19-5690

NO. _____

ORIGINAL

IN THE
SUPREME COURT of the UNITED STATES
October 2019 TERM

SETH DISANTO,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SETH DISANTO, *PRO SE*
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DADE CORRECTIONAL INST.
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QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals erred by ruling DiSanto's lawyer was not ineffective by failing to bring to the attention of the trial court pursuant to Rule 3.172(g), Florida Rules of Criminal Procedure that withdrawal of his plea was mandatory before "formal acceptance of plea" even if his lawyer believed reasonably that the trial court had accepted his plea, contrary to the Strickland v. Washington, standard?[1]

Whether the Eleventh Circuit Court of Appeals erred by ruling that the trail judge's words were sufficient to constitute formal acceptance of DiSanto's plea for purposes of Rule 3.172(g) by relying upon the dictates of Campbell v. State, 125 So.3d 733, 740-41 (Fla. 2013) without violating the Ex Post Facto Law of Article 1, section 10, secured through Article 14 of the United States Constitution?

[1] Strickland v. Washington, 466 U.S. , 104 S. Ct. 2052,

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PETITION FOR WRIT OF CERTIORARI

Seth DiSanto respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

PARTIES TO THE PROCEEDINGS

SETH DISANTO, Petitioner in the United States Court of Appeals for the Eleventh Circuit.

The SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS was the Respondent in the United States Court of Appeals for the Eleventh Circuit.

DECISIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, denying DeSanto's appeal of the denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 appended as **Appendix A1-9**. The decision of the United States District Court, Middle District of Florida, Tampa Division and appended as **Appendix B1-18**.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Disanto's appeal was entered on May 15, 2019. **Appendix A1-6**. A timely Motion for Rehearing was filed by DiSanto and on May 23, 2019, the Eleventh Circuit Court of Appeals denied this motion. The Mandate was issued on May 31, 2019. **Appendix A7-9** . This Court has jurisdiction pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS INVOLVED

I. Article I, sec. 10, of the United States Constitution provides in pertinent part:

Section. 10. "No State shall enter into any Treaty, ... pass any Bill of Attainder, ex post facto Law, ..."

II. Article VI, of the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defense."

III. Article XIV, sec. 1, of the United States Constitution provides:

Section. 1. "All person born or naturalized in the United Staters, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

IV. 28 U.S.C. § 2254 provides in relevant part:

State custody; remedies in Federal courts

***

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Seth Disanto is a Florida prisoner serving a 15-year sentence after pleading no contest on July 11, 2008, to burglary of a dwelling and cannabis possession. After exhausting his state court's remedies, he filed a *pro se* federal habeas petition, pursuant to 28 U.S.C. § 2254 on June 3, 2013. On October 15, 2013, the State responded and on November 14, 2013, Disanto replied. On September 26, 2016, the district court denied the § 2254 petition and denied him a certificate of appealability ("COA"). **Appendix B1-18**. On October 17, 2016, Disanto subsequently filed a *pro se* motion of reconsideration, arguing that the district court erroneously denied Claim 1 – that his trial counsel ineffectively failed to advise the court of its lack of discretion to deny DiSanto's oral motion to withdraw his plea, under Fla. R. Crim. P. 3.172(g). On October 20, 2016, the district court denied his motion for reconsideration, which it construed to be brought pursuant to Fed. R. Civ. P. 59(e), and denied him a COA and leave to proceed on appeal *in forma pauperis* ("IFP").

On November 7, 2016, Disanto appealed and sought a COA and IFP status from the Eleventh Circuit Court of Appeals, which were granted. Specifically, a judge of that court granted a COA as to whether counsel was ineffective for failing to inform the trial court that it lacked discretion to deny DiSanto's oral motion to withdraw his plea, based on Rule 3.172(g).

On March 15, 2019, the circuit court entered an order denying DiSanto's appeal premise upon:

Contrary to DiSanto's assertion, the record evidences that the trial court in fact accepted DiSanto's plea. At the plea hearing, the trial judge said these words:

> So at this time, sir, I'll find that you are making a knowing, voluntary and intelligent waiver of your constitutional rights, and to the testing of any physical evidence which DNA testing could exonerate you; that you understand the significance of your plea; and that you are represented by competent counsel with whom you are satisfied; and that there's a factual basis in both cases. So that at this time, sir, we're gonna put off your sentencing to the September 5th . . . at nine o'clock a.m.

The circuit court concluded from this colloquy, after the plea hearing, the judge signed DiSanto's Waiver of Rights and Plea Agreement. The trial judge attested as follows: "I have determined that the defendant entered into this waiver of rights and plea agreement freely an voluntarily and that there is sufficient factual basis. Therefore, I approve this document and accept the defendant's plea." (emphasis added).

The circuit court was persuaded that the trial judge's words were sufficient to constitute formal acceptance of DiSanto's plea for purposes of Rule 3.172(g). Cf. Campbell v. State, 125 So.3d 733, 740-41 (Fla. 2013)(interpreting "formal acceptance" under Rule 3.172(g) to mean "an affirmative statement on the record, or an affirmative act by the court that the plea has been accepted. . . .").

Based upon the record developed at the state court's plea hearing, the circuit court could not conclude that DiSanto's lawyer performance fell below the wide range of competence demanded of attorneys in criminal cases. DiSanto's lawyer could have believed reasonably that the trial court had accepted DiSanto's plea such that DiSanto was unentitled to automatic withdrawal under Rule 3.172(g). DiSanto has failed to overcome the presumption that his lawyer rendered adequate professional judgment. **Appendix A5-6.**

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari since the Eleventh Circuit Court of Appeals erred by presuming DiSanto's lawyer could have believed reasonably that the trial court had accepted the plea based upon state's case law that did not exist at the time of the motion to withdraw proceeding, thus, violating Article 1, section 10, Article 6 and 14 of the United States Constitution.

Under 28 U.S.C. 2254(d), the availability of federal habeas relief is limited with respect to claims previously ``adjudicated on the merits" in state-court proceedings. The first inquiry this case presents is whether that pro-vision applies when state-court relief is denied without an accompanying statement of reasons. If it does, the question is whether the Court of Appeals adhered to the statute's terms, in this case as it relates to ineffective-assistance claims judged by the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

By its terms 2254(d) bars relitigation of any claim ``adjudicated on the merits" in state court, subject only to the exceptions in 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a ``decision," which resulted from an ``adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning.

Under the deferential review standard, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d). Cullen v. Pinholster, 563 U.S.170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). "This is a difficult to meet, and highly deferential standard for evaluating state-court rulings, which demands that the state-court decisions be given the benefit of the doubt." Id. See also Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) (pointing out that "if [2254(d)'s] standard is difficult to meet, that is because it was meant to be.").

Both the Eleventh Circuit and this Court broadly interpret what is meant by an "adjudication on the merits." Childers v. Floyd, 642 F.3d 953, 967-68 (11th Cir. 2011). Thus, a state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits that warrants deference by a federal court. Id.; see also Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008). Indeed, "unless the state court clearly states that its decision was based solely on a state procedural rule [the Court] will presume that the state court has rendered an adjudication on the merits when the petitioner's claim 'is the same claim rejected' by the court." Childers v. Floyd, 642 F.3d at 969 (quoting Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002)).

"A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme] Court." Thaler v. Haynes, 559 U.S. 43, 130 S. Ct. 1171, 1173, 175 L. Ed. 2d 1003 (2010); see also Carey v. Musladin, 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)(citing Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000))(recognizing "[c]learly established federal law" consists of the governing legal principles, rather than the *dicta*, set forth in the decisions of the United

States Supreme Court at the time the state court issues its decision). "A state court decision involves an unreasonable application of federal law when it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1291 (11th Cir. 2012)(internal quotations and citations omitted). The "unreasonable application" inquiry requires the Court to conduct the two-step analysis set forth in Harrington v. Richter, 131 S. Ct. at 770. **First, the Court determines what arguments or theories support the state court decision; and second, the Court must determine whether "fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior" Supreme Court decision**. Id. Whether a court errs in determining facts "is even more deferential than under a clearly erroneous standard of review." Stephens v. Hall, 407 F.3d 1195, 1201 (11th Cir. 2005). The Court presumes the findings of fact to be correct, and petitioner bears the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. 2254(e)(1).

In the instant case the district court disagreed with Respondent that the claim was unexhausted and procedurally defaulted. The district court held: "Although Petitioner raised the claim in his amended Rule 3.850 motion . . . , he also raised the claim in his initial Rule 3.850 motion. While Petitioner may have inartfully presented his claim in the initial motion, he clearly alleged that trial counsel "failed to advise trial court of the defendant's absolute substantive right to withdraw his plea. [sic] When defendant moved to withdraw his plea prior to sentencing and formal acceptance of plea by the court." The district court addressed the

claim on the merits. **Appendix B9**.

As recognized by the district court, "Petitioner contends that pursuant to Rule 3.172(g), Fla. R. Crim. P. he was entitled to withdraw his guilty plea because the trial court had yet to formally accept the plea or sentence him. Rule 3.172(g) provides that "[n]o plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquires, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification." "[P]rior to a formal acceptance of the plea or pronouncement of sentence, "[u]nder rule 3.172[(g)], the court has no discretion. If the court has not formally accepted the plea, it must allow withdrawal." *Spargo v. State*, 132 So.3d 354, 357 (Fla. 1st DCA 2014)(quoting *Campbell v. State*, 125 So.3d 733, 739 (Fla. 2013)) (alterations in original)." The district court concluded under the dictates of Campbell, 125 So.3d at 740, Petitioner was not entitled to withdraw his plea, therefore counsel did not render deficient performance. **Appendix B9-11**.

The Eleventh Circuit Court of Appeals adopted the reasoning of the district court under Campbell, (interpreting "formal acceptance" under Rule 3.172(g) to mean "an affirmative statement on the record, or an affirmative act by the court that the plea has been accepted. . . .") and included "On this record, we cannot conclude that DiSanto's lawyer's performance fell below the wide range of competence demanded of attorney's in criminal cases. DiSanto's lawyer could have believed reasonably that the trial court had accepted DiSanto's plea such that DiSanto was unentitled to automatic withdrawal under Rule 3.172(g). DiSanto has failed to overcome the presumption that his lawyer rendered adequate professional assistance and

made all significant decisions in the exercise of reasonable professional judgment." **Appendix B5-6.**

The pivotal question is whether the Eleventh Circuit Court of Appeals' application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a Strickland claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of 2254(d)(1), ``an unreasonable application of federal law is different from an incorrect application of federal law." Williams, supra, at 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389. A reviewing court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.

A reviewing court's determination that a claim lacks merit precludes federal habeas relief so long as ``fair minded jurists could disagree" on the correctness of the state court's decision. Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). And as this Court has explained, ``[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Ibid. ``[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009).

Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a de novo review, (**Appendix** B3) and after finding no Strickland violation, it declared, without further explanation, that the "DiSanto has failed to overcome the presumption that his lawyer rendered adequate professional assistance and made all significant decisions in the exercise of reasonable professional judgment." theories supported or, as here, could have supported, the state court's proceeding on the motion to withdraw, and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored ``the only question that matters under 2254(d)(1)." Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under de novo review: Because the Court of Appeals had little doubt that DiSanto's Strickland claim had merit, the Court of Appeals concluded the district court must have been reasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the district court's result and ignores further limitations of 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. See Renico v. Lett, 559 U.S. 766, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010).

If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. Cf. Felker v. Turpin, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (discussing AEDPA's ``modified res judicata rule" under 2244). It

preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a ``guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. Jackson v. Virginia, 443 U.S. 307, 332, n. 5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

The reasons for this approach are familiar. ``Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." Calderon v. Thompson, 523 U.S. 538, 555-556, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). It ``disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." Reed, 489 U.S., at 282, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (Kennedy, J., dissenting).

Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of Wainwright v. Sykes, 433 U.S. 72, 82-84, 97 S. Ct. 2497, 53

L. Ed. 2d 594 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to 2254(d) set out in 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding, see id., at 90, 97 S. Ct. 2497, 53 L. Ed. 2d 594.

Here, however, the Court of Appeals gave 2254(d) no operation or function in its reasoning. Its analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.

In the same way that an appeal not taken because of late filing prejudices a defendant by denying him "the opportunity for a second trial he otherwise would have had," so too does counsel's failure to request withdrawal of a plea in the State of Florida pursuant to Rule 3.172(g) at the time of DiSanto's motion to withdraw proceeding deprive him of a "procedural right to which the law entitle[d] him. State v. Ramsey, 323 F.Supp.2d 27, 40-41 (D.D.C. 2004) "the denial of a significant procedural right . . . is sufficient to satisfy the prejudice prong of Strickland." Ramsey, at 39.

This Court has held that the Ex Post Facto Clause of the United States Constitution does not generally apply to case law. See Marks v. United State, 430 U.S. 188, 191, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977). The clause applies to a judicial opinion only when it results in "an unforeseeable enlargement of a criminal statute." Id. at 192 (quoting Bouie v. City of Columbia, 378 U.S. 347, 353-54, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)); see also Rogers v.

Tennessee, 532 U.S. 451, 149 L.Ed.2d 697, 121 S.Ct. 1693 (2001)(holding that Bouie only restricted the retroactive application of judicial interpretations of criminal statute to those that are unexpected and indefensible by reference to prior law).

The basic due process concept involved is the same as that which this Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See e. g., Wright v Georgia, 373 US 284, 291, 10 L ed 2d 349, 354, 83 S Ct 1240; NAACP v Alabama, 357 US 449, 456-458, 2 L ed 2d 1488, 1496, 1497, 78 S Ct 1163; Barr v City of Columbia, 378 US 146, 12 L ed 2d 766, 84 S Ct 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, this Court thought, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, "a federal right turns upon the status of state law as of a given moment in the past-or, more exactly, the appearance to the individual of the status of state law as of that moment ...." 109 U Pa L Rev, supra, at 74, n 34. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v Hill, 281 US 673, 678, 74 L ed 1107, 1112, 50 S Ct 451. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either

situation is this Court's statement in Brinkerhoff-Faris, supra, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute." Id., at 679-680, 74 L ed at 1112, 1113.

If this view is valid in the case of a judicial construction which adds a "clarifying gloss" to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed." Calder v Bull, 3 Dall 386, 390, 1 L ed 648, 650.**4** If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. Smith v Cahoon, 283 US 553, 565, 75 L ed 1264, 1273, 51 S Ct 582. The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," Hall, General Principles of Criminal Law (2d ed 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect.

Id., at 61.

This Court should therefore grant certiorari, vacate the judgment, and remand this case for reconsideration of the deficiency prong of the Strickland standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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