No. 19-7927

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAY ALLEN NEWCOMB

Petitioner

v.

SECRETARY, FLA. DEP'T OF CORRECTIONS, ET AL.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAY ALLEN NEWCOMB
DC # V09982
Madison Correctional Institution
382 S.W. MCI Way
Madison, FL 32340-4430

PETITIONER, *PRO SE*

QUESTION(S) PRESENTED

1. Is the 11th Circuit's conclusion that "***any error* the sentencing court *made in orally pronouncing* [Petitioner's] *sentence was corrected by the written sentencing order***" supported by prevailing authority from this Honorable Court on questions involving a clear conflict between the *unambiguous* oral pronouncement of sentence and a written sentence order entered *after* the sentencing hearing had concluded?

2. Was Petitioner's Fifth Amendment right *to be free from double jeopardy* violated when, after the sentencing hearing had concluded, the clerk of the court entered a written judgment and sentence that effectively increased the sentence, and was in conflict with the sentence that had been orally pronounced by the court without ambiguity?

3. Was Petitioner's Sixth Amendment *right to confrontation* violated when, after the sentencing hearing had concluded, the clerk of the court entered a written judgment and sentence in the absence of Petitioner, which increased the sentence and was in conflict with the unambiguous oral pronouncement of the court?

4. Was Petitioner's *right to due process* under the Fifth, Sixth and Fourteenth Amendments violated when the written commitment order was allowed to control over the unambiguous oral pronouncement of the court, and a clear conflict existed between the *unambiguous* oral pronouncement and the subsequently rendered written judgment and sentence?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cove page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

There are no related cases pending resolution before any state or federal court.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases Cited

Statutes

Rules

Constitutional Provisions

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ____**A**____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at Appendix___**B**____to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix___ _____ to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[] is unpublished.

The opinion of the _____court appears at Appendix_____ to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was **October 4, 2019.**

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date : **November 19, 2019**, and a copy of the order denying rehearing appears at Appendix **A**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____ (date) on _____ _____(date) in Application No._____.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was._____
A copy of that highest state that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date:_____ _____,and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including_____(date) on _____(date) in Application No._____.

The jurisdiction of this Court in invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution – Prohibits "a person from being compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law.*" Amendment V, U.S. Constitution (emphasis added).

The Sixth Amendment to the U.S. Constitution – Guarantees that "in all criminal prosecutions, *the accused shall enjoy the right to ...be confronted with the witnesses against him*" Amendment VI, U.S. Constitution (emphasis added).

The Fourteenth Amendment to the U.S. Constitution – Section 1 provides in pertinent part that "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.*" Amendment XIV, U.S. Constitution (emphasis added).

> 28 U.S.C. § 2254 provides in pertinent part that:
>
> (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.

28 U.S.C. § 2254(d)(1)-(2) (emphasis added). See also 28 U.S.C. § 2244(d)(1)-(2) (Setting the AEDPA period of limitations for state prisoners to seek habeas relief in federal court at one year after the judgment and sentence became final).

STATEMENT OF THE CASE AND FACTS

The facts in this case are simple and straight forward. The Petitioner was indicted in Volusia County, Florida case number 2001-033723-CFAES, along with a co-defendant (Jamie Whaley). The Indictment filed by the State on August 6, 2002, charged a total of six counts. Counts I – III, were filed against Petitioner's co-defendant, Jamie Whaley; and Counts IV-VI, were filed against the Petitioner herein.

The counts filed against Petitioner charged the following offenses:

Count – IV, First Degree Murder;

Count – V, Armed Burglary of a Dwelling; and

Count – VI, Attempted Armed Robbery with a deadly Weapon.

See Indictment, pp. 1 – 3, attached hereto as Appendix E.

On August 15, 2002, the Petitioner entered a plea of *nolo contendere* to the lesser-included offense of Second Degree Murder (Count – IV); and to the other two offenses (Counts V and VI), as charged. Notably, there is no mention of a firearm in either the plea colloquy or oral pronouncement of sentence.

The sentencing judge pronounced Petitioner's sentence as follows:

> You'll be adjudicated guilty on all three counts. On **Count I** you'll be sentenced to incarceration with the department of corrections, State of Florida for a period of **43 years** with credit for time served. For **Count II** you'll be sentenced to a period of **30 years'** incarceration with the department of corrections, State of Florida to be served concurrently with Count IV. And for **Count VI**, armed robbery with a deadly weapon, you'll be sentenced to **15 years'** incarceration with the department of corrections to be served concurrently with the Counts IV and V.

See Sentencing Transcript, pp. 9-10, attached hereto as Appendix F (emphasis added).

The Transcript of the Sentencing Hearing reflects the court orally pronouncing the following sentence in a clear and unambiguous manner.

Count I	**43 years' incarceration**
Count II	**30 years' incarceration**
Count **IV**	**No sentence imposed**
Count **V**	**No sentence imposed**
Count **VI**	**15 years' incarceration**

See Sentencing Transcript, pp. 9-10, attached hereto as Appendix F.

The written Judgment of Conviction that was prepared by the clerk after the conclusion of the sentencing hearing reflects the following counts:

Count **IV**	Second Degree Murder w/Firearm	782.04(2)	FL
Count **V**	Armed Burglary of a Dwelling	810.02(1),(2)(b)	FF
Count **VI**	Att. Armed Robbery w/D. Weapon	812.13(1),(2)(a)	FS

See written Judgment of Conviction, p. 1, attached hereto as Appendix G.

The written Sentencing/Commitment Order that was prepared by the clerk after the conclusion of the sentencing hearing reflects the following sentences for Counts 4, 5 and 6:

Count **IV**	43 years' incarceration [*not orally pronounced*]
Count **V**	30 years' incarceration [*not orally pronounced*]
Count **VI**	15 years' incarceration [*orally pronounced*]

See Written Sentencing Order, pp. 1 - 8, attached hereto as Appendix H.

After filing an initial Rule 3.800(a) motion to correct illegal sentence, the Petitioner filed a second motion to correct illegal sentence on November 23, 2015.

The trial court granted the second motion and issued an order dated June 6, 2016, in which it reduced the sentence on the first count (Count 1, as orally pronounced) from 43 to 40 years' incarceration. This substantive change in the sentence causing a reduction of 3 years constituted a new judgment dated June 6, 2016.

Relevant to Petitioner's claim involving the 11th Circuit's holding quoted above in *Question 1*, on September 19, 2016, Petitioner filed a third motion to correct illegal sentence pursuant to Rule 3.800(a), Fla. R. Crim. P., where he raised the claim of conflict between the written sentencing order not conforming with the oral pronouncement of sentence. The trial court denied the motion by order rendered March 28, 2017 (Appendix D). The Petitioner appealed, and the Fifth DCA *per curiam* affirmed the postconviction court's decision. A Mandate issued on September 20, 2017.

Notably, in Petitioner's second motion to correct illegal sentence, the State and the postconviction court both relied on the sentencing transcript to grant relief, and reduced the sentence from 43 to 40 years. Inexplicably, however, the same court then turned around and denied relief on Petitioner's third motion to correct illegal sentence by claiming that the same sentencing transcript – which they previously accepted as unambiguous – is now ambiguous. As the popular saying goes – "you can't have your cake and eat it too."

On December 13, 2017, Petitioner timely filed a habeas petition pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Middle District of Florida, Orlando Division under case number 6:17-cv-02147-CEM-DCI. As one of his grounds, the Petitioner argued his claim that the written sentence in his case did not conform to the oral pronouncement of sentence. The U.S. District Court denied the Petition, and denied a Certificate of Appealability (COA) by order rendered February 25, 2019 (Appendix B).

The Petitioner appealed the decision of the U.S. District Court to the U.S. Circuit Court of Appeals for the 11th Circuit, and sought a COA. The 11th Circuit denied a COA by order rendered on November 19, 2019, but nevertheless addressed the merits of Petitioner's claim holding that "***any error the sentencing court made in orally pronouncing Mr. Newcomb's sentenced was corrected by the written sentencing order.***" Id. Order, p. 6 (emphasis added), attached hereto as Appendix A.

This timely filed Petition for Writ of Certiorari now follows.

REASON FOR GRANTING THE PETITION

THE 11TH CIRCUIT HELD THAT: **"ANY ERROR THE SENTENCING COURT MADE IN ORALLY PRONOUNCING MR. NEWCOMB'S SENTENCE WAS CORRECTED BY THE WRITTEN SENTENCING ORDER."** THIS HOLDING MISSTATES THE LAW, AND IS IN DIRECT CONFLICT WITH LONG STANDING LEGAL PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS. AS SUCH IT UPHOLDS A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY, TO CONFRONT WITNESSES, AND TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Argument and Applicable Law

Petitioner's argument is, and has always been, that – as demonstrated above – a clear conflict exists between the oral pronouncement of sentence and the written commitment order that was prepared *after* the sentencing hearing had concluded. The record reflects a clear and unambiguous oral pronouncement of a legal sentence (Appendix F) which must control over the written commitment order that was later prepared by the clerk after the sentencing hearing had concluded (Appendices G and H).

Throughout Petitioner's tortured history of litigating this claim, state and federal courts have simply refused to apply well-settled state and federal law to resolve Petitioner's claim involving a conflict between the unambiguous oral pronouncement of a legal sentence and the subsequently written commitment order.

As such, the 11th Circuit's holding that "*any error the sentencing court made in orally pronouncing Mr. Newcomb's sentenced* ***was corrected by the written sentencing order***" misstates the law, and is in direct conflict with the "firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict." *United States v. Villano*, 816 F.2d 1448, 1450-51 (10th Cir. 1987).

Here, after the sentencing hearing had concluded, the clerk chose to substantively alter the sentence imposed by the court's unambiguous oral pronouncement. Because Petitioner had already commenced serving his sentence, the clerk's actions violated his double jeopardy protections and his right to due process.

In *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 80 L. Ed. 1283 (1936), this Court held that when a "provision in the commitment for imprisonment ... which was *inserted by the Clerk but not included in the sentence orally pronounced* by the judge" such a "provision is *void*." Id. 298 U.S. at 463, 467 (emphasis added). Furthermore, "[a] warrant of commitment departing in matter of substance from the judgment back of it is void." Id. 298 U.S. at 465.

The Court made it clear that where a claim has been raised seeking correction of a void order of commitment resulting from a sentence that was not orally pronounced, if void, it was still void. Such a "commitment was neither better nor worse because of the ruling of the judge that he would let it stand as written." The writ of habeas corpus searches the record back of the commitment. It lays a duty on the court to explore the foundations, and pronounce them false or true. Id. 298 U.S. at 467.

In *Bartone v. United States*, 375 U.S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963), this Court indicated that the error, in enlarging the sentence in the absence of a defendant, is so plain in light of the requirements of Rule 43, Fed. R. Crim. P., that Courts of Appeals under their broad supervisory powers should correct such errors even if they have not been alleged on appeal." Id. 375 U.S. at 53-54, 84 S. Ct. at 22.

Other federal courts have likewise held that "in cases where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment and commitment, ... the oral pronouncement, as correctly reported, must control. The only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant." *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir. 1974) (citations omitted). See also *United States v. Bergmann*, 836 F.2d 1220 (9th Cir. 1988) (same).

In those cases, as in Petitioner's herein, where the written judgment does not conform with the oral pronouncement, courts have "remanded for correction of written judgment to conform with ... the court's oral ruling ...." *United States v. Ko*, 485 Fed. Appx. 102 (6th Cir. 2012).

In Florida, courts have long recognized the "firmly established and settled principle of federal criminal law that an orally pronounced sentence controls over a judgment and commitment order when the two conflict."

In *Williams v. State*, 957 So.2d 600, 603 (Fla. 2007), the Florida Supreme Court articulated its position regarding the controlling nature of an oral pronouncement over a written sentencing order as follows:

> This Court has held that a court's oral pronouncement of a sentence controls over the written sentencing document. See *Ashley v. State*, 850 So.2d 1265, 1268 (Fla. 2003); *Justice v. State*, 674 So.2d 123, 126 (Fla. 1996). When the written document results in a sentence that is more severe than the sentence announced in court, this Court has considered it a potential violation of the constitutional protection against double jeopardy. See *Ashley*, 850 So. 2d at 1268-69; *Justice*, 674 So.2d at 126.
>
> In effect, under our decisions in *Ashley* and *Justice*, we have determined that *a written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence.*
>
> Indeed, we have restricted the authority of a trial court to enter a conflicting written sentence in this manner. *State v. Jones*, 753 So.2d 1276, 1277 n.2 (Fla. 2000). Accordingly, *no court has the authority to enter such a sentence, since the oral pronouncement controls and constitutes the legal sentence imposed.*

Williams, at 603 (emphasis added).

Similarly, in *Brown v. State*, 965 So.2d 1234, 1237-38 (Fla. 5th DCA 2007), a case involving circumstances similar to those in Petitioner's case, the Fifth DCA addressed the question of "whether it was permissible for the court to amend Brown's written sentence, contrary to the oral pronouncement, by switching the sentences for Count I and Count II." Id. at 1237.

Even after recalling Brown for the court to change its oral pronouncement, the Fifth District provided an instructive analysis regarding the double jeopardy implications of attempting to amend an oral pronouncement after the initial sentencing hearing had concluded, and the defendant had already begun to serve his sentence.

The *Brown* court explained its holding as follows:

> *Shepard v. State*, 940 So.2d 545 (Fla. 5th DCA 2006), is more to the point.
>
> Here, **the issue on appeal was *whether the trial court violated appellant's double jeopardy rights by recalling the parties after the sentencing hearing had concluded and then changing its oral pronouncement.***
>
> ...
>
> The *Shepard* court noted that the trial court's oral pronouncement was unambiguous and said that although the lower court was permitted to correct its misstatement *prior to the conclusion of the sentencing hearing*, ***a trial court's pronouncement becomes final when the sentencing hearing ends.*** Id. at 548.
>
> In the present case, it appears the sentencing judge may have been inadvertently misled into getting the sentences for the two counts backwards. ***Nonetheless, such an error cannot be changed once the sentencing hearing has concluded, at least where the originally pronounced sentence was neither ambiguous nor illegal.*** The court was obliged to correct the illegal sentence in Count I but was not permitted to change the legal sentence on Count II after Brown began to serve his sentence. See *Wilhelm v. State*, 543 So.2d 434, 435 (Fla. 2d DCA 1989).

Brown v. State, 965 So.2d at 1237-38 (emphasis added).

The rule that an oral pronouncement controls over a written order stems from the requirement that a defendant be present at sentencing. The presence of the defendant is thus relevant to resolving conflicts between the oral pronouncements and the written sentencing orders.

The Tenth Circuit held that: "A defendant is present *only* when being sentenced from the bench. Thus, ***a defendant is sentenced in absentia when the [written] judgment and commitment order is allowed to control when there is a conflict.***" *United States v. Villano*, 816 F.2d 1448, 1450-52 (10th Cir. 1987) (brackets and emphasis added).

This is so because "[t]he imposition of punishment in a criminal case affects the most fundamental human rights: *life* and *liberty*. Sentencing should be conducted with the judge and defendant facing one another and *not in secret*." *Id.* Therefore, "[i]t is incumbent upon a sentencing judge to choose his words carefully so that the defendant is aware of his sentence when he leaves the courtroom." *Villano*, at 1452-53.

The rules of procedure for both federal and state courts are likewise clear regarding the constitutional requirement that a defendant be present during the imposition of sentence. For example, in federal courts, Rule 43(a), Fed. R. Crim. P. mandates that "the defendant shall be present ... at the imposition of sentence ...." Similarly, in Florida courts, Rule 3.180(a)(9) Fla. R. Crim. P. mandates that a defendant "shall" be present during the "imposition of sentence." Such "presence" is defined in subsection "(a)" of that rule: "A defendant is *present* for purposes of this rule *if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard* through counsel on the issues being discussed." *Id.* (emphasis added).

This Honorable Court has held that these rules have their "source in the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments." *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 1484-85 (1985).

Furthermore, the rule requiring the presence of a defendant at sentencing is widely recognized in virtually every circuit of the nation, including the Eleventh Circuit. See e.g., *United States v. McDonald*, 672 F.2d 864, 867 (**11th Cir. 1982**) (per curiam); *United States v. Lewis*, 200 U.S. App. D.C. 76, 626 F.2d 940, 953 (D.C. Cir. 1980); *United States v. Pagan*, 785 F.2d 378, 380 (2d Cir. 1986); *United States v. Morse*, 344 F.2d 27, 29 n. 1 (4th Cir. 1965); *Schurmann v. United States*, 658 F.2d 389, 391 (5th Cir. 1981); *Scott v. United States*, 434 F.2d 11, 20 (5th Cir. 1970); *United States v. Glass*, 720 F.2d 21, 22 n. 2 (8th Cir. 1983); and *Payne v. Madigan*, 274 F.2d 702, 705 (9th Cir. 1960), *aff'd by an equally divided court*, 366 U.S. 761, 81 S. Ct. 1670, 6 L. Ed. 2d 853 (1961).

In Florida, courts have likewise recognized that "[a] defendant has a basic constitutional right to be present at every critical stage of a criminal proceeding, *including sentencing*. See *Evans v. State*, 909 So.2d 424, 425 (Fla. 5th DCA 2005); *Capuzzo v. State*, 578 So.2d 328, 330 (Fla. 5th DCA 1991).

Because "[o]nce a rule of law becomes established, it provides the basis for orderly, evenhanded, consistent and predictable adjudication. The rule that the oral sentence controls when there is a conflict is an easy rule to apply and avoids the murky area of determining the judge's intentions." *Villano, supra*, at 1453. There is sufficient legal precedent supporting Petitioner's arguments.

At any rate, even if any uncertainty existed in the oral pronouncement, which in this case it does not, the rule of lenity should be applied in favor of the Petitioner. See *Gaddis v. United States*, 280 F.2d 334, 336 (6th Cir. 1960) (holding that a prisoner is entitled to have ambiguous language in the pronouncement construed most favorable to him); *cf. Bell v. United States*, 349 U.S. 81, 83, 99 L. Ed. 905, 75 S. Ct. 620 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment").

Therefore, to the extent that any uncertainty existed in the oral pronouncement, which it does not, the fact remains that "[a]ny reasonable doubt or ambiguity arising in connection with the true meaning and intent of the sentencing court *will be resolved in favor of the defendant.*" *Subas v. Hudspeth*, 122 F.2d 85, 86 (10th Cir. 1941) (emphasis added).

To recap, the Petitioner was charged with counts **4**, **5**, and **6** of the indictment filed in his case (Appendix E). However, at sentencing, the judge orally pronounced a sentence for count **1**, **2**, which, in the Indictment, were filed against Petitioner's co-defendant; the judge imposed no sentence on counts 4 and 5, and then imposed a 15-year sentence on Count **6** (Appendix F).

Petitioner stands sentenced on counts not filed against him in the indictment. Counts 1 and 2 involved charges filed against Jamie Whaley, his co-defendant, and had no relation whatsoever to the Petitioner (Appendix E). Nevertheless, after the sentencing hearing had concluded, the clerk prepared a written sentencing order reflecting sentences for counts 4, 5, and 6 (Appendices G and H), thus substantively amending the sentence in direct conflict with the unambiguous oral pronouncement of the sentencing court.

Based on the record and facts provided herein, the Petitioner contends that the 11th Circuit's holding is, *contrary to, and involved an unreasonable application of, clearly established Federal law*, as determined by this Honorable Court regarding the principle law that an unambiguous oral pronouncement controls over a subsequently prepared written judgment and sentence. Moreover, the 11th Circuit's holding was likewise based upon an *unreasonable determination of the facts in light of the evidence presented* by Petitioner throughout his state and federal court proceedings seeking correction of his written commitment order.

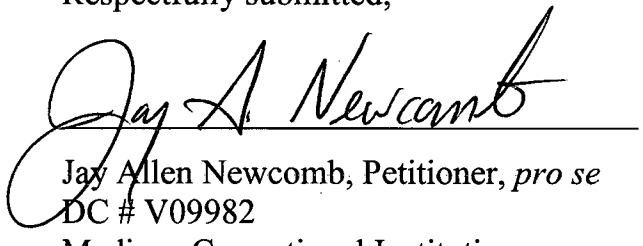
RELIEF SOUGHT

The Petitioner seeks an Order granting certiorari and reversing the denial of relief in federal and state courts by directing the state trial court to vacate the judgment and sentence for Counts 1 and 2 currently authorizing Petitioner's detention in Respondent's custody.

CONCLUSION

WHEREFORE, based on the foregoing facts, argument and authority, the Petitioner requests that this Honorable Court grant the instant Petition for Writ of Certiorari and resolve the Constitutional questions presented above.

Respectfully submitted,



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