NO. 18-5791

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WHARTON,
Petitioner,

v.

DONALD T. VAUGHN,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Third Circuit correctly reject Wharton's claim that his counsel was ineffective at the suppression hearing and at trial, where Wharton failed to prove prejudice?

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COUNTER-STATEMENT OF THE CASE

Petitioner Robert Wharton is a Pennsylvania state prisoner who was convicted of two counts of first-degree murder and sentenced to death for the killings of Bradley and Ferne Hart. The Third Circuit Court of Appeals affirmed the denial of federal habeas relief as to his convictions, but vacated the denial of relief with respect to his death sentences and remanded for an evidentiary hearing. Wharton now seeks certiorari review by this Court on the ground that the Third Circuit erred in rejecting his guilt-phase claim that his counsel was ineffective at the suppression hearing and at trial for not presenting evidence that his confession was involuntary. Because this claim presents no issue worthy of the grant of certiorari, and was correctly rejected by the Third Circuit, further review is not warranted.

The Third Circuit described Wharton's crimes as follows:

> The evidence at trial, viewed in the light most favorable to the Commonwealth, showed that the killings were the culmination of a series of crimes committed by Wharton and his cohorts against the Harts in retribution for Bradley's criticisms of, and refusal to pay for, construction work Wharton performed in the summer of 1983. In August 1983, Wharton and co-worker Larue Owens burglarized the Harts' home twice. During the second burglary, in which [co-defendant Eric] Mason also participated, the intruders extensively vandalized the Harts' home and left a note taunting Bradley's failed efforts to safeguard his family. The following month, Wharton and Mason burglarized the church founded by Bradley's father, Dr. Samuel Hart, leaving a defaced photograph of Bradley pinned to the wall with a letter opener.
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> In January 1984, Wharton, Mason, and Thomas Nixon went to the Harts' home, armed and intending to rob them. However, the plan was abandoned that day when it was discovered that the Harts had a visitor in the house. Later that month, Wharton and Mason returned to the house when only the Harts and their seven-month-old daughter, Lisa, were present. When Bradley answered the door, Wharton pulled out a knife and told Bradley and Ferne to go sit on the couch. After Wharton and Mason entered the house, Wharton forced Bradley to write a check in the amount

that Wharton believed he was owed. The adult Harts were then tied up and forced to sit on the couch while Wharton and Mason were "messing around" and watching television. . . .

The two intruders eventually decided to separate the couple. Bradley was taken to the basement, while Ferne was taken to the second floor. Lisa was left on a bed on the second floor. The adult Harts' faces were then covered with duct tape. Wharton took Ferne into the bathroom and bound her hands and feet with neckties. Wharton then strangled her with a necktie, filled the bathtub with water, and held her head under the water "until the bubbles stopped." . . . Wharton left her body draped over the bathtub, with her pants pulled down and her shirt pulled up, exposing her breasts. As for Bradley, he "was forced to lie face down in a pan of water while one of the intruders stood with one foot on his back, as shown by a footprint on this victim's shirt, pulling on an electrical cord tied around his neck." Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710, 714 (1992). Wharton and Mason then turned off the heat in the house, locked the door, and left Lisa to fend for herself. The two men took with them various items from the house, including a camera and Bradley's coat.

Three days after the murders, Dr. Hart, concerned that he had not heard from Bradley or Ferne, went to the house. After forcing the door open, Dr. Hart heard Lisa's cries and found her upstairs, where she was suffering from dehydration and hypothermia. Dr. Hart also found the bodies of Bradley and Ferne. Lisa went into respiratory arrest on the way to the hospital; fortunately, she recovered and survived.
An investigation into the killings quickly led the police to suspect Wharton. Acting on a statement from the mother of Wharton's girlfriend, Tywana Wilson – Wilson's mother told police that Wharton had given Wilson a camera – the police executed a search warrant on Wilson's residence and found the Harts' camera and several other items stolen from them. Shortly thereafter, the police arrested Wharton. A search of his residence uncovered additional items stolen from the Harts during the January 1984 home invasion, as well as the knife that had been used to gain entry into their house. Wharton waived his Miranda[v. Arizona, 384 U.S. 436 (1966)] rights and confessed to his involvement in the January 1984 home invasion and to killing Ferne. [fn. Wharton later confessed to participating in the two earlier burglaries of the Harts' home. Although Wharton never confessed to burglarizing the church, Larue Owens testified at trial that Wharton had admitted to his involvement in that burglary.] Wharton named Mason as his accomplice and claimed that Bradley had been left downstairs with Mason, who put Bradley's head in a bucket of water.

The police arrested Mason on the same day as Wharton. A search of Mason's residence uncovered Bradley's coat and other items stolen from the Harts during the January 1984 home invasion. One of Mason's

> sneakers matched the imprint found on Bradley's shirt. After Mason's arrest, he waived his Miranda rights and confessed to participating in the January 1984 home invasion. His account was similar to Wharton's; the main difference was that Mason indicated that Wharton had killed Bradley (because Mason could not go through with it).

Wharton v. Vaughn, 722 Fed. Appx. 268 (3d Cir. 2018) (per curiam) (not precedential) (citations to appendix omitted).

Wharton filed a pretrial motion to suppress his confession, which was denied following a hearing. Thereafter, on July 2, 1985, a jury convicted Wharton of two counts of first-degree murder and related offenses.[1] Three days later, the jury sentenced Wharton to death for each murder. The Pennsylvania Supreme Court affirmed his convictions, but vacated the death sentences and remanded for a new sentencing hearing because of a defect in the penalty-phase jury instruction. Commonwealth v. Wharton, 607 A.2d 710 (Pa. 1992).

Following a new sentencing hearing, a second jury again imposed two death sentences. The state Supreme Court affirmed the judgment of sentence. Commonwealth v. Wharton, 665 A.2d 458 (Pa. 1995). This Court denied Wharton's petition for a writ of certiorari. Wharton v. Pennsylvania, 517 U.S. 1247 (1996).

Wharton filed a petition for relief under Pennsylvania's Post Conviction Relief Act (PCRA). The PCRA court dismissed the petition, and the Pennsylvania Supreme Court affirmed. Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002).

On October 7, 2003, Wharton filed a petition for a writ of habeas corpus in federal court. On February 8 and 10, 2012, there was an evidentiary hearing in the

[1] Wharton was tried jointly with his co-defendant Mason, who was likewise convicted of two counts of first-degree murder. Mason was sentenced to life imprisonment.

district court on two of Wharton's claims, including the claim that Wharton raises here – that his counsel was ineffective at the suppression hearing and at trial for not presenting evidence supporting the involuntariness of his confession. The district court ultimately denied Wharton's habeas petition, but granted a certificate of appealability (COA) on the ineffectiveness claim, as well as the claim that Wharton's rights under the Confrontation Clause were violated. The Third Circuit expanded the COA to include another ineffectiveness claim – that counsel was ineffective for not investigating Wharton's adjustment to prison or presenting evidence of that adjustment at the second penalty hearing.

On January 11, 2018, in a non-precedential decision, the Third Circuit affirmed in part and denied in part the district court's denial of Wharton's habeas petition. The Third Circuit affirmed the denial of relief on the two guilt-phase claims, vacated the denial of the sentencing claim, and remanded for an evidentiary hearing on that surviving claim.

Specifically, with respect to the guilt-phase claim at issue in this petition – that counsel was ineffective at the suppression hearing and at trial for not presenting evidence that Wharton's confession was involuntary – the Court of Appeals acknowledged the Commonwealth's arguments that "aspects of this claim are procedurally barred for various reasons." Wharton, 722 Fed. Appx. at 272. The Court determined, however, that "we need not reach those issues [because] even if we assume that every aspect of this claim that is discussed in Wharton's appellate briefing is properly before us, the claim fails on the merits." Id. On the merits, the Third Circuit agreed with the district court's conclusion that even "assum[ing] for the sake of

argument that [counsel's] failure to present this evidence was objectively unreasonable, . . . this claim lacked merit because he could not show prejudice under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." Id. at 273.

Regarding the claim of ineffectiveness at the suppression hearing, the Third Circuit ruled that "Strickland's prejudice analysis is a two-step process. That is, Wharton must prove that (1) his suppression claim is meritorious, and (2) 'there is a reasonable probability that the verdict [at trial] would have been different absent the excludable evidence.'" Id. at 273-274 (quoting Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)). The Court reasoned that "[a]t a suppression hearing, the prosecution must prove, by a preponderance of the evidence, that the defendant confessed voluntarily. . . . Given this relatively low standard, the limited impact of Wharton's proffered evidence, and [the] detailed hearing testimony [of the lead detective regarding the circumstances of Wharton's arrest and confession], Wharton has failed to show that his motion to suppress would have been meritorious if [his counsel] had presented the proffered evidence." Id. at 275.

The Third Circuit likewise concluded that Wharton's claim of ineffective assistance of counsel at trial failed for lack of prejudice:

> We cannot conclude that, had [counsel] done all of the above, there is a reasonable probability that the jury would have found Wharton's confession to be involuntary. Furthermore, as the District Court observed, the Commonwealth's case-in-chief at trial "was comprised of significantly more than [Wharton's] confession." . . . The Commonwealth's other evidence established Wharton's ill-will toward the Harts (particularly Bradley), Wharton's history of escalating crimes against them, his possession of items stolen from the Harts during the January 1984 home invasion (including the check from Bradley for the money that Wharton believed that he was owed), and Wharton's

> conversation with Nixon indicating that Wharton and Mason could not go through with killing Lisa. Because there is no reasonable probability that the outcome of Wharton's trial would have been different had [counsel] done everything outlined here, we will affirm the District Court's denial of this claim.

Id. at 276 (citation omitted).

The Third Circuit's ruling that Wharton was not entitled to guilt-phase relief in the absence of Strickland prejudice raises no certiorari-worthy question, and was entirely correct. This Court should decline to exercise discretionary review.

REASONS FOR DENYING THE WRIT

I. THERE IS NO REASON FOR CERTIORARI, MUCH LESS A COMPELLING REASON

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. Rule 10. "A petition for a writ of certiorari will be granted only for compelling reasons[,]" such as a conflict among the Courts of Appeals on an important matter, a significant departure from the accepted and usual course of judicial proceedings, an important federal question of first impression, or a violation of this Court's precedents on an important federal question. Id.

Here, there is no reason for certiorari review. The Third Circuit's decision does not conflict with those of any other Circuit, depart at all (much less significantly) from the typical course of judicial proceedings, raise a novel issue not previously addressed by this Court, or decide an important federal question in a way that contravenes this Court's decisions. Rather, the Third Circuit has issued an unpublished, non-precedential, and fact-specific opinion correctly applying settled law to the particular circumstances of Wharton's case.

In any case, any hypothetical error (there was none, as detailed below) would not present a proper basis for certiorari. Mere error correction is not a compelling reason for this Court to grant discretionary review. See Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); Martin v. Blessing, 134 S.Ct. 402, 405 (2013) (statement of Alito, J., regarding denial of certiorari) ("we are not a court of error correction"); Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is outside the mainstream of the Court's functions") (quotation marks and citation omitted).

II. THE THIRD CIRCUIT CORRECTLY REJECTED WHARTON'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE AT THE SUPPRESSION HEARING AND AT TRIAL

Wharton makes various arguments as to why the Third Circuit erred in denying his guilt-phase claim that his counsel was ineffective at the suppression hearing and at trial for not presenting evidence that his confession was involuntary. None is persuasive.

A. The Third Circuit correctly rejected the suppression ineffectiveness claim

Wharton claims that the Third Circuit erroneously relied on Kimmelman v. Morrison, 477 U.S. 365 (1986), in denying his claim that his counsel was ineffective at the suppression hearing because, according to Wharton, Kimmelman is inapplicable "where the primary source of the claim emanates from counsel's failure to effectively litigate any suppression claim outside of one regarding the Fourth Amendment" (Petition at 9).

However, this Court has indicated that Kimmelman is not limited only to claims of ineffectiveness based on counsel's failure to competently litigate Fourth Amendment claims. Premo v. Moore, 562 U.S. 115 (2011) involved a claim that counsel was ineffective for not effectively litigating a Fifth Amendment involuntary confession claim, not an ineffectiveness claim premised on the Fourth Amendment. Nonetheless, Premo held that Kimmelman governed the assessment of the adequacy of counsel's performance. See 562 U.S. at 124 ("The Court of Appeals assumed that a motion would have succeeded because the warden did not argue otherwise. Of course that is not the same as a concession that no competent attorney would think a motion to suppress would have failed, which is the relevant question under Strickland. See Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)").[2] The clear import of Premo is that Kimmelman extends to claims, like Wharton's, that counsel was ineffective for not effectively litigating a Fifth Amendment suppression claim. Numerous lower federal and state court decisions have so held.[3]

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[2] While the Premo Court determined that Kimmelman did not govern its prejudice analysis, this conclusion was premised on the fact that Premo was a plea bargain case, whereas Kimmelman involved a conviction after trial. Premo did not distinguish Kimmelman on the basis that the underlying suppression claim in Kimmelman arose under the Fourth Amendment rather than the Fifth Amendment. See Premo, 562 U.S. at 131 ("Kimmelman concerned a conviction following a bench trial, so it did not establish, much less clearly establish, the appropriate standard for prejudice in cases involving plea bargains").

[3] See, e.g., Cuevas v. Chrans, 3 Fed. Appx. 528, 531 (7th Cir. 2001) (concluding that in order for Cuevas to establish that his counsel was ineffective for not moving to suppress confession under Fifth Amendment, he "was required to demonstrate both that a suppression motion would have succeeded and that, having succeeded, there exists a reasonable probability that the outcome of his trial would have been different") (citing Kimmelman); Davis v. State, 743 So.2d 326, 335 (Miss. 1999) ("Though Kimmelman deals with a Fourth Amendment question while this question arises out of the Fifth Amendment rights to remain silent and against self-incrimination, we find that the

Indeed, we have found no decision from any court in any jurisdiction finding Kimmelman inapplicable in the Fifth Amendment context. In light of Premo, as well as the consensus among the lower judiciary that Kimmelman applies to Fifth Amendment cases to the same extent as Fourth Amendment ones, it is evident that the Third Circuit correctly applied Kimmelman here.

Wharton argues in the alternative that "[s]hould this Court disagree with [his] analysis [that Kimmelman does not apply to his ineffectiveness claim], it is asserted that . . . the Third Circuit should have determined that [he] proved the prongs of Kimmelman" (Petition at 10). Contrary to Wharton's contention, the Third Circuit correctly concluded that Wharton failed to satisfy the first prong of Kimmelman. As the Court of Appeals explained, given the Commonwealth's lower burden of proof at the suppression hearing (preponderance of the evidence), the weakness of Wharton's proffered evidence, and the detailed testimony of the lead detective substantiating the

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standard should be the same"); Rodriguez v. Warden, Southern Ohio Correctional Facility, 940 F.Supp.2d 704, 713-714 (S.D. Ohio 2013) (adopted report and recommendation) ("In this context, where the petitioner alleges his counsel was ineffective for failing to file a motion to suppress, 'the defendant must also prove that his Fourth Amendment [and Fifth Amendment] claim[s are] meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice") (quoting Kimmelman). See also Perry v. Taylor, 2014 WL 840580 at *6 (E.D. Ky 2014); United States v. Ratliff, 2013 WL 12350238 at *7 (W.D. Tex. 2013); Collier v. Tucker, 2012 WL 7984338 at *6 (N.D. Fla. 2012); Guillory v. United States, 2011 WL 2912708 at *5 (E.D. Tex. 2011) (report and recommendation); McDaniel v. United States, 2010 WL 3326694 at *2 (W.D. N.C. 2010); Ragsdale v. United States, 2008 WL 877125 at *2 (N.D. Tex. 2008) (findings, conclusions, and recommendation of magistrate judge). Cf. Maldonado v. Burge, 697 F.Supp.2d 516, 525 n.3 (S.D. N.Y. 2010) ("Kimmelman itself involved an ineffective assistance of counsel claim based on counsel's failure to move to suppress evidence alleged to have been seized in violation of the Fourth Amendment, but courts have also applied Kimmelman to motions to suppress identifications alleged to have been unduly suggestive") (citing cases).

voluntariness of Wharton's confession, his suppression motion would have failed. See Wharton, 722 Fed. Appx. at 274-275.[4]

Wharton additionally contends that "the Third Circuit's rote application of Strickland's [sic] prongs . . . without further consideration as to the fairness of the adversarial proceedings was an egregiously erroneous non-application of Strickland" (Petition at 15). Strickland does not include an abstract requirement of fairness. Rather, a "fair" proceeding for Strickland purposes is one "whose result is reliable." 466 U.S. at 687. "Unless a defendant makes both showings [of deficient performance and prejudice under Strickland], it cannot be said that the [judgment] resulted from a breakdown in the adversary process that renders the result unreliable." Id. Here, the Third Circuit correctly determined that Wharton failed to satisfy the prejudice prong of Strickland. See Wharton, 722 Fed. Appx. at 274-275. Thus, the Circuit Court perforce

[4] Wharton insists that "[i]n Stein v. New York, 346 U.S. 156, 183 (1952), this Court established that when establishing physical coercion '[s]light evidence, even interested testimony that violence occurred during the period of detention or at the hands of police. . . might well have tipped the scales of decision below'" (Petition at 11). However, there was no such evidence in Stein. See 346 U.S. at 168 ("There is no direct testimony that petitioners were subjected to physical violence or the threat of it during their detention"). Consequently, the Court's comment regarding the hypothetical impact of evidence of violence was not necessary to the judgment in Stein. This language from Stein is mere non-binding dicta. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend").

More recently, this Court has held that the prosecution need prove only by a "preponderance of the evidence that the confession was voluntary." Lego v. Twomey, 404 U.S. 477, 489 (1972). Pennsylvania law applies the same preponderance standard. See Commonwealth v. Schroth, 435 A.2d 148, 151 (Pa. 1981) ("The Commonwealth must prove by a preponderance of the evidence that the statement was voluntary in order for a confession to be admissible"). The Commonwealth's preponderance showing of voluntariness would not have been refuted by mere "slight evidence" of violence. See In re Winship, 397 U.S. 358, 371-372 (1970).

found that the result of the suppression proceeding was reliable, and that the suppression hearing was consequently fair within the meaning of Strickland.

Wharton asserts that "the Third Circuit should have presumed prejudice . . . under U.S. v. Cronic, 466 U.S. 648 (1984)" because his "'counsel entirely fail[ed] to subject the prosecutions' [sic] case to meaningful adversarial testing'" (Petition at 16 [quoting Cronic]). Cronic has no place here. "When [this Court] spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, [the Court] indicated that the attorney's failure must be complete." Bell v. Cone, 535 U.S. 685, 696-697 (2002).

Here, Wharton's counsel "filed a motion to suppress . . . asserting that [Wharton] did not voluntarily waive his Miranda rights and that his statement was coerced by police." Wharton v. Vaughn, 2012 WL 3535866 at *18 (E.D. Pa. 2012). Moreover, counsel "challenged the voluntariness of the confession at the suppression hearing." Id. "At the close of the suppression hearing, however, trial counsel decided to concede that [Wharton]'s statement was voluntary because he believed that he did not have sufficient evidence to support his motion and 'it was pretty obvious to [him] . . . that [the trial judge] was going to deny the motion to suppress.'" Id. (quoting transcript of evidentiary hearing in district court).

Under these circumstances, where counsel litigated a suppression motion but ultimately was compelled to concede the motion once it became clear that the evidence did not support it, there was not a "complete" failure of counsel, and so counsel's performance must be evaluated under Strickland, not Cronic. Indeed, as this Court stated in Kimmelman, even if counsel had not filed a suppression motion at all, his

performance would not have been presumptively prejudicial under Cronic. See Kimmelman, 477 U.S. at 384 ("we agree with petitioners' view that the failure to file a suppression motion does not constitute per se ineffective assistance of counsel").

B. The Third Circuit correctly rejected the trial ineffectiveness claim

Wharton argues that in rejecting his claim that his counsel was ineffective at trial, "the Third Circuit misapplied Strickland by failing to consider the fairness of the trial and adversarial testing of the state case" (Petition at 20). The Third Circuit ruled that Wharton failed to demonstrate that he was prejudiced by any error by counsel at trial. See Wharton, 722 Fed. Appx. at 276 ("there is no reasonable probability that the outcome of Wharton's trial would have been different had [counsel] done everything outlined here"). Thus, the Third Circuit did in fact find that petitioner's trial was fair.

Wharton incorporates by reference the Cronic argument he made with respect to his allegation of ineffective assistance at the suppression hearing (Petition at 23). This argument may be readily rejected. Counsel at trial clearly did not "entirely fail[ ] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. To the contrary, as the Third Circuit recounted:

> [Counsel] challenged the confession's voluntariness at trial. After the Commonwealth rested its case, [counsel] called Wharton's sister, Beverly Young, to dispute Brown's statement that Wharton had been tackled during the arrest. . . . [Counsel] also presented Wharton's medical records from the Philadelphia Detention Center . . . , where Wharton had been transferred after he was arrested and confessed. These records, which were dated the same day as the arrest and confession, indicated that he had a "[s]mall laceration" on his scalp without "gaping" or bleeding, "[a]brasions" on the right side of his neck, and complaints of a headache. . . .

722 Fed. Appx. at 273 (footnote and citation to appendix omitted).

Finally, Wharton submits that "Kyles v. Whitley, 514 U.S. 419 (1995), has disapproved [the] cumulative assessment" conducted by the Third Circuit in concluding that he was not prejudiced at trial (Petition at 24). Kyles involved a claim that the prosecution withheld evidence favorable to the accused and material to his guilt in violation of Brady v. Maryland, 373 U.S. 83 (1963).[5] The Kyles Court held in pertinent part that in determining materiality under Brady, the "suppressed evidence" should be "considered collectively, not item by item." Kyles, 514 U.S. at 436. This cumulative analysis is conducted by initially "evaluat[ing] the tendency and force of the undisclosed evidence item by item; there is no other way." Id. at 436 n.10. Then, the Court "evaluate[s] its cumulative effect for purposes of materiality separately and at the end of the discussion." Id. That is precisely the methodology employed by the Third Circuit in Wharton's case. See Wharton, 722 Fed. Appx. at 275-276. The Circuit Court did not violate Kyles; it followed it. Because there was no error by the Third Circuit, and there is no compelling reason for discretionary review, there is no basis for certiorari.

[5] The standard for materiality under Brady is the same as the standard for prejudice under Strickland. See United States v. Bagley, 473 U.S. 667, 682 (1985) ("evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully Submitted,

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