22-5033

IN THE
SUPREME COURT OF THE UNITED STATES
JUNE TERM 2022

No. _____

CURTIS CHEWNING
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS AND
ATTORNEY GENERAL, STATE OF FLORIDA,
Respondent.

ORIGINAL

PETITION FOR WRIT OF CERTIORARI TO SECOND DISTRICT COURT OF APPEALS
For the State of Florida

Curtis Chewning DC#H18886
Avon Park Correctional Institution
8100 Hwy 64 E.
Avon Park, Florida 33825
Petitioner Pro Se

QUESTION(S) PRESENTED

Question (1)

WHETHER DUE PROCESS OF LAW IS VIOLATED WHERE A SENTENCE IS INCREASED BASED UPON FACTS NOT INHERENT IN THE CHARGING INFORMATION OR PROVEN BY A JURY BEYOND REASONABLE DOUBT?

Question (2)

WHETHER AN UNLAWFUL SEIZURE HAS OCCURRED WHERE A STATE IMPRISONS A CITIZEN LONGER THAN THAT WHICH IS PERMITTED BY LAW AS A RESULT OF FRAUD BEING COMMITTED UPON A COURT?

LIST OF PARTIES

All parties appear in the Caption of the case on the cover page.

LIST OF ALL PROCEEDINGS DIRECTLY RELATED

The Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida case numbers: CF03-000001-XX and CF03-000002-XX entered a denial of the Petitioner's Rule 3.800(a) Motion to Correct Illegal Sentence. The circuit court denied such motion on October 27th, 2021. See ***Chewning v. State***, case numbers: CF03-000001-XX and CF03-000002-XX . (Appendix A).

The Petitioner then appealed the circuit court's ruling to Florida's Second District Court of Appeal and was given case number: 2D21-3591. The Second District Court of Appeal entered a per curiam affirmed decision on March 16th, 2022. See ***Chewning v. State***, case number: 2D21-3591 (Fla. 2nd DCA 2022)(Appendix B). Mandate issued May 2, 2022.

The Petitioner filed a timely Motion for Rehearing; Rehearing En Banc/Motion Requesting Written Opinion with Certification to the Florida Supreme Court which was denied on April 13, 2022. See ***Chewning v. State***, case number: 2D21-3591 (Fla. 2nd DCA 2022)(Appendix C).

Without a written opinion Florida Supreme Court review is not permitted and therefore the Second District Court of Appeal was the highest court having jurisdiction over this case.

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TABLE OF CITED AUTHORITIES

Cases **Page**

Statutes and Rules;

Constitutional Provisions;

DECISIONS BELOW

Chewning v. State, case numbers: CF03-000001-XX and CF03-000002-XX (Tenth Judicial Circuit in and For Polk County, Florida)(Appendix A).

Chewning v. State, case number: 2D21-3591 (Fla. 2nd DCA 2022)(Second District Court of Appeal)(Appendix B).

Chewning v. State, case number: 2D21-3591 (Fla. 2nd DCA 2022)(Second District Court of Appeal)(Appendix C).

JURISDICTION

This Petition seeks review of the judgment entered by Florida's Second District Court of Appeal on March 16th, 2022, affirming the denial of a Motion to Correct Illegal Sentence filed pursuant to Rule 3.800(a) ***Florida Rules of Criminal Procedure*** that was filed in the Tenth Judicial Circuit in and for Polk County, Florida and denied on October 27th, 2021. The Second District Court of Appeal styled the case ***Chewning v. State***, case number: 2D21-3591 (Fla. 2nd DCA 2022) and was per curiam affirmed on March 16th, 2022; Rehearing En Banc/Motion Requesting Written Opinion with Certification to the Florida Supreme Court denied on April 13, 2022. All three opinions are attached at Appendix A-C.

The jurisdiction of this Court to review the judgment is invoked under 28 **U.S.C.** §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves ***Amendment IV*** to the ***United States Constitution*** which provides that:

> 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.

This case involves ***Amendment V*** to the ***United States Constitution*** which provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves ***Amendment VI*** to the ***United States Constitution*** which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This case involves ***Amendment XIV*** to the ***United States Constitution*** which provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> Section V. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The Petitioner, Curtis Chewning, was charged in the Circuit Court of Polk County, Florida via (2) Information's as follows: Case Number CF03-000001-XX Count (1) Lewd Battery, Count (2) Lewd Battery, Count (3) Contributing to the Delinquency of a Child. Case Number CF03-000002-XX Count (1) Lewd Act Upon a Child, Count (2) Lewd Act Upon a Child, Count (3) Lewd Act Upon a Child (Direct), Count (4) Lewd Battery, Count (5) Lewd Conduct.

The Petitioner accepted an open plea to the court and the Petitioner was ultimately sentenced as follows: CF03-000001-XX Count I (23.635) years in the Florida Department of Corrections; Count II (15) years Sex Offender Probation consecutive to Count I and time served for Count III. Case Number CF03-000002-XX Count I and II (10.8) years Florida Department of Corrections; Counts III and IV (22.5) years Florida Department of Corrections, Count V (23.635) years Florida Department of Corrections all running concurrently followed by Count VI (15) years Sex Offender Probation running consecutive.

Petitioner filed a Motion to Correct Illegal Sentence on October 17th, 2021, in which he raised two issues for review. Only ground one of the motion is being presented to this Honorable Court.

The Petitioner argued in ground one that his sentence of (26.635) years imprisonment in the Florida Department of Corrections is illegal as the Court utilized a scoresheet that improperly included (240) victim injury points for penetration where the victim was never penetrated.

The lower tribunal ultimately denied the Petitioners motion in a one page order on October 27th, 2021 (Appendix A). As to Ground (1) the Court asserted that the Court previously addressed this issue in an order dated June 10, 2005 and claimed that such order was (attached).

The Order was not attached and was not included within the record on appeal as prepared by the Clerk which establishes that the Court never attached a copy of the order.

The Petitioner then appealed the circuit court's ruling to Florida's Second District Court of Appeal and was given case number: 2D21-3591. The Second District Court of Appeal entered a per curiam affirmed decision on March 16th, 2022. See ***Chewning v. State***, case number: 2D21-3591 (Fla. 2nd DCA 2022)(Appendix B).

The Petitioner filed a timely Motion for Rehearing; Rehearing En Banc/Motion Requesting Written Opinion with Certification to the Florida Supreme Court which was denied on April 13, 2022. See ***Chewning v. State,*** case number: 2D21-3591 (Fla. 2nd DCA 2022)(Appendix C).

The last opinion was entered on April 13, 2022. This Petition for a Writ of Certiorari is being filed within (90) days of said order.

BASIS FOR FEDERAL JURISDICTION

This case raises questions of interpretation of the *Fourth*, *Fifth* and *Fourteenth Amendments* to the *United States Constitution*. The jurisdiction of this Court to review the judgment is premised upon the authority conferred by 28 ***U.S.C.*** §1257(a) which reflects:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

REASONS FOR GRANTING THE WRIT

CHEWNING IS BEING UNLAWFULLY DETAINED UNDER THE SIXTH AND FOURTH AMENDMENT BECAUSE AN UNLAWFUL SEIZURE HAS OCCURRED WHERE A STATE HAS IMPRISONED HIM LONGER THAN THAT WHICH IS PERMITTED BY LAW AS A RESULT OF FRAUD BEING COMMITTED UPON A COURT AND BEING DENIED DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE HIS SENTENCE IS INCREASED BASED UPON FACTS NOT INHERENT IN THE CHARGING INFORMATION OR PROVEN BY A JURY BEYOND REASONABLE DOUBT.

FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

A. Conflict with decision of the United States Supreme Court:

The holdings of the courts below that victim injury may be scored for penetration where such was not inherent within the Charging Information, Conceded to by Petitioner, or Submitted to a Jury is directly contrary to the holding of the United States Supreme Court. See ***Blakely v. Washington***, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); ***Apprendi v. New Jersey,*** 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ***Duncan v. Louisiana***, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

The factual issue presented herein is the question of what constitutes victim injury. The Petitioner would show that the Charging Information for Case Number CF03-000001-XX, specifically Count II and Case Number CF03-000002-XX specifically Counts I, III, IV and V include points for penetration that could not be assessed as a matter of law.

The facts as alleged in the Charging Information for the above counts specifically reflects that the Petitioner on one or more occasions, engaged in sexual activity with a child twelve years of age or older but less than sixteen years of age, by penetrating the mouth of [Petitioner] Curtis Eugene Chewning. The face of the record is clear, the victim was never penetrated in these

enumerated offenses, but only the Petitioner and therefore victim injury for penetration for these counts could not be assessed as a matter of law. See ***Carter v. State,*** 920 So.2d 735 (Fla. 5th DCA 2006) (The State concedes that penetration points are not appropriate under the facts as alleged in the information.) Indeed, victim injury points may not be assessed where the charging instrument does not accuse the Appellant of a crime against the victim's person. See ***Delgado v. State***, 2008 Fla. App. LEXIS 945 (Fla. 3rd DCA 2008). See also ***Hammett v. State***, 700 So.2d 21 (Fla. 5th DCA 1997) where the following is found:

> While I agree that penetration occurs when the penis is put into the anus, I disagree that this appellant should be assessed the points because in this case it was the victim who inserted his penis into the anus of the appellant. Thus, appellant committed no act of penetration which warranted scoring extra points for a greater sentence. Under section 921.001(7), Florida Statutes (1991), those points are classified as "severe injury," as is indeed proper, but this penetration was not done on the victim so the injury obviously contemplated by the legislature did not occur here. If the argument is to be made that the legislature did not designate "who penetrates whom," and therefore penetration by either violates the statute, then the statute is vague or ambiguous. The benefit of that doubt must go to the accused. See Thompson v. State, 695 So. 2d 691, 22 Fla. Law W. S340 (Fla. 1997); Chicone v. State, 684 So. 2d 736 (Fla. 1996).

The questions to be resolved by this Honorable Court is: (1) whether due process of law is violated where a sentence is increased based upon facts not inherent in the charging information or proven by a jury beyond reasonable doubt and (2) whether an unlawful seizure has occurred where a state imprisons a citizen longer than that which is permitted by law as a result of fraud being committed upon a court?

QUESTION ONE

WHETHER DUE PROCESS OF LAW IS VIOLATED WHERE A SENTENCE IS INCREASED BASED UPON FACTS NOT INHERENT IN THE CHARGING INFORMATION OR PROVEN BY A JURY BEYOND REASONABLE DOUBT?

The State filed the charges in question under oath and swore in Case Number CF03-000001-XX, specifically Count II and Case Number CF03-000002-XX specifically Counts I, III, IV and V that the Petitioner on one or more occasions, engaged in sexual activity with a child twelve years of age or older but less than sixteen years of age, by penetrating the mouth of [Petitioner] Curtis Eugene Chewning. The face of the record is clear, the allegations as sworn to by the State and the victim was that the victim was never penetrated in these enumerated offenses, but only the Petitioner and therefore victim injury for penetration for these counts could not be assessed as a matter of law.

This Honorable United States Supreme Court ruled in ***Apprendi v. New Jersey***, 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) that:

> The due process clause of the Federal Constitution's Fourteenth Amendment requires that any fact that increases the penalty for a state crime beyond the prescribed statutory maximum-other than the fact of a prior conviction-must be submitted to a jury and proven beyond a reasonable doubt; this rule insures that a state is obliged to make its choices concerning the substantive content of the state's criminal laws with full awareness of the consequence, unable to mask substantive policy choices of exposing all who are convicted to the maximum sentence it provides.

The above due process requirement was revisited again in ***Blakely v. Washington***, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) with additional emphasis on the sixth amendment regarding sentencing under the plea process:

> The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.

In ***Duncan v. Louisiana***, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) this Honorable Supreme Court held that the Fourteenth Amendment encompasses the first eight amendments to the United States Constitution:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; 4 the rights of speech, press, and religion covered by the First Amendment; 5 the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; 6 the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; 7 and the Sixth Amendment rights to counsel, 8 to a speedy 9 and public 10 trial, to confrontation of opposing witnesses, 11 and to compulsory process for obtaining witnesses. 12

The facts of this case that cannot be in dispute is that both the State and Victim in the Petitioner's case swore under oath, via the Charging Information, that the victim was never penetrated for the counts presently before the court. The Respondent, in good faith, cannot challenge this fact.

The Petitioner's sentence was severally increased unlawfully premised upon victim penetration where the victim was never penetrated. Specifically, the scoresheet used for case number CF03-000001-XX included (240) total points for penetration. With the inclusion of these points on the scoresheet the points were scored as follows:

(Primary 74pts + 92.2 additional offenses + 240 victim injury = 406.2pts/months in prison)

The court then utilized the 406.2pts, subtracted 28 then multiplied by .75 leaving a grand total of 23.635pts/months in prison. The Petitioner received a sentence of 23.635 years, i.e., the bottom of the scoresheet sentence which was the Court's intent. (Note: The process of subtracting 28 and multiplying by .75 to determine a sentence is found in Florida Statute 921.0024 "Criminal Punishment Code; worksheet computations; scoresheets").

The removal of the improper penetration points would reflect as follows:

(Primary 74pts + 92.2 additional offenses = 166.2pts/months in prison)

Utilizing the 166.2pts, subtracting 28, then multiplying by .75 leaves a new grand total of 103.65pts/months in prison which equates to a total of 8.64 years in prison. The Petitioner received a sentence of 23.635 years in prison solely as a result of improper victim injury points for penetration where the facts and evidence as sworn to by the State and the Victim assert that the victim was never penetrated.

This United States Supreme Court held in ***United States v. Tucker***, 404 U.S. 443, 447, 92 S. Ct. 589, 591-592, 30 L.Ed.2d 592 (1972) that: "a sentence founded at least in part upon misinformation is of constitutional magnitude." Citing ***Townsend v. Burke***, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L. Ed . 2d 1690 (1948); ***U.S. v. Evans,*** 880 F. 2d 376 (11th Cir. 1989); ***U.S. v. Reme***, 738 F. 2d 1156 (11th Cir. 1984). See also ***Harrington v. Richter***, 131 S. Ct. 770, 786-87 (2011).

The improper points as reflected above were the result of fraud committed upon the court where the State created the scoresheet used in this case and advised the court that the victim was penetrated for the counts in question knowing full well that the State previously swore under oath that the victim was not penetrated.

This Honorable Court held in ***Hazel-Atlas Glass Co. v Hartford-Empire Co.***, 88 LED 1250, 322 U.S. 238 (1944) that:

> "The court below should have set aside its decision because it was the result of fraud practiced on the court itself."

The State knew that the Petitioner did not penetrate the victim for the counts in question and therefore the (240) points for penetration should not have been assessed and utilized to increase his sentence above that was permitted by law.

Question (2)

WHETHER AN UNLAWFUL SEIZURE HAS OCCURRED WHERE A STATE IMPRISONS A CITIZEN LONGER THAN THAT WHICH IS PERMITTED BY LAW AS A RESULT OF FRAUD BEING COMMITTED UPON A COURT?

The Petitioner would reassert that he is currently being unlawfully detained within the Florida Department of Corrections as a result of fraud being committed upon the court. The Petitioner, absent the improper penetration points, would only have scored out to a sentence of 8.64 years in prison as outlined above and asserted within the State court. The Petitioner has been incarcerated for these offenses since April 8, 2004, which means the Petitioner's sentence, absent good time credits, would have expired in 2012.

The improper points as reflected above were the result of fraud committed upon the court where the State created the scoresheet used in this case and advised the court that the victim was penetrated for the counts in question knowing full well that the State previously swore under oath that the victim was not penetrated and the victim admitted as much within the police report that spawned the States Charges.

The Petitioner would reassert that this Honorable Court held in ***Hazel-Atlas Glass Co. v Hartford-Empire Co.***, 88 LED 1250, 322 U.S. 238 (1944) that:

> "The court below should have set aside its decision because it was the result of fraud practiced on the court itself."

The State knew that the Petitioner did not penetrate the victim for the counts in question and therefore the (240) points for penetration should not have been assessed and utilized to increase his sentence above that was permitted by law.

The Petitioner is still incarcerated (10) years after his sentence would have expired absent the unlawful penetration points. The Fourth Amendment to the United States Constitution protects

the Petitioner from unlawful detainment or seizure and therefore this Honorable United States Supreme Court has the jurisdiction to correct this violation via certiorari. See ***United States v. Tucker***, 404 U.S. 443, 447, 92 S. Ct. 589, 591-592, 30 L.Ed.2d 592 (1972): "a sentence founded at least in part upon misinformation is of constitutional magnitude." Citing ***Townsend v. Burke,*** 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L. Ed . 2d 1690 (1948); ***U.S. v. Evans***, 880 F. 2d 376 (11th Cir. 1989); ***U.S. v. Reme***, 738 F. 2d 1156 (11th Cir. 1984). See also ***Harrington v. Richter***, 131 S. Ct. 770, 786-87 (2011).

The State trial court failed to adhere to the tenets of this Honorable Court's decisions in ***Blakely v. Washington***, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); ***Apprendi v. New Jersey,*** 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ***Duncan v. Louisiana,*** 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) all of which were controlling at the time of the Petitioner's sentence and the State trial court's decision is in direct conflict with the precedent as cited above. Under the facts of this case certiorari review is warranted.

B. Importance of the Questions Presented:

This case presents a fundamental question of the interpretation of this Court's decisions in ***Blakely v. Washington***, 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004***); Apprendi v. New Jersey***, 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ***Duncan v. Louisiana***, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

The first question regarding whether due process of law is violated where a sentence is increased based upon facts not inherent in the charging information or proven by a jury beyond reasonable doubt is of great public importance because it effects every court in the United States that is confronted with a Charging Information or Indictment as sworn to by the State as true is

later disputed by the State during a critical stage in the judicial proceedings. The State in the Petitioner's case as well as the victim swore via an Information that the victim was not penetrated for the counts asserted herein and then at sentencing swore that Penetration did occur. Where sworn testimony from the State asserts that penetration of the victim did not occur, the State should not be permitted to later seek an enhanced penalty based upon sworn testimony from the State that penetration did occur during a plea hearing. This question involves an unlawful fourth amendment seizure, sixth amendment increased sentence, and a fifth and fourteenth amendment right to due process of law regarding contrary facts sworn to by the State to unlawfully increase a sentence beyond the maximum permitted by law. See ***Blakely v. Washington,*** 542 U.S. 296, 310, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); ***Apprendi v. New Jersey,*** 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ***Duncan v. Louisiana,*** 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). See also ***United States v. Tucker***, 404 U.S. 443, 447, 92 S. Ct. 589, 591-592, 30 L.Ed.2d 592 (1972): "a sentence founded at least in part upon misinformation is of constitutional magnitude." Citing ***Townsend v. Burke***, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L. Ed . 2d 1690 (1948); ***U.S. v. Evans***, 880 F. 2d 376 (11th Cir. 1989); ***U.S. v. Reme***, 738 F. 2d 1156 (11th Cir. 1984). See also ***Harrington v. Richter***, 131 S. Ct. 770, 786-87 (2011).

The second question regarding whether an unlawful seizure has occurred where a state imprisons a citizen longer than that which is permitted by law as a result of fraud being committed upon a court is of great public importance because it affects every court in the United States that is confronted with fraud being committed upon a court by the State in order to seek an enhanced sentence via a plea agreement.

As the law currently stands, this Honorable Court held in ***Hazel-Atlas Glass Co. v Hartford-Empire Co.***, 88 LED 1250, 322 U.S. 238 (1944) that:

> "The court below should have set aside its decision because it was the result of fraud practiced on the court itself."

The Petitioner has been unable to locate a case from this Honorable Court where a verdict or sentence has been set aside in a criminal case as a result of fraud being committed upon the court but only fraud being committed within the civil context outlined within Hazel, supra. This question involves an unlawful fourth amendment seizure, sixth amendment increased sentence, and a fifth and fourteenth amendment right to due process of law regarding contrary facts sworn to by the State to unlawfully increase a sentence beyond the maximum permitted by law.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully Submitted,

/s/ _____

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