No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

JASON BONDS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a condition of supervised release requiring a defendant to participate in sex offender treatment that may include polygraph examinations violates the Fifth Amendment where the condition explicitly makes any refusal to submit to the polygraph examination a violation of supervised release creating a classic penalty situation in contravention to this Court's holding in *Minnesota v. Murphy*, 465 U.S. 420 (1984)?

Put another way, whether a valid invocation of the right to remain silent will result in an automatic violation of a supervisee's supervised release?

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

Petitioner, Jason Bonds, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 6, 2019.

OPINIONS AND ORDERS ENTERED BY THE COURTS BELOW

The decision of the United States Court of Appeals for the Second Circuit was entered on December 6, 2019, in Docket No. 18-3018 and is attached to this petition as Appendix A. The Second Circuit's decision is not reported but is available at *United States v. Bonds*, 786 Fed. App'x 323 (2d Cir. 2019) (Unpub.).

Mr. Bonds was charged with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He entered a guilty plea and was sentenced on October 1, 2018. Prior to sentencing and at the sentencing hearing, Mr. Bonds objected to a proposed condition of supervised release that required him to participate in sex offender treatment, "which may include polygraph examinations." The condition also clarified that failure to "submit to such assessment or test . . . is a violation of the conditions of supervision." The district court overruled Mr. Bonds' objections and imposed the condition. *See* Appendix B at 4-5, 6-7, 8; Appendix C at 14.

STATEMENT OF JURISDICTION

A writ of certiorari is sought from the decision of the United States Court of Appeals for the Second Circuit filed on December 6, 2019, that affirmed the sentence of the United States District Court for the District of Vermont. *See* Appendix A.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the Supreme Court of the United States jurisdiction to review by writ of certiorari all final judgments of the courts of appeals.

The time for filing a petition for a writ of certiorari began to run on December 6, 2019. A petition for a writ of certiorari must be filed no later than March 5, 2020, pursuant to Supreme Court Rules 13.1, 13.2, and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Introduction and overview of the case

This case presents this Court with an opportunity to clarify the reach of its holding in *Minnesota v. Murphy,* 465 U.S. 420 (1984), while simultaneously resolving an established split in the circuits concerning the role of the Fifth Amendment in compelled self-incrimination cases.

In April of 2016, Google discovered images of child pornography on its platform and submitted a cybertip to the National Center for Missing and Exploited Children. The email account connected to the images of child pornography was "ravenblackbirdjay@gmail.com." Further investigation into the Google account determined that Mr. Bonds was the account user. He would later admit to investigators that he had viewed child pornography. Mr. Bonds ultimately pleaded guilty to an information charging him with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).

On August 14, 2018, a draft pre-sentence report was produced to the parties by the U.S. Probation Office. On September 4, 2018, Mr. Bonds' counsel sent written objections to the U.S. Probation Officer handling the case challenging aspects of the draft PSR. Among his objections, Mr. Bonds challenged the proposed condition of supervised release that called for polygraph examinations. The proposed condition read as follows:

> You must participate in an approved program of sex offender evaluation and treatment, which may include polygraph examinations, as directed by the probation officer. Any refusal to submit to such assessment or test as scheduled is a violation of the conditions of supervision. You will be required to pay the cost of treatment as

> directed by the probation officer. The court authorizes the probation officer to release psychological reports and/or the presentence report to the treatment agency for continuity of treatment.

In spite of his objection, the final PSR recommended the challenged condition be imposed. Mr. Bonds renewed his objection to the polygraph condition in his sentencing memorandum.

> The condition that Mr. Bonds undergo a "polygraph examination as directed by the probation officer" as a part of treatment and that "[a]ny refusal to such assessment or test[] as scheduled is a violation of the conditions of supervision," puts him in a classic compelled self-incrimination situation. [ ]. On the one hand, if he answers questions, he may incriminate himself and be punished for it. On the other hand, if questions are put to him and he invokes his Fifth Amendment right to remain silent, he can have his supervised release revoked and be punished for it. Such is not allowed by the Constitution.

Mr. Bonds raised his objections again at the sentencing hearing. He made clear he was not objecting to the sex-offender treatment portion of the condition—just the condition that he submit to polygraph examinations or face revocation:

> We're not asking that the entire condition be cut. That is I think an offender—rehabilitative sex offender treatment is appropriate. I just don't like that if he refuses to do a polygraph exam, which are notoriously inconsistent, that he could be imprisoned for that.

Appendix B at 16. Mr. Bonds' objections were overruled by the district court and it imposed the condition explaining:

> It is extraordinarily important, it seems to me, that polygraphs be used to enforce the requirement that a defendant not participate in any further abuses of the computer systems, and that this is a fundamental condition to assure that there won't be a continuing offense of possession of child pornography or viewing of child pornography. So until the 2nd Circuit decides otherwise, it seems to me that [it] is a condition which is needed and the court will impose that condition.

Appendix B at 6-7. The district court sentenced Mr. Bonds to 45 months of custody and a five-year term of supervised release imposing the polygraph condition recommended by the PSR.

Mr. Bonds filed a timely appeal to the Second Circuit Court of Appeals challenging the polygraph condition on Fifth Amendment grounds. Relying on prior precedent, the Second Circuit affirmed the polygraph condition imposed by the district court. *Bonds*, 786 Fed. App'x at 323 (citing *United States v. Johnson,* 446 F.3d 272 (2d Cir. 2006), and *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019), cert. denied, 139 S.Ct. 2659 (2019)).

REASONS FOR GRANTING THE PETITION

Jason Bonds' case presents an excellent vehicle for this Court to clarify the reach of *Murphy*, 465 U.S. 42. The Second Circuit has ignored *Murphy*'s pertinent holding that putting a supervisee in a "classic penalty situation" is compelled self-incrimination. Moreover, the Second Circuit's decisions in this case, and the cases it relies on, create a circuit split with at least four other circuit courts. It splits from those courts in at least two fundamental ways: (1) it condones a condition of supervision that forbids invocation of the right against self-incrimination upon penalty of revocation and (2) it finds such a condition constitutionally acceptable because in a later criminal prosecution the defendant may move to suppress incriminating statements. This Court should grant certiorari and resolve this split in the circuits concerning the role of the Fifth Amendment in compelled self-incrimination cases.

A. Supervised Release: the Law.

Under 18 U.S.C. § 3583(d), district courts must impose certain mandatory conditions of supervised release. District courts also have discretion to impose other, non-mandatory conditions of supervised release—but such authority is not unlimited. Release conditions must, among other things, be "reasonably related" to certain prescribed sentencing factors and "involve[] no greater deprivation of liberty than is reasonably necessary" to achieve the purposes of sentencing. 18 U.S.C. § 3583(d); *see also United States v. McLaurin*, 731 F.3d 258, 265 (2d Cir. 2013) ("A condition of supervised release must also be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant" (internal quotations omitted)). Where a particular condition implicates a core liberty interest, "a deprivation of that liberty is reasonably necessary only if the deprivation is narrowly tailored to serve a compelling government interest." *McLaurin*, 731 F.3d at 262; *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (due process forbids the government from infringing on a "fundamental liberty interest[] . . . no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (internal quotations and citations omitted)).

B. The condition at issue here infringes on Mr. Bonds' right to be free from compelled self-incrimination and is at odds with this Court's holding in *Murphy* in that *any* invocation of the right to remain silent will result in an automatic revocation of supervised release.

The condition that Mr. Bonds undergo a "polygraph examination as directed by the probation officer" as a part of treatment and that "[a]ny refusal to such

assessment or test[] as scheduled is a violation of the conditions of supervision," puts him in a classic compelled self-incrimination situation. On the one hand, if Mr. Bonds answers questions, he may incriminate himself and be charged with new crimes. On the other hand, if questions are put to him and he validly invokes his Fifth Amendment right to remain silent, he can have his supervised release revoked and be punished for exercising his Fifth Amendment rights. Such is not allowed by the Constitution.

Prior to its decision in this case, the Second Circuit had upheld an identical condition in *Boles*, which in turn relied on *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (*en banc*)) and *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). *See Boles,* 914 F.3d at 112 (relying on *Asherman* and *Johsnon* in upholding an identical polygraph condition). In *Asherman*, a divided *en banc* court of the Second Circuit held that it was not a Fifth Amendment violation to revoke the supervised home release of a sentenced prisoner upon notification that the prisoner refused to answer questions about his crime at a scheduled psychiatric evaluation. *Asherman*, 957 F.2d at 979–80. Thereafter, in *Johnson*, the Second Circuit relied on *Asherman* to uphold a polygraph condition similar to the one here. *Johnson*, 446 F.3d at 279–80. Citing *Johnson*, the Second Circuit in *Boles* upheld a condition identical to the one here holding that a condition "requiring a defendant to take a polygraph test as a condition of his supervised release does not violate the Fifth Amendment because the defendant retains the right to later challenge any resulting self-incrimination in court." *Boles*, 914 F.3d at 112. It is Mr. Bonds' position that neither *Asherman,* nor

Johnson—the cases relied on by the *Boles* Court (and ultimately decided the case here)—adequately considered this Court's holding in. *Murphy*.[1]

In *Murphy*, the defendant, under questioning, admitted to his probation officer that he committed prior crimes. 465 U.S. at 423. In a subsequent prosecution for those admitted crimes, Mr. Murphy moved to suppress his confession based on, *inter alia*, his claim that he felt threatened that he would be punished if he refused to answer his probation officer's question. This Court rejected this argument because it found that there had been no affirmative or implied threat made to Murphy. *Id.* at 437-438. Important to this appeal, however, the *Murphy* Court acknowledged that if the state so threatened Mr. Murphy, expressly or impliedly, such a threat would violate the Fifth Amendment. *Id.* at 435.

> A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. *There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.*

Id. (emphasis added)

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[1] The dissent in *Asherman* did rely heavily on *Murphy* to support its position that revocation of Asherman's "supervised home release status" for failure to answer questions about his crime during a psychiatric evaluation was, in fact, a Fifth Amendment violation. *Asherman*, 957 F.2d at 986-89 (Cardamone, J., dissenting).

Here, unlike the case in *Murphy*, Mr. Bonds is being threatened *explicitly* with a violation of his supervision for failure to comply: "*Any* refusal to submit to such assessment or tests as scheduled is a violation of the conditions of supervision."[2] And while a defendant may have the right to challenge new charges based on his or her compelled confession pursuant to this condition, in the interim, that defendant will have been charged with a crime and a violation of his or her supervised release. And it is a near certainty that such a defendant will be in custody waiting for the district court to resolve his/her motion to suppress. *See* Fed. R. Crim. P. 32.1(a)(6) (the burden rests with a defendant, charged with a violation of his or her supervised release, to prove by clear and convincing evidence, that he or she is neither a flight risk nor a danger to the community).

The Fifth Amendment cannot abide a condition of supervision that so blatantly compels incriminating statements simply because sometime in the future the incriminating statements *may* be suppressed—all the while the defendant sits in custody. In the alternative, where a defendant validly invokes his/her right to remain silent, the condition envisions a revocation of supervised release—a scenario

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[2] Criminal cases have been brought in the District of Vermont based on the incriminating answers given during sex-offender polygraphs. The polygraph is used, in part, to make sure a supervisee has not reverted to possessing child pornography: "[T]his is a fundamental condition to assure that there won't be a continuing offense of possession of child pornography or viewing of child pornography." App. at 7.

left unaddressed by the Second Circuit's decisions in *Asherman*, *Johnson* and *Boles*.[3]

C. **There is a split in the Circuits.**

The Second Circuit has split from other Circuits in at least two ways. First, the Second Circuit in this case and *Boles* has condoned a condition that makes any invocation against self-incrimination a violation of supervised release: "*[a]ny* refusal to submit to such assessment or test as scheduled *is a violation of the conditions of supervision.*" Second, the Second Circuit has held that such a condition is constitutionally permissible because a defendant, after-the-fact, may challenge any incriminating statements in a future prosecution.

1. **The Second Circuit is at odds with the Tenth Circuit.**

Relying on the reasoning in *Murphy*, the Tenth Circuit recently held that a condition that would punish a federal supervisee for invoking his right against self-incrimination when refusing a polygraph ran afoul of the Fifth Amendment. *United States v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016). Von Behren was on supervised release after a conviction for distribution of child pornography. *Id.* at 1141. His conditions of supervision required that he complete sex offender treatment. *Id.* at 1142. As part of his treatment program, Von Behren was

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[3] The Second Circuit addresses compelled self-incrimination with the possibility of a future suppression. But if a supervisee doesn't want to sit in custody while his/her attorney litigates a suppression motion that person may validly invoke their right to remain silent. Such valid invocation, however, will land that same supervisee in custody. The Second Circuit provides no such future cure for this scenario.

required to complete a sexual history polygraph. *Id.* at 1142–43. Von Behren objected and appealed to the Tenth Circuit.

The *Von Behren* Court held that "[*Minnesota v.*] *Murphy* makes this case an easy one ... It recognizes that a *threat to revoke one's probation* for properly invoking his Fifth Amendment privilege is the type of compulsion the state may not constitutionally impose." *Id.* at 1150 (emphasis added). Because the proposed condition here, like the one in *Von Behren*, *will* punish Mr. Bonds with imprisonment for validly invoking his Fifth Amendment right to remain silent, it places the Second Circuit at odds with the Tenth Circuit on this point.

2. The Second Circuit is at odds with the First Circuit.

The Second Circuit side-stepped the thorny Fifth Amendment question recognized by the *Von Behren* Court by holding that a mandatory polygraph condition was justified because a defendant "retains the right to later challenge any resulting self-incrimination in court." *Boles*, 914 F.3d at 112 (citing *Johnson*, 446 F.3d at 280, and *Asherman*, 957 F.2d at 982-983). The Second Circuit's holdings in *Boles*, *Johnson*, and *Asherman* suggest that a Fifth Amendment violation is tolerable because there is some chance it will be remedied in the future. The "touchstone" of the Fifth Amendment, however, is the right to be *free* from compulsion—not to be compelled and then later have a court determine such compelled statements can't be used against you. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *see also Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973) ("[A] witness protected by the privilege may rightfully refuse to answer *unless and until*

he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." (emphasis added)); *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513 (9th Cir. 1988) ("[I]t is appropriate for a defendant to raise a fifth amendment objection at the time he is required to [make the potentially incriminating statements.]" (Reinhardt, J., concurring)).

Upholding a condition that compels a polygraph examination that compels self-incrimination under threat of violation because any incriminating statement may later be suppressed is a backwards analysis. It leaves unanswered the obvious tension with the Supreme Court's decision in *Murphy*. It also leaves undefined the potential remedy for a person sitting in custody waiting for resolution of a suppression motion. And it therefore fails to provide the lower courts with appropriate guidance. Finally, it does not address what type of remedy is available to Mr. Bonds in the event he invokes his right to remain silent in violation of the polygraph condition and his supervision is revoked.

In contrast to the Second Circuit's approach, is the First Circuit's decision in *United States v. York*, 357 F.3d 14 (1st Cir. 2004). In *York*, the district court included in its sentence a polygraph condition that read as follows:

> The defendant is to participate in a sex offender specific treatment program at the direction of the Probation Office. The defendant shall be required to submit to periodic polygraph testing as a means to insure that he is in compliance with the requirements of his therapeutic program. No violation proceedings will arise based solely on a defendant's failure to "pass" the polygraph. Such an event could, however, generate a separate investigation. When submitting to a

> polygraph exam, the defendant does not give up his Fifth Amendment rights.

Id. at 24-25. Mr. York challenged the condition as violating his Fifth Amendment rights. The First Circuit affirmed the imposition of the condition—but with its own constitutional interpretation. The First Circuit noted that the district court's order could be construed in three different ways:

> (1) that York's supervised release will not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds; (2) that York must answer every question during his polygraph exams on pain of revocation, but that his answers will not be used against him in any future prosecution; or simply (3) that York will be entitled, in any future prosecution, to seek exclusion of his answers on the grounds that the polygraph procedure forced him to incriminate himself.

Id. at 25. The First Circuit chose to construe the condition in the first and "most sensible" way, *id.*, and rejected the second and third possibilities; the third being the rationale the Second Circuit offered for condoning a similar polygraph condition. In this fundamental way, the First and Second Circuits are split in their respective treatment of polygraph conditions—the First Circuit has made it clear that a supervisee may invoke his/her right to remain silent if asked incriminating questions during a polygraph. In contrast, the Second Circuit has held only that a defendant may later challenge his confession after being charged with a new crime.

Unlike the Second Circuit's decisions here (and in *Boles*, *Johnson*, and *Asherman*), the *York* decision is consistent with *Murphy* and provides needed guidance to the lower courts. Here, despite raising his Fifth Amendment claim in the district court, Mr. Bonds' condition has no Fifth Amendment caveat that could

save it. Instead, Mr. Bonds' polygraph condition will find him in violation for "any" invocation, thus presenting "a classic penalty situation." As such, it is at odds with *York*, with this Court's decision in *Murphy* and with the Fifth Amendment.

3. The Second Circuit is at odds with the Third Circuit.

For the same reasons, the Second Circuit is also at odds with the Third Circuit. The Third Circuit has held that a sex offender polygraph condition is permissible because "if a question is asked during the polygraph examination which calls for an answer that would incriminate appellant in a future criminal proceeding, [the defendant] retains the right to invoke his Fifth Amendment privilege and remain silent." *United States v. Lee*, 315 F.3d 206, 212–13 (3d Cir. 2003). In considering *Lee*, the Ninth Circuit identified another way in which the Third Circuit splits from the Second.

> [T]he government's reliance on *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003), fails because that case is distinguishable. As we noted in *Antelope,* the *Lee* court had simply found the defendant failed to show his probation remained conditioned on waiving his Fifth Amendment privilege: the polygraph condition in *Lee* did not require the defendant to answer incriminating questions, and the prosecutor there had stipulated that a failure to pass the polygraph test would not likely result in violation of supervised release. [*United States v.*] *Antelope,* 395 F.3d [1128,] 1138–39 [(9th Cir. 2005)] (discussing *Lee,* 315 F.3d at 212). Here, in contrast, [the defendant] faced a concrete threat of revocation.

United States v. Bahr, 730 F.3d 963, 967 (9th Cir. 2013). Unlike the condition in Mr. Bonds' case that makes clear that "*[a]ny* refusal to submit to such assessment or test *is a violation* of the conditions of supervision," the supervisee in *Lee* could refuse to answer incriminating questions.

4. The Second Circuit is at odds with the Seventh Circuit.

Most recently, the Seventh Circuit addressed a case where Indiana inmates were required to complete a sex offender program while still in custody. *Lacy v. Butts*, 922 F.3d 371 (7th Cir. 2019). Part of that program included interviewing inmates about past criminal conduct and, at the program's discretion, polygraphing the inmate. *Id.* at 373–74. Failure to submit to any part of the program was punished with the reduction of "good-time credits." *Id.* at 374. The inmates filed a class action law suit led by Lacy to enjoin the program's requirements. *Id.* at 373.

Relying, in part on *Von Behren*, as well as this Court's holding in *McKune v. Lile*, 536 U.S. 24 (2002), the Seventh Circuit found that the sex offender program was unconstitutional and needed to be changed.

> We acknowledge that the line between permissible pressure and impermissible compulsion can be difficult to draw. That may explain why in *Lile*, the Supreme Court's latest pronouncement on the subject, the justices failed to produce a majority opinion. 536 U.S. 24, [ ]. Nonetheless, many cases are not close to the line, and ours is one of them.

Id. at 377. Indeed, with respect specifically to polygraph testing as a condition of supervision, the Seventh Circuit is in lockstep with the First: "A defendant on supervised release retains the privilege to invoke his Fifth Amendment rights." *United States v. Kappes*, 782 F.3d 828, 855–56 (7th Cir. 2015).

The Second Circuit's holdings in *Asherman*, *Johnson*, *Boles* and now this case stand in stark contrast with the Tenth Circuit's holding in *Von Behren*, the First Circuit's holding in *York*, the Third Circuit's holding in *Lee*, and the Seventh Circuit's holding in *Lacy* and *Kappes*. In addition to clarifying the reach of this

Court's holding in *Murphy*, this case presents an ideal opportunity to resolve the circuit split on what qualifies as unconstitutional compelled self-incrimination.

5. The circuit split is entrenched and unlikely to be resolved absent action from this Court.

The circuit split described above is now well established and entrenched. Second Circuit precedent has clearly and repeatedly upheld such conditions over Fifth Amendment objections. The decision below made it clear that the Second Circuit will not reconsider its decisions absent action from this Court:

> In the absence of any intervening Supreme Court decisions casting doubt on our prior rulings, we are bound to apply *Boles* and the cases preceding it, even over the objection that they were "wrongly decided"[.] Bonds raises such an objection, but concedes that *Boles* controls our decision nonetheless.

Bonds, 786 F. App'x at 324 (citations omitted). By contrast with the Second Circuit, the First, Third, Seventh, and Tenth Circuits have followed a different approach. Adding to the urgency is the fact that conditions like the one at issue in this case are frequently imposed as part of the approximately 1400 child pornography cases prosecuted annually.[4] This is not to mention the many state cases in which similar conditions are imposed. Review by this Court is necessary to resolve the split and to ensure consistent application of the Fifth Amendment in the federal and state systems.

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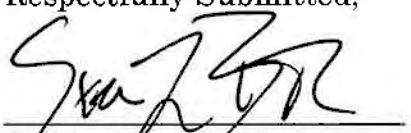
[4] *See* United States Sentencing Commission, *Statistical Information Packet Fiscal Year 2018 Second Circuit*, Table 1 (available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/2c18.pdf).

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that a writ of certiorari be issued.

DATED: March 5, 2020

Respectfully Submitted,



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