

No. _____

In the
Supreme Court of the United States

JONATHAN MOTA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What degree of error and of prejudice must an appellant show with respect to individual errors of the district court before those errors may be considered as part of a cumulative error analysis?

PARTIES TO THE PROCEEDINGS

The parties are petitioner, Jonathan Mota, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jonathan Mota, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on November 30, 2021, Ninth Circuit Court of Appeal № 19-10265.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum decision in this matter. App. 2a. See United States v. Mota, No. 19-10265, 2021 WL 5600342 (9th Cir. Nov. 30, 2021)(unpublished). The district court order from which Mr. Mota appealed is also unpublished. App. 8a. See United States v. Mota, U.S. District Court, Eastern District of California № 1:18 cr 00035.

STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its Memorandum in the instant matter was November 30, 2021. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

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

STATEMENT OF THE CASE AND FACTS

A. Mr. Mota's Personal History

In the fall of 1981, Mr. Mota was born on the Pomo Reservation to Clifford and Deborah Mota. PSRs¹ 16. Mr. Mota's father was Native American from the Pomo Tribe. PSRs 16. Mr. Mota has two siblings and a stepbrother with whom he was close until his brother was killed in 2014. PSRs 16.

Mr. Mota's family was deeply unstable. PSRs 3. His father left the family when Mr. Mota was five years old. Later, Mr. Mota became acutely aware that both his parents were heavy drug and alcohol users. PSRs 16.

Following his parents' divorce, Mr. Mota lived with his mother who used methamphetamine and marijuana, often having people "partying" in their house. PSRs 16. For at time, Mr. Mota's mother abandoned him. Upon her return, she introduced Mr. Mota to alcohol and marijuana and the two used together. When asked whether she

¹"PSRs" refers to the volume filed under seal containing the presentence reports.

thought it was wrong of her to use drugs with her son she stated, “I didn’t think it was a bad thing...it relaxed him.” PSRs. 16. While he lived with his mother, Mr. Mota witnessed his mother’s involvement in troubled relationships. PSRs 16. Mrs. Mota ultimately remarried a man who also abused drugs and alcohol. PSRs 16.

Eventually, Mr. Mota went to live with his father, who, unfortunately, was no more stable than his mother. While living with his father as a child, Mr. Mota used marijuana and methamphetamine with him. PSRs 16.

In 2003, Mr. Mota married Maria Garcia. Following the end of that marriage, he had a child with Yoland Garibay in 2013. PSRs 17.

As a result of being introduced to alcohol, marijuana, and methphetamines by his parents at a young age, his drug use progressed to heroin, cocaine, hallucinogens, and morphine. PSRs 17. Ultimately, however, Mr. Mota completed a drug treatment program and, following the program, attended AA/NA meetings. PSRs 17.

B. Mr. Mota's Criminal History

Mr. Mota had a criminal history that culminated in a life sentence which he was serving at the time of his conviction in the instant matter. ER. 10-12. The life sentence arose from a 2013 federal conviction, accusing Mr. Mota of robbing a gas station and causing the death of one of the gas station clerks. ER 12.

At the trial of the 2013 incident, Mr. Mota represented himself, with the assistance of advisory counsel. ER 12. He was found guilty on Count One of the superseding indictment, Robbery Affecting Interstate Commerce, and on Count Three Use/Possession of a Firearm Causing Murder. Mr. Mota received a 120 month sentence on Count One and Life sentence on County Three. The two sentences were to be served consecutively. ER 12.

In 2017, Mr. Mota had a disciplinary report for being in possession of a homemade weapon. During that same year, he was accused of engaging in “highly disruptive conduct” that included making a “sexual proposal.” ER 12.

C. The Facts Giving Rise To the Instant Conviction

In October of 2017, Mr. Mota was serving a life sentence at the Federal Penitentiary in Atwater, California. PSRs 43, 40. On October 5, 2017, a fellow inmate at Mr. Mota's facility, Erick Chiago, was on his way to a religious ceremony when he was stopped by a staff member, Jeremy Karam. Mr. Karam refused to let Mr. Chiago proceed. ER 210, 314, 577-578.

Mr. Chiago protested Mr. Karam's actions and refused to obey Mr. Karam. ER 211-215. Mr. Karam then ordered Mr. Chiago to undergo a physically intrusive and humiliating strip search, claiming that he thought Mr. Chiago might have some unspecified type of contraband on him. ER 214-215, 217, 252-253, 255-256, 577-578, 597-598, 1229-1230, 1232, 1234-1236, 1255-1256, 1297-1298. No contraband was located. ER 43, 257, 1243.

On October 6, 2017, Mr. Chiago and Mr. Mota allegedly approached Mr. Karam in the Education Department copy room, and proceeded to assault him for approximately 7 seconds before Mr. Karam exited into the education hallway. ER 810, 812, 816, 821, 823-

824, 833, 1297-1298. Other inmates then joined in the assault while staff entered the area and began using pepper spray to separate the inmates. ER 585-586, 614, 629, 810, 812, 816, 821, 823-824, 829, 831-832, 835-836, 846-847.

Once the assault ceased, Mr. Karam stood up and was escorted to health services and then to the local hospital where he received stitches for cuts to his nose and top of his head. He had additional wounds to his left leg and neck and bruises to his face, head, chest, back and leg. ER 8, 242, 244-246, 699-701, 710, 1297-1298; PSRs 44-45.

Mr. Chiago and Mr. Mota allegedly used two homemade shanks during the assault. ER 7, 749-751, 834, 839, 842, 859. Mr. Karam's report about the incident, however, showed that he reported that Mr. Chiago stabbed him, not Mr. Mota. ER 1246. Further, one of the staff present at the altercation, indicted that she was focused on Mr. Mota, but she did not see him with a weapon. ER 600.

D. Mr. Mota's Indictments, Detention, and Arraignment

On February 15, 2018, the U.S. Attorney filed an Indictment against six individuals accused of being involved in the October 6, 2017 incident. These defendants were Mr. Mota, Mr. Chiago, William Acevedo, Dominic Adams, Michael Martin, and Joey Thomas. ER 1465, 1478. Each was charged with assault under 18 U.S.C. § 111(a)(1), (b). Mr. Mota and Mr. Chiago were also charged with committing the acts using a deadly or dangerous weapon. ER 1478-1479.

The district court arraigned Mr. Mota on March 19, 2018 where he pleaded not guilty. ER 1460. Mr. Mota was detained and placed in Kern County Jail. ER 1301, 1416, 1418, 1463. The court ordered that he and his co-defendants were to be shackled throughout the proceedings. ER 1487-1488.

On or about August 8, 2018, the government sent Mr. Mota a letter containing a plea offer. The letter indicated that if Mr. Mota did not enter a guilty plea pursuant to the agreement on or before August 23, 2018, then the government would file a superseding

indictment charging conspiracy to murder and attempt to kill a federal officer. ER 1304-1305.

Mr. Mota did not accept the plea agreement. ER 1315-1316. And, true to its word, the government filed a Superseding Indictment against Mr. Mota and Mr. Adams. ER 1320, 1325. The Superseding Indictment no longer included the original assault charge with respect to Mr. Mota. Rather, Count One of the new indictment alleged Conspiracy to Murder a Federal Officer under 18 U.S.C. §1117, and Count Three alleged an Attempt to Kill a Federal Officer under 18 U.S.C. § 1114. ER 1325. Mr. Mota pleaded not guilty to both counts charged. ER 1347.

E. Mr. Mota's Pro Se Status and Requests for Legal Assistance

At his March 19, 2018 arraignment hearing, Mr. Mota's request to proceed pro se was granted. ER 1418, 1460. The court did not appoint standby counsel. ER 1460.

On June 11, 2018, Mr. Mota asked the district court to transfer

him from the Kern County Jail to FCI Mendota. ER 1416. In so requesting, Mr. Mota explained that the Kern County Jail did not have a law library and the facility's process for obtaining legal materials unreasonably hindered him preparing his own defense. ER 1403, 1417-1419. The government opposed the request. ER 1415. At the status conference of June 18, 2018, the district court denied the motion.

On July 2, 2018, Mr. Mota requested an order appointing standby counsel. ER 1389. The district court denied that request. ER 1369. Similarly, the district court denied Mr. Mota's request for reconsideration of the denial. ER 1304, 1377.

On July 23, 2018, Mr. Mota requested an order providing him with an appointed investigator. ER 1361. Mr. Mota needed an investigator to question several witnesses in order to prepare a proper defense. ER 1363. The district court denied this request. ER 1328.

At his August 29, 2018 arraignment on the Superseding Indictment, Mr. Mota raised this issue of his pro se status and his

inability to access legal materials at the Kern County Jail stating, “My concern is that I do want to represent myself. My concern, your Honor, is that I'm being forced to give up my self-representation in order to receive resources necessary to conduct a meaningful defense. And I don't want to do that.” ER 1341-1342.

In or about August 2018, Mr. Mota made an ex parte motion requesting that he be allowed unmonitored phone calls in preparation of his defense. The district court granted Mr. Mota's request in part by ordering 3, fifteen-minute phone calls per day for three consecutive days. ER 1319.

Following the district court's repeated refusals to provide Mr. Mota legal support, Mr. Mota terminated his pro se status and requested the appointment of counsel. ER 1300. In so doing, Mr. Mota expressed his belief that his sixth and fourteenth amend rights were being violated in that he has not received sufficient support to take meaningful advantage of his right to self-representation. ER 1301.

The trial court granted Mr. Mota's request for trial counsel on

September 24, 2019. ER 1334-1336. Mr. Mota, however, on the first day of trial, requested pro se status again which the district court granted as of April 30, 2019. ER 1043, 1273, 1275. In so requesting, Mr. Mota did not ask that the district court appoint standby counsel. ER 1045. The district court also granted Mr. Mota law library access at the Fresno County Jail. ER 1276.

F. The Trial

Mr. Mota's trial began on April 30, 2019. ER 1029. Also at trial was co-defendant, Dominic Adams . The other co-defendants, William Acevedo, Michael Martin, and Joey Thomas had pleaded guilty earlier in the proceeding. ER 1278.

Before the start of trial Mr. Mota requested that the district court require the government to present its case from behind the desk. ER 1045. This was because Mr. Mota would have to present from behind his desk due to the shackles he wore. ER 1045-1046, 1048. After receiving input from the U.S. marshal, the district court denied Mr. Mota's request. ER 1049.

Mr. Karam testified at trial about the morning of October 6, 2017. That morning, while he was in the education copy room, Mr. Chiago and Mr. Mota entered. ER 219-220, 224. Mr. Chiago and Mr. Mota then began to assault Mr. Karam. ER 226-227, 234-235, 243. Although Mr. Karam testified that he noticed weapons in both Mr. Chiago and Mr. Mota's hands, his earlier recounting of events indicated that only Mr. Chiago had a weapon. ER 226, 230, 264-265.

Shortly after the assault began, Mr. Karam exited the copy room where he encountered other inmates who tackled him and continued the assault. ER 229-231, 234, 238. Mr. Karam testified, "I felt like I would have been killed." ER 232, 243.

Mr. Karam testified that he was six feet tall and 260 pounds. ER 270. He further testified that during his career, he has recovered metal weapons at the Atwater Penitentiary and he is aware that inmates at the facility make truly metal weapon as opposed to the largely plastic weapons found at the scene of Mr. Karam's assault. ER 270. Mr. Karam was asked "And it's fair to say if you were intended to be killed,

metal weapons would preferably been used?" ER 270. Mr. Karam responded that because he wasn't a weapons expert, he could not answer. ER 270-271.

The initial staff member who intervened in the altercation, Diana Becerra, testified that she focused on Mr. Mota during the altercation and restrained him until additional help arrived. ER 614. She further testified that she had no doubt that Mr. Mota was one of the individuals involved in the altercation. ER 614, 616, 620. She also testified that at no time did she see Mr. Mota with a weapon. ER 600.

Brian Beardsley, the second staff member to intervene in the assault, testified that he saw Mr. Mota, Mr. Chiago, and Mr. Karam exit the copy room where the assault began. ER 627-628, 630. He also saw Mr. Karam being chased and assaulted in the corridor. ER 628, 630. When Mr. Beardsley intervened, he was assaulted. ER 630-631, 640-641. Mr. Beardsley testified that he saw Mr. Mota assaulting Mr. Karam with a prison-made weapon. ER 631, 662. However, when Mr. Beardsley was presented with a copy of the initial memorandum he

prepared regarding the incident, it showed that he had failed to state he had seen Mr. Mota with a weapon. ER 645-646, 651. Mr. Beardsley' testified that in his second incident report, he did not specify that Mr. Mota had a weapon either. ER 669. Rather, he stated that Mr. Mota was assaulting Mr. Karam with closed fists. ER 670-672.

A third staff member who arrived at the scene after the altercation, noticed Mr. Mota in the area, down on the ground, his hair covered with pepper spray. ER 680. Mr. Mota was detained at that point, in the hallway outside the copy room where the altercation began, and then escorted to medical assessment, where he was placed in a restraint chair. ER 680, 687, 693,-694, 747-748.

After Mr. Mota and the other inmates were detained from the scene, staff asked them to strip off all their clothes. These clothes were then bundled together in one pile. ER 336-338. DNA analysis of a substance found on the pants obtained from Mr. Mota immediately following the incident indicated a high probability that it came from Mr. Karam. ER 544-545.

Mr. Adams, who was Mr. Mota's co-defendant at trial, testified that there was no conspiracy to harm Mr. Karam. He further testified that at no point on October 6, 2017 did he see Mr. Mota with a knife. ER 365-366. Mr. Adams very plainly testified to the following:

Q. Given the Native population, Mr. Adams, if the Natives intended to do serious harm to Mr. Karam, could they have possibly done it?

A. Possibly, yes.

Q. But they didn't. Correct?

A. No.

ER 365.

Although Mr. Mota was restrained in the education hallway where the altercation took place, both of the alleged weapons were found in the library. ER 167-168, 750-751. The principle staff member who secured the two weapons had not had any training on how to secure evidence from the Bureau of Prisons. ER 167, 198-199. That staff member did not use any collection security methods in taking possession of the weapons. ER 181, 194-195, 198.

Neither of the first two staff members who secured the weapons had on gloves. The weapons were secured by kicking them across the floor, handing them from one staff member to another, and putting them in a staff member's pocket. ER 180-181, 195-196. The staff member principally responsible for securing the weapons personally handcuffed one of the alleged assailants. ER 186, 196. DNA analysis showed that Mr. Mota's tissue could not be excluded as being present on one of the weapons obtained from the assault. ER 530-532, 534, 536.

The penitentiary's physician testified that Mr. Karam's injuries were consistent with the types of injuries that would be inflicted with the weapons assertedly used in the attack. ER 706-707. The physician testified that the weapons could have killed Mr. Karam. ER 07-708. The physician also examined Mr. Mota who complained of the injuries that had been inflicted upon him by staff. ER 718.

The district court allowed into evidence a picture of Mr. Mota, shirtless, over Mr. Mota's objection. ER 777. Mr. Mota also objected to the court allowing the witness to show the jurors the shanks as

opposed to having the bailiff showing them. ER 858. Throughout the trial, expert witnesses testified on matters that were within an average juror's common understanding as well as on the ultimate element of intent. ER 909-910, 912, 922, 1000.

During the deliberations, the jurors informed the court that they were having a difficult time reaching a verdict. Shortly thereafter, they informed the district court that they wanted to try to continue to work it out. ER 144.

G. The Verdict, Sentencing, and Appeal

1. The verdict

On May, 7, 2019, the jury found Mr. Mota innocent of conspiracy. It did, however find him guilty of attempting to kill a federal officer. ER 145-146. The jury found Mr. Adams guilty of assault. ER 135-136. At that point, the court transferred Mr. Mota to the Kern County Jail. ER 84.

2. The presentence report and sentencing memoranda

The Office of Probation's Presentence Report (PSR) indicted that Mr. Mota's applicable offense level was 41 and that he had a criminal history category of IV. These factors produced a guideline imprisonment range of 360 months to life. ER 18; PSRs 55. The statutory maximum was, however, a 240-month term of imprisonment, which probation offered as the recommended term of incarceration. ER 4, 18; PSRs 41, 55.

Mr. Mota objected to the original PSR explaining, *inter alia*, that the addition of two points to the calculation of his guidelines range for causing "serious bodily injury" was inappropriate because Mr. Karam's injuries were not serious. Probation, explained, however, that the removal of the two additional points would not have changed his guideline range. PSRs 30. The government believed that the guidelines had been correctly calculated. ER 71; PSRs 28.

3. The sentencing hearing

Prior to his sentencing hearing, Mr. Mota requested that he be moved to the Fresno County Jail so that he would have access to a law library where he could prepare for sentencing. ER 83. He also requested copies of the trial transcripts to assist in preparing for the hearing. ER 81. Mr. Mota was transferred back to Fresno County Jail on May 29, 2019. PSRs 42. The district court, however, denied Mr. Mota's request for copies of the trial transcripts. ER 81-82.

Mr. Mota's sentencing hearing took place on July 29, 2019. ER 8. The district court found that the Office of Probation's decision that the matter involved serious bodily injury was appropriate. ER 12.

Mr. Mota requested a below-guidelines sentence. ER 49. In making this request, Mr. Mota presented myriad mitigating factors. At the age of 13 and as a first time offender, he was sentenced to 9 years in the California Youth Authority (CYA). This was the maximum sentence that could be awarded. ER 59. Thus, as a child he had to endure months of solitary confinement as was the normal procedure for the CYA at that time. ER 51, 59. He explained that his

life turned out the way it did because of the “childhood trauma and abuse he experienced in CYA. The indisputable horrors of life in the CYA in the 1990's is mitigating circumstances that should be considered.” On this basis, Mr. Mota asked that he receive a 188-month sentence to run concurrently with his life sentence. ER 15, 25-26, 54-55.

Mr. Mota also requested that he not be sentenced more heavily than his co-defendants. ER 24-25. In this regard, the district court had sentenced the co-defendants as follows: Mr. Chiago, 188 months; Mr. Acevedo, 156 months; Mr. Martin, 150 months; and Mr. Thomas, 97 months. ER 1482-1484; PSRs 1-2.

In response to Mr. Mota's sentencing requests, the trial court stated:

Do you understand that there is not equality here with regard to your codefendants, except possibly Mr. Adams, and that is that they accepted responsibility. You did not. And in addition to that, they did not get up on the witness stand and perjure themselves like you did.

ER 26.

In response, government stated, "I would note Mr. Mota did not testify at trial, your Honor. ER 26. The following exchange then took place:

THE COURT: . . . You understand that there is a substantial difference when you don't accept responsibility. Do you understand that?

MR. MOTA: Correct.

THE COURT: Well, that's a big difference between you and the codefendants that did not go to trial. Do you understand?

ER 26.

The district court sentenced Mr. Mota to the maximum term of imprisonment, 240 months, to run consecutively to the sentence he was already serving. ER 2, 31.

4. The appeal

At his July 29, 2019 sentencing hearing, Mr. Mota specifically asked that he be allowed to file a notice of appeal. Additionally, he filed a written notice of appeal of the judgment entered on that same day. ER 45. On November 30, 2021 the Ninth Circuit Court of Appeals issued a memorandum affirming Mr. Mota's conviction and

judgement. App 2a.

H. Bail Status

At time the actions giving rise to the instant appeal took place, Mr. Mota was serving a life sentence. Thus, he remains incarcerated with no expected date of release. See www.bop.gov/inmateloc. The sentence imposed in the instant matter was 240 months of imprisonment to run consecutively to his current sentence. App 8a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS MATTER MAGNIFIES THE CONFLICT AMONG THE CIRCUITS REGARDING THE STANDARD FOR THE DETERMINATION OF CUMULATIVE ERROR.

Throughout Mr. Mota's trial, the district court committed a number of errors, which the Court of Appeals refused to recognize. These error included the following:

- The district court allowed the admission of expert testimony which offered nothing more than the common understanding any juror would normally possess. ER 707-708, 922. Because the information offered was well within the bounds of a jury's ordinary experience it violated Federal Rules of Evidence, Rule 702. See also *United States v. Montas*, 41 F.3d 775, 784 (1st Cir.1994).
- The district court allowed the government's expert witnesses to testify about Mr. Mota's intent to kill. ER 909, 912, 1000. This testimony violated Federal Rules of Evidence, Rules 403 and 704 because intent was an

element of the alleged crime. *United States v. DelaCruz*, 358 F.3d 623, 626 (9th Cir. 2004) It also violated the Due Process Clause because it was fundamentally unfair and invaded the jury's role as the sole arbiter of guilt. See *Cooper v. Sowders*, 837 F.2d 284, 286-287 (6th Cir. 1988)

- The district court refused to accommodate Mr. Mota's requests regarding shackling. ER 1045-1046, 1048-1049. This refusal was an abuse of discretion because less restrictive alternatives were available. *United States v. Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004), modified, 425 F.3d 1248 (9th Cir. 2005); *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990)
- The district court admitted a picture of Mr. Mota shirtless for the mere purpose of facial/neck identification. ER 777. This admission was a violation of Federal Rules of Evidence, Rule 403.

Each of the district court's errors should have been grounds for a reversal of Mr. Mota's conviction. Even if, however, the lower courts

were correct in deciding that none of the complained of error individually rose to the level of reversible error, a cumulative assessment of the errors challenged required a reversal of Mr. Mota's conviction because they deprived him of due process and a right to a fair trial. Despite this fact, the Court of Appeals in this matter decided that, "If there were any individual or cumulative evidentiary errors, they did not rise to the level of plain error as they did not affect Mota's substantial rights given the other evidence against him. See *Lopez*, 762 F.3d at 863." App 3a.

Inherent in the Court of Appeals' decision is the requirement that each alleged wrongdoing by a district court must be a distinct error worthy of supporting a reversal were it not for an insufficient level of harm. To similar effect see, *United States v. Lloyd*, 807 F.3d 1128, 1168 (9th Cir.2015) citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). The Sixth Circuit takes a similar view in that "[E]rrors that might not be prejudicial when viewed alone, may together produce a fundamentally unfair trial." *United States v. Ward*, 190 F.3d 483, 491 (6thCir.1999) citing *United States v.*

Ashworth, 836 F.2d 260, 267 (6th Cir.1988). The First, Seventh and Tenth Circuits follow suit. *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir.1993); *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir.2000); *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (*en banc*).

The Fifth Circuit takes the cumulative error analysis a step further in that "[A]n error that would not have risen to constitutional dimension by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of . . . relief." *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir.1992) (*en banc*). Thus, the Fifth Circuit does not require that there be a constitutional error before that error can be aggregated with others to become part of a cumulative error analysis.

The Eighth Circuit takes an entirely different view in that it requires each of the errors raised be prejudicial in and of themselves before they can be considered under a cumulative error analysis. See *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir.2002) stating that a petitioner could not "... build a showing of prejudice on a series of

errors, none of which would by itself meet the prejudice test.”

The various cumulative error standards in the sister circuits should be addressed by this Court so that it may resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: February 27, 2022

Respectfully submitted,

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APPENDICES