No. 18-6672

IN THE SUPREME COURT OF THE UNITED STATES

MARCIANO MILLAN VASQUEZ, AKA CHANO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting on plain-error review petitioner's challenge to the extraterritorial application of 21 U.S.C. 848(e)(1)(A), which prohibits murder while "engaging in" certain drug-trafficking crimes, including crimes that may themselves be committed extraterritorially.

2. Whether the court of appeals erred in rejecting on plain-error review petitioner's challenge to the jury instructions for 21 U.S.C. 848(e)(1)(A) concerning that provision's "engaging in" requirement and aiding-and-abetting liability.

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OPINIONS BELOW

The revised opinion of the court of appeals is reported at 899 F.3d 363.[1] The opinion of the district court is not published in the Federal Supplement but is available at 2016 WL 4523935.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2018. The petition for a writ of certiorari was filed on November 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The court of appeals revised the opinion that petitioner has reproduced at Pet. App. A1-A29. This brief therefore cites the revised opinion as reproduced in the Federal Reporter.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of more than 30 murders while engaged in drug trafficking, in violation of 21 U.S.C. 848(e)(1)(A) (Count 1); conspiracy to possess with intent to distribute at least 1000 kilograms of marijuana, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 2); conspiracy to import with intent to distribute at least 1000 kilograms marijuana, in violation of 21 U.S.C. 952 and 960(a)(1) (Count 3); extra-territorial distribution of controlled substances, in violation of 21 U.S.C. 959(a) (2012) (Count 4); employing a minor in a drug operation, in violation of 21 U.S.C. 861(a)(1) (Count 5); conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 6); conspiracy to import with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. 952 and 960(a)(1) (Count 7); conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 8); conspiracy to possess firearms in furtherance of drug-trafficking offenses, in violation of 18 U.S.C. 924(c)(1) and (o) (Count 9); and making false statements to a federal official, in violation of 18 U.S.C. 1001(a)(2) (Count 10). Judgment 1-2; Verdict Form 1-6. The district court sentenced petitioner to seven consecutive life sentences on Counts 1 to 4 and 6 to 8; three terms of imprisonment, five years of which are

to run consecutively to the life sentences; and a $1 million fine. Judgment 3, 7. The court of appeals affirmed. 899 F.3d 363.

1. The Zetas are "[a] violent drug cartel" that dominated the city of Piedras Negras, Mexico -- "[j]ust across the border from Eagle Pass, Texas" -- where the cartel "stocked vast warehouses * * * with drugs" that the cartel then smuggled "into the United States." 899 F.3d at 368. Petitioner "was a hitman for the cartel" and the "so-called 'plaza boss' of Piedras Negras." Ibid. In that role, petitioner "directed the traffic in drugs and did whatever was required to protect the cartel's bottom line." Ibid. Petitioner "kidnapped, tortured, and killed scores of men, women, and children -- often in brutal fashion" -- and ordered the executions of others. Id. at 368-369.

Petitioner "routinely killed and ordered his underlings to kill" -- often in especially violent ways -- anyone "unlucky enough to have drawn the cartel's ire," including informants, debtors, defectors, the military or law-enforcement personnel, and members of rival cartels. 899 F.3d at 368-369. Petitioner, for example, murdered a U.S. citizen serving as an informant for U.S. law enforcement, "dismembered his corpse, and burned it." Id. at 369. Petitioner separately directed the murder of another informant -- and the informant's girlfriend -- and then "'cook[ed]' them" by "dissolv[ing] the bodies in acid or diesel gasoline." Ibid. And when a cartel member (Pancho Cuellar) who was indebted to the cartel fled to the United States and began cooperating with law

enforcement, petitioner in retaliation "helped to plan, coordinate, and, ultimately, carry out the round-up and the slaughter" of "more than 30 people" in Piedras Negras, "including children." Ibid.

On another occasion, petitioner kidnapped and tortured a fellow member of the cartel, Jorge De Leon, who had failed to pay a debt to the cartel. 899 F.3d at 369-370. Petitioner "forced [De Leon] to watch one brutal murder after another" over a 13-day period to "show[] De Leon what would happen to him" if his friends and family failed to pay a $100,000 ransom. Ibid. Petitioner and his underlings first "dismembered four men and one woman in front of [De Leon], burning their corpses afterward." Id. at 370. After that, "[f]our children suspected of working for a rival cartel and two men were 'cut up' while De Leon was forced to watch." Ibid. "Three Mexican military personnel were shot right in front of [De Leon]." Ibid. And De Leon was "forced to watch as [petitioner] dismembered and then burned a six-year-old girl in front of her parents," before petitioner then turned to "murder[] the parents" once "they [had] watched their daughter die." Ibid. De Leon's mother eventually managed to secure his release by selling her house to make a down payment on his debt. Ibid. Under threat of similar "horrors" if he failed to make further payments, De Leon fled with his family to the United States, where he later testified at petitioner's trial. Ibid.

2. In July 2015, U.S. Marshals arrested petitioner in Texas. 899 F.3d at 370. After petitioner was indicted on multiple counts for his drug trafficking and violent crimes, a federal jury found petitioner guilty on all counts. Ibid. Among other things, the jury's special verdict on Count 1 found petitioner guilty of the murders of 29 separately identified individuals plus "an unknown number of persons" who had been rounded up and murdered in mass in retaliation for Cuellar's defection. Id. at 370 & n.4; see Verdict Form 1-3.

Petitioner challenges in this Court his conviction for violating 21 U.S.C. 848(e)(1)(A) as charged in Count 1, which underlies just one of petitioner's seven consecutive life sentences. Section 848(e)(1)(A) provides in pertinent part that "any person engaging in an offense punishable under [21 U.S.C.] 841(b)(1)(A) * * * or [21 U.S.C.] 960(b)(1) * * * who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results," shall be sentenced to 20 years to life imprisonment, or to death. 21 U.S.C. 848(e)(1)(A). Section 960(b)(1), in turn, sets forth the punishment for a "violation of [Section 960](a)," which applies to a person who, inter alia, either "knowingly or intentionally imports * * * a controlled substance" "contrary to * * * [21 U.S.C.] 952" or "manufactures, possesses with intent to distribute, or distributes a controlled substance" "contrary to [21 U.S.C.] 959". 21 U.S.C. 960(a)(1), (3), and (b)(1). Section 952 makes it a

criminal offense "to import into the United States from any place outside thereof[] any controlled substance in schedule I or II." 21 U.S.C. 952(a). Section 959 similarly makes it a criminal offense to "manufacture or distribute a controlled substance in schedule I or II" "intending" or "knowing" that "such substance * * * will be unlawfully imported into the United States." 21 U.S.C. 959(a) (2012); see 21 U.S.C. 959(a) (Supp. V 2017). Section 959 further specifies that "[t]his section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." 21 U.S.C. 959(c) (2012); accord 21 U.S.C. 959(d) (Supp. V 2017).[2]

Count 1 of petitioner's indictment had alleged that petitioner violated Section 848(e)(1)(A) and 18 U.S.C. 2 (the general accomplice-liability statute) by "knowingly, intentionally, and unlawfully, kill[ing]" -- and "counsel[ing], command[ing], induc[ing], procur[ing], and caus[ing] the intentional killing" of -- specifically identified victims and other adults and children "in the Western District of Texas, the Republic of Mexico, and elsewhere" "while [he] engaged in offenses punishable under [21 U.S.C.] 841(b)(1)(A) and * * * 960(b)(1)." Third Superseding Indictment 2. Counts 3, 4, and 7 had charged petitioner for his own role,

[2] In 2016, Congress moved the text quoted above, which expressly directs the extraterritorial application of Section 959, from Section 959(c) to Section 959(d). Congress also made changes to Section 959(a) in 2016, but because petitioner's offense conduct was before that change, this brief discusses the 2012 version of Section 959(a).

from January 2006 until his July 2015 arrest, in the Zetas' conspiracy to import marijuana, cocaine, and methamphetamine into the United States in violation of Sections 952(a) and 959(a). Id. at 3-6.

3. After the jury's verdict, petitioner moved for a judgment of acquittal. 899 F.3d at 370. As relevant here, petitioner argued for the first time that Section 848(e)(1)(A) does not apply extraterritorially, ibid., and that he therefore could not properly be convicted on Count 1 because all the murders occurred in Mexico. 2016 WL 4523935, at *1. The district court denied petitioner's motion. Id. at *1-*2.

4. The court of appeals affirmed. 899 F.3d 363. As relevant here, the court rejected petitioner's challenge to the extraterritorial application of Section 848(e)(1)(A), id. at 371-378, and to the jury instructions for Section 848(e)(1)(A), id. at 378-380.

a. First, the court of appeals observed that petitioner failed to challenge the extraterritorial application of Section 848(e)(1)(A) until after the verdict; and it applied plain-error review to that challenge. 899 F.3d at 371-373. The court ultimately determined that "[t]he district court did not err -- plainly or otherwise -- by concluding that [Section] 848(e)(1) applies extraterritorially," id. at 378. See id. at 373-378.

The court of appeals explained that, under RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016), a statute overcomes

the normal interpretive presumption against extraterritoriality if its statutory context embodies a "'clear indication of extraterritorial effect,'" even if the statute does not itself contain a "clear statement" thereof. 899 F.3d at 375, 377 (quoting 136 S. Ct. 2102) (emphasis omitted). And it found that, "[l]ike the [RICO] statute" that RJR Nabisco held to apply extraterritorially, "a conviction under [Section] 848(e)(1)(A) requires proof of underlying offenses that themselves apply extraterritorially." Id. at 374. The court accordingly determined that Section 848(e)(1)(A) "applies extraterritorially to the same extent as those underlying offenses." Ibid.

The court of appeals reasoned that Section 848(e)(1)(A) requires an offender to "first 'engag[e] in' one of the predicate offenses" punishable under Section 841(b)(1)(A) or Section 960(b)(1), because it penalizes a defendant's role in an intentional killing only if he is a "'person engaging in an offense punishable under [those provisions].'" 899 F.3d at 375 (quoting 21 U.S.C. 848(e)(1)(A)) (first set of brackets in original). Those relevant predicates, the court determined, "apply to at least some foreign conduct." Id. at 376 (quoting RJR Nabisco, 136 S. Ct. at 2101). In particular, the court observed that the indictment separately charged petitioner with violating Section 959(a), which is a predicate for Section 848(e)(1)(A) that "prohibits manufacturing or distributing a schedule I or II substance" intending or knowing that "'such substance . . . will be unlawfully imported

into the United States.'" Ibid. (quoting 21 U.S.C. 959(a)). In light of Section 959's "express statement of [Section 959's] extraterritorial effect," the court determined that the relevant statutory context was "fatal to [petitioner's] argument" challenging Section 848(e)(1)(A)'s extraterritorial application. Ibid.

b. The court of appeals separately rejected petitioner's contention that his conviction on Count 1 should be overturned based on the absence of a jury instruction specifically defining the "'engaging in' element of [Section] 848(e)(1)(A)." 899 F.3d at 378-380. Because the jury instructions directed that, to find petitioner guilty of violating that provision, the jury had to find that petitioner killed or caused the intentional killing of his victims "'while engaged in [predicate] offenses'" punishable under Section 841(b)(1)(A) or Section 960(b)(1), and because petitioner never requested any additional instruction, the court determined that the relevant question was whether "the district court plainly erred by reciting the statutory language [in the instruction] without elaborating further on the 'engaging in' element." Id. at 378-379. The court then found that petitioner failed to show reversible plain error for multiple reasons. Id. at 379-380.

First, the court of appeals determined that any instructional error would not have been "clear or obvious." 899 F.3d at 379. The court explained that the scope of the "engaging in" element was "an issue of first impression" to it, and that while other

courts of appeals had determined that the element requires a "substantive connection" between the killing and predicate drug-trafficking offense, those courts had "rejected" petitioner's contention that "the 'primary' or 'predominant' purpose of the murders [must be] to advance the drug conspiracy." Id. at 378-379. The court also observed that those other courts of appeals had themselves "affirmed convictions based on jury instructions identical or similar to the one" here. Id. at 379.

Second, the court of appeals determined that petitioner failed to show a "'likelihood' that the instruction," even if erroneous, prejudiced him. 899 F.3d at 379-380. The court stated that the "evidence [showed] that [petitioner's] drug trafficking was a primary motivation" "[f]or each of the charged murders." Id. at 379. And "in light of the overwhelming and unchallenged evidence that the murders were in fact intended primarily to further [petitioner's] drug-trafficking enterprise," the court had "no doubt that the jury still would have returned a verdict of guilty as to count one" if instructed as petitioner suggested. Id. at 379-380.

c. Finally, in a footnote, the court of appeals stated that petitioner had "forfeit[ed]" any argument about Count 1's aiding-and-abetting instruction because he failed to present adequately such an argument on appeal. 899 F.3d at 380 n.11. The court added that, in any event, the instruction correctly instructed that an aider-and-abettor must share the "'criminal intent of

the principal,'" here, an "intent to kill." Ibid. The court also determined that any error in the aiding-and-abetting instruction would have been "harmless," because a conviction on Count 1 required only "one, specific murder" and "the jury found [petitioner] guilty on every murder alleged, including several he indisputably committed as a principal." Ibid.

ARGUMENT

Petitioner contends (Pet. 2-3) that 21 U.S.C. 848(e)(1)(A) does not apply to murders committed extraterritorially "when connected to a drug importation" offense. Petitioner further contends (Pet. 4-5) that the jury was not properly instructed on the elements of that offense. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle for review because both of petitioner's contentions are at most subject to review only for reversible plain error; petitioner has not carried -- nor even attempted to carry -- his burden under the plain-error standard; and reversing petitioner's conviction under Section 848(e)(1)(A) would have no practical effect in light of petitioner's six other consecutive life sentences on counts of conviction that he does not challenge in this Court.

1. Petitioner contends (Pet. 2-3) that the court of appeals erred in determining that Section 848(e)(1)(A) applies to murders committed abroad by a person engaging in a predicate "drug importa-

tion" offense. The court of appeals correctly rejected petitioner's challenge to his Section 848(e)(1)(A) conviction, explaining that the district court did "not err -- plainly or otherwise" -- in rejecting petitioner's post-verdict challenge to the statute's extraterritorial application. 899 F.3d at 378.

a. The interpretive presumption against extraterritorial application of federal law is "overcome" when statutory "[c]ontext" provides "a clear indication of extraterritorial effect." RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016) ("[A]n express statement of extraterritoriality is not essential."); see id. at 2101. In RJR Nabisco, this Court held that the RICO statute applied extraterritorially, explaining that the "most obvious textual clue" is that some of the predicate offenses that may constitute racketeering activity "plainly apply to at least some foreign conduct." Id. at 2101. "Congress's incorporation of [those] extraterritorial predicates into RICO," the Court concluded, "gives a clear, affirmative indication" that RICO's substantive prohibition applies to "foreign racketeering activity" "to the extent that the predicates alleged in a particular case themselves apply extraterritorially." Id. at 2102. Given that conclusion, the Court explained that it was unnecessary to decide if "the case involves a domestic application of the statute" by examining whether the "conduct relevant to the statute's focus

occurred in the United States," because "a finding of extraterritorial[]" reach itself "obviate[s]" the need to conduct that "'focus' inquiry." Id. at 2101 & n.2; see id. at 2103-2104.

Like the RICO statute at issue in RJR Nabisco, Section 848(e)(1)(A) incorporates predicate offenses that "plainly apply to at least some foreign conduct," 136 S. Ct. at 2101. Section 848(e)(1)(A) prohibits murders by an offender "engaging in an offense punishable under [21 U.S.C.] 841(b)(1)(A) * * * or [21 U.S.C.] 960(b)(1)." 21 U.S.C. 848(e)(1)(A). That list of offenses includes, as most relevant here, drug-importation offenses under Sections 952(a) and 959(a). See pp. 5-6, supra (discussing statutory provisions). The court of appeals explained that drug "importation," "by definition, implicate[s] extraterritorial conduct." 899 F.3d at 376. And as the court observed, Congress has expressly applied Section 959 extraterritorially by providing that "[t]h[at] section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States," 21 U.S.C. 959(c) (2012); accord 21 U.S.C. 959(d) (Supp. V 2017) (same). See 899 F.3d at 376. Thus, Section 848(e)(1)(A) incorporates by reference extraterritorial conduct at least with respect to those predicates. See RJR Nabisco, 136 S. Ct. at 2102.

Petitioner did not dispute in the court of appeals that if Section 848(e)(1)(A) is applicable extraterritorially in some circumstances, it was applicable in the circumstances of this case.

See 899 F.3d at 377. Although recognizing that it did not need to do so, the court nevertheless considered the issue and found that "the indictment clearly alleges permissible extraterritorial applications." Ibid. Petitioner was separately indicated -- and convicted -- under Section 952(a) (Counts 3 and 7) and 959(a) (Count 4), see Judgment 1, for his role from January 2006 to July 2015 in the cartel's distribution of at least 1000 kilograms of marijuana, at least five kilograms of cocaine, and at least 500 grams of methamphetamine. See Third Superseding Indictment 3-6. And the court correctly determined that "[t]he district court did not err -- plainly or otherwise -- by concluding that [Section] 848(e)(1) applies extraterritorially" in this case. 899 F.3d at 378.

Petitioner does not discuss, much less provide any reason to question, the court of appeals' interpretation and application of Section 848(e)(1)(A). See Pet. 2-3. Petitioner instead merely asserts that "further clarification" is warranted about "whether RJR Nabisco can serve to authorize [his Section 848(e)(1)(A)] conviction for a murder which wholly occurs outside of the United States when connected to a drug importation statute." Pet. 3 (emphasis added). But the court of appeals specifically applied RJR Nabisco's teachings to this case, 899 F.3d at 374-377, and petitioner has not identified any conflict of authority that might warrant this Court's review. Indeed, no other court of appeals

has yet to address, much less decide, whether Section 848(e)(1)(A) can apply extraterritorially.

b. Even if certiorari were warranted to decide whether Section 848(e)(1)(A) can apply extraterritorially, the posture of this case makes it an unsuitable vehicle in which to consider that question. As a threshold matter, as the government argued below, petitioner's failure to raise his challenge in a pretrial motion under Rule 12 barred its later consideration in the absence of "good cause," Fed. R. Crim. P. 12(c)(3), which he has never shown. See Gov't C.A. Br. 20-21 & n.5. In any event, although the court of appeals disagreed with the government's Rule 12 argument, it recognized that at a minimum, plain-error review applies in light of petitioner's forfeiture. See 899 F.3d at 371-373. The plain-error inquiry requires that any error be "clear" or "obvious," United States v. Olano, 507 U.S. 725, 734 (1993), and not "subject to reasonable dispute," Puckett v. United States, 556 U.S. 129, 135 (2009). Any such error must also be plain "at the time of appeal." Johnson v. United States, 520 U.S. 461, 468 (1997); see Henderson v. United States, 568 U.S. 266, 273, 276 (2013) (concluding that, where "the law is unsettled at the time of error," the plain-error "rule will help [a defendant] only if * * * the law changes in the defendant's favor" and "the change comes after trial but before the appeal is decided"). Petitioner, however, does not address the plain-error context and points to

nothing that, either before his appeal ended or otherwise, would support any assertion of plain error. See Pet. 2-3.

2. Petitioner also contends (Pet. 3-4) that the court of appeals erred in rejecting his challenge to the district court's jury instructions regarding Section 848(e)(1)(A), focusing on that statute's "engaging in" element and the district court's aiding-and-abetting instruction. Petitioner again disregards (ibid.) the plain-error context of this case and provides no sound basis for this Court's review.

a. The relevant jury instructions tracked the text of Section 848(e)(1)(A) by requiring the jury to determine whether petitioner killed or caused the killing of a victim while "'engaged in [relevant drug-trafficking] offenses.'" 899 F.3d at 378. The district court did not -- and petitioner never asked it to -- further define the "engaging in" requirement. Id. at 378-379. Petitioner nevertheless argued on appeal that the district court should have instructed that Section 848(e)(1)(A)'s "engaged in" element requires a finding that "the 'primary' or 'predominant' purpose of the murders was to advance the drug conspiracy." Id. at 379. The court of appeals correctly rejected that contention on the ground that it was not "plain error [to] declin[e] to do so without any request from [petitioner]." Ibid. The court explained that courts of appeals had required "a 'substantive, and not merely temporal, connection' between the murder and the predicate offense," but that such courts had "rejected th[e] standard" that

petitioner himself advanced. Ibid. (quoting United States v. Aguilar, 585 F.3d 652, 658 (2d Cir. 2009), which cites other decisions). Moreover, the court of appeals explained that such courts had themselves affirmed "jury instructions identical or similar to the one given in this case." Ibid. Petitioner provides no basis for reviewing that plain-error determination, which does not implicate any division of authority warranting review.

Petitioner likewise disregards the court of appeals' separate determination that he failed to establish prejudice from the asserted error. "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it," United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004), and requires a showing that, inter alia, any error affected his "substantial rights," which generally means that it "affected the outcome of the district court proceedings," United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). Here, the court of appeals determined that "in light of the overwhelming and unchallenged evidence that the murders were in fact intended primarily to further and protect [petitioner's] drug-trafficking enterprise," it had "no doubt that the jury still would have returned a verdict of guilty as to count one" even if the jury had been instructed as petitioner's argument on appeal suggested. 899 F.3d at 379-380. Petitioner does not contest that determination, which independently supports the court's finding of no plain error. And any such factbound challenge would not warrant this Court's review. See

United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

b. Petitioner mentions (Pet. 3-4) the aiding-and-abetting theory on which the jury was instructed, but it is unclear what petitioner seeks to argue in that regard. Petitioner does not contest the court of appeals' determination that he forfeited any instructional-error argument regarding aiding and abetting. 899 F.3d at 380 n.11. Nor does he explain why it was insufficient to instruct the jury that he must share "'the criminal intent of the principal'" who committed a killing to be found guilty of aiding and abetting a Section 848(e)(1)(A) offense. Ibid. And he likewise does not address the court of appeals' conclusion that any instructional error regarding aiding-and-abetting liability would have been "harmless," because his Section 848(e)(1)(A) conviction merely required a finding that he "committed only one, specific murder," yet the jury found him guilty of multiple murders that "he indisputably committed as a principal." Ibid. In short, petitioner provides no sound basis for this Court to grant review on any plain-error issue regarding aiding and abetting that may be presented in this case.

3. Finally, this case would be a particularly poor vehicle for review because petitioner challenges only his Section 848(e)(1)(A) conviction on Count 1, which resulted in only one of his seven consecutive life sentences. Even if petitioner were to

overturn that conviction on the grounds that he presents to this Court, his other six consecutive terms of life imprisonment would remain. Review would therefore have no practical effect on petitioner's criminal sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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