Supreme Court, U.S.
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NO. 18-9086

IN THE SUPREME COURT OF THE UNITED STATES

ROEL DANIEL GALVAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FOUR LEVEL ENHANCEMENT FOR POSSESSING A FIREARM IN CONNECTION WITH ANOTHER FELONY OFFENSE PURSUANT TO U.S.S.G. §2K2.1(b)(6)(B) APPLY WHEN THE PREDICATE OFFENSE IS A MISDEMEANOR? THE GOVERNMENT REQUESTED THAT THE DISTRICT COURT USE A HYPOTHETICAL GUIDELINE APPROACH TO TURN PETITIONER'S STATE CHARGED MISDEMEANOR INTO A STATE FELONY WHICH IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN CARACHURI-ROSENDO v. HOLDER, 130 S.CT. 2577 (2010)

II. WHETHER THE SIXTH AMENDMENT FORBIDS JUDGES FROM FINDING HYPOTHETICAL FACTS NECESSARY TO SUPPORT AN OTHERWISE UNREASONABLE SENTENCE?

LIST OF PARTIES

All Parties of Interest appear in the caption of the case on the cover page as part of this litigation.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

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UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIOIRARI

The Petitioner, Roel Daniel Galvan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

A copy of the opinion of the Fifth Circuit Court of Appeals, dated January 10, 2018.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on January 10, 2018. No petition for Rehearing was requested because by the time the opinion reach the Petitioner the deadline to submit one had expired. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[;]... Nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the United States constitution provides in relevant part:

> "in all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation."

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §922(g)(1) provides the following:

> "(g) It shall be unlawful for any person ——
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;"

Texas Penal Code §22.05 provides in relevant part:

> "(a) A person commits an offense if he recklessly engages in conduct that places another in imminet danger or serious bodily injury."...

"(e) an offense under subsection (a) is a class A misdemeanor."...

United States Sentencing Guidelines involved U.S.S.G. §2k2. 1(b)(6) provides in relevant part:

"If the defendant used or possessed any... firearm... in connection with another felony offense, increase by 4 levels."

U.S.S.G. §2K2.1(b)(6) commentary note 14(c) providess in relevant part:

"regardless of whether a criminal charge was brought, or a conviction obtained."

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS.

On September , 2014, Petitioner was indicted in the Southern District of Texas in the Corpus Christi Division. Petitioner was charged for being a felon in possession of a firearm and ammunitiion, in violation of 18 U.S.C. §922(g)(1) and §924(a)(2). Petitioner pleaded guilty to being in possession of a firearm by a convicted felon pursuant to a plea agreement with his appeal rights intact.

On February 12, 2015, the Petitioner was sentenced by the district court using the base offense of level 20 due to one prior conviction of a "crime of violence." The district court went on to also add a 4 level enhancement for "used or possessed any firearm or ammunition in connection with another felony offense." After subtracting 3-level for a total offense level of 21. Petitioner's had a criminal history category of IV which resulted in a guideline range of 57 to 71 months. The district court sentenced him to a 71 month term of imprisonment, three years of supervised release, and a $100 court assessment fee. Petitioner filed a timely notice of appeal.

Trial counsel failed to prosecute Petitioner's appeal. Petitioner filed a motion pursuant to 28 U.S.C. §2255. In the motion, Petitioner pleaded that he suffered a violation of Sixth Amendment right of effective assistance of counsel on direct appeal for failing to prosecute his direct appeal.

On March 30, 2016, the district court held a hearing and found that trial counsel filed a timely notice of appeal but failed to pursue any further action involving the appeal because he also filed a motion to withdraw as Petitioner's counsel with the notice of appeal.

The district court found that Petitioner was deprived of the right to appeal. To cure the error the district court re-entered the judgment on March 30, 2016 after the hearing. Petitioner then filed a timely notice of appeal.

On June 8, 2017, Petitioner's appeals attorney filed a brief in accordance with **Anders v. California, 386 U.S. 768 (1967).**

On January 10, 2018, the Court of Appeals granted appeals counsel's **Anders** Brief and denied Petitioner's submotions. Thus, affirming his sentence.

B. STATEMENT OF FACTS.

On September 9, 2014, an officer with the San Diego, Texas Police Department received a complaint that a mand driving a white in color Ford Mustang pointed a gun at several people near a set of basketball court. The officer conducted a traffic stop after seeing a vehicle leaving the area that matched the description. Petitioner was pulled over and questioned about the incident. Petitoiner admitted that his girlfriend had been harassed and got into verbal altercation with someone at the basketball court and came home crying. Petitioner admitted that he was pointing a video camera, not a gun.

After the background check, the officer question the Petitioner about being a convicted felon and if he could search Petitioner's car. Petitioner acknowledge that he was an ex-felon and that the officer could search the car. The officer handcuffed the Petitioner and place him in the back of the police car. A search of the car yielded a gun that was loaded with give rounds of ammunition.

Petitioner's girlfriend came to the arrest scene and told the officer that Petitioner had only went to the basketball courts to video-tape the group of guys there so that she could of identify the person who had groped and insulted her.

Petitioner's girlfriend was allowed to leave with Petitioner's car because Petitioner was under arrest. Later, Petitioner was charged under Texas State law for a Class A misdemeanor of deadly conduct pursuant to Tex. Penal Code Ann. §22.05(e). A violation under §22.05(e) does not proscribe conduct punishable by imprisonment for more than one year in the State of Texas.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE WHETHER THE FOUR-LEVEL SENTENCING ENHANCEMENT FOR POSSESSING A FIREARM IN CONNECTION WITH ANOTHER FELONY OFFENSE PURSUANT TO U.S.S.G. §2K2.1(b)(6)(B) APPLIES WHEN THE STATE PREDICATE OFFENSE IS A MISDEMEANOR? THE GOVERNMENT REQUESTED FOR A THE DISTRICT COURT TO TAKE A HYPOTHETICAL APPROACH IN TURNING PETITIONER STATE MISDEMEANOR INTO A STATE FELONY TO INCREASE HIS PUNISHMENT IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS. BESIDE THE FACT, THAT THIS PROCEDURE IS ALSO IN CONFLICT WITH THIS COURT'S PRECEDENT IN CARACHURI-ROSENDO V. HOLDER, 560 U.S. 563 (2010).

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10.

CONSIDERATION GOVERNING REVIEW ON WRIT OF CERTIORARI

> A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition of writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (c) When a... United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court...

Id. Supreme Court Rule 10.1(c).

At sentencing, the Petitioner argued that he did not qualify for a four-level enhancement for possessing a firearm in connection with another felony offense pursuant to U.S.S.G. §2K2.1(b)(6)(B) does not apply when the predicate State offense is a Class A misdemeanor. Petitioner requested for the district court to take a commonsense approach that the predicate State offense could never meet the definition of a felony.

The Government request that the district court use a hypothetical approach to turn the predicate State misdemeanor into a Texas felony offense of aggravate assault as defined in Tex. Penal Code §22.02(a)(2). The Government used Police reports to constitute its hypothetical approach without ever submitting any Texas State caselaw that displaying a firearm is considered an aggravated assault. Nor did the Government show any statistical proof that when a person displays a firearm in the State of Texas he is charged or has committed an aggravated assault.

The district court employed the government's request that under a hypothetical approach the Petitioner's misdemeanor charge could meet the felony definition of aggravated assault under Texas law. The State of Texas could not of charged the Petitioner in such a way to make the Class A misdemeanor punishable by more than a year. The district court's actions were in clear conflict of the reason and logic in this Court holding in **Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010).**

In **Carachuri-Rosendo**, the Court considered whether the Defendant, who was convicted of two misdemeanors drug offenses and who had not been charged as a recidivist, had been convicted of an "aggravated felony" for the purposes of the Immigration and Naturalization Act. This Court rejected the Government's argument that the defendant had been convicted of an "aggravated felony" because has the defendant been prosecuted in federal court, he could of been prosecuted as a felon and receive a 2 year sentence based on the fact of his prior simple possession offense. This Court held that the Federal Immigration Court could not "ex post, enhance the State offense of record just because facts known to it would have authorized a greater penalty under either State or federal."

The decision by this Court in **Carachuri-Rosendo** directly conflicts the district court use of the guideline hypothetical approach policy of relabeling a misdemeanor offense into an underlying felony that might or could have been charged authorized a greater penalty. By contrast, this court should resolve this conflicting procedure because it is a constantly recurring problem in the district courts. These facts strongly militate for grant of cert. See Supreme Court Rule 10(c).

This Guideline policy is contradicts the Fifth Amendment which provides, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[;]... Nor be deprived of liberty, or property, without due process of law." Petitioner's due process right of the Fifth Amendment were violated when this Guidelines allows the actual indictable offense and adds something that he could never be indicted for by a Grand Jury of his fellow citizens. For "no principle of Due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issue raised by that charge, if desired. are among the constitutional rights of every accused in a criminal proceeding in all courts, State or federal." **Cole v. Arkansas, 333 U.S. 196, 201 (1948).**

Nowhere, in the long history of American jurisprudence has this Court approved for a hypothetical sentencing procedure which circumvents the defendant's right to have a grand jury determine by a probable cause what crime he may have committed. Nor has any directive by Congress gives the Sentencing Commission such an unconstitutional right to do what it see fit.

In light of the forgoing, this Court should exercise its supervisory power to address this unconstitutinal guideline policy by granting certiorari because this Court's guidance on this question is sorley needed. In the alternative, this court may still grant certiorari, vacate the judgement and remand the issue back to the lower court to withdraw the Andres brief and to further litigate the forgoing.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE SIXTH AMENDMENT FORBIDS A JUDGE FROM FINDING HYPOTHETICAL FACT NECESSARY TO SUPPORT AN OTHER-WISE UNREASONABLE SENTENCE.

This Court left open whether the Sixth Amendment forbids a judge from finding facts necessary to suport an otherwise unreasonable sentence over a decade ago in Rita V. United States, 551 U.S. 338 (2007). But Justice Scalia who was joined by Justice Thomas, both of them endorsed a Sixth Amendment commonsense Sixth Amendment approach used by Massachusetts Federal Distict Judge Young. They offered a particularly persuasive explanation on how to avoid a Sixth Amendment violation at every stage of a criminal proceeding in footnote 5 of Rita which states:

"At least one conscientious district judge has decided to shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent, correctly concluding that this is the only way to eliminate Sixth Amendment problems after Cunningham v. California, 549 U.S. 270 (2007)"..."(citing United States v. Griffen, 494 F.Supp.2d 1, 12-14 (D.Mass. 2007)(Judge Young)."

In United States v. Gurley, 860 F.Supp.2d 95 (D.Mass. 2012), Judge Young explained his commonsense Sixth Amendment procedure which the government also endorses its use, by stating:

At the initial criminal case management scheduling conference, the Court inquires of the government what, if any, enhancements it will seek should the defendant be convicted. The Court then informs all parties that the government must prove such enhancements to the jury at the trial beyond a reasonable doubt pursuant to the Federal Rules of Evidence. If, after deliberation, the jury finds the defendant guilty of the charged crime, it is also (on the same verdict form) asked whether the government has proven the Guidelines enhancement facts. The jury is instructed to use the same reasonable doubt standard as to these facts. As a corollary, when taking a plea, the Court carefully reminds the defendant that he has a right to a jury trial on any disputed enhancement and that it is the policy of the Court still to confer the Guidelines' discount for a plea should the government fail to meet its burden of proof as to that enhancement. In either event, the Court initially considered itself bound by the jury's findings. The defendant may, of course, waive the proffered jury trial as to any enhancement, in which case a jury-waived trial as to the enhancement will follow the main jury trial or the plea. The burden of proof at such trial similarly was beyond a reasonable doubt upon a record of evidence admissible under the Federal Rules of Evidence.There's nothing original about any of this. It was (and remains) the logical response to Blakely [v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)]...

For more than six years, I have followed this approach to sentencing in every criminal case. In every plea colloquey, I have explored whether the defendant actually admits to the facts undergirding each sentencing enhancement, and in every trial the government has stepped up and sought to prove to the jury each sentencing enhancement by actual evidence beyond a reasonable doubt. In those few cases where a defendant has balked at exposing the jury to evidence of a specific enhancement, e.g., loss calculations or organizer-leader role in the offense, I have readily offered a jury-waived trial with the protections of proof beyond a reasonable doubt upon actual evidence. See, e.g., United States v. Thomas, Criminal Action No. 11-10172 (D. Mass. 2012); United States v. Gonsalves, Criminal Action No. 10-10398 (D. Mass. 2011).

Without exception, the system has worked smoothly, fairly, and well - until now Most recently, see the report of this Court in United States v. Carrasquillo, 818 F. Supp. 2d 385, 390 n.3 (D. Mass. 2011).

Even after Rita and Justice Scalia's dicta remedial solution that a jury should find the facts necessary to render a sentence reasonable. This Court has repeatedly "left [that question] for another day" **Jones v. United States, 135 S.Ct. 8, 8-9 (2014)** (Justice Scalia, dissenting from the denial of cert.). It is hard to imagine a better example of the consequences of runaway judicial hypothetical factfinding than this case. Petitioner's sentence was substantially almost doubled based on hypothetical factual findings made by the sentencing judge by a preponderance of the evidence. The court should finally resolve this long-unsettled question put an end to unconstitutional sentences such as in Petitioner's case.

A. THE QUESTION PRESENTED IS AN IMPORTANT ONE EXPRESSLY RESERVED BY THIS COURT AND SUBJECT TO EXTENSIVE DEBATE BY JUDGE IN THE LOWER COURTS

1. In **Rita v. United States, 551 U.S. 338** (2007), this Court held that applying a presumption of reasonableness to within guidelines sentences is constitutional on the ground that the Sixth Amendment does not "automatically forbid" a judge from taking account of factual matters not determined by the jury. Id. at 352. Justice Scalia, joined by Justice Thomas, expressed concern that this scheme would lead to "constitutional violations" if a defendant's sentence is "upheld as reasonable only because of the existence of judge-found facts." Id. at 374(opinion concurring in part and concurring in the judgment). In response, the Court stated that the question was "not presented by this case." Id. at 353. Justice Stevens, joined by Justice Ginsburg, noted

that "[s]uch a hypothetical case should be decided if and when it arises." Id. at 366(concurring opinion).

Seven years later, Justice Scalia, joined by Justice Thomas and Ginsburg, noted the pressing need for the Court to resolve the question. See **Jones**, 135 S.Ct. at 8-9(opinion dissenting from the denial of certiorari). Justice Scalia observed that, ever since the question was reserved in Rita, the Courts of Appeal had "uniformly taken our continuing silence" on the question as they are within the statutory range." Id. at 9. Justice Scalia urged the Court to grant certiorari in an appropriate case in order to "put an end to the unbroken string of cases disregarding the Sixth Amendment or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." Ibid.

Shortyly after Justice Scalia's opinion in Jones, then-judge Gorsuch similarly observed that "[i]t is far from certain whether the Constitution allows" a judge to increase a defendant's sentence within the statutorily authorized range "based on facts the judge finds without the aid of a jury or the defendant's consent." **United States v. Sabillion-Umana**, 772 F.3d 1328, 1331 (10th Cir. 2014)(citing Jones). Three years later, however, that question remains unanswered by the Court, despite numerous opportunities to address it.

2. As several member of the Court have now recognized, the lower courts will continue to authorize sentences that would be unreasonable but for judge found facts until this Court

intervenes. In the decision below, the court of appeals rejected Petitioner's Sixth Amendment argument as having no support in existing law even after objecting to his lawyer filing an Anders brief. And other courts have declined to adopt similar arguments in the absence of clearer guidance from this Court, despite admitting that "there is room for debate." United States v. Briggs, 820 F. 3d 917 ,922 (8th Cir. 2016), cert. denied, 137 S. Ct. 617 (2017); United States v. Cassius, 777 F.3d 1093, 1099 n.4 (10th Cir.) (calling argument about judge-found sentencing facts "percluded by binding prece dent" but citing Jones), cert. denied, 135 S. Ct. 2909 (2015); see alos United States v. Settles, 530 F. 3d 920, 923-924 (D.C. Cir. 2008) (noting that "we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence," but ultimately relying on "binding precedent" to affirm the sentence), cert. denied, 555 U.S. 1140 (2009).

Numerous judges in the lower courts have urged a different approach or specifically importuned tis Court to provide guidance, nothing the importance of the question and the attendant uncertainty surrounding sentencing practices while the question remains open. See, e.g., United States v. White, 551 F.3d 381, 390 (6th Cir. 2008) (en banc) (Merritt, J., dissenting) (taking the position on behalf of six judges that, when the judge-found enhancements increase the Guidelines range such that, absent those facts, the sentence would be unreasonable, "those judge-found facts are necessary for the lawful imposition of the sentence, thus violating the Sixth Amendment right to a jury trial"), cert. denied, 556

U.S. 1215 (2009); United States v. Bell, 808 F.3d 926, 932 (D.C Cir. 2015) (per curiam) (Millet, J., concurring in denial of rehearing en banc)(noting that "only Supreme Court can reslove the contradictions in the current state of the law"), cert. denied, 137 S. Ct. 37 (2016); id. at 927 (Kavanaugh, J., concurring in denial of rehearing en banc) ("shar[ing] Judge Millett's overarching concern" and observing that a solution "would likely require" intervention by this Court). The court should accept the recurrent invitation to intervene and finally resolve the question presented.

B. The Decision Below Erroneous

The lower courtl erred when it concluded that Petitioner's Sixth Amendment did not forbids the district court from finding a hypothrtical facts to support an otherwise unreasonable sentence because his argument had no suport in existing law. In so conclluding, the court of appeals ignored the development of this Court's Sixth Amendment juriprudence and the serious concerns raised by numerous memeber of this Court.

The Sixth Amendment was intended to preserve the "jury's historic role as bulwark between the State and the accused at the trial for an alleged offense." Southern Union Co. v. United States, 567 U.S. 343, 350 (2012) citation omitted). The Sixth Amendment's guarantee of a trail by jury is constitutional protection"of surpassing importance, "Apprendi v. New Jersey, 530 U.S. 466, 476-477 (2000), and it "has occupied a cental position in our system of justice by safeguarding a person accused of a crime against arbitrary exercise of power by prosecutor or judge," Batson v. Kentucky, 476 U.S. 79, 86 (1986).

The jury trial right is a "fundamental reservation" of jury power that ensures that a judge's "authority to sentence derives wholly from the jury's verdict." Blackely v. Washington, 542 U.S. 296, 306 (2004) (emphasis added). In Apprendi, this Court held that "facts that increase the prescribed range of penalties to which a crimanal defendant is exposed" must either be admitted by the defendant or submitted to a jury. 530 U.S. at 490; see Blakely, 542 at 303. The Court reaffirmed that principle in Alleyne v. United States, 133 S. Ct. 2151 (2013), explaining that, "[w]hen a finding of fact alters teh legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Id. at 2162. Most recently, in Hurst v. Florida, 136 S. Ct. 616 (2016), the Court declared Florida's capital sentencing scheme unconstitutional under the Sixth Amendment because it permitted a judge, not a jury, to find the aggravating circumstances necessary to suport a defendant sentence. Id. at 624.

The forgoing principles apply with equal force where, as here, judicial hypothetical factfinding alters the Guidelines range and thereby encourages the court to impose a sentence that would otherwise be substantively unreasonable. Although the Sentencing Guidelines are no longer mandatory, they "remain the starting point for every sentencing calbulation in the federal system." Peugh v. United States, 133 S. Ct. 2072, 2083 (2013). "[I]f the judge uses the sentencing range as the beginning point" for the sentencing decision, "then the Guidelines are in a real sense the basis for the sentence," even if the ultimate sentence deviates from the Guidelines range. Id. A sentencing court is not free to impose a sentence, even if it falls within the statutory range, without taking account of the Guidelines range and explaining any variance. To do otherwise constitutes procedural error and results in an unlawful sentence. Id.

In the absence of a decision by this court squarely addressing the question presented, however, the Sixth Amendment right to trial by jury is being "lost by erosion. "Apprendi 530 U.S. at 483 (citation omitted). The government is now frequently permitted a "second bit at the apple" at sentencing when it presents a judge with conduct for which the defendant was acquiteed or (as here) not even charged. That strategy--whereby the governmetn relies on facts the jury either refused or had not opportunity to find--"entirely trivialzes" the jury's principal fact-finding function." Canania, 532 F.3d at 776 (Bright, J., concurring).

Even within the statutory range, there are sentences that would be unlawful but for a judge's fact-finding. Under the Court's Sixth Amendment precedents, facts that justify an otherwise unreasonable sentence must be found by a jury or admitted by the defendant before they can be used to increase the defendant's sentence. This Court should grant review and definitvely hold that practive of sustaining an otherwise unreasonable sentence through judicial hypotheticalfactfinding is unconstitutional.

C. The Question Presented Warrants Review In This Case.

This case is a particularly egregious example of judicial hypothetical factfinding. Petitioner never was admonished that a hypothetical felony offense would be used to almost double his guideline range. Petitioner was never charged by the State of Texas for a felony offense and the State only charged him with a misdemeanor. These factual hypothetical findings greatly increased Petitioner's Guideline range. This Court should grant certiorari on this question, to review his consequential unconstitutional sentence on the merits.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays that this Court grant his Writ of Certiorari and permit briefing and argument on the issues presented.

Respectfully Submitted on This Date 10th of April 2018

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