20-7180

ORIGINAL

No. 20-_____

IN THE
Supreme Court of the United States

WILLIAM HUGH WILSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit erred in denying Wilson's Motion for Certificate of Appealability and Granting Relief.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, William Hugh Wilson ("Wilson"), was a criminal defendant in the United States District Court for the Western District of Michigan, Southern Division, in USDC Criminal No.1:17-cr-00060-PLM-1; as a Movant in the United States District Court for the Western District of Michigan, Southern Division, in USDC Civil No. 1:19-cv-00578-PLM; and as Appellant in the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in USCA No. 20-1161. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished at *Wilson v. United States of America,* (No. 20-1161) (6th Cir. July 10, 2020), is attached in the Appendix at 1a.

STATEMENT OF JURISDICTION

Petitioner-Appellant timely appealed from the district court's Judgment in a Civil Case to the United States Court of Appeals for the Sixth Circuit. On July 10, 2020, the Court of Appeals for the Sixth Circuit issued an Order denying Wilson's Motion for Certificate of Apppealability. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Proceedings Below

On January 26, 2017, a grand jury sitting in the United States District Court for the Western District of Michigan, Southern Division, returned a three (3) count Indictment charging Wilson and Rodney Steven Martin, co-defendant. See Doc. 20.[1] Count 1 charged Wilson with Felon in Possession of Firearms, in violation of 18 U.S.C. §§ 922(g)(1) & 924(e); Count 2 charged Wilson with Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C); and Count 3 charged Wilson with Possession of Firearms in Furtherance of a Drug Trafficking Crime, in violation of 924(c)(1)(A). Wilson was also named in a Forfeiture Allegation pursuant to 21 U.S.C. § 853. *Id.*

On June 1, 2017, a Change of Plea Hearing was held and Wilson pled guilty to Count 1 of the Indictment, pursuant to a written Plea Agreement. See Docs. 46 & 49.

On October 18, 2017, Wilson was sentenced to a term of 204 months' imprisonment, 5 years of Supervised Release, no fine or restitution, and a Mandatory Special Assessment Fee of $100.00. See Docs. 69 & 70.

On November 2, 2017, Wilson timely filed a Notice of Appeal. See Doc. 72.

On July 16, 2018, the Sixth Circuit affirmed Wilson's appeal. See Doc. 89.

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1 "Doc." refers to the Docket Report in the United States District Court for the Western District of Michigan, Southern Division in Criminal No. 1:17-cr-00060-PLM, which is followed by the Docket Entry Number.

On July 18, 2019, Wilson filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), which was denied and dismissed by the District Court on December 5, 2019. See Docs. 113 &114.

On February 3, 2020, Wilson timely filed a Notice of Appeal re: denial of his § 2255 Motion. See Doc. 117.

On July 10, 2020, the Sixth Circuit issued an Order denying Wilson's Motion for Certificate of Appealability ("COA"). See Doc. 130.

B. The Factual Background

1. Offense Conduct

In December 2016, a confidential informant informed police that narcotics were being sold from a residence located at 732 Hawley Street, Kalamazoo, Michigan. A controlled buy for narcotics was made at the residence on December 22,2016. Cocaine was purchased from the residence. On December 22, 2016 the informant identified Wilson as the person who sold the cocaine. Another controlled buy was conducted on January 4, 2017 where cocaine was again purchased from the residence. The informant on January 4, 2017 identified the person involved in the cocaine transaction as Mr. Martin.

On January 5, 2017, a search warrant was executed at 732 Hawley Street. Wilson and co-efendant Martin were found inside of the residence, along with a third individual named Hundley. Wilson and Martin did not provide statement to the police. Hundley agreed to speak with police and advised the police that he lived at the residence along with both Wilson and Martin. The owner of the premises was also contacted and gave a statement to the

police that Mr. Wilson lived at the residence and had been observed at the residence on previous occasions.

Upon entering the residence police officers observed three firearms in plain view. A fourth firearm was located hidden underneath a chair cushion in the living room. Five grams of cocaine was discovered hidden inside of a can on the dining room table. Hundley stated to police that he had previously observed Wilson at the residence in possession a shotgun. All of the firearms were located in the living room area of the home. There was also $903.00 in plain view on the dining room table, and $983 on Martin's person. Martin was also in possession of the "buy money" - a pre-recorded $20.00 bill used in the January 4, 2017 purchase of cocaine.

Mr. Wilson's relevant criminal history revealed:

• A May 3, 2002, DeliverylManufacture Less Than 50 Grams, 9th Circuit Court;

• A March 13, 2006, delivery/manufacture less than 50 grams, 9th Circuit Court;

• An April 13, 2007, delivery/manufacture less than 50 grams, 31st Circuit Court, Port Huron, Michigan;

• A second April 13, 2007, delivery/manufacture less than 50 grams, 31st Circuit Court, Port Huron, Michigan; and

• A July 2, 2012, possession with intent to distribute less than 50 grams, 3rd Circuit Court, Detroit, Michigan.

2. Plea Proceeding

On June 1, 2017, Defendant pleaded guilty to Count 1 in exchange for the dismissal of Count 2. Under a plea agreement, the Government agreed to recommend a sentence at the low end of the Sentencing Guidelines range, and to not oppose a reduction in Defendant's

offense level for acceptance of responsibility. See Plea Agreement Doc. 46.

3. Presentence Report Calculations and Recommendations

The Final Presentence Investigation Report ("PSR") calculated Defendant's recommended range of sentence under the Sentencing Guidelines as 262 to 327 months, based on a total offense level of 34 and a criminal history category of VI. The PSR set the offense level at 34 because Defendant was deemed an "armed career criminal" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). See U.S.S.G. § 4B1.4 (2016) (setting the offense level at 34 for armed career criminals). Defendant had at least three prior convictions for a "serious drug offense," as that term is defined in 18 U.S.C. § 924(e)(2)(A). All five of his prior drug convictions were deemed as serious drug offenses. See Mich. Comp. Laws § 333.7401(2)(a)(iv).

The PSR also determined that Defendant was not eligible for any credit for acceptance of responsibility, but Wilson's counsel objected to that determination.

4. Sentencing Proceeding

On October 18, 2017, Wilson was sentenced. The Court sustained Wilson's lawyer's objection regarding his acceptance of responsibility. Accordingly, the Court reduced the total offense from level 34 to 31, resulting in a sentencing range of 188 to 235 months. The Court sentenced Wilson near the bottom of the guidelines range to 204 months in prison, 5 years of Supervised Release, no fine or restitution, and a Mandatory Special Assessment Fee of $100.00. See Docs. 69 & 70.

5. Appellate Proceeding

Wilson appealed his sentence, arguing that the ACCA enhancement did not apply because his prior drug convictions involved small quantities of drugs and, thus, were not "serious drug offenses." The Court of Appeals rejected that argument and affirmed this Court's judgment. See *United States v. Wilson*, (No. 17-2324) (6th Cir. July 16, 2018). It also noted that Defendant had "knowingly and voluntarily" waived his right to appeal. *Id*

6. Postconviction Proceeding

On July 18, 2019, Wilson filed a 2255 Motion. He raised the following grounds for relief in his motion under § 2255 and his supplement thereto:

I. This court lacks subject matter jurisdiction over this case;

II. The plea in this matter is inadmissible evidence; and

III. [Defendant's] prior state drug convictions do not qualify as a serious drug offenses for (ACCA) enhancement. See Docs. 99 & 102.

On December 5, 2019, the district court denied Wilson's 2255 Motion without an evidentiary hearing. See Doc. 113.

On February 3, 2020, Wilson timely filed a Notice of Appeal re: denial of his § 2255 Motion. See Doc. 117.

On July 10, 2020, the Sixth Circuit issued an Order denying Wilson's Motion for COA. See Doc. 130.

REASONS FOR GRANTING THE PETITION

As a preliminary matter, Wilson respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. See *Small v. Brock*, 963 F.3d 539 (6th Cir. 2020); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The United States Court of Appeals for the Sixth Circuit Erred in Denying Wilson's Motion for Reconsideration of Denial of Motion for Certificate of Appealability.

Wilson contends that the Sixth Circuit erred denying his Motion for COA, for the following facts and reasons:

The Sixth Circuit's Order dated July 10, 2020, denying Wilson's Motion for COA states:

Wilson fails to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is DENIED.

See Appendix at 1a.

COA: Standard of Review

A COA will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack, v. McDaniel*, 529 U.S. 473, 482 (2000); *Hohn v. United States*, 524 U.S. 236, 248 (1998). This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Under the controlling standard, the Court must make a gateway examination of the district

U.S.C. § 2255. Where there has been a "denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* (emphasis added).

In this petition, Wilson waives his first two (2) grounds he raised in his § 2255 Motion and only raises ground three:

Whether Wilson's prior state drug convictions qualify as serious drug offenses for purposes of his ACCA enhancement.

ARGUMENT

Wilson's Prior State Drug Convictions Do Not Qualify As Serious Drug Offenses for His ACCA Enhancement.

In this case, Wilson's prior Michigan convictions, for delivery of a controlled substance, do not constitute predicate offenses under the ACCA.

A. Armed Career Criminal Act

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who has three prior convictions "for a violent felony," including "burglary, arson, or extortion," or a "serious drug offense." 18 U.S.C. 924(e). To determine whether a prior conviction is a listed crime, courts apply the "categorical approach," asking whether the elements of the offense sufficiently match the elements of the generic (commonly understood) version of the enumerated crime. When a statute defines

multiple crimes by listing multiple, alternative elements, a sentencing court must discern which of the alternative elements was integral to the defendant's conviction, by employing the "modified categorical approach" and examining a limited class of documents from the record of a prior conviction. Mathis pleaded guilty to being a felon in possession of a firearm. He had five prior Iowa burglary convictions. Under the generic offense, burglary requires unlawful entry into a "building or other structure." The Iowa statute (702.12) reaches "any building, structure, [or] land, water, or air vehicle." The district court applied the modified categorical approach, found that Mathis had burgled structures, and imposed an enhanced sentence. The Eighth Circuit affirmed, reasoning that the Iowa statute's list of places did not establish alternative elements, but rather alternative means of fulfilling a single locational element. The Supreme Court reversed. Because the elements of Iowa's law are broader than those of generic burglary, Mathis's prior convictions cannot give rise to ACCA's sentence enhancement. The "underlying brute facts or means" by which the defendant commits his crime make no difference; even if the defendant's conduct fits the generic definition, the mismatch of elements saves him from an ACCA sentence. Construing ACCA to allow a sentencing judge to go further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. A statute's listing of disjunctive means does not mitigate the possible unfairness of basing an increased penalty on something not legally necessary to the prior conviction. See *Mathis v. United States*, 136 S. Ct. 2243 (2016).

The section defines serious drug offenses as those violations of state or federal drug law punishable by imprisonment for 10 years or more. See 18 U.S.C. 924(e)(2)(A). Conviction under a statute which carries a 10-year maximum for repeat offenders qualifies, even though the maximum term for first-time offenders is five

years. See *United States v. Rodriquez*, 533 U.S. 377, 380 (2008) It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines called for a term of less than 10 years, [*United States v. Rodriquez*, 533 U.S. at 390] or when the defendant was in fact sentenced to a lesser term of imprisonment. See *United States v. Buie*, 547 F.3d 401, 404 (2d Cir. 2008) To qualify as a predicate drug offense, the crime must have been at least a 10-year felony at the time of conviction for predicate offense. See *McNeill v. United States*, 131 S.Ct. 2218, 2220 (2011).

As long as the attempt or conspiracy was punishable by imprisonment for 10 years or more, the term "serious drug offense" includes attempts or conspiracies to commit a serious drug offense. See *United States v. Trent*, 767 F.3d 1046, 1057 (10th Cir. 2014).

B. Wilson's Prior Michigan State Drug Convictions

In light of *Mathis,* Michigan's statute criminalizing delivery of a controlled substance is overbroad The Sixth Circuit has held that Mich. Comp. Laws § 333.7401 is divisible because its subsections list various alternative crimes that require different levels of punishment. See *United States v. House*, 872 F.3d. 748 (6th Cir. 2017); *United States v. Tibbs*, 685 F. App'x 456, 463 (6th Cir. 2017). Here, Wilson argues that the Court erred in these decisions and maintains that § 333.7401 is indivisible and covers a broader swath of conduct than is covered by the definition of "controlled substance offense" in the under ACCA and the Sentencing Guidelines, making it categorically not a predicate offense capable of supporting the enhancement. There are two different reasons for concluding Mich. Comp. Laws § 333.7401 is overly broad that were not addressed in *Tibbs* or *House*.

First, Michigan's schedules of controlled substances include substances that are not included on the federal list of controlled substances. Second, Michigan's definition of what it means to "deliver a controlled substance" includes attempts to deliver, which necessarily includes solicitation.

1. Michigan's Schedules 1 and 2 are broader than the federal government's.

Wilson's sentence was enhanced under ACCA because the district court believed he had three convictions for "serious controlled substance offenses." The Guidelines define a "controlled substance offense" as follows:

> "[A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year that prohibits the manufacture,import,export,distribution, or dispensing of a controlled substance (or a counterfeit sibstance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture,import,export,distribute, or dispense".

See U.S.S.G. § 4B1.2.

The Guidelines do not define which substances are "controlled." Federal and state governments disagree about which substances to include on the various schedules of controlled substances. But that distinction often makes a difference. Consider Michigan Complied Laws § 333.7401(2)(e), which criminalizes possession with intent to distribute schedule 5 controlled substances. Michigan has chosen to include Loperamide (an anti-diarrheal medication, like Imodium) on the list of schedule 5 substances. Mich. Comp. Laws § 333.7220(1)(a). Yet thefederal government chose to remove Loperamide from the list of controlled substances in 1982. See 47 FR

49840-02 (1982).

United States v. Tate, 822 F.3d 370, 376 (7th Cir. 2016), is instructive as to how courts should resolve these discrepancies. In *Tate*, the Seventh Circuit considered how to define the undefined term "listed chemical" as a precursor for manufacturing a controlled substance. The court looked exclusively to the federal government's listed chemicals, found in 21 U.S.C. § 802(34) and (35) for that answer. Because the defendant had been charged with possessing a substance on the current list, the court reasoned that his conviction was not a predicate offense under the career-offender guidelines.

While *Tate* is informative, *Mathis* does not permit a detailed case-by-case comparison, and so the key question is whether the state schedule of controlled substances includes substances not listed on the federal schedules. *Mathis* instructs that whether a state conviction is a predicate offense for purposes of the ACCA guidelines turns on a comparison between the elements of the federal and state offenses. The actual conduct the defendant was charged with is irrelevant to this analysis. See *Mathis*, 136 S. Ct. at 2248. The Court explained, "'[e]lements" are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Id.* (quoting Black's Law Dictionary 634 (10th ed. 2014)). "Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements"; "[t]hey are 'circumstance[s]' or 'event[s]' having no 'legal effect [or] consequence.'" Id. (citing Black's Law Dictionary 709).

Although the *Mathis* court used this distinction to determine whether a state burglary statute is a "crime of violence" under the career offender guideline, its teachings extend to controlled-substance offenses. The Supreme Court has required courts to look only at federal drug schedules when determining whether possession of certain

drugs permits federal punishment, such as removal from this country. See *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). And lower courts have applied the meanselements distinction described in *Mathis* to determine whether a state controlled-substance conviction is a predicate offense under the career offender guideline. See *United States v. Dozier*, 848 F.3d 180, 188 (4th Cir. 2017) (holding that the defendant was properly classified as a career offender under U.S.S.G. §4B1.1 because his state controlled-substance conviction was a "categorical match of a generic controlled substance offense"); see also, *United States v. Hinkle*, 832 F.3d 569, 570 (5th Cir. 2016)(concluding that a defendant's conviction for delivery of a controlled substance was "not a 'controlled substance offense' within the meaning of the Guidelines").

Applying those principles here, Michigan criminalizes possession with intent to distribute more substances than the federal government does, and so Wilson does not have three predicate convictions. The Michigan-controlled-substance statute prohibits the "manufacture, creation, delivery or possession with intent to manufacture, create, or deliver a controlled substance." Mich. Comp. Laws § 333.7401. The statute bases its penalties on the schedule of the substance, not the type of substance itself. For example, the specific subsection of the state statute under which Wilson was convicted penalizes the conduct with respect to "[a] controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv)." Mich. Comp. Laws § 333.7401(2)(a)(iv). Mich. Comp. Laws § 333.7214(a)(iv) lists coca leaves and its derivatives. Thus, the elements of an offense under Mich. Comp. Laws § 333.7401 are (1) the manufacture, creation, or delivery or the possession with intent to manufacture, create, or deliver, (2) a schedule 1 controlled substance or a schedule 2 controlled substance that is a narcotic or a coca leaves or their derivatives.

Effective October 1, 2010, Michigan listed

Salvinorin A as a Schedule 1 controlled substance. Mich. Comp. Laws § 333.7212(w). While the DEA has studied scheduling this substance, it has not yet placed this substance on the federal schedule at all. U.S. Dep't Justice, Drug Enforcement Administration, Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals (Dec. 2017).By including on the Michigan schedule a substance not on the federal schedule, Michigan's controlled substance statute, on its face and according to its elements, covers a broader range of conduct than the federal definition of a controlled substance offense. Therefore, Wilson's May 3, 2002, Delivery Manufacture Less Than 50 Grams, 9th Circuit Court; March 13, 2006, delivery/manufacture less than 50 grams, 9th Circuit Court; April 13, 2007, delivery/manufacture less than 50 grams, 31st Circuit Court, Port Huron, Michigan; and April 13, 2007, delivery/manufacture less than 50 grams, 31st Circuit Court, Port Huron, Michigan convictions used as predicate ACCA "serious drug offense" convictions cannot serve as a predicate offenses for purpose of ACCA enhancement regardless of the actual facts underlying that conviction.

Therefore, it is important to remember that it is the schedule, not the substance, which forms the basis of conviction, according to the statute. The state court need never have listed the actual substance of which Wilson was in possession, to allegedly deliver so long as they proved to the jury or to the court that the substance he possessed was scheduled according to Mich. Comp. Laws § 333.7401(2)(a). Critically, the statutory language makes clear that the prosecution need not prove the specific type of substance possessed; only that the substance possessed is included on schedules 1 or 2. The statute states, "a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form." This language is indivisible; a defendant still violates the statute if he possesses small amounts of three

types of substances so long as each substance is included in schedules 1 and 2. In other words, the type of drug possessed is a means to commit the crime. Even if the statute were divisible, the division, based on the foregoing language, would limit Wilson's conduct to "possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form." Because the possession with intent to deliver a prescription form or a counterfeit prescription form falls outside of the definition of controlled substance offense located in the statute, his conduct is categorically not a controlled substance offense for purposes of the U.S.S.G. § 2K2.1(a)(4)(A) enhancement.

2. Michigan's definition of "deliver" is broader than the federal definition.

As the Fifth Circuit persuasively explained in *Hinkle*, 832 F.3d at 569–77, a statute that includes offers to sell narcotics within the definition of "delivery" is overly broad. As this Court explained in *Tibbs*, "in Michigan, defendants are generally charged with a particular form of the various offenses listed in the statute—manufacture, creation, or delivery or possession with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription— and the act they are charged with becomes an element of the offense." 685 F. App'x at 463 (discussing Mich. Comp. Laws § 333.7401). But once the means has been tried, courts must still ask how state courts define the actus reus (e.g., delivery) charged. See *Mathis*, 136 S. Ct. at 2256 ("Here, a state court decision definitively answers the question: [elements or means?]").

For many years, Michigan courts have held that any attempt to deliver a controlled substance constitutes a delivery. See *People v. Marji*, 447 N.W.2d 835, 838 (Mich. Ct. App. 1989) ("[T]here is no lesser included offense of

"attempted delivery of cocaine." Under the statute, any attempts are subsumed in the actual offense of delivery."); *People v. Wright*, 253 N.W.2d 739, 740–41 (Mich. Ct. App. 1977) (same). For that reason, evidence that the defendant offered to sell cocaine is sufficient to sustain a conviction for delivery of cocaine. See *People v. Alexander*, 469 N.W.2d 10, 12 (Mich. Ct. App. 1991). Because § 333.7401 criminalizes offers to sell narcotics, it is broader than the definition of a "controlled substance offense" as described in U.S.S.G. § 4B1.2. See *Hinkle*, 832 F.3d at 575–76.

As fully explained above, designating Wilson as an ACCA offender was an error. That error was also apparent based on the framework described in *Mathis*, *Hinkle*, and *Dozier*. And the error substantially impacted Wilson's ultimate sentence; the ACCA designation nearly tripled his guidelines range.

Hence, Wilson has shown violations of his constitutional rights where jurists of reason could conclude that the ACCA ground presented in his § 2255 Motion is debatable, or wrong, and that they are adequate to deserve encouragement to proceed further. As such, the Sixth Circuit erred when it denied to issue Wilson a COA.

CONCLUSION

For the above and foregoing reasons, Wilson's petition for a writ of certiorari should be granted.

Respectfully submitted,

December 7, 2020.

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