. 30a. And the Illinois Supreme Court vacated the trial court's order holding petitioner in contempt, along with the accompanying sanctions. *Ibid*. It is thus unclear what tangible benefit petitioner would receive from a favorable resolution of the question presented.

Petitioner contends that she would face continuing consequences from the contempt order if she sought admission to practice in a new court or jurisdiction, Pet. 24, but that is not so: on any such application for admission she may simply disclose that the Illinois Supreme Court vacated the contempt judgment. For similar reasons, a vacated judgment of friendly contempt obtained "solely to permit an appeal of the issue of multiple representation of defendants in light of the 2010 revisions to the Illinois Rules of Professional Conduct," Pet. App. 30a, hardly rises to

the level of reputational harm that was sufficient to confer standing on the appellee in *Meese v. Keene*, 481 U.S. 465 (1987).

To be sure, this Court has held that the prospective effects of a constitutional ruling permit appellate review at the behest of a government party that has escaped liability thanks to qualified immunity. *Camreta v. Greene*, 563 U.S. 692 (2011). But the Court was careful to limit its holding to the "special category" of qualified immunity rulings, *id*. at 704, which force officials to change their conduct lest they "invite further law suits and possible punitive damages," *id*. at 708. Moreover, the Court addressed only "what this Court *may* review," while noting that "what we actually will choose to review is a different matter." *Id*. at 709 (emphasis in original). This Court should not choose to review a case where the concrete interests of the petitioner are so doubtful.

Second, the petition presents a serious problem of third-party standing. As petitioner recognizes, under the Sixth Amendment "the client, not the attorney, possesses the substantive right." Pet. 23. Although petitioner tellingly fails to specify whose Sixth Amendment rights she is asserting, the Illinois Supreme Court understood the gravamen of petitioner's claim to be "that a direct conflict of interest prevented her from zealously representing Cole." Pet. App. 22a. *See also* Pet. App. 23a (petitioner represented to the trial court "that Cole would be prejudiced by her appointment"); Pet. App. 12a

(describing issue on appeal as "whether Campanelli established that potential conflicts imperiled Cole's right to a fair trial").

But Petitioner cannot assert the Sixth Amendment rights of Cole, whom she has never represented. Perhaps at an earlier stage of this litigation her interests and those of Cole were sufficiently aligned to permit the Illinois courts to resolve the question whether she would be required to represent Cole. Now that that question has been answered in the negative, however, petitioner has no third-party standing in federal court to vindicate Cole's rights, or, for that matter, those of future defendants she may be called upon to represent. *See Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004) (attorney has no third-party standing to assert claims of future, unidentified clients). Those clients will remain free, of course, to assert (or knowingly and intelligently waive) their own Sixth Amendment rights as they choose.

IV. The State Court's Judgment Does Not Conflict with This Court's Precedent.

Finally, this Court should deny review because there is no merit to petitioner's contention that the state court's judgment conflicts with *Holloway v. Arkansas*, 435 U.S. 475 (1978). Under *Holloway*, when a court is alerted to a potential conflict between codefendants represented by the same counsel, the court must either "appoint separate counsel or … take adequate steps to ascertain whether the risk [of

conflict is] too remote to warrant separate counsel," and must do so without requiring counsel to disclose confidential information as part of that inquiry. *Id*. at 484.

But unlike Holloway, Cole and her codefendants were *not* represented by the same attorney. Petitioner's argument that, as public defender, she was the attorney for all codefendants rested entirely on her erroneous interpretation of state law. *See* Section I, *supra*.

Moreover, even if one grants petitioner's state-law predicate, the state trial court complied with *Holloway*'s inquiry requirement. After petitioner alerted the trial court to a potential conflict of interest, the court considered the issue at length before determining that any conflict was too remote to warrant appointment of separate counsel, for petitioner only speculated that representation of codefendants by separate assistant public defenders might result in a conflict in the future. And that determination was unquestionably correct, for *Holloway* holds that "[r]equiring or permitting a single attorney to represent codefendants . . . is not per se violative of the constitutional guarantee of effective assistance of counsel." 435 U.S. at 482. It follows *a fortiori* that requiring or permitting separate attorneys in the same office to represent codefendants is not per se violative of the Sixth Amendment. *See Burger v. Kemp*, 483 U.S. 776, 783 (1987) (assuming *arguendo* that two private law firm partners are considered as

one attorney but declining to hold that requiring them to represent codefendants is per se Sixth Amendment violation). Yet that is precisely petitioner's argument: that requiring attorneys within a single public defender's office to represent codefendants always creates a conflict in violation of the Sixth Amendment. Accepting that argument would require this Court to overrule *Holloway*, something petitioner does not ask the Court to do.

Finally, petitioner's complaint that the Illinois Supreme Court "forced defense counsel to choose between disclosing confidential information and failing to provide the level of detail necessary to persuade the trial court of a direct conflict," Pet. 18–19, cannot be squared with the record. To the contrary, petitioner strategically framed the potential conflict as resulting from the mere fact of multiple representation of codefendants by different attorneys in her office, and did so with the intent of obtaining a friendly contempt adjudication so that she could test her construction of the 2010 Rules of Professional Conduct on appeal. 6/15/16 R12–13.

The state courts invited petitioner to raise any facts peculiar to the case that might "preclude the representation of competing interests by separate members of the public defender's office," Pet. App. 20a, and made clear that she "need[ed] only present the gist

of such a conflict," Pet. App. 25a.[3] She did not do so. That the trial court later granted petitioner's motion to withdraw from representation of codefendants Whitehead and Reed after finding that "a conflict of interest existed where Whitehead and Reed had been charged with intimidating codefendant Washington," Pet. App. 5a n.1, further belies petitioner's suggestion, Pet. 19, that Illinois does not follow *Holloway*, or that it is impossible to make a showing of a conflict without revealing privileged information.

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[3] Relevant factors include "whether the two public defenders were trial partners in the defendant's case; whether the public defenders were in hierarchical positions where one supervised or was supervised by the other; or whether the size, structure, and organization of the office in which they worked affected the closeness of any supervision." Pet. App. 25a–26a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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