NO. _____

# In The
# Supreme Court of the United States

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## JUROTHER LEE ALSTON, JR.,

*Petitioner*,

**v.**

## UNITED STATES OF AMERICA,

*Respondent*.

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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***Dated: January 8, 2020***

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## QUESTION PRESENTED

What is the scope of the Inevitable Discovery doctrine originally set out in *Nix v. Williams*, 467 U.S. 431, 444 (1984)?

## LIST OF PARTIES TO PROCEEDING BELOW

Petitioner, Jurother Lee Alston, Jr. was the Defendant and Appellant below. The United States of America was the Plaintiff and Appellee below.

## CORPORATION DISCLOSURE STATEMENT

Petitioner is an individual and there are no corporate interests to disclose.

## STATEMENT OF RELATED CASES

The following proceedings are directly related to this case:

*United States v. Juother Alston,* 1:17-cr-00446-NCT-1, final judgment entered in the United States District Court for the Middle District of North Carolina on July 25, 2018. (Appendix p. 14a).

*United States v. Jurother Alston,* 18-4524, published opinion of the United States Court of Appeals for the Fourth Circuit Affirming the District Court on October 24,2019. (Appendix p. 1a)

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## MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Fourth Circuit issued a Published Opinion in United States v. Alston, ___ F.3d.____ (4th Cir. 2019) (Appendix p. 1a). The Fourth Circuit held the exclusionary rule was not appropriate as the illegally obtained evidence would have inevitably been discovered. (Appendix p. 11a)

## JURISDICTIONAL GROUNDS

The District Court for the Middle District of North Carolina had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231 and 18 U.S.C. § 922. The United States Court of Appeals for the Fourth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291 and Rule 4(a) of the Federal Rules of Appellate Procedure. The opinion of the Court of Appeals affirming the District Court's denial of Petitioner's Motion to Dismiss was October 24, 2019. Petitioner did not request a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the Fourth Amendment to the United States Constitution which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment is applicable to the States by the Fourteenth Amendment.

## STATEMENT OF THE CASE

The indictment in this case arises out of the detention and search of Mr. Alston and the derivative evidence from said detention and search. On December 11, 2017, Mr. Alston encountered law enforcement when he drove a black Chevrolet into the intersection of North Buchanan Boulevard and West Club Boulevard in Durham, North Carolina. As Mr. Alston approached the intersection, he traveled in the left lane and made a left turn. Alleging the light was red when Mr. Alston entered the intersection, Captain Aleem of the Durham County Sheriff's office, activated his emergency blue lights and drove behind Mr. Alston. (J.A. 73, 97).

According to Captain Aleem's testimony at the suppression hearing, the Chevrolet did not immediately stop. It slowed down, finished its left turn, continued past a Burger King, then made a right on the next street and drove an additional block. (J.A. 98-99). At 13:53:56, some point during the pursuit, Captain Aleem notified dispatch of a suspicious vehicle instead of calling it a "traffic stop" (Herein "The Call"). (J.A. 187)[1]. As Mr. Alston's vehicle slowly moved forward, Captain Aleem testified, he noticed the driver lean low towards the passenger side and continued to look back. (J.A. 74). Captain Aleem testified he assumed he was reaching for something deep on the passenger side of the vehicle because he dipped completely out of view and would not stop. (J.A. 86). Within one minute of reporting "The Call," Captain Aleem called dispatch with the vehicle's license plate number. (J.A. 188). The Chevrolet continued to move forward until it struck a parked vehicle on the side

[1] A report of a suspicious vehicle is the second highest priority call of six levels. (J.A. 175).

of the road. (J.A. 74). The impact was slight and did not cause any damage to either vehicle. (J.A. 79).

Captain Aleem testified he drove his police vehicle very close along the left of Mr. Alston's Chevrolet to prevent Mr. Alston from being able to open the driver's side door. (J.A. 75). Captain Aleem testified he intentionally pulled up to Mr. Alston's vehicle aggressively to take away any "psychological advantage" Mr. Alston may perceive. In describing his aggressive traffic stop technique used to pull Mr. Alston, Captain Aleem stated, "[S]o the moment I pull up beside him, the psychological advantage is shattered" (J.A. 103). Further, Captain Aleem testified he pulled up next to Mr. Alston's vehicle rather than behind to prevent Mr. Alston from jumping out of the car or from fleeing. (J.A. 103).

After Captain Aleem pulled his vehicle closely along the driver's side of Mr. Alston's vehicle, he witnessed Mr. Alston look up and start to talk. Having now "shattered" Mr. Alston's "psychological advantage" Captain Aleem noted Mr. Alston appeared to be "extremely nervous." (J.A. 75). Captain Aleem interrupted and reminded Mr. Alston he had run a red light. (J.A. 75). According to Captain Aleem's testimony, Mr. Alston replied, "[H]is girlfriend was pregnant and he needed to go pick up the kids and he just ….. wasn't paying attention and he went through the light." (J.A. 75). Captain Aleem then told Mr. Alston "Bro, you mighty nervous, you got anything else in the vehicle you shouldn't have?" (J.A. 108). According to Captain Aleem, Mr. Alston, who has been "shattered," replied "All I got is this little bag of weed, that's all I got." (J.A. 75, 112). Captain Aleem testified he leaned over in his

vehicle and ordered, "Go ahead and give it to me." (J.A. 75). Mr. Alston then tossed it through the window into Captain Aleem's vehicle. (J.A. 75). This occurred within minutes after the traffic stop was initiated. Although Mr. Alston was acting nervous, Captain Aleem admitted he reassured Mr. Alston that he wasn't going to take him to jail, even after seizing the bag of marijuana. (J.A.112). As Captain Aleem reassured Mr. Alston he was not going to take him to jail, Mr. Alston began to relax a bit. (J.A. 112).

Captain Aleem testified he next asked Mr. Alston for his driver's license, and Mr. Alston admitted his driver's license was revoked. Captain Aleem contacted dispatch 8 minutes and 30 seconds from "The Call" and dispatch confirmed Mr. Alston's license was revoked 9 minutes 47 seconds after "The Call." (J.A. 191). Still Captain Aleem did not wish to arrest Mr. Alston and again let Mr. Alston know that he was not going to arrest him. (J.A. 115) In point of fact, instead of arresting Mr. Alston, Captain Aleem asked Mr. Alston to call someone to come and drive the vehicle, whereby Mr. Alston called his mother. (J.A. 114). As Mr. Alston was not acting as nervous and calmed down, Captain Aleem backed his vehicle up and parked behind Mr. Alston. (J.A. 112).

Now parked behind Mr. Alston's vehicle, Captain Aleem exited his vehicle and approached Mr. Alston's vehicle with Mr. Alston still inside. Captain Aleem called dispatch with the parked vehicle tags four minutes and one or two seconds after "The Call". (J.A. 188). Captain Aleem inspected the parked vehicle for damage and invited the owner of the parked vehicle to also check for damage. Determining no damage

occurred, Captain Aleem walked back to Mr. Alston. Captain Aleem did not ticket Mr. Alston or question him but stood by and waited for Mr. Alston's mother to arrive. According to Captain Aleem, about five minutes elapsed between when Mr. Alston called his mother and his mother's arrival. (J.A. 116). Captain Aleem estimated Mr. Alston's mother arrived on scene about ten to fifteen minutes after the stop. (J.A. 117).

While waiting for Mr. Alston's mother, Captain Aleem testified he and Mr. Alston chatted about him being nervous, and assured him he would not be taken to jail. They also chatted about "this, that, and the other," however, Captain Aleem did not further question him about anything else in the vehicle nor was a search of the vehicle conducted. (J.A. 116). Captain Aleem even admitted during his testimony he had implied to Mr. Alston that he would be free to leave once his mother arrived. (J.A. 116). However, contrary to what Captain Aleem implied during the five minute wait for Mr. Alston's mother to arrive, Mr. Alston was, in fact, not free to leave upon her arrival. (J.A. 116). Captain Aleem's decision to stop his investigation, standby, imply Mr. Alston was free to leave, and wait for Mr. Alston's mother to arrive, while chatting about "this, that, and the other" unjustifiably prolonged the stop.

According to Captain Aleem, Mr. Alston's mother's arrival occurred about ten minutes into the stop. (J.A. 117). Once Captain Aleem informed Mr. Alston he was not going to be arrested, decided not to issue a ticket or search the vehicle, thus he paused any investigation, and implied Mr. Alston was free to leave, the justification for the traffic stop and detention was over. However, Captain Aleem, without

justification, reinitiated his investigation once Mr. Alston's mother arrived. Captain Aleem told Mr. Alston's mother about the bag of marijuana and without any new cause restarts his interrogation of Mr. Alston. As Captain Aleem testified he "still needed to find out whatever else he had in the vehicle." (J.A. 81).

In response to Captain Aleem's interrogation, Mr. Alston paused for a minute but Captain Aleem continued to press Mr. Alston, stating "I've been honest with you, I've been straightforward with you, and I need for you to be straightforward with me." (J.A. 49) At this point Mr. Alston is alleged to have handed Captain Aleem a bag containing digital scales, rubber bands, a box of baggies, and a mason jar containing leafy material. (J.A. 81, 84, 118). At no point was Mr. Alston free to leave. (J.A. 118). At no point was Mr. Alston informed of his Fifth Amendment privileges. (J.A. 127).

After Captain Aleem had the bag he continued to interrogate Mr. Alston. He next told Mr. Alston, "I appreciate him being honest with me about this, but I'm going to need to get the heater[2]." (J.A. 85). At this point in the stop of Mr. Alston, there was not any articulable basis to believe a firearm was located in the vehicle. Nonetheless, after examining the content of the black bag, Captain Aleem testified he told Mr. Alston's mom and Mr. Alston that he appreciated him being open and honest but … he was "going to need the heater." (J.A. 85). Mr. Alston replied "Are you going to take me to jail?" To which Captain Aleem replied, "I need you to be honest with me and I will not take you to jail today." (J.A. 120-121). Captain Aleem testified he believed getting a gun off the street was more important than arresting Mr. Alston.

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[2] Slang term for gun.

(J.A. 121). Mr. Alston is reported to have looked at both Captain Aleem and his mother and said, "[I]t is under the passenger seat". (J.A. 85). Captain Aleem never advised Mr. Alston of his and a rights during the entire interrogation. (J.A. 58). At this point Mr. Alston was allowed to exit the vehicle for the first time. (J.A. 121).

Once Mr. Alston exited his vehicle, Captain Aleem searched Mr. Alston and found he did not have anything on his person. Just as he was searching Mr. Alston, a second deputy arrived on the scene; now 14 to 16 minutes after "The Call." (J.A. 192). Captain Aleem asked Mr. Alston to stand with his mother and with the second deputy. Once Mr. Alston exited the vehicle, Captain Aleem retrieved the Glock Firearm from under the passenger seat. However, he did not further search the vehicle. (J.A. 88). Captain Aleem contacted dispatch seventeen minutes twenty-eight seconds from "The Call" to run the Glock firearm's serial number. (J.A. 123, 193). Captain Aleem did not place Mr. Alston in handcuffs but spoke to him and his mother about programs in lieu of going to jail. (J.A. 91).

After locating the firearm, Captain Aleem went back to his vehicle and confirmed the firearm was stolen and then received a call from Deputy Gryder about Mr. Alston. Deputy Gryder requested Captain Aleem detain Mr. Alston until he could arrive on scene and assume custody of Mr. Alston. (J.A. 92). A confidential informant had previously notified Deputy Gryder, an FBI task force officer with the Durham County Sheriff's department, that Mr. Alston had been stopped for a traffic offense. (J.A. 139). Upon confirming Captain Aleem had stopped Mr. Alston and that a firearm was in the vehicle, Deputy Gryder requested Captain Aleem detain Mr.

Alston until he could arrive and take custody of Mr. Alston. (J.A. 139). About 35 minutes had elapsed from the initiation of "The Stop" before Deputy Gryder arrived and took custody of Mr. Alston. (J.A. 127). Deputy Gryder arrived on scene and subsequently placed Mr. Alston under arrest. (J.A. 138).

Based on the evidence the district court partially granted suppression. The district court found the initial stop was a traffic stop, as Mr. Alston had run a red light and did not stop when the office initiated his emergency lights. Further, Mr. Alston's disappearance out of sight as if he were reaching for something or to hide something arose to articulable suspicion for an investigative detention in addition to the routine traffic stop. (J.A. 257).

The district court found that Mr. Alston's traffic stop was not a routine stop. (J.A. 205). The district court went on to find that even though Mr. Alston appeared nervous, Captain Aleem "did nothing to overcome Mr. Alston's will or coerce him into a statement with regard to the bag of marijuana." (J.A. 259). Further, the district court found that Mr. Alston voluntarily admitted to the bag of marijuana as well as showed the officer the bag of marijuana.

However, the district court held that Mr. Alston's will was overborne at some point during the detention and found that Captain Aleem continued on several occasions to tell Mr. Alston and his mother that he was not interested in taking Mr. Alston to jail. The district court went on to find that based on the totality of the evidence, that it was Captain Aleem's full intent not to arrest Mr. Alston. (J.A. 260). Further, the district court held, Captain Aleem's promise not to arrest Mr. Alston

"would be associated by a reasonable person with, law enforcement is not going to do that because he was the law enforcement person at that time." (J.A. 261). Hence, the district court held that Mr. Alston's responses after a time were a direct result of his will being overborne and, thus, required suppression. Specifically, Mr. Alston's will was overborne by the repeated promises not to be taken to jail. The district court then held the action of showing the bag to Captain Aleem as well as the statement, "the firearm is under the seat," to be suppressed. (J.A. 216).

Unfortunately, in its opinion, the district court suppressed Mr. Alston's statement that led Captain Aleem to the gun but did not suppress the "fruit of the poisonous tree," i.e. the gun. (J.A. 261). The district court found that the automobile exception gave Captain Aleem authority to search. (J.A. 261). The district court never expressly held that Captain Aleem would have conducted the search based upon the automobile exception. As the record shows the car was *never* searched. (J.A. 129). Upon being asked on direct questioning by the Government if he searched Mr. Alston's vehicle, Captain Aleem admitted he simply searched under the seat and retrieved the firearm. (J.A. 88, 122-123). In other words, Captain Aleem found the firearm exclusively and only because of Mr. Alston's suppressed statement that a gun was "beneath the passenger seat." (J.A. 87). Once the gun was found under the passenger seat, no further search of Mr. Alston's vehicle was conducted and the vehicle was released to Mr. Alston's mother. (J.A. 129).

Subsequent to the district court's ruling, Mr. Alston pled guilty to one count of the indictment pursuant to the Federal Rule of Criminal Procedure 11(a)(2). Mr.

Alston entered a conditional plea of guilty to the charge of possession of a firearm in furtherance of a drug-related crime in violation of 18 U.S.C. § 924(c), reserving his right to appeal the adverse ruling of the District Court on his motion to suppress. (J.A. 281-287).

Mr. Alston appealed the district court's decision to the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals affirmed the district court and held the firearm would have inevitably been discovered as the automobile exception gave the officer cause to search the vehicle and the officer would have searched the vehicle. (Appendix p. 12a). The Fourth Circuit did not disturb the opinion of the district court regarding the voluntariness of the statements and the partial suppression. (Appendix p. 8a). Rather, the Fourth Circuit found, "Evidence discovered by illegal means, like the gun here, is not admissible if obtained "by exploitation of that illegality," but it is admissible if discovered "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959))." (Appendix p. 8a).

The Fourth Circuit held that the evidence is admissible pursuant to inevitable discovery doctrine only:

> [i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nixv. Williams*, 467 U.S. 431, 444 (1984). "A finding of inevitable discovery necessarily rests on facts that did not occur," but "by definition the occurrence of these facts must have been likely, indeed 'inevitable,' absent the government's misconduct." *United States v. Allen*,159 F.3d 832, 840 (4th Cir. 1998).

(Appendix p. 8a).

The Fourth Circuit determined Captain Aleem would have inevitably searched the vehicle even without the wrongfully obtained statements. (Appendix p. 12a). This despite the government never argued Captain Aleem would have conducted a search of the vehicle nor did the district court make any finds on this issue. This holding flies in the face of the simple fact the car was *never* searched.

## REASON FOR GRANTING THE WRIT

WHAT IS SUFFICIENT TO ESTABLISH INEVITABLE DISCOVERY?

Inevitable discovery is an exception to the exclusionary rule of improperly obtained evidence and without parameters the post-hoc logic of the inevitable discovery doctrine can be used to justify practically anything[3]. Succinctly stated, "The circuits disagree over the scope of the doctrine." *U.S. v. Goree*, 365 F.3d 1086, 1095 Footnote 2 (D.C. Cir. 2004). In the ruling of *Nix v. Williams*, 467 U.S. 431, 444 (1984) this Court held inevitable discovery demands the prosecution prove by a preponderance of the evidence: first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so. The question is what is sufficient evidence to show the police *would* have done so? In the instant case the prosecutor did not prove or even argue the inevitable discovery doctrine. Not only did the prosecutor not argue inevitable discovery, the district court simply held that the police *could* have uncovered the evidence absent the improperly obtained statement that led to the discovery but the district court did *not* make a finding that police *would* have done so. (J.A. 261).

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[3] Peter Brooks, (2003) "Inevitable Discovery" – Law, Narrative, Retrospectivity. 15:1 Yale Journal of Law & the Humanities. (71-101, 76).

In the instant case the Fourth Circuit found that Captain Aleem would eventually have searched the vehicle. This finding is contrary to the evidence, as Captain Aleem never did search the vehicle. Captain Aleem had more than seventeen minutes from the initial stop and the initial probable cause to search the vehicle but did not. He reached under seat *only* because of the suppressed statements. Hindsight, tells us the gun was in the car and there was a basis to search the vehicle at the inception of the stop. However, it is mere speculation to assume Captain Aleem would have ever searched the vehicle.

Some courts have held the second prong is met with a more standardized criteria, "[s]uch as uniform police department policy and performed in good faith." *Colorado v. Bertine*, 479 U.S. 367, 374 n.6 (1987). In *United States v. Lopez-Soto*, 205 F.3d 1101, 1106-7 (9th Cir. 2000) citing *United States v. Ramirez Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989). The Seventh Circuit and Ninth Circuit Court of Appeals have held that the government can meet its burden if "by following routine procedures, the police would inevitably have uncovered the evidence." A routine includes standardized booking procedures and standardized inventory searches subject to arrest. *United States v. Haldorson*, No. 18-2279 (7th Cir. 2019); *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986); *United States v. Dunson*, 4:06-CR-97-ALL Unpublished on Remand from the Supreme Court of the United States (5th Cir. 2010).

Other courts have held the second prong is met with any hypothetical no matter how tenuous to what actually did occur. For example, in *U.S. v. Feldhacker*,

849 F.2d 293 (8th Cir. 1988), the Eighth Circuit held the names of five witnesses originally obtained through suppressed statements would have inevitably been discovered through the use of a properly obtained fragmented and vague address book. Said address book identified some individuals by initials only. The court justified its ruling by stating, "This inquiry necessarily entails reasoning about hypothetical circumstances contrary to fact." *Feldhacker*, at 296.

Four circuits like the Eleventh Circuit have required the lawful means that would have led to the discovery of the evidence be actively pursued prior to the occurrence of the illegal conduct as"[t]he government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable." See *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). In *Satterfield*, the court held although a search warrant could have been obtained it was not nor was it attempted prior to an illegal search and the inevitable discovery doctrine did not apply. *See United States v. Connor*, 127 F.3d 663, 667-68 (8th Cir. 1997) (finding evidence obtained from illegal entry into hotel room was properly excluded); *United States v. Pimentel*, 810 F.2d 366, 369 (2d. Cir. 1987) (allowing letters into evidence because an audit was ongoing); *United States v. Drosten*, 819 F.2d 1067, 1070 (1lth Cir. 1987) (allowing witness' testimony because informant had provided information about the witness 'location that would have led to discovery); *United States v. Cherry*, 759 F.2d 1196, 1204-05 (5th Cir. 1985)

(distinguishing between evidence upon which the government failed to carry burden of proof and admissible evidence)[4].

Five circuits have expressly rejected the active pursuit requirement. *See United States v. Larsen*, 127 F.3d 984, 986-87 (10th Cir. 1997) (relating to traced bank records); *United States v. Kennedy*, 61 F.3d 494, 498-500 (6th Cir. 1995) (dealing with a lost suitcase at airport); *United States v. Ford*, 22 F.3d 374, 377-78 (1st Cir. 1994) (relating to a protective sweep); *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) (regarding illegal entry into hotel room); *United States v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987) (involving a garage search)[5].

The Third Circuit, on the other hand, has determined that if a search warrant *could* have been obtained and would not have been motivated by the illegal search than the evidence would not warrant suppression. Specifically, the Third Circuit held, "(1) [w]hether a neutral justice would have issued the search warrant even if not presented with information that had been obtained during an unlawful search and (2) whether the first search [the search of the contents of the eleven video files] prompted the officers to obtain the [subsequent] search warrant." *U.S. v. Stabile*, 633 F.3d 219, 233 (3d Cir. 2011) quoting *U.S. v. Herrold*, 962 F.2d 1131, 1144 (3d Cir. 1992). "If the answers to these questions are yes and no respectively ... then the evidence seized during the warranted search, even if already discovered in the original entry, is admissible." *Supra.*

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[4] Eugene L. Shapiro, 2011 Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine. 39:2 *GONZAGA LAW REVIEW* 295-347, 316.
[5] Id. 316.

Other circuits have created a 'bright-line" rule ensuring that the inevitable discovery doctrine will apply based on the expected issuance of a warrant. See *United States v. Christy*, 739 F.3d, 534, 541 (10 Cir. 2014); *United States v. Are*, 591 F.3d 499, 507 (7th Cir. 2009); *United States v. Cabassa*, 62 F.3d 470, 473-74 (2d Cir. 1995); *United Sates. v. Ford*, 22 F.3d 374, 378-80 (1st Cir. 1994); *United States v. Lamas*, 930 F.2d 1099, 1104 (5th Cir. 1991).

**Why this Court should grant certiorari**

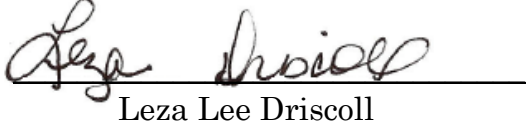
As stated above, there is a split in the circuits as to the proper application of the inevitable discovery exception to the exclusionary rule. With such a vast difference between the circuits in the application of the inevitable discovery exception, the issue is ripe for this Supreme Court to determine how and when the inevitable discovery doctrine should be applied.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 8th day of January, 2020.

**Law Office of Leza Lee Driscoll, PLLC**



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