No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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GUILLERMO SOLORIO, Jr.,

Petitioner,

vs.

WILLIAM MUNIZ, Warden,

Respondent.

_____

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

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QUESTIONS PRESENTED FOR REVIEW

Whether a Petition for a Writ of Habeas Corpus based on *Brady v. Maryland* Evidence That Was Hidden from a Criminal Defendant – Until After Appeal and Denial of an Earlier Federal Habeas Corpus Petition – Is Subject to the Requirements for a Second or Successive Petition Within the Meaning of 28 U.S.C. §2244(b)(2)

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

Petitioner Guillermo Solorio, Jr. respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in this matter on May 8, 2018. In the alternative, Petitioner prays for an original writ of habeas corpus.

OPINION BELOW

The Amended Opinion of the Ninth Circuit Court of Appeals, is reported at 896 F.3d 894. It is reproduced in the Appendix to this Petition as Appendix A.

JURISDICTION

The order of the Court of Appeals, denying the application to file a second or successive petition for a writ of habeas corpus, was entered on May 8, 2018. A timely petition for rehearing en banc was denied on July 20, 2018.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) and, alternatively, under the Court's original jurisdiction pursuant to 28 U.S.C. § 1651(a) and § 2241(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244, provides in relevant part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines

that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

Guillermo Solorio first learned of exculpatory information withheld by the prosecution when he obtained it by filing a post conviction discovery request. By then it was too late. His appeal had been exhausted. His federal habeas petition had been filed and denied.

This petition addresses the question whether the restrictions found in 28 U.S. C. § 2244(b)(3)(E) and § 2244(b)(2)(B) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) apply to claims under *Brady v. Maryland*[1] that material exculpatory evidence was withheld from disclosure by the prosecution and unavailable at a criminal defendant's trial.

Guillermo Solorio, Jr., is serving a sentence of life without the possibility of parole consecutive to an additional term of ten years.

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[1] 373 U.S. 83 (1963)

He was convicted on March 5, 1999 in the Santa Clara County Superior Court of California for murder, firearms, and gang association charges.

He previously brought a petition for a writ of habeas corpus in the United States District Court for the Northern District of California pursuant 28 U.S.C. § 2254. It was denied and affirmed by the Ninth Circuit Court of Appeals. No. 07-16097.

On December 2, 2010, and January 6, 2011, petitioner discovered for the first time police reports showing that the star witness at his trial had sought and received benefits for his work as a police informant. He also discovered audio/video tapes of witness interviews undermining important testimony against him at trial.

Based on this discovery, Solorio filed a petition for a writ of habeas corpus in state court, contending that the prosecution's failure to produce the evidence before trial violated his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The Santa Clara County Superior Court denied the petition. Petitioner then brought his claims to the California Court of Appeal and the California Supreme Court, which denied relief.

Acting Pro Se, Solorio then filed an application directly in the Ninth Circuit for permission to file a second or successive 28 U.S.C. § 2254 petition.[2]

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[2] The court of appeals appointed counsel to file a supplemental application.

A. *Trial Evidence*

According to the opinion of the California Court of Appeal[3] the facts underlying the conviction are as follows.

A Norteno street gang ordered a man known as "Chente" to murder another man known as "Memo." But Chente refused to kill Memo. As a result, Chente was killed. Solorio was convicted for carrying out Chente's murder.

On the morning of March 6, 1998 a truck driver notified the California Highway Patrol he had seen a body along state Route 152. The body was identified as Vincent Garcia Sanchez, "Chente." A spent cartridge was found close to Chente's feet. Chente had died from three gunshot wounds. Based on an autopsy, a physician believed Chente had been shot before midnight on March 4.

A crime scene investigator found a copper-jacketed spent bullet near Chente's right knee and a gray lead spent bullet about 15 feet from the same knee. Another lead bullet was found in Chente's body. A criminalist testified all three were approximately .38 caliber and almost identical. Based on the rifling marks on the copper-jacketed bullet he concluded it probably had been fired from either a .38 special or .357 magnum revolver.

Guillermo Morales Diaz, known as "Memo," testified at trial that he and Chente had been good friends. Memo knew petitioner, Guillermo Solorio, as "Capone." Memo said Solorio was also a friend of Chente's.

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[3] *People v. Solorio*, California Court of Appeal, Sixth Appellate District, H019808 (Aug. 29, 2011) (unpublished). See Appendix C.

At trial, Memo testified Chente had been a member of a Norteno gang affiliate. Memo testified that on several occasions Chente warned Memo about 'someone wanting to kill [him].'

About three days before he died, Chente came to Memo's work driven by Solorio. Chente entered and spoke with Memo. He asked Memo for a handgun. Memo thought Chente wanted to see it, so he took the handgun from a drawer and handed it to Chente. Chente looked at the gun and then looked at Memo. Chente threw the gun back to Memo and said, 'I can't do it.'

Chente then told Memo he came to kill Memo because he was told to do so. Chente said '[a] friend of mine . . . is going to do it to me.' Chente said he would be killed by 'one of his friends' for failing to carry out his assignment. Chente then left with Solorio.

After Chente died, Memo told law enforcement officers what he knew. A police officer testified Memo advised him gang members had a contract out on his life. Memo told the officer that he had learned his friend Chente had been shot to death and that Chente had said he had been ordered to 'hit" Memo.

A witness, Freddie Fonseca told a grand jury he saw Solorio and two others leave the site of a community barbeque and return. Fonseca remembered hearing about guns. The three left in Solorio's car. When they returned they all had guns. Solorio had a nickel or chrome-plated gun which he said was a .38. The three men left again in Solorio's car and did not return.

Another witness testified she saw a green Honda pull up to an area with Solorio and another person. She saw Solorio and the other man go to trunk of a car and remove a gasoline can and a filled

garbage bag. One of them lit the bag on fire. She heard the other man say 'that fucker's finally gone.' After this, she saw them laugh.

Evidence showed Solorio ran from the police when they tried to arrest him and that he did not attend Chente's funeral.

A police officer gang expert testified he believed Chente's murder was gang related. The expert testified that if a local gang member refused an assignment to kill someone, his own death could be expected.

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The proof that Solorio killed Chente was propped up by Memo's trial testimony and Fonseca's testimony to the grand jury, which was read at trial. Fonseca said that Solorio had a .38 at the barbeque. Without crediting Memo's testimony, and without Fonseca's testimony that Solorio had a .38, the remainder of the evidence was too attenuated to show beyond a reasonable doubt that Solorio was responsible for the death of Chente, that Solorio had a gun during a murder, that he committed murder for the benefit of a street gang, or that he carried a gun during a street gang crime.

B. C. *Prior Proceedings*

Solorio was convicted and sentenced on March 5, 1999 for violation of California Penal Code § 187, murder with a special circumstance of lying in wait, Pen. Code § 190.2(a)(15), plus carrying a handgun during a street gang crime. Pen. Code § 12021.5(a). The jury found true enhancements for being armed with a handgun during the murder, Pen. Code § 12022(a)(1), being a principal and using a handgun (Pen. Code § 12022.53(b) and (e)(1), and that he

committed murder for the benefit of a street gang. Pen. Code § 186.22(b)(1).

He appealed his conviction to the California Court of Appeal, Sixth Appellate District, which affirmed in an unpublished opinion on August 29, 2001. No. H019808. Appendix C. He sought review in the California Supreme Court. The California Supreme Court denied review on November 20, 2001.

On June 11, 2002, Solorio filed a petition for a writ of federal habeas corpus in the United States District Court for the Northern District of California. *Solorio v. McGrath*, No.C02-2781SBA(PR) (N.D. Cal. June1l, 2002). The Court found petitioner's claims cognizable, but dismissed the petition with leave to amend because it contained unexhausted claims. After exhausting in state court, Solorio filed another habeas petition in the district court which was docketed under the same number.

The petition was denied on March 31, 2006. The Ninth Circuit affirmed in an unpublished memorandum on November 6, 2007. No. 07-16097. Petitioner sought certiorari from the Court, but it was denied on April 14, 2008. *Solorio v. Horel*, No. 07–9145.

On June 18, 2010, petitioner filed a motion for post-conviction discovery in the California Superior Court pursuant to Cal. Pen. Code § 1054.9.[4] The prosecution produced approximately 4,000 pages of documents, many of which had previously been produced, but several that had not been previously disclosed. Documents were

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[4] California Pen. Code § 1054.9, did not go into effect until January 1, 2003. *See In Re Steele*, 32 Cal.4th 682, 690 (2004).

received on or about December 2, 2010. This included several audio taped interviews, which were received on January 6, 2011.

Solorio filed a petition for a writ of habeas corpus in the Santa Clara County Superior Court on June 7, 2011 based on the newly disclosed evidence.

On August 31, 2011, the Superior Court issued an order to show cause on the following issues: (1) Whether Guillermo "Memo" Diaz could have been impeached as a witness due to the information shown in the Salinas Police Department Confidential Informant Reports that he requested assistance with [a] traffic violation in exchange for information, and (2) whether tapes of interviews with Freddie Fonseca and another witness, Veronica Moya, provided material exculpatory evidence.

In its return the prosecution admitted that documents from the Salinas Police Department related to Guillermo Morales Diaz ("Memo") had not previously been produced to Solorio.

On February 28, 2014, the superior court denied the Petition for a Writ of Habeas Corpus. Appendix D.

On the failure to disclose the Salinas Police Department documents concerning Memo's work as a confidential informant, the superior court only considered the failure to disclose that Memo had received benefits regarding a traffic citation. The court found that Solorio's trial attorney had known Memo was working as a confidential informant with law enforcement because that fact was mentioned in in limine motions and it was raised in Solorio's brief on appeal. However, the court said there was no evidence that Solorio's attorney was aware of any benefit Memo may have received for

information provided to police in other cases. The court found that Solorio had shown that five confidential informant reports demonstrated Memo was working with the Salinas Police Department between March and August 1998. The court found that the prosecutor did not deny failing to turn over the documents.

The court said that the prosecution had an obligation under *Brady v. Maryland* to disclose them.

Petitioner alleged that revelation of the information at trial would have impeached Memo's credibility at trial. However, the court found that failure to disclose the information was immaterial and would not have undermined confidence in the verdict.

With regard to the production of the Freddie Fonseca tape, the court refused to consider whether Fonseca had been offered inducements by the police because that issue was not included in the order to show cause. Accordingly, the court refused to reconsider it.

The court further found that disclosure of the tape was immaterial because it did not have impeachment value. The court said that an investigating sargeant's notes, which were disclosed before trial, showed that Fonseca did not see Solorio with a .38. Further, Fonseca's statement on tape was consistent with his grand jury testimony, which is the only substantive testimony Fonseca gave at trial. In that testimony Fonseca said he had heard the .38 discussed, but did not see it.

With regard to a taped statement by Fonseca that "Johnny" had killed Chente, the court found this to be immaterial because the police notes disclosed before trial showed that Fonseca had said everyone was saying Johnny did it. Further, the court said it did not

matter because Solorio and Johnny Loredo were each charged with the murder of Chente and one would have aided and abetted the other.

The tape of Fonseca's interview also showed him telling the two detectives that Capone [Solorio] "wouldn't have the balls enough to do, he don't do shit like that." This statement was not addressed by the Superior Court and it was unknown to Solorio at the time of trial.

Solorio subsequently filed a Petition for a Writ of Habeas Corpus in the California Court of Appeal, Sixth Appellate District on July 7, 2014. The Petition was denied on February 5, 2015. Appendix E. On February 17, 2015, Solorio filed a petition for review in the California Supreme Court. It was denied without opinion on April 1, 2015. Appendix F.

C. *The Ninth Circuit Proceeding*

In his supplemental application to file a second or successive habeas corpus petition Solorio assumed the Ninth Circuit was bound by its earlier precedent *in Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015), holding that newly discovered *Brady* claims that ripened at trial are subject to the requirements for second or successive petitions. However, Solorio expressly reserved for en banc review a challenge to *Gage* and its rule in the event the court of appeals denied him permission to file a second or successive habeas corpus petition under 28 U.S. C. § 2244(b)(2).[5]

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[5] The Supplemental Application said: "the claim does not fall within the scope of 28 U.S.C. §2244 for second or successive petitions

The Ninth Circuit denied Solorio's application to file a second or successive petition. It held that he had not shown the requisite diligence required by section 2244(b)(2) and that he had not shown likely innocence by clear and convincing evidence, as required by the statute.

On the same day the same panel also filed a published opinion in *Brown v. Muniz*, an appeal from the dismissal of a writ of habeas corpus on the ground that new claims under *Brady v. Maryland* are not excused from the prefiling requirements of 28 U.S.C. § 2244(b)(2), governing second or successive petitions. *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018). See Appendix G. *Brown* squarely held that "*Brady* claims are subject to AEDPA's second or successive gatekeeping requirements because the 'factual predicate [supporting a *Brady* claim] existed at the time of the first habeas petition.' *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015)." *Id.* at 668.[6]

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and petitioner is excused from satisfying the provisions governing such petitions. See *Panetti v. Quarterman*, 551 U.S. 930 (2007); *United States v. Lopez*, 577 F.3d 1053, 1064-67 (9th Cir. 2009)." Solorio went on to say that despite *Gage* "we submit this argument to preserve it for potential en banc review if it is necessary and appropriate." His argument heading said: "Petitioner's *Brady* Claims Should Not Be Subject to Second of Successive Petition Requirements."

[6] The court decided in an unpublished memorandum a third case on the same day which also raised the question whether newly disclosed *Brady* claims are subject to section 2244(b)(2). *Prince v. Lizarraga*, United States Court of Appeals for the Ninth Circuit, No. 16-55418, 733 F. App'x 382 (May 8, 2018).

In Solorio's case, with respect to the *Brady* issue, the court of appeals considered Solorio's application as solely seeking permission to file a second or successive petition. *Solorio v. Muniz*, 896 F.3d at 919, n. 6. See Appendix A.

REASONS FOR GRANTING THE PETITION

Whether *Brady* Claims That Were Unknown at the Time of a Previous Habeas Petition Are Required to Meet the Stringent Standards Imposed by 28 U.S.C. §2244(b)(2) Presents an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court

Solorio does not seek certiorari in connection with the Ninth Circuit decision to deny his application under section 2244(b)(2), recognizing that 28 U.S.C. § 2244(b)((3)(E) prohibits such a petition. Solorio does seek certiorari with respect to whether section 2244(b)(2) applies at all to *Brady* claims that were not ripe at the time of his previous federal habeas petition. The Court should grant the petition on this question which is distinct from the question whether Solorio meets the gatekeeping requirements governing those claims that fall within the scope of section 2244(b)(2).

In the alternative, Solorio seeks an original writ from this Court pursuant to 28 U.S.C. §§ 1651(a), 2241(a), 2242, and 28

U.S.C. § 2254(a), an option that is not foreclosed by section 2244(b)(3)(E). *Felker v. Turpin*, 518 U.S. 651 (1996).[7]

Title 28 U.S.C. § 2244(b)(2) requires a showing of diligence and a showing of probable innocence by clear and convincing of evidence before a second or successive habeas corpus petition may be filed in the district court. This forecloses federal consideration of newly disclosed material *Brady* evidence. The Court should decide whether this is consistent with the intent of Congress and with Court's precedents.[8]

The Ninth Circuit holding effectively blocks any practical recourse to habeas corpus relief when a prosecutor succeeds in

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[7] The present petition meets the requirements of this Court's Rule 20.4. First, the petition shows that filing in the district court would have been futile. Second, it shows Solorio exhausted his state remedies. Third, it shows that he could not obtain federal relief from the court of appeals due to its interpretation of section 2244(b)(2) and the extraordinarily stringent requirements imposed by that statute.

[8] Petitioner is informed that petitions for certiorari will be filed by the appellants in *Brown v. Muniz* and in *Prince v. Lizzaraga*. See pages 13-14 and note 6 *supra*. The time to file these petitions has been extended by the Chief Justice to November 19, 2018.

Additionally, the Eleventh Circuit recently held, despite a very persuasive plea for reconsideration by a three judge panel, that newly discovered *Brady* claims are subject to 28 U.S.C. § 2255(h), which provides restrictions that are parallel to those in section 2244(b)(2). *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018).

Petitioner is informed that a petition for a writ of certiorari will be filed in *Scott* as well. A petition for rehearing en banc was denied by the Eleventh Circuit on August 16, 2018.

hiding material exculpatory evidence from a defendant until after the defendant has proceeded to file a first federal habeas corpus petition. This effectively rewards intentional and inadvertent subversion of the adversary process and condones the denial of a fair trial. It elevates finality and deference to the prosecution over all other values. "A rule thus declaring a 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). This is especially true in this case, where the California Superior Court found the failure to disclose some of the new material inexcusable.[9]

The Court has not given "second or successive," a literal meaning as that term is used in § 2244(b). *See Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007) (a second in time habeas petition raising a claim a petitioner is incompetent to be executed is not second or successive despite failure to raise the claim earlier). The phrase is a term of art. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). "The statutory bar on 'second or successive' applications does not apply" to claims "brought in an application filed when the claim is first ripe." *Panetti*, 551 U.S. at 947; *Magwood v. Patterson*, 561 U.S. 320, 343 (2010) (Breyer, J., concurring) (A claim that the petitioner had no fair opportunity to raise in his first habeas petition is not a second or successive application.); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (claim previously

[9] See Order of the Superior Court at 9-10. Appendix C.

dismissed as unripe is not subject to second or successive gatekeeping).

The *Brady* rules have been well settled by the Court and reiterated recently. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). Due process requires the prosecution to disclose evidence favorable to the defense before trial, whether the defendant asks for it or not. *Brady v. Maryland*, 373 U.S. 83 (1963). Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* obligation. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The *Brady* rule applies to evidence affecting witness credibility. *Wearry* at 1006, citing *Giglio v. United States*, 405 U.S. 150 (1972).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999), quoting *Bagley, supra*. The materiality of evidence cannot be assessed in isolation. An evaluation of its cumulative effect on the verdict is required. *Wearry* at 1007.

Brady evidence that was hidden by the prosecution at the time of trial and a previous federal habeas petition undermines the legitimacy and fairness of the original trial. The Ninth Circuit rule completely forecloses federal review of practically all claims and rewards prosecutors for failing to meet their constitutional obligations.

The fact that *Brady* claims involve (a) suppression, and (b) the state's specific failure to meet a constitutional due process obligation,

fundamentally changes their character in the "second or successive" analysis.

First, the Ninth Circuit panel in *Brown* read §2244(b)(2)(B)(i) literally to apply to claims that could not have been discovered through due diligence, thereby ruling that Congress intended that all *Brady* claims are subject to preauthorization.[10] We submit this literal interpretation reads too much into the statute. Such a literal reading encourages and condones prosecutorial misconduct when the evidence existed, but should have been disclosed by the prosecution in the first place and could not be used because the prosecution hid it.

Second, the court of appeals recognized *Panetti* as having relevance to *Brady* claims, but then moved on to the statutory language of §2244(b) once again, giving no weight to the fact that *Brady* evidence should have been disclosed, but was instead hidden by the prosecution.

Third, the court of appeals gave substantial weight to principles of comity, finality, federalism and judicial efficiency. These are important and worthy goals. But, here, they have been employed to warp justice by providing sustenance to prosecutors who fail in

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[10] In *Brown*, the court of appeals cited opinions from other circuits in support of its holding. 889 F.3d at 673, n. 9. Without analysis *In Re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012), made a one sentence assertion that *Brady* claims are second or successive. *Tompkins v. Secretary of the Department of Corrections*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) limited *Panetti* to its facts, that is, competency claims. *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000) was decided before *Panetti*.

their duty to make timely disclosure of material exculpatory evidence.

CONCLUSION

The writ should be granted.

October 17, 2018

Respectfully submitted,

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