No. _____

In The
Supreme Court of the United States

GREGORIO GIGLIOTTI
and ANGELO GIGLIOTTI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment is violated when foreign law enforcement officials engage in wiretapping at the behest of United States officials pursuant to a joint investigation, in order to further the United States' criminal investigation.

2. Whether in reviewing whether foreign wiretapping violated the Fourth Amendment, courts should apply the "joint venture" doctrine used by most federal circuits, or the less protective "virtual agent" standard used by the Second Circuit.

3. Whether *Batson v. Kentucky* and its progeny permit a trial court to reseat a challenged juror when there is no claim by the opposing party that the strike of that juror was for a constitutionally impermissible reason.

4. Whether the three-step burden-shifting allows for a trial court to *sua sponte* reseat a challenged juror when the opposing party has expressly stated that they do not object to the strike of that juror.

5. Whether this Court's decision in *McCollum v. Georgia* recognizes plenary authority on the part of a trial court to make its own determination as to whether there has been a discriminatory challenge under *Batson*, and to reseat a juror regardless of whether there is an objection to that juror.

QUESTIONS PRESENTED—Continued

6. Whether a *Batson* objection is timely if it is not raised until the challenged jurors have been excused and left the court.

7. Whether the Fourth Amendment is violated when a warrantless administrative search that would otherwise be legally permissible pursuant to *New York v. Burger* was performed as a pretext to allow for collection of information to assist in a Federal criminal investigation.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America against Gregorio Gigliotti and Angelo Gigliotti.

RELATED CASES

United States v. Angelo Gigliotti and Gregorio Gigliotti. No. 15-CR-204 (RJD), U.S. District Court for the Eastern District of New York. Judgments entered April 24, 2017 ((Gregorio Gigliotti), June 27, 2017 (Angelo Gigliotti).

United States v. Eleonora Gigliotti, Franco Fazio, Defendants, Gregorio Gigliotti, Angelo Gigliotti, Defendants-Appellants. No. 17-1541 (Gregorio Gigliotti), 17-2166 (Angelo Gigliotti), U.S. Court of Appeals for the Second Circuit, Summary Order and Judgment entered March 2, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Angelo Gigliotti and Gregorio Gigliotti pray for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Eastern District of New York. By Order of April 15, 2021, the Court of Appeals denied Petitioners' requests for panel rehearing or rehearing *en banc*, reproduced in the appendix at App. 110. The rulings of the district court are reprinted starting at App. 17.

JURISDICTION

The order of the court of appeals denying a timely motion for rehearing *en banc* was entered on April 15, 2021. This petition for a writ of certiorari is being timely filed within 150 days of the entry of that order, in compliance with Rule 13.3 of this Court's rules, and the Court's Order of March 19, 2020, regarding extension of filing deadlines. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides the following, in pertinent part:

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

United States Constitution, Amendment V, provides the following, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI, provides the following, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

STATEMENT OF THE CASE

1. Petitioners were convicted in the United States District Court for the Eastern District of New York, of one count of conspiracy to import cocaine, in violation of 21 U.S.C. §§ 963, 952(a), 960(a)(1) and 960(b)(1)(B)(ii), two counts of importation of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and

960(b)(1)(B)(ii), one count of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846 and 841(b)(1)(A)(ii)(II), and one count of attempted possession of cocaine, in violation of 21 U.S.C. §§ 846, 840(a)(1) and 841(b)(1)(A)(ii)(II). Additionally, Gregorio Gigliotti was convicted of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A).

The convictions arose from charges that Petitioners were involved in a scheme to import cocaine to the United States from Costa Rica and then export it to Italy. Much of the prosecution case derived from a lengthy wiretapping of Gregorio Gigliotti's phone, which in turn provided probable cause for assorted search warrants that uncovered evidence used at trial.

In July, 2016, following extensive pretrial litigation, including with respect to whether wiretapping by Italian law enforcement that provided the initial probable cause for electronic surveillance by American investigators was done in violation of the Fourth Amendment, Gregorio Gigliotti and Angelo Gigliotti proceeded to trial. Following the 10-day trial, Gregorio Gigliotti was found guilty on all counts, and Angelo Gigliotti was found guilty of all counts except the firearms count. Co-defendant Franco Fazio, who was not extradited from Italy, instead faced trial in Italy in a prosecution, arising out of the same joint investigation, in which Gregorio and Angelo Gigliotti were named as defendants.

2. Gregorio Gigliotti was sentenced on April 18, 2017 to a term of 182 months' imprisonment. Angelo Gigliotti was sentenced on June 22, 2017, to the statutory minimum of 20-years' imprisonment based on the existence of a prior felony information. Both Petitioners timely filed notices of appeal.

In late June, 2017, Angelo Gigliotti received a copy of a disc obtained from the Italian courts (the "Columbus disc"), containing many thousands of pages of documents, primarily in Italian. A review of that disc revealed that American investigators were using Italian investigators to avoid probable cause requirements under the Constitution.

Based on the contents of the Columbus disc, Angelo Gigliotti filed a new trial motion in the district court on September 11, 2018. While that motion was pending, Angelo Gigliotti received additional information in the form of trial transcripts from Italy in which the lead Italian investigator, Giampietro Muroni, testified that the Italian investigation had only begun when United States investigators provided him with information regarding a cell phone belonging to Gregorio Gigliotti, who at the time was the subject of a United States investigation. A wiretap initiated by the Italian officials provided the central probable cause for United States investigators to begin their own wiretap of Gregorio Gigliotti. Despite the import of this new information, the district court denied the motion for a new trial by Order of May 15, 2019. (App. 38).

3. The Petitioners raised multiple issues on appeal—including the denial of Appellants' new trial motion regarding the foreign wiretapping; the district court's violation of protocol announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), by reseating two jurors challenged by the defense, who had already been excused and left the court, and one of whom was not objected to by the prosecution; and that a pretextual warrantless administrative search by New York State Liquor Authority Agents of premises belonging to Gregorio Gigliotti came at the direction of a federal task force member seeking information for the criminal investigation of Gregorio Gigliotti.

The Court of Appeals rejected all the Petitioners' arguments. In doing so, the Court of Appeals stated the following, in pertinent part:

> First, we discern no error, much less an abuse of discretion, in the district court's determination to entertain the government's *Batson* objection while jury selection was still underway. *See Martinez*, 621 F.3d at 109–10. The government made its objection minutes after the end of the peremptory strikes and while the court was still in the process of screening potential alternate jurors. *See McCrory v. Henderson*, 82 F.3d 1243, 1249 (2d Cir. 1996); *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990). The district court then instructed counsel to be prepared to offer reasons for striking the jurors at a hearing later the same day. This timing in no way prejudiced defense counsel, nor was

> defense counsel likely to have forgotten its reasons for exercising the peremptory strikes in the intervening period. *Cf. McCrory*, 82 F.3d at 1247. Moreover, because the struck jurors were still in the courthouse, had not yet been excused, and were able to report back to the court, a clear remedy was still available at the time of the government's objection. (App. 4–5).

In a footnote, the Court of Appeals addressed the district court's decision to reseat a juror who was not subject to a prosecution *Batson* objection:

> We also reject Defendants-Appellants' unpreserved contention that it was error for the district court to consider the sufficiency of defense counsel's proffered basis for striking Juror 16 after the Government appeared to withdraw its objection to that strike. The Government initially objected to the strikes of all ten male jurors. Once the district court found a prima facie case of discrimination, which it properly did in this case, it had an independent obligation to conduct an inquiry and fashion a remedy if necessary. The district court is obliged to protect (and the Government cannot waive) the rights of prospective jurors not to be discriminated against. *See*, *e.g.*, *Georgia v. McCollum*, 505 U.S. 42, 49–50 (1992) ("Be it at the hands of the state or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice. . . ." (App. 5, n.4).

With respect to the administrative search of Petitioners' business location, the Court of Appeals stated the following:

> Defendants-Appellants next argue that evidence obtained from a search of their restaurant should have been suppressed because law enforcement, in coordination with New York State Liquor Authority ("NYSLA"), carried out a pretextual administrative search of the restaurant prior to obtaining a search warrant. "On appeal from a district court's ruling on a motion to suppress evidence, we review legal conclusions de novo and findings of fact for clear error." *United States v. Purcell*, 967 F.3d 159, 178 (2d Cir. 2020) (internal quotation marks omitted).
>
> The independent source doctrine "permits the admission of evidence seized pursuant to an unlawful search if that evidence would have been obtained through separate, lawful means." *United States v. Vilar*, 729 F.3d 62, 83 n.19 (2d Cir. 2013); *Segura v. United States*, 468 U.S. 796, 814 (1984). This doctrine applies where: (1) the warrant is supported by probable cause "derived from sources independent of the illegal entry;" and (2) the decision to seek the warrant was not "prompted by information gleaned from the illegal conduct." *United States v. Johnson*, 994 F.2d 980, 987 (2d Cir. 1993). When considering the second prong, the "relevant question is whether the warrant 'would have been sought even if what actually happened had not occurred.'"

Id. (*quoting Murray v. United States*, 487 U.S. 533, 542 n.3 (1988)).

Here, assuming arguendo that the administrative search was improper, suppression of the evidence obtained from the restaurant search was not required because the search warrant later obtained by law enforcement was supported by independent sources, and the administrative search did not prompt the warrant application. As the district court concluded, the search warrant application relied on more than six months' worth of wiretaps carried out prior to the NYSLA inspection. That investigation had revealed that Defendants-Appellants were importing cocaine, and that there was a fair probability that contraband or evidence of a crime would be found in the restaurant. Law enforcement had further seized 55 kilograms of cocaine from produce containers connected with one of Gregorio's produce import/export companies, suggesting that Gregorio used his businesses as a cover for his criminal operations.

Defendants-Appellants contend that the independent source doctrine cannot apply because the NYSLA search provided law enforcement with details about the layout of the restaurant. But the warrant application would not have lacked necessary particularity without this information. *See United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011) (explaining that under the Fourth Amendment, a warrant application must "particularly describe[e] the place to be searched, and the

> persons or things to be seized" (internal quotation marks omitted)); *United States v. Ross*, 456 U.S. 798, 820–21 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." (Footnote omitted)). Moreover, law enforcement already knew from the wiretaps and confidential informants that there was a computer and landline in the restaurant, and that these devices were likely located in the basement of the restaurant. Accordingly, the district court did not err in applying the independent source doctrine and denying Defendants-Appellants' motion to suppress. (App. 7–10).

With respect to the issue regarding the wiretapping for Italian officials, the Court of Appeals concluded as follows:

> Here, the district court did not abuse its discretion in rejecting Defendants-Appellants' motion for a new trial, which it construed as a motion to suppress evidence under Fed. R. Crim. P. 12(b)(3). The district court appropriately concluded that the documents provided to the court concerning the Italian legal proceedings did not demonstrate a violation under *Maturo*. As it reasoned, the documents did not suggest that the conduct of Italian law enforcement rendered those officials "agents, or virtual agents" of U.S. law enforcement. *Id*. While Angelo argues that the district court overlooked testimony provided by Inspector

> Giampietro Muroni, that testimony does not call into question the independent nature of the Italian law enforcement effort. *See United States v. Getto*, 729 F.3d 221, 231 (2d Cir. 2013) ("Defendant's allegations, even if credited, demonstrate only robust information-sharing and cooperation across parallel investigations and do not contradict the government's claim that the [foreign] investigation was not controlled or directed by American law enforcement."); *United States v. Lee*, 723 F.3d 134, 141 (2d Cir. 2013) (finding no *Maturo* violation despite the Drug Enforcement Administration and Jamaican authorities having "agreed on several measures designed to facilitate collaboration and cooperation in transnational drug investigations"). The district court therefore also did not abuse its discretion by failing to hold a new suppression hearing. *United States v. Helmsley*, 985 F.2d 1202, 1209–10 (2d Cir. 1993) ("No hearing is required on a new trial motion if the moving papers themselves disclosed the inadequacies of the defendants' case, and the opportunity to present live witnesses would clearly have been unavailing"). (App. 11–12).

Petitioners timely sought panel rehearing and rehearing *en banc* from the United States Court of Appeals for the Second Circuit. By Order of April 15, 2021, the Second Circuit denied without elaboration Petitioners' motion for rehearing. (App. 110–11).

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Make Clear That Wiretapping By Foreign Law Enforcement Officials Violates The Fourth Amendment When It Has Been Done As Part Of A Joint Investigation With United States Officials, And To Resolve The Circuit Split Between The Numerous Courts Of Appeals That Have Applied The "Joint Venture" Doctrine And The Second Circuit, Which Employs The "Virtual Agency" Standard.

1. With the increasingly international role of United States law enforcement in recent decades, courts have struggled to find a balance between the fundamental protections of the Fourth Amendment and the limits of those protections when they involve the actions of foreign law enforcement officials. With respect to Title III in particular—which on its face does not apply to evidence obtained by a foreign jurisdiction—the majority of circuits, but not the Second Circuit, have determined that the "joint venture" doctrine provides the best protection against the danger that a relationship between American and foreign law enforcement was so substantial that Fourth Amendment concerns were implicated, even when wiretapping was technically performed by the foreign officials. *See United States v. Valdivia*, 680 F.3d 33, 52 (1st Cir. 2012), *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987), and *United States v. Behety*, 32 F.3d 503, 511

(11th Cir. 1994); *but see United States v. Getto*, 729 F.3d 221, 233 (2d Cir. 2013) (discussing Second Circuit's continued decision not to adopt joint venture doctrine in favor of more stringent "virtual agency" standard).

For the reasons stated below, the Court should grant Certiorari so that it can side with the majority of courts that have adopted the joint venture doctrine. Had the district court and Court of Appeals properly applied the "joint venture" doctrine rather than its own "virtual agent" standard, suppression would have been required.

Under the joint venture doctrine, the following factors must be considered in determining whether the relationship between American and foreign law enforcement was so substantial that Fourth Amendment concerns were implicated by wiretapping technically performed by the foreign officials:

> 1) Whether American authorities initiated the investigation in the foreign country;
>
> 2) Whether American authorities were involved in the decision to seek the foreign wiretap;
>
> 3) Whether American officials controlled, directed, or supervised the foreign wiretap;
>
> 4) Whether American officials participated in the implementation of the wiretap and the recording of conversations.

United States v. Minaya, (Slip Op.) (D. N.J., Civ. No. 17-359, April 16, 2019), *citing Valdivia*, 680 F.3d at 52.

Accord United States v. Marte, 2018 WL 4571657 at *6 (D. Mass. Sept. 24, 2018) ("[i]f United States law enforcement officials conduct interceptions in cooperation with foreign authorities thereby triggering the Fourth Amendment's protections, a defendant who has standing is entitled to challenge the wiretap's legality on Fourth Amendment grounds," and *citing Valdivia*).

Even while acknowledging that "constitutional requirements may attach . . . where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials," *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992), the Second Circuit has been unwilling to join the numerous Circuits that have applied the joint venture standard under such circumstances. *Id*. at 61–62.

The virtual agent standard largely ignores whether the United States officials initiated the investigation in the foreign country and whether they were involved in the decision to seek the foreign wiretap, and focuses almost entirely on whether American officials "control" or "direct" the conduct of the foreign parallel investigation. *United States v. Getto*, 729 F.3d at 230; *United States v. Lee*, 723 F.3d 134, 140 (2d Cir. 2013).

Here, the district court and the Court of Appeals, bound by the Second Circuit's precedent rejecting the joint venture doctrine, made no effort to employ the four factors, and focused exclusively on whether the Italian National Police acted as "virtual agents" of the

United States law enforcement officials, *i.e.*, whether the American officials "controlled, directed, or supervised the foreign wiretap."

The principal reason cited by the Second Circuit for its decision to adhere to the "virtual agent" requirement was enunciated in *United States v. Getto*, 729 F.3d at 233:

> We have repeatedly declined to adopt the joint venture doctrine in the context of the Fourth Amendment. *See Lee*, 723 F.3d at 140 n.4; *Maturo*, 982 F.2d at 61–62. As we have explained above, the purpose of the Fourth Amendment's exclusionary rule is "to inculcate a respect for the Constitution in the police of our own nation." *Lee*, 723 F.3d at 139 (internal quotation marks omitted); *see also* note 7, ante. This purpose of deterrence is not served in instances where American law enforcement officers, not intentionally seeking to evade our Constitution, participate in a so-called "joint venture" but do not direct or otherwise control the investigation. *See* Part II.A.ii, ante.

Id.

The Second Circuit's explanation in *Getto* ignores the all-too-likely scenario in which American agents, fully intent on circumventing the protections of our Constitution, initiate a joint investigation in order to further those goals, while perhaps not necessarily fulfilling the exacting "virtual agency" requirement. The joint venture doctrine properly takes into account the various factors that show a concerted effort by United

States and foreign law enforcement to circumvent Constitutional requirements.

In *United States v. Peterson*, the Ninth Circuit observed that "[t]he DEA was involved daily in translating and decoding intercepted transmissions, as well as advising the Philippine authorities of their relevance[; t]he DEA treated the affair as one in which the marijuana was destined for the United States, and so assumed a substantial role in the case[; and i]n all of the circumstances here, we are unable to conclude that the DEA's role was subordinate to the role of Philippine authorities." 812 F.2d at 490. Thus, the *Peterson* court determined that "[t]he district judge erred in concluding that the operation was not a joint venture." *Id*.

The cases that have addressed the question have demonstrated that the broader joint venture standard provides stronger protection against the all-too-real temptation of United States investigators using foreign law enforcement to bootstrap its own criminal investigation while avoid the inconvenience of the Fourth Amendment. In *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd on other grounds*, 494 U.S. 259 (1990), the Ninth Circuit, after discussing the history and evolution of the joint venture doctrine in the various courts of appeals with respect to physical searches, determined that "when we consider the facts of this case against the backdrop of prior cases, it is abundantly clear that the DEA's involvement in this search was so great that no court could logically conclude anything other than that the search was an American operation from start to finish."

Id. at 1224–25. This Court then granted certiorari, not to address the applicability of the joint venture doctrine, but to determine whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. 494 U.S. at 261. Although the Court answered that question in the negative, it did not address the question of whether the joint venture doctrine itself is the proper standard.

Most recently, in *United States v. Minaya*, 827 Fed. Appx. 232 (3d Cir. 2020), the Third Circuit was asked to find that the investigation at issue violated the joint venture doctrine, but did not reach the question of whether to adopt the joint venture doctrine, since the facts would not satisfy that standard in any event. *Id*. at 236–37. Although the Third Circuit did not take advantage of the opportunity to rule on the question of what standard to follow, the district court in *Minaya* engaged in a thorough discussion of the joint venture doctrine and the rationale behind it. *United States v. Minaya*, 2019 WL 1615549 at *13 (D. N.J. April 16, 2019). The district court ultimately ruled that none of the four factors had been satisfied. *Id*. at *13.

2. Here, in contrast, the factors weigh in favor of a determination that the Italian investigation began as part of a joint venture intended to circumvent the Fourth Amendment. At a bare minimum, the facts before the district court showed that Inspector Muroni of the Italian National Police did not begin the purportedly independent Italian investigation until after United States law enforcement officials provided

Inspector Muroni with information *intended to further United States law enforcement goals*:

> "I was directly informed by an FBI agent while I was in New York for another activity, *I was informed of the existence of an investigation activity that the Bureau was carry on* against an Italian, some Italian subjects including Gigliotti Gregorio" (Petitioner Angelo Gigliotti Ct. of App. Appendix at 272–73; emphasis added);
>
> —"[t]he main point was that *the Bureau was investigating crime contexts attributable to Italian subjects living in New York* and more precisely in these contexts they were examining Calabrian subjects" (Petitioner Angelo Gigliotti Ct. of App. Appendix at 272–73; emphasis added).

Necessarily, the purpose of providing Muroni with the information regarding Gregorio Gigliotti was not to aid in an existing Italian investigation—since Muroni's testimony makes it clear that there was no existing investigation at the time—but rather to enlist a foreign government into an existing American investigation,[1] and using them as the means of avoiding the requirements of the Fourth Amendment.

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[1] The timing indicates the phone information regarding Gregorio Gigliotti was furnished to the Italian police at the same time an existing two-year joint investigation between the Italian National Police and the Eastern District of New York, identified as "New Bridge," was being completed and arrests were being made. This joint investigation was discussed in detail in an Eastern District of New York case, *United States v. Amabile*, 2015 WL

Particularly troubling is the fact that the wiretapping anticipated by Muroni and American investigators necessarily would result in the interception of conversations involving Gregorio Gigliotti on United States soil, rather than conversations occurring in Italy, where the exemptions from Fourth Amendment protection might be more sensibly applied. *See*, *e.g.*, *United States v. Kachkar*, 2018 WL 6974949, at *2 (S.D. Fla. Dec. 26, 2018) (noting Fourth Amendment generally inapplicable to actions carried out by foreign officials in their own countries enforcing their own laws, even if American officials are present and cooperate in some degree).

Additionally, excerpts from the testimony of Special Agent Daniel LaMarca—the American law enforcement officer whose initial affidavit formed the basis for the eavesdropping in the United States, and who claimed that there had been no joint investigation between the United States and Italy—showed his own active participation in the Italian investigation from its genesis, as well as further showing that Muroni participated with United States law enforcement in the

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4478466 (E.D. N.Y. July 16, 2015), in which the court observed that the defendants there, some of whom were similarly charged in a prosecution in Reggio Calabria, "came to the attention of the United States Federal Bureau of Investigation ("FBI") and the Italian National Police ("INP") as a result of a criminal investigation *jointly conducted* by these law enforcement agencies," and that "the FBI and INP's *joint investigation* using tools such as pen registers, tap and trace devices and search warrants on email accounts monitored by the FBI and telephone calls intercepted by the INP." *Id*. at *2–3 (emphasis added).

search of containers from Costa Rica in Wilmington, Delaware, and Chester, Pennsylvania (Petitioner Angelo Gigliotti Ct. of App. Appendix at 24–25).

Indeed, Inspector Muroni himself testified at the Italian trial that "wiretapping was activated on a cell number of Gigliotti and a number of the restaurant," (Petitioner Angelo Gigliotti Ct. of App. Appendix at 276) During the same Italian trial, Muroni introduced evidence of an outgoing call from the restaurant phone to Costa Rica made on May 23, 2014, which cannot be explained any other way. (Petitioner Angelo Gigliotti Ct. of App. Appendix at 272–73). Additionally, the Italian court's explanation of the investigation in January and February of 2014 involving Fazio and Gregorio Gigliotti, raised questions about monitoring those calls prior to the formal initiation of wiretaps in April, 2014. (Petitioner Angelo Gigliotti Ct. of App. Appendix at 260).

3. Courts in several jurisdictions have found the existence of a joint investigation under circumstances similar to those here. *See Lau v. United States*, 778 F. Supp. 98, 100–01 (D.P.R. 1991) ("[a]lthough this is a close case, a number of significant facts guide the Court to conclude that the activities of the United States officials in connection with the search of Lau's residence in St. Martin were sufficient to constitute a joint venture between the United States and St. Martin," noting that DEA agent had met with Netherland Antilles Attorney General "to discuss the investigation and what assistance they wanted from the Dutch Police"); *see also United States v. Peterson*, 812 F.2d 486,

488–90 (9th Cir. 1987) (finding joint venture existed where United States officials participated in translation of conversations and where investigators themselves referred to it as "joint investigation").

Moreover, the pattern of cases in which arguments were rejected based on a claim of "virtual agency" or "joint investigation" invariably related to scenarios in which there was considerably less United States involvement than was present here. *See*, *e.g.*, *United States v. Vatani*, 2007 WL 789038, at *7–8 (E.D. Mich. Mar. 14, 2007) ("The American officers did not instruct, tell, or ask the Canadians to conduct the wiretap; nor did the Americans instruct or *tell the Canadians who to wiretap, identify potential targets*, or provide any financial assistance for the wiretap" (emphasis added)); *United States v. Derewal*, 703 F. Supp. 372, 375 (E.D. Pa. 1989) ("DEA's involvement was limited to notifying the Costa Rican officials of Mr. Derewal's suspected activities[, and a]t their own initiative, the Costa Rican authorities installed a telephone wire interception on Mr. Derewal's telephone.").

It is difficult to avoid the conclusion that under the joint venture doctrine, this set of circumstances—as well as considerable other evidence that the investigators from the two countries were joined at the hip from start to finish—would properly be viewed as a calculated effort to use Italian investigators to establish probable cause for wiretapping in the United States, which is what in fact occurred. The Court should grant certiorari to make clear to all courts in the nation that

a joint investigation cannot be used to circumvent the rights guaranteed under the Fourth Amendment.

II. The Court Should Grant Certiorari To Make Clear That A Trial Court May Not Reseat A Peremptorily Challenged Juror When The Adverse Party Expressly Does Not Object To The Strike Of That Juror, And Also To Decisively Hold That An Objection Pursuant To *Batson v. Kentucky* Must Be Made Before The Challenged Jurors Are Excused.

4. Although this Court has historically noted the importance of the familiar three-stage burden-shifting process when an objection has been raised with respect to peremptory challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), a decisive holding is needed to make clear that a trial court may not sua sponte reseat a stricken juror when the objecting party has expressly not objected to the peremptory strike of that juror. Here, even where the district court noted having been thrown into "a hornet's nest" of procedural irregularities when the Government made a *Batson* objection after the court excused the jurors who had been challenged peremptorily, the court ultimately recalled and reseated two jurors, including one with regard to whom the prosecutors told the court they did not believe had been challenged for a discriminatory reason.

Here, the issue is magnified because the prosecution did not merely fail to follow up on the objection to the strike of Juror 16, they expressly stated to the

court that they did not object to the strike of that juror. Specifically, when the court asked the Government, two days after their initial *Batson* objection, whether they still adhered to their position, the prosecutor stated:

> [W]e did review our position after counsel made their representations about the basis for their peremptory challenges against the ten men. Between my trial partner and myself, we agreed that—forgive me, Your Honor. Five of them struck us as nonpretextual, and the other five struck us as—I'm sorry, *six of them struck as nonpretextual, and four of them struck us at pretextual*. I should say, in our opinion, they didn't provide a facially neutral reason that was sufficient to meet the burden. (Petitioner Gregorio Gigliotti Ct. of App. Appendix at 306–07 (emphasis added)).

The prosecutors identified Jurors 3, 12, 18, and 21 as being jurors where the defense had failed to proffer sufficient facially neutral reasons for the strikes. (Petitioner Gregorio Gigliotti Ct. of App. Appendix at 306–07) Since the prosecutors did not identify Juror 16, he was necessarily among the six who the prosecutors had determined were the subjects of non-pretextual strikes. Accordingly, under *Batson* protocol, the objection was waived and any inquiry regarding Juror 16 should have stopped at that point. The district court nevertheless rationalized its decision, stating:

> The Court recognizes that shortly before it announced its decision on this matter, the government indicated that the strike of Juror

> 16 was not among the four for which it felt defense counsel's explanations were lacking. Whatever inspired the government's position, it does not alter the Court's determination that defense counsel failed to offer an acceptable, gender-neutral explanation for their strike of Juror 16. (App. 50, n.12).

Notably, the district court did not cite any direct legal support for the remarkable conclusion that the district court was entitled to reseat Juror 16 even after the prosecutors has expressly stated that they did not object to that challenge and did not view that challenge as having been discriminatory. Indeed, it would be difficult to imagine such authority could exist since a *Batson* objection is ordinarily deemed waived if not pursued by the opponent of the strike. *United States v. Reid*, 764 F.3d 528, 533 (6th Cir. 2014); *United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010); *Morning v. Zapata Protein (USA), Inc*., 128 F.3d 213, 216 (4th Cir. 1997).

5. To be sure, the Court of Appeals cited the general language of this Court's decision in *Georgia v. McCollum*, 505 U.S. 42, 49–50 (1992)—expressing the now well-established holding that the principles underlying *Batson* apply to peremptory challenges made by the defendant as well as those made by the prosecution, *id*. at 59—in support of the conclusion that the district court "had an independent obligation to conduct an inquiry and fashion a remedy if necessary." (App. 5, n.4). But the context surrounding the language in *McCollum* relied upon by the Second Circuit—that

("[b]e it at the hands of the state or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice"—expressly relates to the issue of whether *Batson* applies when a criminal defendant is the proponent of the strike, not whether the court has what amounts to plenary power to undo peremptory strikes based on the court's own impressions.

A review of the cases discussing *McCollum* has not found *McCollum* to have been cited for any such power. In fact, a recent case shows that the opposite is true. *See Hayden v. Warden, Maine State Prison*, 2020 WL 4677289, at *4 (D. Me. Aug. 12, 2020) ("the cases Mr. Hayden cites do not provide support for his thesis[; t]he portion of *Edmonson* Mr. Hayden quotes does not refer to any obligation of the trial judge, but to a civil defendant's ability to bring a *Batson* claim. *Edmonson*, 500 U.S. at 623–27, 111 S. Ct. 2077. The portion of *McCollum* Mr. Hayden cites simply states the holding of that case: that a prosecutor may initiate a *Batson* challenge based on the use of a peremptory strike by a criminal defendant. *McCollum*, 505 U.S. at 59, 112 S. Ct. 2348. Similarly, the portion of *Powers* Mr. Hayden cites does not suggest that a judge has a sua sponte obligation to conduct a *Batson* inquiry. *Powers*, 499 U.S. at 412, 111 S. Ct. 1364").

If a trial court were in fact invested with plenary power in order to protect the interests of jurors, independent of the rights of the parties, *Batson* jurisprudence would be rendered meaningless. While there can

be no doubt that the interests of the public in performing jury service without being subject to discrimination must be protected, those interests have nevertheless always been subject to the requirements of timeliness, and the burden-shifting procedure. Significantly, this Court and lower courts have emphasized the importance of adherence to *Batson* procedures, specifically the three-step burden-shifting framework in which 1) the objecting party must timely alert the court of a prima facie case of discrimination, 2) the proponent of the strike must then provide a race-neutral reason for the strike, and then 3) the court must determine whether the objecting party has carried the burden of proving the strike was motivated by purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995); *United States v. Martinez*, 621 F.3d at 108; *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (vacating and reversing judgment); *Galarza v. Keane*, 252 F.3d 630, 636 (2d Cir. 2001).

6. In the Court of Appeals, Petitioners cited *United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), for the following conclusion:

> The district court then asked defense counsel to explain the reasons for the exercise of his first four peremptory challenges. When Paris articulated non-gender-based reasons for those challenges, *the Government withdrew its* Batson *challenge as to one of Paris's strikes* and the district court accepted Paris's reasons for his remaining strikes. *Accordingly, the district court allowed Paris's strikes to stand*.

Id. at 104–05 (emphasis added). This was appropriate because, despite the Court's recognition that *Batson* and its progeny exist to protect the rights of jurors and the community at large, *id*. at 107, ultimately *Batson* objections must be governed by the three-part procedural framework in which "the ultimate burden of persuasion regarding improper motivation rests with, and never shifts from, the opponent of the strike." *Id*. at 109, *citing Rice v. Collins*, 546 U.S. 333, 338 (2006). It is impossible for that burden to be met when the party nominally opposing the strike either withdraws the objection or fails to object at all.

Other district courts have similarly and appropriately declined to reseat challenged jurors where there was not specific objection to the challenged juror. In *Figueroa v. Ercole*, 2013 WL 3655903 (S.D.N.Y. 2013), a traditional *Batson* case in which the defendant alleged that the prosecution had intentionally stricken potential jurors based on race, the district court observed that, since the burden of persuasion remains on the objecting party, the defendant had a continuing burden to "press the objection as to the challenged juror." *Id*. at *18. The defendant failed to do so in *Figueroa*, however, and the challenge was permitted to remain intact. *Id*.

Likewise, other circuits examining the question of a trial court's role have emphasized the need for the court to remain a neutral arbiter whose authority is contingent on the objections of the parties. For instance, in *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006), in which the defendant failed to object

to a prosecutor's stated reasons for a peremptory strike, but then argued on appeal that the trial court had an independent duty to develop the factual record, including questioning the prosecutor, the Eleventh Circuit rejected that there was such a duty:

> Requiring the court to develop the defendant's arguments through examination of the prosecutor *would make the judge an advocate rather than a neutral arbiter*. Houston never alerted the court to the existence of white venire members whom he now contends were similarly situated and whom the prosecution did not strike despite their familial criminal histories. *We find no error in the court's failure to draw comparisons that no party asked it to draw*.

Id. at 1339 (emphasis added).

The court in *Davis v. Baltimore Gas and Electric Co*., 160 F.3d 1023 (4th Cir. 1998), reached a similar conclusion, albeit in the context of a civil case. There, after the defendant had made a *Batson* objection and the defendant had proffered racially neutral explanations for the strikes at issue, the court noted that:

> After Defendant's proffer of racially neutral reasons, the record reveals no further comment on the matter, which is the crux of the case before us. Plaintiff made no attempt to satisfy the third step in the *Batson-Edmonson* scheme. The burden is on the party alleging discriminatory selection of the venire to prove the existence of purposeful discrimination, *see Batson*, 476 U.S. at 93, 106 S. Ct. 1712, yet

> when faced with BGE's presentation of a seemingly race-neutral explanation, *Plaintiff stood mute—effectively abandoning his Batson-Edmonson challenge*.

Id. at 1027 (emphasis added). The court stated that "we now follow the lead of other circuits that have held that the movant's failure to argue pretext constitutes a waiver of his initial objection." *Id*., *citing Hopson v. Fredricksen*, 961 F.2d 1374, 1376 (8th Cir. 1992) (plaintiff failed to pursue *Batson* objection when he made no attempt to rebut defendant's proffered explanation).

Indeed, with respect to the concerns expressed by the Court of Appeals here, the law already does provide protection for jurors' rights, namely the very process laid out in the line of cases following *Batson*. All the cases discussed above, and countless others, were decided well after *Georgia v. McCollum*, yet all make clear that the burden remains on the objecting party and that the three-part process must be followed. If the Court of Appeals were correct that a trial court may simply act on its own to protect the interest of the jurors, this procedural framework would be unnecessary and meaningless.

7. Certiorari should also be granted to make clear that a party seeking to object to peremptory challenges on *Batson* must do so before a trial court has excused the challenged jurors. This Court has never directly addressed the question of when a *Batson* objection must be raised in order to be timely. *See Ford v. Georgia*, 498 U.S. 411, 422–23 (1991). Here, the

problems inherent in allowing a late *Batson* objection manifested themselves when the trial court allowed the prosecution to register an objection approximately 30 minutes after the peremptory challenge process was completed, and after the challenged jurors had expressly been told that they were "excused" and to "please leave." The court reversed its course later in the day and stated that those jurors had not in fact been excused but rather had been held by the court's jury clerk, and ultimately engaged in a convoluted two-day process following which two jurors were eventually recalled and reseated.

This Court has long emphasized the importance of adherence to *Batson* procedures, specifically the three-step burden-shifting framework in which 1) the objecting party must timely alert the court of a prima facie case of discrimination, 2) the proponent of the strike must then provide a race-neutral reason for the strike, and then 3) the court must determine whether the objecting party has carried the burden of proving the strike was motivated by purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995); *United States v. Martinez*, 621 F.3d at 108; *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (vacating and reversing judgment); *Galarza v. Keane*, 252 F.3d 630, 636 (2d Cir. 2001).

Although this Court expressly declined in *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016), to recognize a bright line rule prohibiting recall of jurors after they have been discharged in the context of civil cases, we respectfully submit that the circumstances here

highlight why the Court should not apply that holding to criminal cases such as this and should in fact adopt a clear bright line standard that a *Batson* objection must be raised, or otherwise forfeited, prior to the challenged jurors being excused from the courtroom. Notably, this Court expressly left open the question of whether the holding should apply in the context of a criminal case. *Id*. at 1895. It should take this opportunity to hold that it does not, and that a bright line rule should instead apply.

Although the Second Circuit has generally held that in order to be "timely," a *Batson* objection must have been made prior to the end of jury selection. *See McCrory v. Henderson*, 82 F.3d 1243, 1244 (2d Cir. 1996); *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990) ("*Batson* objections should be entertained and adjudicated during the process of jury selection"). Although the Second Circuit further noted that "unwarranted exclusion of cognizable groups should be remedied on the spot, without waiting to see the ultimate composition of the jury," *United States v. Alvarado*, 891 F.2d 439, 445 (2d Cir. 1989), *rev'd on other grounds*, *Alvarado v. United States*, 497 U.S. 543 (1990), the court did not heed its own counsel here, instead engaging in the protracted review described *supra*, which involved among other things the challenged jurors spending more than two days out of court after having been told they were free to leave.

8. The Court of Appeals nevertheless determined that the decision to entertain the *Batson* objection was not untimely because "[t]he government made its

objection minutes after the end of the peremptory strikes and while the court was still in the process of screening potential alternate jurors," although the record showed that approximately half an hour passed, during which time there were a number of sidebars and other colloquy, before the objection was first raised, and because "a clear remedy was still available at the time of the government's objection" since "the struck jurors were still in the courthouse, had not yet been excused, and were able to report back to the court." (App. 4–5).

The factors identified by the Court of Appeals below only serve to echo the concerns raised by Justice Thomas in his dissent to *Dietz v. Bouldin*. As Justice Thomas observed:

> After discharge, the court has no power to impose restrictions on jurors, and jurors are no longer under oath to obey them. Jurors may access their cellphones and get public information about the case. They may talk to counsel or the parties. They may overhear comments in the hallway as they leave the courtroom. And they may reflect on the case—away from the pressure of the jury room—in a way that could induce them to change their minds. The resulting prejudice can be hard to detect. And a litigant who suddenly finds himself on the losing end of a materially different verdict may be left to wonder what may have happened in the interval between the jury's discharge and its new verdict. Granting a new trial may be inconvenient, but at least

> litigants and the public will be more confident that the verdict was not contaminated by improper influence after the trial has ended. And under this bright-line rule, district courts would take greater care in discharging the jury.

Dietz v. Bouldin, 136 S. Ct. at 1898 (Thomas, J., dissenting). Indeed, the majority acknowledged those risks as well, even while determining that they could be addressed using a multi-part balancing test:

> The potential for taint looms even larger when a jury is reassembled after being discharged. While discharged, jurors are freed from instructions from the court requiring them not to discuss the case with others outside the jury room and to avoid external prejudicial information.

Id. at 1894; *see also United States v. Maseratti*, 1 F.3d 330, 335, n.1 (5th Cir. 1993) ("[a]lthough it is not crystal clear in the record that the veniremen had been dismissed, we see no reason for the trial judge to raise the issue otherwise[, and a]dditionally, once the venire was dismissed from the courtroom, the opportunity for them to be tainted was too great, and it was the responsibility of the Defendants, as the movers, to insure that the integrity of the jury security was preserved").

It is important to note that some of the inconveniences cited by Justice Thomas, particularly the prospective waste of time and resources that would likely arise with the grant of a new trial, would be minimized in the context of *Batson* challenges, since all

that would be required would be a new jury selection. Moreover, the *Dietz* Court recognized a litany of different individuals who might have contact with an excused juror and could potentially influence the juror, especially since the excused jurors would be free of the court's instructions about avoiding discussions of the case:

> Whether the jurors have spoken to anyone about the case after discharge. This could include court staff, attorneys and litigants, press and sketch artists, witnesses, spouses, friends, and so on. Even apparently innocuous comments about the case from someone like a courtroom deputy such as "job well done" may be sufficient to taint a discharged juror who might then resist reconsidering her decision.

Id. at 1894.

Here, as the Court of Appeals recognized below, there was necessarily contact at several points between the excused jurors and court personnel, specifically the jury clerk who instructed the jurors that they would need to return, and who gave a putatively "neutral explanation" as to why they would potentially be reseated. (App. 7). Notably, any such explanation was necessarily made outside of open court, thus manifesting the danger that the jurors might have been unintentionally influenced by it without any possibility of correction. Finally, it must be noted that whereas in *Dietz* there was a possibility that one juror had left the courthouse, "the jurors did not speak to any person about the case after discharge," 136 S. Ct. at 1895, here

all the excused jurors, including the two who were ultimately reseated left the courthouse for two days without any assurance that they had properly been warned not to discuss the case.

III. The Court Should Grant Certiorari To Hold Definitively That The Fourth Amendment Has Been Violated When A Warrantless Administrative Search That Would Otherwise Be Legally Permissible Pursuant To *New York v. Burger* Was Performed As A Pretext To Allow For Collection Of Information To Assist In A Federal Criminal Investigation.

9. On March 3, 2015, agents of the New York State Liquor Authority engaged in an administrative search of Gregorio Gigliotti's restaurant, Cucino Amodo Mio, assisted by Detective McCabe, who was working as part of a task force with Department of Homeland Security. (Trial Tr. 275). Detective McCabe acknowledged that the purpose of the administrative search was to prepare for an anticipated search warrant execution in connection with the federal criminal investigation of Petitioners. (Trial Tr. 274). Detective McCabe acknowledged that when he participated in the March 11, 2015, search warrant execution, he was focused on the basement office area and the wine storage area which he had observed during the pretextual administrative search. (Trial Tr. 280–81). Among the items recovered from the area were firearms, currency, and a ledger, all of which were introduced at trial.

Although this Court ruled in *New York v. Burger*, 482 U.S. 691, 716 (1987), that "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect," this Court has not applied *Burger* to a scenario in which an otherwise permissible warrantless administrative search is solely conducted in order to uncover evidence of criminal violations. In the instant case, the district court expressly recognized that "defendants' argument is not entirely without merit" (App. 93), and that this Court had not yet "spoken directly on point" with respect to the issue. (App. 94). For its part, the Second Circuit has stated that "[u]nder the existing case law, the line between a legitimate administrative search and a pretextual administrative search is hazy and ill-defined, and the facts of this case lie in the blurred boundaries of such a determination." *Anobile v. Pelligrino*, 303 F.3d 107, 121–23 (2d Cir. 2001).

At least one Circuit Court of Appeals has, however, determined that such search violates the Fourth Amendment. *See United States v. Johnson*, 994 F.2d 740, 744 (10th Cir. 1993) ("Federal agents may not cloak themselves with the authority granted by state inspection statutes in order to seek evidence of criminal activity and avoid the Fourth Amendment's warrant requirement."); *see also Club Retro LLC v. Hilton*, 568 F.3d 181, 197 (5th Cir. 2009) ("Even under a valid inspection regime, the administrative search cannot be pretextual.").

In *Johnson*, federal and state agents engaged in a warrantless inspection of the defendant's taxidermy

shop, purportedly under the authority of the state's taxidermy regulatory laws, although the court found that the sole purpose of this search was to aid the federal agent's criminal investigation into suspected illegal importation of animal parts into the United States. 994 F.2d 740, 742–43. The court cited *Burger* to conclude that "[a]lthough the government may address a problem in a regulated industry through administrative and penal sanctions, an administrative investigation may not be used as a pretext solely to gather evidence of criminal activity," and since the sole purpose of the warrantless administrative search was to gather evidence of criminal activity, the court held that it was unreasonable under the Fourth Amendment. *Id*. at 742–43.

10. Other Circuits have adopted a broader rule in which consent to a purportedly administrative search is invalidated when a government agent affirmatively or deliberately misrepresents the nature of the government's investigation, if the defendant is aware that he is speaking to a government agent. For instance, in *United States v. Bosse*, 898 F.2d 113 (9th Cir. 1990), the Ninth Circuit held that "[a]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the Fourth Amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." *Id*. at 115.

Similarly, the Fifth Circuit held in *SEC v. ESM Gov't Sec., Inc*., 645 F.2d 310 (5th Cir. 1981), that "it is

clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in the government." *Id*. at 316; *see also United States v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1994) (noting "misrepresentations about the nature of an investigation may be evidence of coercion," and that such misrepresentations "may even invalidate the consent if the consent was given in reliance on the officer's deceit"). The rationale for this rule is that "a person has the right to expect that the government, when acting in its own name, will behave honorably." *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d at 316 ("[w]hen a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations"). *Id*.

11. Here, the inspection of Cucino Amodo Mio was a transparent abuse of the NYSLA's authority to conduct warrantless administrative searches of commercial premises, because the primary purpose of the inspection was to gain information for federal law enforcement officials' criminal investigation, which the government freely admitted was the case. The Government denied, however, that the intent was to uncover evidence, but rather was only to observe the layout of the premises. The Government also contended that the inspection was a permissible "mixed purpose" search, since the NYSLA would have been authorized to conduct an inspection because the restaurant's liquor license would soon expire. There was no indication,

however, that there was any intent on the part of NYSLA inspectors to conduct such a search absent the federal investigation.

Accordingly, since it is self-evident that the administrative search of the restaurant's premises, under the guise of the NYSLA was pretext for federal agents to conduct a warrantless search for evidence of criminality, McCabe intentionally misled Gregorio Gigliotti with respect to his actual identity and purpose for being there, and Gregorio Gigliotti thus did not knowingly and voluntarily consent to the search of the premises that day, the Court should grant certiorari to expressly adopt the standard employed in *Johnson*, or alternately the standard employed by the Fifth and Ninth Circuits where the defendant's consent is deemed invalid. Under either standard, the search would necessarily have violated the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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