No. 21-6227

IN THE

Supreme Court of the United States

FILED
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SUPREME COURT, U.S.

MISAEL CORDERO,

Petitioner,

v.

ADMINISTRATOR EAST JERSEY STATE PRISON, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Which divided Courts of Appeals are correct: the Eleventh, Fifth and Second Circuits holding that a due process violation occurs when the government knowingly uses false testimony even if the defense knows of the false testimony, or the Fourth, Seventh and District of Columbia Circuits holding that if the defense is aware of the false testimony no due process violation occurs?

2. Which divided Courts of Appeals are correct: the Ninth and Third Circuits holding that the actual prejudice *Brecht* standard does not apply to perjured-testimony in *habeas corpus* cases, or the First, Sixth, Eighth, and Eleventh Circuits holding the opposite?

3. Can defense attorneys allow the government to knowingly use false testimonies to convict their clients without violating their clients' right to effective representation under the Sixth Amendment?

4. When criminal defense attorneys provide deficient representation during plea negotiations that prevent the plea negotiations to materialize into plea agreements that would have resulted in sentences lower than the ones received after trial, have they violated their clients' Sixth Amendment right, and what would be the remedy?

LIST OF PARTIES

Misael Cordero, Petitioner

Robert Chetirkin, Administrator of East Jersey State Prison

Andrew J. Bruck, Attorney General of New Jersey

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner humbly prays that a writ of certiorari be issued to review the major claims of constitutional violations involve in this case.

OPINIONS BELOW

The unpublished opinions of the United States Court of Appeals for the Third Circuit appear as Appendices A and C, attached to this petition.

The Opinions of the United States District Court appear as Appendices B and D, attached to this petition.

JURISDICTION

The last date on which the United States Court of Appeals for the Third Circuit decided a claim on this case was September 8, 2021. (Appendix A).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Six Amendment right to a fair trial, an impartial jury, and to efficient representation during plea negotiations and trial.

The Fourteenth Amendment right to due process, not to be convicted by false testimony.

The Fourteenth Amendment right to due process, not to be prejudiced by errors made by court appointed interpreters.

STATEMENT OF THE CASE

The Government knowingly used two false testimonies to secure the conviction. The record is unclear as to whether the defense was aware of the false testimony from one of the detectives, which was used by the Government in its summation. But the record clearly shows that the defense was aware of the false testimony from Petitioner's co-defendant and still let the Government use it against Petitioner. Some United States Courts of Appeals are divided as to whether the intentional use of false testimony by the government constitutes a due process violation, when the defense too is aware of the false testimony. There is also a division among some United States Courts of Appeals as to whether the actual prejudice standard addressed by this Court in *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) applies to perjured-testimony in habeas cases. No Certificate of

Appealability ("COA") was granted on the false-testimony claims despite meeting the COA requirements established by this Court. This case involves a two-fold claim of deficient legal representation during plea negotiations. The first aspect of the claim is that Petitioner would have used 3,247 days of gap-time credit, as well as the fact that five counts of the seven-count indictment were time-barred, to negotiate a plea deal that he would have accepted had counsel not failed to advise him about these two important facts. No COA was ever granted on this aspect of the claim.

The second aspect of the plea-claim is that had Petitioner been advised of these two facts he would have accepted one of the oral plea offers proffered by the Government. Two COAs were granted on this second aspect of the claim. But even though the defense admitted that its errors prevented the plea negotiations to materialize into a plea agreement that would have resulted in a sentence lower than the life sentence given to Petitioner after trial, no prejudice was found. The trail court overruled the defense's objections and allowed two jurors to deliberate even though their partiality was exposed by another juror. Court appointed interpreters conceded making errors in translating the testimony of a government's witness, but no corrections were made and the defense's motion for a mistrial was denied.

REASONS FOR GRANTING THE PETITION

I. Two Distinct Splits Exist Among Some United States Courts Of Appeals, (1) Whether A Due Process Violation Occurs When The Government Knowingly Uses A False Testimony - Known To The Defense - To Secure A Conviction, And (2) Whether The Actual Prejudice *Brecht* Standard Applies To Perjured-Testimony In Habeas Cases

A. The First Split

On multiple occasions this Court has held that the Government is prohibited from knowingly using false evidence to obtain criminal convictions because it is fundamentally unfair to the accused where the prosecution's case includes perjured testimony and the government knew, or should have known, of the perjury. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *United States v. Agurs*, 427 U.S. 97, 103 (1976). But the question as to whether this Court's prohibition also applies to cases in which the defense is aware of the false testimony remains in dispute, and there is a split among some United States Courts of Appeals on this issue. According to the Eleventh, Fifth and Second Circuits if the defense is aware of the false testimony but does not object to it, that does not neutralize the due process violation especially if the government uses the false testimony during summation. *See Demarco v. United states*, 928 F.2d 1074 (11th Cir. 1991); *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977); *United States v. Valentine*, 820 F.2d

565 (2d Cir. 1987); *United States ex rel. Washington v. Vincent*, 525 F.2d 262 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). But according to the Court of Appeals from the District of Columbia, the Seventh and the Fourth Circuits, there is no violation of due process resulting from the government knowingly presenting a false testimony if defense counsel is aware of it and fails to object. *See United States v. Iverson*, 208 U.S. App. D.C. 364, 648 F.2d 737 (D.C. Cir. 1981); *Ross v. Heyne*, 638 F.2d 979 (7th Cir. 1980), and *United States v. Meinster*, 619 F.2d 1041 (4th Cir. 1980).

B. The First False Testimony

Here, the Government's case depended on the testimony of its two main witnesses hereinafter Cynthia and Santiago. Without their testimonies, there could have been no indictment and no evidence to carry the case to the jury. The Government's theory was that the detectives interrogated Cynthia in 1999 to see if she had any information concerning an unrelated homicide. But that Cynthia voluntarily informed the detectives about this homicide instead in which she inculpated the Petitioner, and stated that Santiago could have been involved as well. Petitioner's defense consisted of attacking Cynthia's and Santiago's credibility because Cynthia is a drug addict with a criminal record who was accusing Petitioner with facts given to her by the detectives, and Santiago has a documented history of blaming others for his crimes as well as a criminal record.

During cross-examination, Cynthia finally confessed that when the detectives confronted her in 1999 they told her that the victim in this case had been shot in an apartment during a drug deal with Petitioner, and threatened to charge her with an unrelated murder and with taking her kids away if she did not cooperate with them. Cynthia also attested that she was not permitted to talk to a lawyer. The first of the three statements memorializing Cynthia's interrogation shows that the detectives began interrogating her at 11:30 A.M., the Miranda warnings were given to Cynthia after her statement had ended at 1:10 P.M., and Cynthia signed the Miranda waiver form at 1:15 P.M. (T. 4/23/02 at P.144 L.20-23; T. 4/24/02 at P.73 L.1-17; T. 5/1/02 at P.75 L.1-9). To mitigate the damage caused by Cynthia's confession a detective testified after her and asserted, falsely, that prior to talking to Cynthia in 1999 he knew nothing about this homicide and had no information to give her concerning this homicide. The detective also attested that he had never reviewed a file on this case because no file existed prior to 1999, and that the only file involving this homicide is the one generated by him in 1999. (T. 4/30/02 at P.85 L.11 to P.86 L.2). The Government then emphasized to the jury during summation that it would have been impossible for the detective to have given information to Cynthia about this homicide, because according to the detective prior to 1999 no information nor file existed concerning this homicide:

> **[Government's Summation]:** The detective told you on the stand that he did not even know that Elias Lopez existed or that he was dead. And I

> think it's important that she brought it up. That she told the detective. []. I mean, the implication is that the State told this witness- -the witness how to testify and gave them the information. The detective testified--and you have to decide who you believe here-- that he didn't know anything about that homicide. She brought it up, if the detectives are telling her what to say, then you have to decide where are the detectives getting this information from. (T. 5/8/02 at P.123 L.17 to P.124 L.19).

The detective's testimony as well as the Government's argument to the jury are clearly and unequivocally false and the Government was aware of the falsehood. Indeed, the Government was in possession of three reports from a 1992 investigation of this homicide. According to these 1992 reports, the victim had been shot in the head by Petitioner in an apartment in Newark, New Jersey during a cocaine deal. Therefore the detective did have information regarding this homicide prior to taking to Cynthia in 1999, and could indeed had giving it to her. (Appendix F). It is unclear whether trial counsel was in possession of the 1992 reports prior to trial. When asked at the state evidentiary hearing, trial counsel testified that he has no knowledge about the existence of the 1992 reports and evaded giving an answer as to why the Government was allowed to use the detective's false testimony to destroy Petitioner's defense and convict him. (T. 6/27/08 at P.27 L.17 to P.28 L.24, P.36 L.12 to P.39 L.23). Petitioner was provided with the 1992 reports after the trial in this case was over. The Government provided the reports together with the discovery of another case that was tried subsequent to this one. This false-testimony argument was not addressed

by the state courts, nor the District Court, nor the Third Circuit Court of Appeals even though it was raised by Petitioner *pro se* in all those courts. Petitioner raised it asserting a due process violation and labeled it under ineffective assistance of counsel. (See Appendix E at Prejudice Caused by Counsel's Ineffectiveness, Part Two).

C. <u>The Second False Testimony</u>

The detectives confronted Santiago and alleged to him that Cynthia had inculpated Petitioner and himself in this homicide. Santiago gave a statement to the detectives saying that a guy named Jose Caraballo committed this homicide by shooting the victim in the head because Petitioner paid him to do it, and that Caraballo died of AIDS soon after. As a result of Cynthia's and Santiago's allegations, Petitioner was indicted under Indictment Number 00-6-1614. Based on some concerned members of the Prosecutor's Office, Cynthia was given several polygraphs regarding her story involving the Petitioner in this homicide, and she failed them all. As a result, Santiago too was asked to take a polygraph. But to avoid taking the lie detector test Santiago changed his story which caused the dismissal of Indictment Number 00-6-1614 against Petitioner. In his new statement, Santiago alleged that he shot and killed the victim because Petitioner paid him to do it. But Santiago never took the polygraph. The Government presented Santiago's new story to a Grand Jury in front of which Santiago and a

detective testified that "a polygraph was the reason why Santiago changed his story." Petitioner was re-indicted under Indictment Number 00-12-3513. (T. 12/15/00 at P.15 L.22 to P.16 L.7).

At trial, to avoid mentioning the word polygraph to the jury, the Government and the defense agreed that Santiago was going to testify that he changed his story because the detectives confronted him with additional information. So the trial court instructed Santiago accordingly. But when asked by the Government why he changed his story, Santiago testified falsely to enhance his credibility and told the jury that "he changed his story because he became a born again Christian and God gave him the courage to tell the truth." (T. 4/24/02 at P.190 L.9 to P.191 L.3; T. 4/25/02 P.3 L.5 to P.4 L.2, P.9 L.1-11). The Government did not correct Santiago's religious testimony although knowing that it was completely false. Neither did the defense even though trial counsel's position was that Santiago was a liar who could not be believed. Moreover, the defense was also aware that even the use of true religious testimony to enhance credibility is prohibited under New Jersey Rule of Evidence 610, which makes it a bigger unsound decision not to correct the false religious testimony. Evidentiary errors in state cases are considered to be of constitutional proportion and cognizable in federal habeas corpus proceedings if, like in the present case, the errors deprive a defendant of fundamental fairness in his criminal trial. *Donnelly v. DeChristoforo*, 416 U.S.

637, 642-43 (1974). This false-testimony argument was addressed halfway by the state courts and the District Court. The false part of it was overlooked by said courts, and it was addressed only as a violation of New Jersey Rule of evidence 610, but was found to be a sound strategic decision by trial counsel even though it violates the due process doctrine, affected the fairness of the trial, and it is antithetical to many precedents from this Court. (See Appendix E at Prejudice Caused by Counsel's Ineffectiveness, Part Three; Appendix D at 6-7).

The defense exacerbated the prejudice caused by Santiago's false religious testimony by failing to ask the trial court to instruct the jury that Santiago's guilty plea may not be used as substantive evidence of Petitioner's guilt. Prior to the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), under precedents from the Fifth and Third Circuit Courts of Appeals it is a violation of due process to use a co-conspirator's guilty plea as substantive proof of a defendant's complicity in a conspiracy without cautionary instruction. But after the enactment of the AEDPA it is unclear if state juries are constitutionally permitted to use a defendant's guilty plea as substantive proof of a co-defendant's guilt. *Bisaccia v. Attorney General*, 623 F.2d 307 (1980), citing *Labb v. United States*, 218 F.2d 538 (5th Cir. 1955).

It must be emphasized that the jury requested a readback of the entire testimony of Cynthia and Santiago. Only then, the jury returned with a guilty

verdict. Therefore without the two false testimonies the jury would have not convicted the Petitioner. In fact, during sentencing the Judge stated on the record "I impose a sentence based upon my assumption that the jury verdict is the correct one. What I would do if I had been a juror, who knows. Obviously, for example, on the possession of a weapon by a convicted felon which was tried before me non-jury I came to a different conclusion as to the ultimate charge of actual possession than the jury did." (T. 7/31/2002 at P.83 L.11-17).

In sum, both false testimonies secured a conviction that according to multiple precedents from this Court cannot stand. *See* *Miller v. Pate*, 386 U.S. 1, 7 (1967), holding that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

D. The Second Split

There is another split among some United States Courts of Appeals as to whether the "actual prejudice" *Brecht* standard applies to perjured-testimony cases in habeas context. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). In 2017 the Third Circuit Court of Appeals addressed this split extensively and joined the Ninth Circuit's holdings that the "actual prejudice" *Brecht* standard does not apply to perjured-testimony cases in habeas context. *See* *Haskell v. Superintendent Green SCI*, 866 F.3d 139, 150 (3d Cir. 2017); *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). The Third Circuit differed from the First, Sixth, Eighth, and Eleventh

Circuits' holdings that the "actual prejudice" *Brecht* standard does apply to perjured-testimony in habeas corpus cases. *See Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995); *Rosencrantz v. Lafler*, 568 F.3d 577, 587-90 (6th Cir. 2009); *United States v. Clay*, 720 F.3d 1021, 1026-27 (8th Cir. 2013); *Trepal v. Sec'y, Florida Dep't of Corr.*, 684 F.3d 1088, 1111-13 (11th Cir. 2012).

Due to these two splits and the fact that this Honorable Court has repeatedly ruled that the presentation of known and false evidence is incompatible with the rudimentary demands of justice, Petitioner humbly prays that this petition be granted. Or, at the minimum, that this case be remanded to the Third Circuit Court of Appeals to address this claim since that court declined to issue a COA even though this claim meets the COA standard reconfirmed by this Court in *Buck v. Davis*, 137 S. Ct. 759 (2017).

II. The Defense Admitted That It Provided Ineffective Legal Representation During Plea Negotiations That Prevented Petitioner From Resolving This Case Via A Plea Deal And Receive A sentence Lower Than the Life Sentence He Ended Up With

This case presents a different question than the one answered by this Honorable Court in *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012). Those cases involved defendants who alleged that, but for their attorneys' errors, they would have accepted a formal plea deal. But it still unclear whether *Frye* and *Cooper* provide additional means for demonstrating

prejudice arising from the deficient performance of lawyers during plea negotiations. Here, for example, the defense admitted that its errors prevented the plea negotiations to materialize into a plea agreement that would have resulted in a sentence lower than the life sentence given to Petitioner after trial. (T. 10/16/18 at P.42 L.14-24, P.43 L.8-13, P.56 L.3 to P. 57 L.8, P.81 L.17-23, P.98 L.3-5). Accordingly, the facts and circumstances of this case show that even though no formal plea agreement was reached due to counsel's deficient performance during the negotiations, a reasonable probability still existed that the case would have been resolved via a plea agreement had counsel not erred. Now the main question is what would be the appropriate remedy for such Sixth Amendment violation.

A somewhat similar scenario was presented to this Court in *Jae Lee v. United States*, 2017 US LEXIS 4045, where Lee argued to this Court that he could show prejudice because had his attorney advised him that he would be deported if he accepted the government's plea offer, he would have bargained for a plea deal that did not result in certain deportation. But this Court did not address this argument because it found that Lee showed prejudice based on the reasonable probability that he would have gone to trial. In this case, close to seven years into a 50-year sentence for drug convictions Petitioner was charged as an accomplice with first degree murder, first degree felony murder, second degree conspiracy to commit murder, first degree robbery, second degree conspiracy to commit robbery,

third degree possession of a weapon, and second degree possession of a weapon. The defense as well as the Government failed to realize that all counts - except for the murder and felony murder counts - were time barred by the statute of limitations. They also missed the fact that Petitioner was entitled to 3,247 days of gap time credit. (Appendix B at 2 & 14). Plea negotiations were conducted that did not materialize into a plea agreement, even though the Government and Petitioner were willing to resolve the case via a plea deal. The reason why no plea agreement was reached is because Petitioner was not advised that he was entitled to 3,247 days of gap time credit that would have reduced the back number of a plea deal, nor that he did not have to plead guilty to the non-murder counts for they were time barred. (Appendix A at 6-7, footnote 4).

Petitioner raised a two-fold plea argument. First, Petitioner argued that he would have used the statute of limitations and the gap time credit to negotiate and accept a plea deal - as he did in a subsequent case - more favorable than the life sentence he received after trial. The District Court denied this aspect of Petitioner's claim and no COA was ever issued. (Appendix E at Prejudice caused by Counsel's Ineffectiveness, Part One; Appendix D at 6). However, since then, the District Court of New Jersey has emphasized that a split exists among some district courts around the country as to whether if a defense counsel errs during plea negotiations and the defendant can establish that a plea agreement would have

resulted if not for defense counsel's error, there is no reason why the usual two-part *Strickland* test should not be applied. *See Shnewer v. United States*, 2016 U.S. Dist. LEXIS 28891 (D.N.J., Mar. 7, 2016), at number 58.

Petitioner's second aspect of the plea-argument is that he would have taken one of the oral plea offers that were proffered by the Government during the plea negotiations, if not for defense counsel's errors. Two COAs were granted by the Third Circuit Court of Appeals on this second aspect of Petitioner's plea claim. (Appendix A at 3; Appendix C at 3). But this second argument was ultimately denied by the District Court and affirmed by the Third Circuit Court of Appeals despite transcripts showing that plea negotiations were conducted during which all efforts were made to resolve this case other than with a trial. The courts below required documentation memorializing what exactly occurred during the plea negotiations in order to find prejudice. Which is an impossible requirement to meet because the defense as well as the Government made it clear that in homicide cases plea offers were first made orally, and reduced to writing only after the defendants had agreed to accept the oral plea offers. Therefore there is no documentation memorializing what exactly occurred during the plea negotiations because no plea agreement was reached, and neither the defense nor the Government have a recollection of any specific oral plea offer due to the pass of time. (Appendix A at 4). This Court has repeatedly expressed the importance of

adequate legal representation during plea negotiations, particularly because ninety-four percent of all criminal state cases are resolved via plea deals. This reality calls for as much guidance as possible from this Court on legal representation during plea negotiations. Indeed, this Court emphasized in *Missouri v. Frye*, 566 U. S. 134 (2012) that criminal defendants require effective counsel during plea negotiations because anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him. (citations omitted). For all these important reasons, Petitioner humbly prays that certiorari be granted to address the two aspects of this issue as well.

III. Incorrect Translations Are Violating Defendants' Constitutional Rights To Due Process For Lack Of Clearly Established Federal Law

In this case, a State witness was asked by the Government if he had any conversations with Petitioner or Santiago concerning this case. The witness was testifying through two interpreters because he only spoke Spanish. The witness said to the interpreters that he told Santiago that he thought Santiago was going to kill him. And that **he** (Santiago) replied that if he did not say anything **he** (Santiago) was not going to kill him, but that **he** (Santiago) would kill him and the owners of the house where the body was buried if the witness said anything. But the interpreters changed the word **he** to **they** during the translation which conveyed to the jury that Petitioner was involved in the threat made against the witness and

the owners of the house. The defense objected. The interpreters proposed a review of the videotape out of the presence of the jury, which was granted. The interpreters reviewed the videotape and agreed that "a correction should be made for the jury." The court ordered the interpreters to review the corrections with the defense, and after doing so, the interpreters once again informed the court that "they are satisfied that corrections were warranted." But due to a family emergency with one of the jurors the corrections were postponed until the next court day. (T. 4/18/02 at P.68 L.15 to P.75 L.15, P.82 L.13 to P.88 L.13).

The next court day, instead of making the corrections the interpreters changed their minds. Petitioner moved for a mistrial arguing denial of a fair trial, but the motion was denied. (T. 4/23/02 at P.15 L.12 to P.16 L.17, P.18 L.15-17, P.18 L.18 to P.19 L.5). Although this Court has not yet recognized a specific constitutional right to a court-appointed interpreter, improper denial of an interpreter could still violate clearly established federal law. *See Alvares v. Warden,* 2019 U.S. Dist. LEXIS 57594, at Number 475. But erroneous interpretations make trials fundamentally unfair and there is no way for defendants to obtain relief from said constitutional violations. In fact, in this case the District Court ruled that this claim does not warrant habeas relief because there is no clearly established federal law from this Court on this kind of claims. (Appendix D at 10-11). Interpreters are use in thousands of trials and other legal proceedings in

this Country yearly, and faulty interpretations that violate due process and fair trials should not be permitted.

IV. The Sixth Amendment Right To An Impartial Jury Was Not Afforded In This Case

The defense made eight unsuccessful challenges for cause. The defense's request to make additional questions to one of the eight jurors was denied. The defense dismissed all eight jurors using peremptory challenges, and subsequently spent all the remaining peremptories. The defense objected about the empaneled jury with concerns of partiality and asked for four additional peremptories, but the request was denied. After the jury was sworn and the first State witness had testified, a juror exposed the partiality of two of the selected jurors. The telling-juror advised the court that the two jurors were obsessed with television court shows and that they relish harsh treatment of defendants, "even though that person might have been innocent." The defense motioned to discharge the jury, but the motion was denied. The claims made by the telling-juror were confirmed during *voir dire*. The defense motioned to dismiss the two bias jurors, but said motion was denied as well. Yet, the trial court dismissed the telling-juror instead, over the objection of the defense. One of the two bias jurors deliberated in this case. (T. 4/9/02 at P.187 L.17 to P.188 L.5, P.190 L.24 to P.191 L.1, P.192 L.9-16; T. 4/10/02 P.9 L.21 to P.10 L.3, P.59 L.20 to P.62 L.10).

It is settled by precedents from this Court that any claim that the jury was not impartial must focus on the jurors who ultimately sat. *Ross v. Oklahoma*, 487 US 81, 86 (1988)(and cases cited). Here, at least one of the jurors who deliberated expressed bias and the defense made more than one cause challenge without success. The record also shows that the two exposed jurors demonstrated partiality, and that the defense objected about the composition of the jury before it was sworn. In short, the Sixth Amendment right to an impartial jury was not afforded in this case as required by precedents from this Honorable Court.

CONCLUSION

For the constitutional reasons presented herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

By: Misael Cordero
MISAEL CORDERO

Date: 11-2-21