No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EFRAIN CAMARILL CRUZ,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his federal habeas claims that (1) constitutional double jeopardy principles prohibit the Petitioner from being convicted/sentenced for both a section 847.0135(3)(a), Florida Statutes, violation and a section 847.0135(4)(a), Florida Statutes, violation and (2) in light of his mental illness, the Petitioner was not able to fully comprehend his guilty plea and therefore the plea was involuntary (or, alternatively, defense counsel rendered ineffective assistance of counsel by failing to properly evaluate and argue that the Petitioner was incompetent to enter a guilty plea).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, EFRAIN CAMARILL CRUZ, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on April 8, 2020. (A-3).[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution, applicable to the States through the Fourteenth Amendment to the Constitution, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

In order for a guilty plea to be valid, the plea must be entered knowingly, intelligently, and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969). When a criminal proceeding is held against a defendant who does not have a proper understanding of the proceeding (due to a mental health issue), the defendant's

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

constitutional right to a fair proceeding is denied. *See Hill v. State*, 473 So. 2d 1253, 1259 (Fla. 1985); U.S. Const. Amend XIV.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

G. STATEMENT OF THE CASE

In 2013, the Petitioner was convicted – following an "open" guilty plea – of use of internet or device to lure a child (count 1),[2] use of a internet or device to lure the parent/guardian of a child (count 2),[3] traveling to meet a minor for illegal sexual conduct (count 3),[4] and attempted lewd or lascivious battery (count 4).[5] The Petitioner initially appealed the judgment, but the direct appeal was later voluntarily dismissed.

Thereafter, the Petitioner timely filed a state court motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The Petitioner raised several claims in his rule 3.850 motion – two of which are the subject of the instant petition: (1) the Petitioner's convictions and sentences for both a section 847.0135(3)(a), Florida Statutes, violation and a section 847.0135(4)(a), Florida Statutes, violation,

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[2] *See* § 847.0135(3)(a), Fla. Stat.

[3] *See* § 847.0135(3)(b), Fla. Stat.

[4] *See* § 847.0135(4)(a), Fla. Stat.

[5] *See* §§ 777.04(1) & 800.04(4)(a), Fla. Stat.

violate double jeopardy principles and (2) in light of his mental illness, the Petitioner was not able to fully comprehend his guilty plea and therefore the plea was involuntary; alternatively, defense counsel rendered ineffective assistance of counsel by failing to properly evaluate and argue that the Petitioner was incompetent to enter a guilty plea and failing to request a hearing pursuant to Florida Rule of Criminal Procedure 3.210. The state postconviction court summarily denied both claims (i.e., the state court did *not* hold an evidentiary hearing). On appeal, the Florida Fifth District Court of Appeal *per curiam* affirmed the denial of the Petitioner's rule 3.850 motion. *See Cruz v. State*, 175 So. 3d 302 (Fla. 5th DCA 2015).

Subsequently, the Petitioner timely raised his double jeopardy claim in a petition filed pursuant to 28 U.S.C. § 2254. On September 23, 2019, the district court denied the Petitioner's § 2254 petition. (A-6). The district court did *not* conduct an evidentiary hearing prior to denying the § 2254 petition.

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit. On April 8, 2020, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claims. (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability in this case. As explained below, the Petitioner has made "a substantial showing" of the denial of his constitutional rights. 28 U.S.C. § 2253(c)(2). Both of the Petitioner's § 2254 claims are addressed in turn below.

1. Constitutional double jeopardy principles prohibit the Petitioner from being convicted/sentenced for both a section 847.0135(3)(a), Florida Statutes, violation and a section 847.0135(4)(a), Florida Statutes, violation.

Both in his state postconviction motion and in his § 2254 petition, the Petitioner argued that constitutional double jeopardy principles prohibit him from being convicted/sentenced for both a section 847.0135(3)(a), Florida Statutes, violation and a section 847.0135(4)(a), Florida Statutes, violation. The Double Jeopardy Clause of the Fifth Amendment to the Constitution, applicable to the States through the Fourteenth Amendment to the Constitution, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

The Petitioner was convicted (following an "open" guilty plea) and sentenced for both a section 847.0135(3)(a) violation ("soliciting") and a section 847.0135(4)(a) violation ("traveling") relating to a single alleged victim. The information/charging document specifically alleges that all alleged activity purportedly took place on a single date (i.e., June 22, 2012). (A-113). The law is clear that when a defendant is charged with separate violations pursuant to section 847.0135(3)(a) and section 847.0135(4)(a) – and when all of the conduct occurs on a single date – convictions and sentences for

both statues violate double jeopardy principles. *See State v. Shelley*, 176 So. 3d 914, 919 (Fla. 2015) ("Accordingly, because Shelley's dual convictions for solicitation and traveling after solicitation based upon the same conduct impermissibly place him in double jeopardy, the Second District properly vacated Shelley's solicitation conviction and sentence because solicitation is the lesser offense.").

In denying this claim, the state postconviction court concluded that because there were separate communications/computer devices used, the soliciting charge is not subsumed by the traveling charge:

> The State filed a response on March 6, 2014, and pointed out that the Defendant exchanged 117 text message [sic], 16 phone calls, and numerous emails with the undercover law enforcement officer he believed was the mother of a 13 year old minor being offered for unlawful sexual activity. As stated in *Pinder* [*v. State*, 128 So. 3d 141 (Fla. 5th DCA 2013)], "each separate use of a . . . device capable of data storage or transmission wherein an offense described in [§ 847.0135(3)] is committed may be charged as a separate offense." *Id.* at 144. Therefore, as in *Pinder*, under the facts of this case, convictions under subsection (3)(a) and (3)(b) were for separate offenses; thus, no double jeopardy violations occurred.

(A-105-106). The state postconviction court's reasoning has been rejected by the Florida Second District Court of Appeal:

> The State asserts that because Shelley's three separate uses of computer devices on the date charged in the information would have supported three separate soliciting charges, the soliciting charge is not subsumed by the traveling charge. We are not persuaded by this argument. The State only charged one use of computer devices to solicit, *and that charge was based on a solicitation occurring on the same date as the traveling offense.* We find no legal basis to deny a double jeopardy challenge based on uncharged conduct simply because it could have been charged. But we acknowledge that convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged

> and proven separate uses of computer devices to solicit. *See Hartley* [*v. State*], 129 So. 3d [486,] 491 [(Fla. 4th DCA 2014)] (vacating a soliciting conviction for conduct on the same date as the traveling conviction but affirming two soliciting convictions for conduct *on different dates*); *Pinder*, 128 So. 3d at 144 (affirming soliciting and traveling convictions because the soliciting conduct *was charged over multiple dates and the evidence established multiple offenses over multiple dates*).

Shelley v. State, 134 So. 3d 1138, 1141-42 (Fla. 2d DCA 2014) (emphasis added), *approved by State v. Shelley*, 176 So. 3d 914 (Fla. 2015). As explained above, in the instant case, all of the conduct occurred on the *same date* (June 22, 2012). Thus, regardless of whether there were separate uses of communication devices on June 22, 2012, constitutional double jeopardy principles prohibit the Petitioner from being convicted and sentenced for a soliciting charge and a traveling charge that occurred on the same date.

The rights afforded by the Double Jeopardy Clause are personal and can be waived by a defendant as a result of a plea, *see United States v. Broce*, 488 U.S. 563, 575-576 (1989), but a "narrow exception to the waiver rule" applies "when a double jeopardy claim is so apparent either on the face of the indictment or on the record existing at the time of the plea that the presiding judge should have noticed it . . . ." *United States v. Kurti*, 427 F.3d 159, 162 (2d Cir. 2005). In the district court's order, the district court concluded that the exception does not apply in the Petitioner's case. (A-43). Contrary to the district court's conclusion in the order denying the Petitioner's § 2254 petition, the double jeopardy violation was apparent on the record. The record is undisputed that the actions that formed the basis for the two charges in question

(i.e., the section 847.0135(3)(a) violation and the section 847.0135(4)(a) violation) all took place on the *same day* (June 22, 2012). The communications/solicitation (i.e., the section 847.0135(3)(a) violation) started and ended on June 22, 2012. The traveling offense (i.e., the section 847.0135(4)(a) violation) also began and ended on June 22, 2012 (the "Arrest Affidavit/First Appearance Form" in this case specifically states that the arrest occurred at 23:55 on June 22, 2012). (A-117). Additionally, the information alleges that all offenses occurred on June 22, 2012. (A-113). Finally, on page 16 of its state court postconviction/appellate Answer Brief, the State acknowledged that "the solicitation charge and the traveling charge were arguably based on conduct occurring on the same date . . . ." (A-100).

The district court's order asserts that the record is not clear whether there were two alleged victims ("Tiffany" and "Jenny") or just one – although in a footnote the district court acknowledges that there was only one alleged victim. (A-43-A-44). Contrary to the district court's assertion, it is clear from the police report that this case involved a single minor victim. (A-118-119). *See also* (A-120-A-123). Notably, the "Incident Report" states the following:

> During this time the male kept attempting to call and I even had Deputy Tiffany Wright from the Citrus County Sheriff's Office call him posing as the daughter "Jenny."

(A-115). Pursuant to the "Incident Report," it is clear that there are *not* two separate victims in this case because "Tiffany Wright" and "Jenny" are the same person (i.e., "Tiffany Wright" is the deputy who was pretending to be "Jenny") – and this is clear

from the face of the record.[6]

Finally, in their response, the Respondents conceded the following:

> [T]he Florida Supreme Court has recently held that "the statutory elements of solicitation are entirely subsumed by the statutory elements of traveling after solicitation," and that "the offenses are the same for purposes of the *Blockburger*[7] same-elements test," *State v. Shelley*, 176 So. 3d 914, 919 (Fla. 2015), *reh'g denied* (Oct. 9, 2015) . . . .

(A-73-A-74) (footnote added). Pursuant to *Shelley*, the Petitioner's convictions/sentences violate constitutional double jeopardy principles, and – contrary to the Eleventh Circuit's order in this case – this violation is clear from the face of the record that existed at the time of the plea.

For all of these reasons, the Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Petitioner's claim is a matter debatable among jurists of reason. Therefore, the

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[6] The district court – citing an appellate brief filed by the prosecution – also asserts that " the prosecutor's theory was premised, in part, on the solicitation and the traveling offenses occurring on different days, which could have supported convictions under both subsections of the statute." (A-45) (citation omitted). What the appellate brief actually states is as follows:

> Appellant contended that the traveling offense occurred on the same day, *although the State contended that it is impossible to determine whether the traveling offense occurred on the same day as the solicitation or on the following day*.

(A-99) (emphasis added). An assertion by the prosecution in an appellate brief that "it is impossible to determine whether the traveling offense occurred on the same day" does *not* justify the conclusion that the prosecution had a "theory" that the offenses occurred on different days.

[7] *Blockburger v. United States*, 284 U.S. 299 (1932).

Eleventh Circuit should have granted a certificate of appealability for this claim.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion – especially in light of the Florida Supreme Court's holding in *Shelley*. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

2. In light of his mental illness, the Petitioner was not able to fully comprehend his guilty plea and therefore the plea was involuntary. Alternatively, defense counsel rendered ineffective assistance of counsel by failing to properly evaluate and argue that the Petitioner was incompetent to enter a guilty plea and failing to request a hearing pursuant to Florida Rule of Criminal Procedure 3.210.

Both in his state postconviction motion and in his § 2254 petition, the Petitioner argued that in light of his mental illness, he was not able to fully comprehend his guilty plea and therefore the plea was involuntary. In order for a guilty plea to be valid, the plea must be entered knowingly, intelligently, and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969). When a criminal proceeding is held against a defendant who does not have a proper understanding of the proceeding (due to a mental health issue), the defendant's constitutional right to a fair proceeding is denied. *See Hill v. State*, 473 So. 2d 1253, 1259 (Fla. 1985); U.S. Const. Amend XIV.

In his § 2254 petition, the Petitioner explained that he suffered a traumatic head injury when he was a child. The Petitioner further alleged that his mental health capacity is in the lower end of the "borderline" range of functioning. The Petitioner's mental illness was known or should have been known by defense counsel.

After being retained to represent the Petitioner in his state postconviction proceedings, undersigned counsel consulted with Dr. Herbert Ginart, Psy.D., P.A., a neuropsychologist. Dr. Ginart has examined the Petitioner and Dr. Ginart concluded that the Petitioner was incompetent to enter a guilty plea on August 19, 2013. A report/letter from Dr. Ginart was attached to the Petitioner's § 2254 petition. (A-79). Pursuant to Dr. Ginart's conclusion, the Petitioner asserted in both his state postconviction motion and his § 2254 petition that his guilty plea was not entered knowingly, intelligently, and voluntarily. The Petitioner further alleged that the withdrawal of his guilty plea is necessary to correct a manifest injustice.[8] The Petitioner affirmatively asserted that he was not competent to enter his guilty plea. A person determined to be incompetent cannot enter a guilty plea and any such plea entered is invalid.

Alternatively, the Petitioner alleged in his state postconviction motion that defense counsel rendered ineffective assistance of counsel by failing to properly evaluate him and failing to argue that he was incompetent to enter a guilty plea and

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[8] *See Miller v. State*, 814 So. 2d 1131, 1132 (Fla. 5th DCA 2002) (holding that when "a defendant seeks to withdraw a plea after sentencing," the "defendant must show that withdrawal of the plea is necessary to correct a manifest injustice").

failing to request a hearing pursuant to Florida Rule of Criminal Procedure 3.210. When a criminal proceeding is held against a defendant who does not have a proper understanding of the proceeding (due to a mental health issue), the defendant's constitutional right to a fair proceeding is denied. *See Hill*, 473 So. 2d at 1259; U.S. Const. Amend XIV. Rule 3.210(b) provides in relevant part:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court *shall* immediately enter its order setting a time for a hearing to determine the defendant's mental condition ....

(Emphasis added).

In its order denying this claim, the state postconviction court stated the following:

> In regard to the Defendant's first claim that trial Counsel was ineffective by failing to properly evaluate and argue that the Defendant was incompetent to enter a guilty plea and failing to request a hearing pursuant to Rule 3.210; this claim is conclusively refuted by the record. Attached is a copy of the plea transcript where it was revealed that the Defendant had no criminal history, was a gainfully employed artist, was married, understood the English language, was not under the influence of any alcohol or intoxicant, had never been found incompetent or mentally challenged, understood the rights he was giving up in his plea agreement, understood that he would be subject to deportation, understood the sexual offender registration and monitoring requirements, was satisfied with the representation of his attorney, and that there was simply no indication of any mental incompetency. In fact, the transcript points out that the Defendant's immigration attorney was present at the plea hearing to ensure that the Defendant understood he would be deported. Thus, the claim that trial Counsel was ineffective for failing to evaluate the Defendant as incompetent or request a hearing pursuant to Rule 3.210, is without merit.

(A-110). Contrary to the state postconviction court's reasoning (and the reasoning

contained in the Eleventh Circuit order), the transcript of the plea hearing does *not* conclusively refute the Petitioner's claim that he was incompetent to enter a guilty plea. In support of his argument, the Petitioner relies on the decision of the Florida Second District Court of Appeal in *Storey v. State*, 32 So. 3d 105, 106-07 (Fla. 2d DCA 2009), wherein the state appellate court stated:

> Bernard A. Storey appeals the denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm without comment the denial of all but one of his claims. Because Storey's claim that his violation of probation admission was involuntary due to his mental illness is not conclusively refuted by the record, we remand for an evidentiary hearing.
>
> In 2005, Storey was charged with aggravated assault arising from a domestic altercation with his wife. Storey pleaded guilty and was placed on eighteen months' probation. In 2007, an affidavit was filed alleging Storey had violated a condition of his probation. Storey entered an admission to the violation of probation and was sentenced to one year and one day in prison.
>
> In ground one of his motion for postconviction relief, Storey alleged that his violation of probation admission was involuntary due to his mental illness. *Relying on Storey's affirmative responses at the plea colloquy, the postconviction court summarily denied this claim and determined Storey was not suffering from any mental or emotional problems which affected his understanding of the plea.*
>
> To uphold the trial court's summary denial of claims raised in a rule 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. *See* Fla. R. Crim. P. 3.850(d). "[W]here no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Here, in support of his motion for postconviction relief, Storey alleged he suffers from mental health issues. He stated that he has been to seven mental hospitals and has bipolar disorder and schizophrenia. Storey suffered mental breakdowns in 2002 and 2004 resulting in hospitalization and had a mental breakdown at Tampa International Airport eleven days before his violation of probation admission, causing a portion of the airport to close. Storey also alleged that he is prescribed six different psychotropic drugs, and at the time of the plea colloquy he had not received these medications for weeks. Storey argued that without these medications he was unable

> to understand the consequences of his pleas and would not have entered his pleas had he understood the nature and consequences of doing so.
>
> *Because the plea form and transcript of the plea colloquy do not adequately refute Storey's claim so as to warrant a summary denial of his motion, we reverse and remand to the postconviction court for an evidentiary hearing on Storey's claim that his violation of probation admission was involuntary due to his mental illness. See Forster v. State*, 779 So. 2d 550, 550 (Fla. 2d DCA 2001) (finding a hearing on the merits was required where petitioner claimed his plea was involuntary because he was not administered medication for bipolar disorder); *Irving v. State*, 741 So. 2d 519, 519 (Fla. 2d DCA 1999) (noting "that mere affirmative responses by [the defendant] during the plea colloquy may not be sufficient to conclusively refute his claim of incompetence").

(Emphasis added) (footnote omitted). As explained by the court in *Storey*, "mere affirmative responses" by a defendant during the plea colloquy can "not be sufficient to conclusively refute [a] claim of incompetence." *Irving v. State*, 741 So. 2d 519, 519 (Fla. 2d DCA 1999).

The district court's order cites the following portion of Dr. Ginart's report:

> Petitioner was cognitively, intellectually, and psychiatrically incompetent to enter a plea (on his own), under stress/duress without adequate legal representation.

(A-30). The district court then concluded that because the Petitioner was represented by counsel during the plea hearing, "Dr. Ginart's opinion can be interpreted to imply Petitioner was competent at the time." (A-30). Undersigned counsel submits that the district court's interpretation of Dr. Ginart's report is unreasonable – especially since neither the district court nor the state postconviction court held an evidentiary hearing – meaning that Dr. Ginart has never been afforded an opportunity to testify about his opinion that the Petitioner was incompetent at the time of his plea. As explained by

the Sixth Circuit Court of Appeals in *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000), without conducting an evidentiary hearing, it is impossible to determine whether defense counsel was ineffective for failing to have the Petitioner's competency evaluated:

> Barnes argues that he was denied effective assistance of counsel by his trial attorney's failure to investigate or call a medical witness to establish Barnes's inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes's medical condition, and why he failed to contact Dr. Waring. *Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound trial strategy*, *see Strickland* [*v. Washington*], 466 U.S. [668], 690-691 [(1984)] ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."), or was constitutionally deficient performance. *See id.* at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. *Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of Strickland.*

(Emphasis added). Thus, undersigned counsel submits that it is at least "debatable" as to whether the district court should have held an evidentiary hearing in order to hear directly from Dr. Ginart regarding his conclusions in this case.

Thus, for this claim, the Petitioner also contends that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Petitioner's claim is a matter debatable among jurists of reason – especially in light of

Dr. Ginart's report. Therefore, the Eleventh Circuit should have granted a certificate of appealability for this claim.

As stated above, to be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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