

No. _____

In The
Supreme Court of the United States

NELSON CONTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S MERITORIOUS APPEAL OF THE DENIAL OF APPELLANT'S MOTION IN LIMINE TO INCLUDE THE FULL INTERVIEW OF THE APPELLANT IN THE TRIAL IN DISTRICT COURT.

LIST OF THE PARTIES

NELSON CONTO, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED FOR REVIEW.....	i
LIST OF THE PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS AND RULES INVOLVED.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	3
1. Pre-Trial Motions	3
2. Trial	6
3. Sentencing	10
REASONS FOR GRANTING THE WRIT	12
I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S MERITORIOUS APPEAL OF THE DENIAL OF APPELLANT'S MOTION IN LIMINE TO INCLUDE THE FULL INTERVIEW OF THE APPELLANT IN THE TRIAL IN DISTRICT COURT.....	12
A. Standard of Review.....	12
B. Analysis.....	12
CONCLUSION.....	16

APPENDIX:

Judgment
U.S. Court of Appeals for the Fourth Circuit
entered January 25, 2022 Appendix A

Unpublished Opinion
U.S. Court of Appeals for the Fourth Circuit
entered January 25, 2022 Appendix B

TABLE OF AUTHORITIES

	Page(s):
Cases:	
<i>United States of America v. Conto,</i> (4 th Cir. 20-4563)	1
<i>United States v. Conto,</i> 2022 U.S. App. LEXIS 2314 (4 th Cir. 2022).....	14
<i>United States v. Lentz,</i> 524 F.3d 501 (4 th Cir., 2008)	13
<i>United States v. Wilkerson,</i> 84 F.3d 692 (4 th Cir. 1996)	12, 13
<i>United States v. Woolbright,</i> 831 F.2d 1390 (8 th Cir. 1987)	12, 13
Statutes:	
18 U.S.C. § 1028A	1, 2, 10
18 U.S.C. § 1344.....	1, 2, 10
18 U.S.C. § 1349.....	1, 2, 10
18 U.S.C. § 3742(a)	1, 3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291.....	2
28 U.S.C. § 2101.....	1
Constitutional Provisions:	
U.S. Const. amend. V.....	15
Sentencing Guidelines:	
U.S.S.G. § 2B1.1(b)(1)(H).....	11

Rules:

Fed. R. App. P. 32.1	1
Fed. R. Evid. 106.....	<i>passim</i>
Fed. R. Evid. 611.....	12
Fed. R. Evid. 801(c).....	13
Fed. R. Evid. 801(d)(2).....	13
Fed. R. Evid. 803-4.....	13
Sup. Ct. R. 13(1).....	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nelson Conto (hereinafter “Petitioner”) respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Fourth Circuit is reported at *United States of America v. Conto*, (4th Cir. 20-4563). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on January 25, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. §2101.

STATUTORY PROVISIONS AND RULES INVOLVED

A. 18 U.S.C. §1028A, 18 U.S.C. §1344, 18 U.S.C. §1349, 18 U.S.C. §3742(a), 28 U.S.C. §1254(1), 28 U.S.C. §2101, Federal Rules of Appellate Procedure 32.1, Federal Rules of Evidence 106.

STATEMENT OF THE CASE

The Appellant was charged through a Bill of Indictment with: (1) one count of violating 18 U.S.C. §1349 (Conspiracy to Commit Bank Fraud) (“Count One”); and (2) one count of violating 18 U.S.C. §1344 (Bank Fraud) (“Count Three”); and (3) one

count of violating 18 U.S.C. §1028A (Aggravated Identity Theft) (“Count Thirteen”). (JA at 9-19). The Appellant pled not guilty to the charges. (JA 23-32).

The Appellant filed a Motion in Limine on February 2, 2020, to require the Government to admit the full interview of the Appellant, or in alternative to exclude the interview (JA 80.1). The Appellant’s Motion in Limine was heard in District Court on February 3, 2020 and denied. The trial took place the same day, and the jury returned the following verdict: (1) guilty to Count One, charging the Appellant with conspiracy to commit bank fraud in violation of 18 U.S.C. §1349; (2) guilty to Count Three, charging the Appellant with bank fraud in violation of 18 U.S.C. §1344; and (3) not guilty to Count Thirteen, charging the Appellant with aggravated identity theft in violation of 18 U.S.C. §1028A.

The Appellant was sentenced on October 27, 2020 (JA at 456). After hearing the remaining objections from the Appellant and arguments of Counsel, the court found the Appellant to have an offense level of 23, a history category of II, with a resulting advisory range of 51 to 63 months (JA at 464). After the Court issued their judgment, the Government made a motion to decrease the Appellant’s offense level downward two levels, putting him in the advisory range of 41 to 51 months, to avoid sentence disparity among the other codefendants (JA at 465). The Appellant was ultimately sentenced to forty-one (41) months on each count, to be served concurrently, as well as restitution for the entire loss (JA at 471-3).

On November 10, 2020, the Appellant filed a direct appeal of his conviction and sentence to this Court. Jurisdiction of this Court is authorized by 28 U.S.C. §1291

and 18 U.S.C. §3742(a) because the appeal was filed prior to the expiration of fourteen (14) days from the entry of judgment. There is also good cause to hear this appeal because it involves a substantial right affecting the Appellant's Constitutional Due Process Rights. On January 25, 2022, the Fourth Circuit Court of Appeals affirmed the judgment of the district court. Petitioner timely files this Writ of Certiorari before the United States Supreme Court.

STATEMENT OF THE FACTS

1. Pre-Trial Motions

The Appellee filed a Trial Brief on 30 January 2020, which set forth the Appellee's intention to offer excerpts from a post-arrest interview of the Appellant and exclude the remaining statement (JA 21-43). The Appellant filed a Motion in Limine on 2 February 2020 (hereinafter the "Motion in Limine") to require Government to admit the full interview of the Appellant, or in the alternative to exclude the interview entirely (JA 80.1). The Motion in Limine provided a list of excerpts of the interview that the Government intended to offer, and intended to exclude:

(A) To exclude 5 minutes and 30 seconds between 10:48 and 10:53:30, during which time Conto explains the context of the statements he makes in the next segment; and

(B) To admit two minutes and 11 seconds from 10:53:30 to 10:55:41; and

- (C) To exclude one minute and 19 seconds between 10:55:41 and 10:57, during which period Conto provides context for doing the acts he admits both before and after this section; and
- (D) To admit one minute and 7 seconds between 10:57 and 10:58:07; and
- (E) To exclude 13 seconds between 10:58:07 and 10:58:20, where Conto says he mentions having contact with Ketter; and
- (F) To admit 39 seconds between 10:58:59 and 10:59:15; and
- (G) To exclude 16 seconds between 10:58:59 and 10:59:15, where Conto answers questions regarding his knowledge of purported co-conspirators; and
- (H) To admit 22 seconds between 10:59:15 and 10:59:37; and
- (I) To exclude 29 seconds between 10:59:37 and 11:00:06, where Conto explains why he took the action reported in the previous segment; and
- (J) To exclude 11 minutes and 40 seconds between 11:00:20 and 11:12:00, wherein Conto, in response to the agent's questions, summarizes his conduct previously described individually; and
- (K) To admit 27 seconds between 11:12:00 and 11:12:27; and
- (L) To exclude five minutes and 33 seconds between 11:12:27 and 11:18, during which time Conto further clarifies his activities and the extent of his knowledge of the scheme (JA 80.1 – 80.2).

The Appellant's Motion in Limine ultimately argued that using the excerpts of the post-arrest interview would "mislead the jury regarding the true meaning of what Conto told the agent and that its admission as proposed would therefore be unfair

and in violation of Rule 106” (JA 80.2 – 80.3). The Appellant also argued that Rule 106 of the Federal Rules of Evidence allows the introduction of the remaining statement when the remaining statement “ought in fairness to be considered contemporaneously with it.” (JA 80.3).

The Appellant’s Motion in Limine was heard in District Court on February 3, 2020, wherein the Appellee confirmed their intention to offer six excerpts from the Appellant’s post-arrest interview in the trial (JA 141-6). Counsel for the Government offered the following in describing each excerpt they intended to introduce: (1) that the “first excerpt deals with Conto’s statements about his initial participation in the conspiracy, who gave him instructions about how to open the accounts” (JA 141); (2) the second excerpt is a statement wherein the Appellant states who was in the car with him during the bank transaction (3) the third excerpt being a discussion about the Appellant’s awareness of a co-conspirator’s check scheme; (4) the fourth excerpt being a discussion wherein the Appellant stated he did not receive the promised money he thought he would receive; (5) the fifth excerpt wherein the Appellant acknowledged he received a check for \$2,000.00; and (6) the sixth excerpt wherein the Appellant acknowledged he went to the bank for a cash withdrawal (JA 142). The Appellee further argued that the remainder of the Appellant’s post-arrest interview is self-serving and not required under Rule 106 of the Federal Rules of Evidence (JA 142). The Appellee further argued that most of the statements in the post-arrest interview are from Postal Inspector Berkland.

The Appellant argued to the District Court that several of the excluded excerpts added context to the statements the Government intended to introduce (JA 144-5). For instance, the Government asked to exclude a discussion by the Appellant indicating it was a co-conspirator's idea to cash the checks and asked to exclude a later discussion that the same co-conspirator took the bank card from the Appellant. *Id.* The Government also asked to exclude a discussion by the Appellant as to who he thought "Bryn Chancellor" was, which the Appellant argued added context to the excerpt of his admissions related to checks written to Bryn Chancellor. *Id.*

There is nothing in the record to indicate that the Court listened to either the complete interview, excerpts of the interview, or reviewed a transcript of the interview prior to rendering a decision (JA 141). However, the Court denied the Appellant's Motion to Include the entire interview or disallow the excerpts and stated "I don't think any of that is necessary to understand the excerpts that the government intends to play. I think a bunch of what I heard from you is exculpatory and inadmissible under not Rule 106, but exculpatory information that's inadmissible." (JA 145).

2. Trial

The Government presented evidence first from Sherri Lester, the financial controller of Showalter Construction Company, who was an alleged victim in the Appellant's charges herein (JA 191). She testified that, on behalf of Showalter, she wrote a check to Primark Capital, LLC in the amount of \$7,796.75 and mailed it by

depositing it into a blue mailbox outside of the post office (JA 193-4). She also testified that the check was altered and executed on the back by Nelson Conto, listing Bryn Chancellor Landscaping underneath his signature (JA 196). She also testified that she does not know who stole the check or how the check was altered (JA 199).

The Government next presented testimony from Bryn Chancellor, who is both a teacher and a writer (JA 201). She testified that she received a notice from PNC Bank, clarifying a new PIN number for an online account recently opened in her name (JA 202-3). She further testified that she had not opened a new bank account and contacted the bank and police to investigate the matter further (JA 210-1). She subsequently testified that she received further documentation from PNC Bank, indicating that the new account was listed in the name of Nelson Conto, dba Bryn Chancellor, with Ms. Chancellor's home address being the address of record (JA 211). She also testified that she did not ask Mr. Conto to open an account in her name or file a dba with the Register of Deeds in her name. *Id.* She testified further that she did not have any affiliation with Showalter Construction and did not operate a landscaping company (JA 214). Lastly, she testified on direct examination that she never received a check in the amount of \$4,250.00, which she had expected from her agent, and that the check was not executed in her handwriting (JA 216).

Ms. Chancellor was unable to state in her testimony who deposited the check in the amount of \$4,250.00, who altered the check, who endorsed the check for \$7,796.00, who deposited the checks, or who registered for the bank accounts (JA 217).

The next witness called by the Government was Deputy Director of the Mecklenburg County Register of Deeds, Tonya Goodman (JA 218-9). Ms. Goodman authenticated video from the register of deeds, which depicted the Appellant registering the dba listing both Nelson Conto and Bryn Chancellor Landscaping (JA 222-230). She also testified that Mr. Conto paid with a credit card to his name (JA 230-1). On cross examination, she testified that the Appellant did not wear a disguise (JA 231).

The Government also called Terri Hoover, a bank investigator with PNC Bank who investigates claims of fraud, to testify (JA 234-5). Ms. Hoover authenticated a video and still images clipped from a PNC Bank branch location video depicting Nelson Conto opening the bank account in the name of Bryn Chancellor Landscaping (JA 240-3). She also: (1) authenticated an image from a video depicting the deposit of \$4,450 at a PNC Bank ATM; verified a still image from a video of Nelson Conto withdrawing \$1,500.00 from the account; (3) verified various bank documents signed in the name of Nelson Conto; (4) verified a still image from a video of Nelson Conto withdrawing \$2,000.00; and (5) testified as to how the same phone number is used for the bank accounts of co-defendant Antonio Williamson dba Kelley Landscaping and Nelson Conto's dba Bryn Chancellor Landscaping (JA 243-254).

On cross examination, Ms. Hoover testified that the Appellant presented his true identifying information, including his social security number, alien card number, and date of birth (JA 258). She also testified that she did not have any information as to who actually signed and endorsed the check (JA 258).

The Government's next witness was Antonio Williamson, a co-defendant to the Appellant's charges. Mr. Williamson entered into a plea agreement for the charges but had not been sentenced (JA 278-9). He testified that the United States could tell the Court at his sentencing that he cooperated in the Defendant's trial. *Id.* Mr. Williamson stated in the trial that he was living in and out of hotels, when the Appellant offered him money to use his bank accounts (JA at 280-1). He also testified that he was in what he believed to be the Appellant's car with the Appellant when he deposited a check in the bank account on the Appellant's behalf (JA at 282). He testified that the Appellant offered him forty dollars (\$40.00) to deposit the check (JA at 283).

Mr. Williamson also testified that he deposited a check made out to Hickory Grove Baptist Church into his account at the Appellant's direction in the amount of \$4,007.00 (JA at 285-6). Mr. Williamson stated further that he went to the register of deeds at the Appellant's behalf and registered a dba for the business of Shook Kelley Landscaping, and a bank to open a banking account for the business of Shook Kelley Landscaping, where a check was later deposited in the amount of \$60,204.00 (JA at 289 – 309). Mr. Williamson testified that he opened the bank accounts but does not know the phone number he registered to the account, which was co-defendant Phillip Ketter's phone number (JA-309).

The last witness called by the Government was U.S. Postal Inspector Anton Jones, who investigates federal crimes pertaining to U.S. Mail (JA at 311). Inspector Jones sat with the Appellant during his post-arrest interview which was the subject

of the Appellant's pre-trial motion (JA at 312-3). The Government moved to introduce the excerpts identified in their Pre-trial Brief, and the Court admitted them over the Appellant's renewed objections (JA at 315). During the first excerpt, the Appellant stated who he worked with and how he opened the bank account (JA 316). During the second excerpt, the Appellant was asked about his knowledge of Phillip Ketter. *Id.* During the third excerpt, the Appellant was asked about how much money he received from his participation (JA at 317). During the fourth excerpt, the Appellant admitted that he made the cash withdrawal. *Id.* On cross examination, Inspector Jones testified that the Appellant stated in the interview that Keeter told him what to do and even took the bank card from the Appellant (JA at 318).

The Appellant did not testify in the trial. After hearing closing arguments and receiving jury instructions, the jury returned the following verdicts: (1) guilty to Count One, charging the Appellant with conspiracy to commit bank fraud in violation of 18 U.S.C. §1349; (2) guilty to Count Three, charging the Appellant with bank fraud in violation of 18 U.S.C. §1344; and (3) not guilty to Count Thirteen, charging the Appellant with aggravated identity theft in violation of 18 U.S.C. §1028A.

3. Sentencing

The Appellant was sentenced on 27 October 2020 (JA at 456). On April 20, 2020 Senior U.S. Probation Officer W. Ross Baker filed a Presentence Investigation Report (JA at 494). The Presentence Investigation Report computes the Appellant to have an offense level of twenty-five (25), with fourteen (14) of the twenty-five (25) points coming from an enhancement for attributing a foreseeable loss amount to the

Appellant of \$823,635.04 pursuant to USSG §2B1.1(b)(1)(H) (JA at 501-2). In calculating this amount, the Presentence Investigation report goes beyond the evidence presented at trial to include banking transactions attributable to defendants who were presented at trial as being associated with the Appellant (JA at 498-503).

The Appellant objected to the inclusion of a fourteen-level enhancement for a foreseeable loss in the amount of \$823,635.05 (JA at 488, and at 518). The Court overruled the Appellant's objection to a fourteen (14) level enhancement, finding that the trial evidence demonstrated he was more involved in the criminal conspiracy than other defendants because there was evidence that he opened an account, completed a dba, made withdrawals from bogus accounts, and allowed co-conspirators to use the account (JA at 461-2).

After hearing the remaining objections from the Appellant and arguments of Counsel, the court found the Appellant to have an offense level of 23, a history category of II, with a resulting advisory range of 51 to 63 months (JA at 464). After the Court issued their judgment, the Government made a motion to decrease the Appellant's offense level downward two levels, putting him in the advisory range of 41 to 51 months, to avoid sentence disparity among the other codefendants (JA at 465). The Appellant was ultimately sentenced to forty-one (41) months on each count, to be served concurrently, as well as restitution for the entire loss (JA at 471-3).

REASONS FOR GRANTING THE WRIT

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S MERITORIOUS APPEAL OF THE DENIAL OF APPELLANT'S MOTION IN LIMINE TO INCLUDE THE FULL INTERVIEW OF THE APPELLANT IN THE TRIAL IN DISTRICT COURT.

A. Standard of Review

The Appellant filed a timely pre-trial Motion in Limine to either include the entirety or exclude in its entirety a pre-trial interview conducted between the investigators and the Appellant (JA at 80.1). A trial judge's evidentiary decisions are reviewed on an abuse of discretion standard. *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996).

B. Analysis

The common-law doctrine of completeness has been codified in Rule 106 of the Federal Rules of Evidence. *Id.* Rule 106 states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Fed. R. Evid. 106. The purpose of the rule is to "prevent a party from misleading the jury by allowing into the record relevant portions of the excluded testimony which clarify or explain the part already received." *Wilkerson*, at 696 (4th Cir., 1996). It does not allow for the Court to "render admissible the evidence which is otherwise inadmissible under the hearsay rules." *Id.*; citing *United States v. Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987). The *Woolbright* Court specifically held that "neither Rule 106 or Rule 611 authorizes a court to admit

unrelated hearsay when that hearsay does not fall within one of the exceptions to the hearsay rule.” *Wilkerson*, at 696 (4th Cir., 1996), citing *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987).

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). An exception to hearsay is admissions by party opponents. Fed. R. Evid. 801(d)(2). It does not fit within the hearsay exception when a statement is self-serving and exculpatory. Fed. R. Evid. 803-4. In the *Lentz* Court, the District Court carefully and individually considered all excerpts proposed to be included or excluded by both sides. *United States v. Lentz*, 524 F.3d 501, 526 (4th Cir., 2008). The court, however, declined to include the statements believed to be exculpatory statements made by the Defendant “*which were unnecessary to place Lentz’s comments in perspective.*” (emphasis added) *Id.*

Without review of each individual statement, or review of the recording of the post-arrest interview, the District Court Judge introduced all the excerpts requested by the Government and denied the Appellant’s Motion in Limine to include the entire interview. Similarly, the Court offered no explanation as to why each individual statement was excluded or included beyond the general statement that “I don’t think any of that is necessary to understand the excerpts that the government intends to play. I think a bunch of what I heard from you is exculpatory and inadmissible under not Rule 106, but exculpatory information that’s inadmissible.” (JA 145).

The Fourth Circuit opinion states that the Appellant has failed to state, “how any of the excerpted statements admitted at trial were misleading or lacking context.” *United States v. Conto*, 2022 U.S. App. LEXIS 2314 (4th Cir. 2022). However, in his Brief to the Fourth Circuit the Court went through the admitted statements, and why the statement is misleading or lacking in context.

The first statement admitted contains statements by the Appellant relating to his initial participation in the conspiracy, and who gave him instructions to open the banking account (JA at 141). The second admitted excerpt is a statement wherein the Appellant states who was in the car with him during the bank transaction (JA at 141-2). The third admitted excerpt is a discussion about the Appellant’s awareness of a co-defendant’s check scheme (JA 142). However, in the time right before, during, and right after these cherry-picked excerpts, the Appellant discusses conduct relevant to the admissions within the admitted excerpt, which adds both context and perspective to the admitted statements (JA 144-5). The Appellant mentions contact he had with co-defendant Ketter, which provides context and perspective to the admitted statements (JA 143-5). Specifically, the excluded statements described that it was Ketter’s idea to cash the check, that Ketter instructed the Appellant as to what to do, and that Ketter maintained sole control of the bank card to the account. *Id.* The admitted and excluded discussions are part in parcel and relate to one another entirely. As a matter of fairness, all the Appellant’s related statements about the co-defendant’s should be either admitted or excluded. These statements give a rounded

perspective of Conto and Ketter's involvement in the scheme. The limited excerpts do not fully provide the context to Conto's role, and therefore mislead the jury.

The fourth admitted excerpt is a discussion wherein the Appellant stated he did not receive the promised money he thought he would receive (JA at 142). In the immediately preceding statement, the Appellant discusses why he took the actions he did, which provide context to why he made the statement that he had not received the money he was promised. These statements are related through motive and offer context to the admitted statements regarding the Appellant's payment for his services. The fifth excerpt admitted is a statement wherein the Appellant testifies about receiving a \$2,000.00 check and going to the ATM to withdraw funds (JA at 142). However, the Government subsequently excludes further statements where he describes the extent to his knowledge of the remainder of the scheme *Id.* For instance, one statement excluded was a statement by the Appellant that he thought Bryn Chancellor was a business, not a person. *Id.* at 145.

The District Court first failed to properly consider the relevancy of the individually admitted and excluded statements to one another. Each statement offers context and perspective into the admitted excerpts from the Appellant's post-arrest interview. To include partial statements by the Appellant, without including the entirety of the statement that provides context to the admitted statements is prejudicially unfair and infringes on the Appellant's Fifth Amendment Constitutional right to not have to testify in a criminal trial. To admit the partially true excerpts, without the related statements which add context, places an unfair burden on the

Appellant's decision to testify because the only way to get the fair and complete statements into the record would be for him to testify.

To deny the Appellant's Motion to include the remaining portions of the interview which add context to the admitted statements under Rule 106 of the Federal Rules of Evidence was an abuse of discretion and unfair to the Appellant.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the United States Supreme Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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