No. 19-6095

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES DEVAN FULTON, SR., 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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QUESTION PRESENTED

Whether the court of appeals erred in applying the good-faith exception to the exclusionary rule, where police officers relied on a judicially issued search warrant supported by an application containing information obtained from an earlier seizure that the court concluded violated the Fourth Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tx.):

United States v. Fulton, No. 15-cr-7 (June 24, 2016) (denial of petitioner's motion to suppress)

United States v. Fulton, No. 15-cr-7 (Dec. 5, 2017) (judgment)

United States Court of Appeals (5th Cir.):

United States v. Fulton, No. 17-41251 (June 27, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 928 F.3d 429. The memorandum and order of the district court (Pet. App. 14-21) is reported at 192 F. Supp. 3d 728.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2019. The petition for a writ of certiorari was filed on September 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012), and one count of conspiracy to commit sex trafficking, in violation of 18 U.S.C. 1594(c). Judgment 1-2. The district court sentenced petitioner to life imprisonment, to be followed by 15 years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-13.

1. In late 2014 and early 2015, the Galveston Police were investigating petitioner for drug trafficking. Pet. App. 15. As part of that investigation, Galveston Police Officer David Roark obtained an arrest warrant for petitioner and a search warrant for his residence. Id. at 14-15. The warrants, which were signed by a Texas state judge, authorized the seizure of a list of items related to illegal drug activities, such as "ledger[s]"; the list did not explicitly include cell phones. Id. at 15.

Police executed the warrant on February 9, 2015. Pet. App. 15. They found a minor female at the residence, as well as petitioner himself. Pet. 5. Officers also found petitioner's cell phone, which was "within the area of his immediate control – a few feet away, in the same room of the house in which he was arrested." Pet. App. 19. They seized the phone. Id. at 15. Nine days later, Officer Roark sought and obtained a state warrant to

search the phone. Pet. App. 15. The Galveston Police Department was unable, however, to access the password-protected phone. Ibid.

On February 25, 2015, the FBI began an investigation into petitioner's trafficking of minor girls for sex. Pet. App. 16. FBI Special Agent Richard Rennison sought a federal warrant to search petitioner's phone for evidence of sex trafficking; that warrant was signed by a federal magistrate judge on March 25, 2015. Ibid. The federal warrant application accurately recounted the circumstances under which law enforcement had obtained the phone. C.A. ROA 235. The warrant application noted that the Galveston Police Department had already obtained a warrant but had been unable to access the device, and stated that "while the FBI might already have all necessary authority to examine the Device, I seek this additional warrant out of an abundance of caution to be certain that an examination of the Device will comply with the Fourth Amendment and other applicable laws." Ibid.

The FBI was ultimately able to gain access to petitioner's phone. Pet. App. 3. The phone contained evidence of petitioner's involvement in trafficking minors for sex. Ibid.

2. A federal grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiracy to commit sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012) and 18 U.S.C. 1594(c), and six substantive counts of sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012). C.A. ROA 107-114. Petitioner moved to suppress the

evidence recovered from his cell phone. Pet. App. 17. As relevant here, he argued that the initial seizure of the cell phone violated the Fourth Amendment because it was not authorized by a warrant, and that the subsequent search was therefore also unlawful. Ibid.

After an evidentiary hearing, the district court denied petitioner's motion to suppress. Pet. App. 18. The court determined that police had lawfully seized petitioner's phone without a warrant incident to his arrest, and that the seizure therefore did not violate the Fourth Amendment. Id. at 19 (citing Chimel v. California, 395 U.S. 752, 755-756 (1969) and United States v. Robinson, 414 U.S. 218, 236 (1973)). The court also found that "law enforcement had to take [petitioner's] cell phone into custody incident to [petitioner's] arrest because [petitioner] told the arresting law enforcement officers that the phone was his, but that the house where he was arrested was not." Pet. App. 20. Observing that law enforcement then obtained warrants to search the phone, as required by Riley v. California, 573 U.S. 373 (2014), the district court found no Fourth Amendment violation. Pet. App. 19-20.

At petitioner's trial, the government's evidence included testimony from law enforcement officers, a sex trafficking expert, petitioner's co-conspirator and girlfriend, an adult prostitute who worked for petitioner, and five of the juvenile victims. Gov't C.A. Br. 6, 16-18. The government also introduced evidence recovered from petitioner's cell phone, such as text messages and

photographs. Pet. App. 3. The jury found petitioner guilty of conspiracy to commit sex trafficking of a minor and four substantive counts of sex trafficking of a minor. Judgment 1-2. It acquitted on the two remaining substantive counts of sex trafficking. Judgment 1.

3. The court of appeals affirmed. Pet. App. 1-13.

As relevant here, petitioner argued on appeal that the evidence from his cell phone should have been suppressed. Pet. App. 2. As it had in the district court, the government defended the validity of the cell phone seizure and search on several grounds. The government maintained that police had properly seized the phone pursuant to the residential search warrant, which permitted the seizure of "ledger[s]" and other "implements and instruments used in" drug trafficking. Gov't C.A. Br. 29-33 (citation omitted). In the alternative, the government contended that officers validly seized the phone without a warrant under the plain-view and search-incident-to-arrest exceptions to the warrant requirement. Id. at 33-38. The government also contended that, even assuming that Galveston police violated the Fourth Amendment by seizing the phone, the good-faith exception to the exclusionary rule should apply to evidence obtained pursuant to the FBI's later search warrant. Id. at 41-45. Finally, the government maintained that any error related to the admission of evidence from petitioner's cell phone was harmless at trial, where the key

evidence was the testimony of petitioner's victims. Id. at 45-46.

The court of appeals initially issued an opinion in which it found no Fourth Amendment violation because the warrant to search petitioner's residence authorized the seizure of petitioner's cell phone. 914 F.3d 390. Citing United States v. Aguirre, 664 F.3d 606, 614 (5th Cir. 2011), cert. denied, 566 U.S. 954 (2012), the court reasoned that because the phone could be "'used as a mode of both spoken and written communication * * * containing text messages and call logs, [thereby serving] as the equivalent of records and documentation of sales or other drug activity,'" it was the "functional equivalent" of a "ledger," which the warrant explicitly listed as an item to be seized. 914 F.3d at 396. On rehearing, however, the court concluded that the residential search warrant did not, in fact, extend to the phone, because "nothing in the Galveston warrant suggest[ed] that anything similar to computers or even electronics was to be seized." Pet. App. 5. But the court, without reaching any of the alternative justifications for seizing the phone, determined, citing United States v. Massi, 761 F.3d 512 (5th Cir. 2014), cert. denied, 135 S. Ct. 2377 (2015), that evidence of the phone was properly presented at trial notwithstanding the unlawful seizure because the good-faith exception to the exclusionary rule applied. Id. at 6-7.

The court of appeals explained that "viewed objectively, an FBI agent who obtained a search warrant in these circumstances would not have had reason to believe the seizure and continued possession of the cell phone by the Galveston police were unlawful." Pet. App. 7. The court observed that "the question of whether the [initial search] warrant applied to the cell phone does not lead to an easy negative answer." Ibid. And it found that as a result, the phone seizure was "close enough to the line of validity" to permit an inference that the ultimate search warrant was prepared and obtained in good faith. Ibid.

ARGUMENT

Petitioner contends (Pet. 12-23) that the court of appeals erred in applying the good-faith exception to the exclusionary rule. The court of appeals' decision is correct, no circuit conflict exists that requires this Court's intervention, and this case would be a poor vehicle to consider the question presented. No further review is warranted.

1. The court of appeals correctly determined that the good-faith exception to the exclusionary rule applied based on Agent Rennison's reliance on the magistrate-issued warrant, even though the warrant application included information obtained from activity (the initial seizure of the cell phone) that the court viewed to have violated the Fourth Amendment.

a. "The fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies."

Herring v. United States, 555 U.S. 135, 140 (2009). To the contrary, this Court has "repeatedly held" that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," and the Court has therefore "limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" Davis v. United States, 564 U.S. 229, 236-237 (2011) (citation omitted). Where, in contrast, "suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.'" Id. at 237 (citation omitted); see Herring, 555 U.S. at 141.

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis, 564 U.S. at 237 (citation omitted). "The analysis must also account for the 'substantial social costs'" of the exclusionary rule. Ibid. (citation omitted). "Exclusion exacts a heavy toll" because "[i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Ibid. This Court's decisions "hold that society must swallow this bitter pill when necessary, but only as a 'last resort.'" Ibid. (citation omitted). Exclusion can be an appropriate remedy only when "the deterrence benefits of suppression * * * outweigh its heavy costs." Ibid.

Those principles are reflected in this Court's decision in United States v. Leon, 468 U.S. 897 (1984), which held that evidence should not be suppressed if it was obtained "in objectively reasonable reliance" on a search warrant, even if that warrant is subsequently deemed invalid. Id. at 922. Under Leon, suppression of evidence seized pursuant to a warrant is not justified unless (1) the issuing magistrate was misled by affidavit information that the affiant either "knew was false" or offered with "reckless disregard of the truth"; (2) "the issuing magistrate wholly abandoned his judicial role"; (3) the supporting affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid." Id. at 923 (citation omitted). "[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 919 (citation omitted).

Contrary to petitioner's suggestion (Pet. 16), neither Riley v. California, 573 U.S. 373 (2014), nor Carpenter v. United States, 138 S. Ct. 2206 (2018), established that cell phones enjoy "heightened protection" under the Fourth Amendment that would alter the application of the exclusionary rule. In Riley, this

Court held that police generally may not, without a warrant, search digital information on a cell phone seized from someone who has been arrested, 573 U.S. at 386. In Carpenter, this Court held that the government's acquisition of seven or more days of historical cell-site location records is a Fourth Amendment "search" generally subject to the warrant requirement, 138 S. Ct. at 2217. Both cases thus concern the threshold question of whether a warrant is required under the Fourth Amendment. Neither Riley nor Carpenter discussed the exclusionary rule or its good-faith exception.

b. The court of appeals correctly applied the good-faith exception to the exclusionary rule in petitioner's case. The FBI's search of petitioner's phone was unquestionably authorized by a magistrate-issued warrant. See Pet. App. 16. Petitioner does not contend that any of Leon's exceptions to the application of the good-faith exception to a magistrate-issued warrant would apply. Instead, petitioner has sought to rely on an additional exception, asserting that the exclusionary rule overcomes good-faith reliance on a magistrate-issued warrant if the warrant was issued on the basis of "fruit of the poisonous tree." Pet. 14.

The court of appeals correctly rejected that argument. The FBI reasonably relied on a facially valid magistrate-issued warrant in searching petitioner's phone. Even assuming that the Galveston police erred by seizing petitioner's phone during his arrest, that error was subtle enough that an objectively reasonable

agent who later prepared a search warrant for the phone "would not have had reason to believe the seizure and continued possession of the cell phone by the Galveston police were unlawful." Pet. App. 7. As the court of appeals observed, the "question of whether the [initial] warrant applied to the [seizure of] the cell phone d[id] not lead to an easy negative answer" under the Fifth Circuit's case law. Ibid. Indeed, the initial panel opinion had answered that question in the affirmative. And as addressed further below, other grounds could have -- and do -- support the lawfulness of the seizure of petitioner's phone at his arrest. As a result, the FBI agent who obtained the search warrant for the seized phone had no reason to "know[] that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n.23. The good-faith rule applies in these circumstances. See, e.g., United States v. Hopkins, 824 F.3d 726, 733 (8th Cir.) (applying good-faith exception where prior search was "close enough to the line of validity" to render reliance on the warrant objectively reasonable) (citation omitted), cert. denied, 137 S. Ct. 522 (2016).

This Court's decisions confirm the correctness of the court of appeals' determination. "The basic insight of the Leon line of cases is that the deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." Davis, 564 U.S. at 238 (quoting Herring, 555 U.S. at 143) (brackets omitted). And whether "a reasonably well trained officer would have known

that the search was illegal despite the magistrate's authorization" is to be decided based on "all of the circumstances." Leon, 468 U.S. at 922 n.23. "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights," exclusion serves a meaningful deterrent function. Davis, 564 U.S. at 238 (quoting Herring, 555 U.S. at 144). "But when," as in this case, "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, * * * the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" Ibid. (quoting Leon, 468 U.S. at 908 n.6, 909, 919).

2. No conflict exists in the circuit courts on the question presented that warrants this Court's review. Several courts of appeals have correctly applied the good-faith exception to determine that suppression is not appropriate where a "search warrant application cite[d] information gathered in violation of the Fourth Amendment," but the earlier violation was "'close enough to the line'" to "'make the officers' belief in the validity of the warrant objectively reasonable.'" United States v. Cannon, 703 F.3d 407, 413 (8th Cir.) (citations omitted), cert. denied, 569 U.S. 987 (2013); see, e.g., United States v. Diehl, 276 F.3d 32, 44-45 (1st Cir.), cert. denied, 537 U.S. 834 (2002); United States v. Bain, 874 F.3d 1, 21 (1st Cir. 2017), cert. denied, 138 S. Ct. 1593 (2018); United States v. Ganias, 824 F.3d 199, 221-226 (2d. Cir.), cert. denied, 137 S. Ct. 569 (2016); United States

v. Massi, 761 F.3d 512, 528 (5th Cir. 2014), cert. denied, 135 S. Ct. 2377 (2015); United States v. McClain, 444 F.3d 556, 565-566 (6th Cir. 2005), cert. denied, 549 U.S. 1030 (2006); Hopkins, 824 F.3d at 733-734.[1]

Petitioner cites (Pet. 19-23) decisions by other courts of appeals that have refused to apply the good-faith exception to warrants obtained using information derived from prior Fourth Amendment violations, without asking whether the officers' conduct was objectively reasonable. See, e.g., United States v. McGough, 412 F.3d 1232, 1240 (11th Cir. 2005); United States v. Scales, 903 F.2d 765, 767-768 (10th Cir. 1990); United States v. Wanless, 882 F.2d 1459, 1466-1467 (9th Cir. 1989); United States v. Vasey, 834 F.2d 782, 789-790 (9th Cir. 1987).

This Court's review, however, is unwarranted. The decisions viewing the good-faith exception as inapplicable to warrants issued based on information obtained in violation of the Fourth Amendment have rested on the assumption that the good-faith

[1] Petitioner contends (Pet. 17-18) that the Sixth Circuit's decision in McClain followed this approach "with a distinction" by focusing on whether the same officers conducted both searches and whether the warrant affidavit fully described the initial warrantless search. McClain did emphasize those facts, but did not require their presence in order to apply the good-faith exception. 444 F.3d at 565-566. Nor have later Sixth Circuit decisions done so. See, e.g., United States v. Tucker, 742 Fed. Appx. 994, 1003 (2018). In any event, in this case the officers who seized petitioner's cell phone and who later obtained a search warrant were different people, and the search warrant accurately described how law enforcement had obtained the phone. See C.A. ROA 235.

doctrine applies only where law enforcement officers relied on a third party's judgment in violating the Fourth Amendment. See, e.g., Scales, 903 F.2d at 767-768; Vasey, 834 F.2d at 789; see also McGough, 412 F.3d at 1239-1240 (relying at least in part on that consideration). But this Court's decision in Herring v. United States rejected that assumption and applied the good-faith doctrine to authorize the admission of evidence obtained as a result of a negligent constitutional violation by law enforcement officers. 555 U.S. at 147-148. And, more generally, this Court's recent good-faith decisions have admonished that suppression is inappropriate where "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." Davis, 564 U.S. at 238 (citation omitted).

With the benefit of this Court's recent decisions, lower courts that once deemed the good-faith exception categorically inapplicable to warrants that reflected information gathered from unlawful police searches have begun to revisit that conclusion. In United States v. Artis, 919 F.3d 1123 (2019), the Ninth Circuit recognized that its prior decisions in Wanless and Vasey were no longer good law because "the Supreme Court's precedent on application of the good-faith exception has shifted." Id. at 1133. "In light of Herring," the Ninth Circuit recognized, "we can no longer declare the good-faith exception categorically inapplicable whenever a search warrant is issued on the basis of evidence illegally obtained as a result of constitutional errors by the

police." Ibid. Similarly, the Eleventh Circuit has now applied the good-faith exception where a search warrant relied, in part, on information collected in violation of the Fourth Amendment, explaining that the exclusionary rule does not apply where "law enforcement officers act 'with an objectively "reasonable good-faith belief" that their conduct is lawful.'" United States v. Smith, 741 F.3d 1211, 1224 (2013), cert. denied, 574 U.S. 102 (2014) (quoting Davis, 564 U.S. at 238).

Petitioner cites (Pet. 21) only one court of appeals decision since Herring and Davis that suppressed evidence on the theory that the good-faith doctrine is categorically inapplicable to warrants based in part on information obtained in violation of the Fourth Amendment. In United States v. Loera, 923 F.3d 907, cert. denied, No. 19-5866 (Oct. 15, 2019), the Tenth Circuit relied on its prior decision in Scales to state that "the good faith exception does not apply" when "the illegality at issue stems from unlawful police conduct, rather than magistrate error." Id. at 925. The Tenth Circuit did not mention this Court's decisions in Herring and Davis or explain how Scales's rationale withstands those decisions.

Any remaining shallow conflict does not warrant this Court's review. This Court has recently and repeatedly denied petitions raising the issue, see Bain v. United States, 138 S. Ct. 1593 (2018) (No. 17-7494); Holley v. United States, 137 S. Ct. 2118 (2017) (No. 16-7781); Ganias v. United States, 137 S. Ct. 569

(2016) (No. 16-263); Hopkins v. United States, 137 S. Ct. 522 (2016) (No. 16-6428); Massi v. United States, 135 S. Ct. 2377 (2015) (No. 14-740), and there is no reason for a different outcome in this case.

3. In any event, this case would be an unsuitable vehicle to consider petitioner's contentions, for two independent reasons. First, several bases exist for concluding that the initial seizure of petitioner's cell phone was lawful, meaning that the subsequent search warrant did not rely on the fruits of any Fourth Amendment violation. And second, petitioner would not be entitled to any relief even if he were to prevail on the question presented because any error in the admission of evidence recovered from his cell phone was harmless.

a. In the district court and the court of appeals, the government maintained that officers validly seized petitioner's phone without a warrant under the incident-to-arrest and plain-view exceptions to the warrant requirement. See Gov't C.A. Br. 33-38. The district court agreed with the first point, finding the seizure lawful as incident to petitioner's arrest, and did not address the plain-view doctrine. Pet. App. 20. The court of appeals did not address either rule. Id. at 4-5. If either applies, however, then the good-faith exception is not relevant here.

When police officers make an arrest, they may search the arrestee's person and the area "within his immediate control"

without obtaining a warrant. Chimel v. California, 395 U.S. 752, 762-763 (1969). Such a warrantless search incident to arrest is justified by the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the "concealment or destruction" of evidence. Id. at 763. In United States v. Robinson, 414 U.S. 218 (1973), this Court held that the search-incident-to-arrest doctrine is a bright-line rule authorizing a search incident to any arrest. Id. at 235. The Court explained that the authority to search should not "depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." Ibid.

Here, the district court correctly relied on the search-incident-to-arrest doctrine to determine that Galveston police lawfully seized petitioner's phone incident to his arrest. As a factual matter, the district court found that petitioner's "cell phone was within the area of his immediate control." Pet. App. 6. Petitioner also "told the arresting law enforcement officers that the phone was his, but that the house where he was arrested was not his," making it reasonable for law enforcement to preserve the phone by seizing it rather than leaving it behind after arresting petitioner. Id. at 7. Law enforcement then obtained a warrant before searching the phone, which is precisely the sequence of events contemplated by this Court in Riley. See 573 U.S. at 401

(explaining that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest").

The plain-view doctrine also supports the seizure of petitioner's cell phone. Under that doctrine, law enforcement officers "may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." Kentucky v. King, 563 U.S. 452, 462–63 (2011). The "incriminating character" of the evidence "must also be 'immediately apparent.'" Horton v. California, 496 U.S. 128, 136 (1990) (citation omitted). It is undisputed here that the Galveston police had a valid search warrant pursuant to which they searched petitioner's temporary residence for evidence of drug-trafficking, and discovered petitioner's phone in plain view. The only question -- not addressed by either court below -- is whether the potential evidentiary value of petitioner's cell phone was "immediately apparent." But the Fifth Circuit has explained that "[t]he incriminating nature of an item is 'immediately apparent' if the officers have 'probable cause' to believe that the item is either evidence of a crime or contraband." United States v. Conlan, 786 F.3d 380, 388 (5th Cir. 2015). And that standard was met here, as reflected in Officer Roark's testimony about extensive cell phone use by drug dealers in furtherance of their crimes. See Gov't C.A. Br. 33-35.

b. In any event, even if a Fourth Amendment violation did occur, and petitioner prevailed on the question presented, he would not be entitled to relief because any error in the admission of text messages and other evidence recovered from his cell phone was harmless. Contrary to petitioner's contention, the cell phone evidence was not "critical to the Government's case," Pet. 4, which instead rested largely on other evidence. Indeed, the government lacked victim testimony for one charged count but presented evidence from petitioner's phone, and the jury acquitted on that count. Gov't C.A. Br. 46 n.15. The strongest evidence of petitioner's guilt came from the testimony of the girls he trafficked for sex. See id. at 45-46. The government's evidence also included testimony from petitioner's girlfriend (a co-conspirator) and another adult prostitute who described their regular discussions and disputes with petitioner about the minor victims' underage status. Id. at 17. Petitioner's girlfriend, for example, testified that she told petitioner not to prostitute children "[a]bout a million times." C.A. ROA 1284; Gov't C.A Br. 17. The outcome of petitioner's case would therefore not change even if petitioner prevailed before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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