No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BAXTON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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7 November 2023

QUESTIONS PRESENTED FOR REVIEW

The U.S. Constitution demands that a conviction may stand only on evidence of each element of the offense proved beyond a reasonable doubt. When an element is not proved, or when jury instructions are incorrect such as to lead to a finding of guilt that is not lawful, the Sixth Amendment is violated.

To convict Petitioner of racketeering, the government was required to prove the existence of the criminal enterprise and, separately, at least two predicate acts. With all the prior bad act evidence the government presented, and with Petitioner's reasons for believing some of this conduct were not qualifying predicates or were based on evidence that would be ruled inadmissible, Petitioner asked for a special verdict so that the record would reflect what the jury had concluded were the predicate acts. The district court denied him the request, and the Fourth Circuit rejected Petitioner's argument on direct appeal that the district court erred in denying his request for a special verdict.

One of the charged predicate acts was attempted second-degree murder under North Carolina law. The jury instructions went into that allegation in detail, affirmatively stating that it qualified as a predicate act. But this affirmative statement was false, as the offense did not even exist under North Carolina law. But Petitioner's counsel had not objected to that jury instruction. When Petitioner complained that counsel was ineffective for failing to object, the district court's response was that Petitioner could not show prejudice because of the amount of prior bad acts. Of course, Petitioner could not show prejudice because he had been denied the special verdict he had requested. More importantly, however, the district court defied this Court's case law by applying plain error by reviewing for whether the evidence was sufficient to sustain the verdict but for the error, rather than by reviewing for whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

The jury instructions also failed to list "interdependence" as an element of the racketeering conspiracy. A circuit conflict exists as to whether interdependence is an element of the offense that needed to be proved to the jury beyond a reasonable doubt. Cf. 4th and 10th Circuit cases. To reject Petitioner's argument that his counsel was ineffective for failing to object to the lack of this element, the district court relied on a Fourth Circuit case that passively did not list the element, ignoring another Fourth Circuit case that listed it and case law from the Tenth Circuit that lists it as an element.

Accordingly, the first question for the Court is whether the district court and Fourth Circuit have ignored the Court's decisions in *Brecht* and *Kotteakos* stating that the harmless error review of incorrect jury instructions is not whether the evidence would be sufficient to find guilt without the error but whether the error had substantial and injurious effect or influence in determining the jury's verdict. The second question for the Court is whether "interdependence" is an element of conspiracy and therefore an element of racketeering conspiracy.

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Baxton respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit, declining to issue a certificate of appealability and affirming the district court's denial of Petitioner's motion under 28 U.S.C. § 2255 is unpublished. *United States v. James Baxton*, No. 22-36468 (4th Cir. Aug. 10, 2023). Pet. App. 1a. The memorandum order of the U.S. District Court for the Western District of North Carolina denying Petitioner's motion under 28 U.S.C. § 2255 is also unpublished. *James Baxton v. United States*, No. 3:21-cv-00420 (W.D.N.C. Feb. 16, 2022). Pet. App. 4a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction as Petitioner James Baxton filed a motion under 28 U.S.C. § 2255 a year of the date his federal convictions became final. See *Clay v. United States*, 537 U.S. 522, 527, 532 (2003); 28 U.S.C. § 2255(f)(1).

The Fourth Circuit had jurisdiction, as Petitioner timely filed an application for certificate of appealability following the district court's denial of his § 2255 motion. See 28 U.S.C. § 1291; 28 U.S.C. § 2253(c).

This Court has jurisdiction under 28 U.S.C. § 1254(1), as Petitioner is filing this petition within 90 days of the Fourth Circuit's decision finding that the district court's decision was not debatable, Petitioner's application for certificate of appealability and affirming the district court. See Sup. Ct. R. 13.1, 13.3., 29.2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

U.S. Const. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> Constitutional right to be convicted only on proof of all elements beyond a reasonable doubt.

U.S. Const. amend. VI.

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > * * *
> >
> > (B) the final order in a proceeding under [28 U.S.C. § 2255].
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

STATEMENT OF THE CASE

The Court has held that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2009). The proper standard of review in this circumstance is not to review whether evidence was otherwise sufficient but for the error but to question whether the flaw in the instructions "had substantial and injurious effect or influence in

determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted).

1. Petitioner and others were charged with a racketeering conspiracy in violation of 18 U.S.C. § 1962(d). To obtain Petitioner's conviction, the government was required to prove beyond a reasonable doubt "a pattern of racketeering activity," i.e., that Petitioner agreed to the commission of no fewer than two predicate acts in support of the enterprise. See *H.J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 240-42 (1989).

2. The record demonstrates that the government's plan for proving that Petitioner had engaged in two predicate offenses was largely hinged on showing that Petitioner had committed attempted second-degree murder under North Carolina law. But it is also true that the government referenced several other potential predicate offenses. In light of the number of alleged predicate acts and his arguments that some of the evidence of predicate acts was inadmissible, Petitioner requested a special verdict. Only with a special verdict would the record show which predicate offenses the government had proved. But the district court denied Petitioner's request for that special verdict.

3. Throughout the jury trial, the government asserted that one predicate offense was attempted second-degree murder under North Carolina law. At the conclusion of the presentation of evidence, the jury was affirmatively instructed that attempted second-degree murder under North Carolina law could qualify as a predicate offense. But as a matter of law, this offense could not be a predicate offense for a racketeering conspiracy. Accordingly, this instruction to the jury that a certain prior offense could qualify as a predicate act was legally erroneous.

4. Through a general verdict, the jury found Petitioner guilty of the racketeering conspiracy. Petitioner appealed. Among his arguments was that the district court erred in denying his request for a special verdict. The Fourth Circuit affirmed. *United States v. Gutierrez*, 963 F.3d 320 (4th Cir. 2020).

5. While Petitioner's pro se motion under 28 U.S.C. § 2255 motion was not a model of clarity, the district court's memorandum opinion demonstrates that the motion was more than sufficient to convey accurately two arguments that his trial counsel was prejudicially ineffective failing to object to certain jury instructions. First, Petitioner noted that his trial counsel was ineffective failing to object legally false instruction that attempted second-degree murder offense under North Carolina law was a predicate act on which the jury could rely to find Petitioner guilty of the racketeering conspiracy. To deny relief, the district court did not disagree with the conclusion that, as a matter of law, North Carolina's attempted second-degree murder could not be a predicate offense because no such offense exists. Instead, the district court resorted to denying relief on a conclusion that any error was harmless. Harmless error review was appropriate. But in executing it, the district court ignored this Court's directive not to review for whether the evidence was otherwise sufficient to support the verdict. Pet. App. 14a.

7. Petitioner's second ineffective assistance of counsel claim relevant here was that trial counsel erred in failing to object to a lack of jury instruction that an element of the conspiracy offense was "interdependence." The district court denied relief, pointing to a Fourth Circuit case that did not list "interdependence" as an element. Pet. App. 15a. In reaching this decision, the district court did not recognize a Fourth Circuit case that listed "interdependence" as an element

or Tenth Circuit case law listing it as an element and explaining why it was an element of conspiracy.

8. The Fourth Circuit denied Petitioner's timely application for certificate of appealability. Pet. App. 2a, 3a.

Petitioner stands wrongfully convicted of racketeering conspiracy. He remains incarcerated at U.S.P. Canaan under a term of incarceration of 240 months.

REASONS FOR GRANTING THE PETITION FOR WRIT

This case presents important constitutional and procedural questions regarding legally inaccurate jury instructions, jury instructions that eliminate the government's burden of proof, and the lower courts failing to use the appropriate standard of review set forth by this Court. Granting the writ is not only required to correct the injustices in this case but to reinforce for the lower courts the procedures for reviewing cases involving inaccurate instructions and those that lead to constitutional violations, and the repercussions for these errors.

First, the government's case sought to show that Petitioner was guilty of the racketeering conspiracy based on an alleged predicate offense of attempted second-degree murder under North Carolina law. But it is undisputed that offense was not a valid, qualifying predicate offense. The Court has noted both that a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one and that, when this error occurs, harmless error review applied. But the Court has been equally clear that review does not mean simply asking whether the evidence was overwhelming. After all, with the emphasis the government placed on the attempted second-degree murder, it is entirely possible and even likely the jury relied on the murder to find Petitioner guilty. Instead, the Court has

directed courts to ask whether the flaw in the instructions had substantial and injurious effect or influence in determining the jury's verdict. In this case, the district court denied relief by failing to follow this Court's directive, using the incorrect standard, and finding that the evidence was overwhelming. Under the correct standard, Petitioner was due relief.

Second, the district court's instructions to the jury failed to list as an element of racketeering conspiracy "interdependence." Petitioner pointed to Fourth Circuit case law listing this element. The district court pointed to Fourth Circuit case law not listing this element. If the Fourth Circuit case law stating that "interdependence" is an element is correct, the district court and Fourth Circuit have wrongly ignored that case law here. If the Fourth Circuit's case law instead means that "interdependence" is not an element, a circuit conflict exists, as the Tenth Circuit has definitively found that interdependence is an element of a conspiracy.

The Court should accept jurisdiction, address and resolve these three important constitutional questions.[1] The issues in the first question shows that the decision of the circuit court below conflicted with relevant decisions of this Court. See Sup. Ct. R. 10(c). The issue in the second shows that the decision of the circuit court conflicts with a decision of another circuit

[1] Additional questions are inherently involved, of course. Petitioner asserted below that his trial counsel failed to provide the constitutionally required effective assistance by failing to raise these objections to the jury instructions. See *Strickland v. Washington*, 466 U.S. 668, 686-90 (1984). The district court disagreed. In response, Petitioner argued to the district and circuit courts that the district court's decisions finding counsel effective were debatable among jurists of reason and deserved encouragement to proceed further. See *Buck v. Davis*, 580 U.S. 100, 124 (2017). The lower courts disagreed. Accordingly, the additional questions potentially before the Court are whether the district court's decision finding that counsel's conduct was objectively unreasonable, whether Petitioner was prejudiced, and whether the lower courts' rulings were debatable and worthy of further review. But because those questions turn on, and are answered by, rulings on the questions presented to the Court, Petitioner does not brief them in this petition for writ of certiorari.

on the same important matter which is an important issue that has not been but should be addressed by this Court. See Sup. Ct. R. 10(c).

I. The Court Should Grant Certiorari to Address and Correct the District Court's Failure to Follow this Court's Direction on the Standard of Review for when a Jury was Instructed on Alternative Theories of Guilt and Relied on an Invalid One.

A. To prove guilt on a charge of racketeering conspiracy, the government is required to prove a "pattern of racketeering activity," meaning no fewer than two qualifying predicate acts that supported the enterprise.

To obtain a conviction for racketeering conspiracy in violation of 18 U.S.C. § 1962(d), the government must prove beyond a reasonable doubt several elements including that the defendant engaged in a "pattern of racketeering activity." To show "a pattern of racketeering activity," the government must establish that the defendant agreed to the commission of no fewer than two predicate acts, that the predicate acts were related, and that the acts amount to, or otherwise constitute, a threat of continuing racketeering activity in support of the enterprise. *H.J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 240-42 (1989). The continuity in combination with the relationship produces the pattern required under the statute. *Id*. at 239.

B. A conviction may not rest on an instruction to the jury on a theory of guilt that is legally incorrect.

"A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2009) (citing *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957)). A conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). An erroneous charge is worse than equivocal. *Id*.

C. The government's case against Petitioner was substantially based on a theory that Petitioner was guilty of an offense that is not a qualifying predicate offense, and yet the jury was instructed that the offense.

The government presented multiple theories of guilt—potential predicate offenses from which it hoped the jury would find at least two were related to and in support of the enterprise and proved beyond a reasonable doubt. Potentially because of the inflammatory nature of the crime, the government's case had a focus on an alleged attempted second-degree murder under North Carolina law. The district court very specifically instructed the jury that this attempted second-degree murder offense was a qualifying predicate offense. Because the district court denied Petitioner's request for a special verdict was denied (a decision affirmed on direct appeal), the jury's verdict finding Petitioner guilty was a general verdict. A challenge is appropriate because that general verdict was returned when the jury was instructed on alternative theories of guilt and may have relied on an invalid one. See *Pulido*, 555 U.S. at 58. The theory that attempted second-degree murder in North Carolina was a qualifying predicate offense was invalid because the offense does not exist.[2]

D. When a general verdict is returned and an alternative theory of guilt was instructed, harmless error review is not simply an assessment of whether the evidence was otherwise sufficient or overwhelming.

The appropriate standard of review is to question whether the flaw in the instructions "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted). If an error had a

[2] See *State v. Coble*, 351 N.C. 448, 451, 527 S.E.2d 45, 48 (2000) ("Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical impossibility under North Carolina law."). The district and circuit courts assumed without deciding that the offense was not a valid predicate offense and, for that reason, Petitioner does not further brief that issue for the Court in this petition.

substantial influence, or if the record is so evenly balanced that a conscientious judge is in "grave doubt" as to whether it had such an effect, the conviction must be reversed. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995).

As the Court cautioned in *Kotteakos v. United States*, 328 U.S. 750 (1946), in undertaking harmless-error analysis "it is not the [reviewing] court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out." *Id*. at 763 (citations omitted). Thus, "[t]he inquiry cannot be merely whether there was enough to support the result" in the absence of the error. *Id*. at 765. Rather, the proper question is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id*.

E. The district court below failed to follow this Court's directives, denying relief on a finding that sufficient evidence supported the result rather than inquiring whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

Petitioner recognizes that harmless error review applies. But the Court's case law reflects the reality that harmless error review in a circumstance like this cannot simply be the process of a court assuming the role of the jury and, with the benefit of hindsight, consider whether there was another theory of guilt that the jury might have found credible and proved beyond a reasonable doubt. This is why the lower courts are required to review for whether the errors had a substantial and injurious effect or influence in determining the jury's verdict.

The district court reviewed for whether the evidence presented against Petitioner was sufficient to otherwise support the verdict, thereby assuming the role of the jury and, in its place, deciding that the other evidence supporting other theories of guilt was credible and proved

beyond a reasonable doubt. The district court's ruling was that "the evidence that the Government presented in this regard was overwhelming" and that "there was no reasonable probability that the outcome of the trial would have been different." Pet. App. 14a. This review was conducted in direct contravention of *Brecht* and *Kotteakos*, as the district court inquiry was "merely whether there was enough to support the result" in the absence of the error—precisely the opposite of what the Court has instructed. See *Kotteakos*, 328 U.S. at 765.

The district court's citation to *United States v. Borromeo*, 954 F.2d 245 (4th Cir. 1992), further demonstrates that the district court applied the wrong standard. *Borromeo* predated *Brecht* by a year. Failing to recognize *Kotteakos* (and failing to cite any decision of this Court), the *Borromeo* court reviewed an argument that the jury had been improperly instructed as to an element of a racketeering conviction, finding any error harmless. Setting aside the obvious distinguishing factor that an error undisputedly occurred in the instructions in this case, the *Borromeo* decision shows that court reviewed for whether there was a reasonable probability that the outcome of the trial would be different, contrary to *Brecht* and *Kotteakos*. *Id.* at 248.

F. Writ of certiorari is appropriate because, under the correct standard, the error in this case had a substantial and injurious effect or influence in determining the jury's verdict.

The evidence may have been "overwhelming," as the district court reported, in the sense that the government presented several alternative theories on which the jury could find two or more predicate acts. But this was irrelevant. Considering, the incendiary nature of an attempted second-degree murder claim, the government's focus on alleging Petitioner was connected to that offense and that it supported the alleged enterprise, and the jury instructions' focus on that offense, falsely asserting that it was a valid predicate offense, a reasonable court applying the

correct standard would have found that the error had a substantial and injurious effect on the jury's decision to find Petitioner guilty. Petitioner asks the Court to grant this petition for writ of certiorari and order full briefing on this important legal question.

II. The Court Should Grant Certiorari to Address and Resolve a Circuit Split on whether "Interdependence" is an Element of Conspiracy.

A. A conviction may only rest on proof of each element of the offense beyond a reasonable doubt.

The Due Process Clause of the Fifth Amendment denies governments the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. See *In re Winship*, 397 U.S. 358, 364 (1970) (relating to a state's power and the limitations placed by the Fourteenth Amendment's Due Process Clause). Jury instructions relieving a state or the federal government of this burden violate a defendant's due process rights. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979). "Such directions subvert the presumption of innocence afforded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989).

B. The Court has not addressed whether "interdependence" is an element of conspiracy, leaving the circuit courts to address this issue.

The Court has noted that 18 U.S.C. § 1962(d)

> makes it unlawful to "conspire to violate" [the Racketeer Influenced and Corrupt Organizations Act], which makes it unlawful, among other things, "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]"

Smith v. United States, 568 U.S. 106, 110 fn.3 (2013) (citing 18 U.S.C. § 1962(c)).

The *Smith* Court did not list "interdependence" as an element, and Petitioner's search of the Court's case law finds no mention of that element in conjunction with racketeering conspiracy or any federal conspiracy. The *Smith* Court's footnote may not have been an exhaustive review of the elements, however.

The Fourth Circuit has case law including "interdependence" as an element of conspiracy and other case law that does not. In *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (*en banc*), the Fourth Circuit sitting en banc listed the elements of conspiracy and did not list interdependence: "(1) an agreement to possess cocaine with intent to distribute existed between two or more persons; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of this conspiracy." *Id*. at 857. But in the more recent case, *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001), the Court listed interdependence as a element of conspiracy: "(1) an agreement with another person to violate the law, (2) knowledge of the essential objectives of the conspiracy, (3) knowing and voluntary involvement, and (4) interdependence among the alleged conspirators." *Stewart*, 256 F.3d at 250.

In support of the finding that interdependence was an element of conspiracy, the *Stewart* decision cited Fourth Circuit, as well as First and Tenth Circuit case law dating back to 1986: *United States v. MacDougall*, 790 F.2d 1135, 1146 (4th Cir. 1986) (noting that a pattern of mutual cooperation between participating individuals demonstrates the requisite level of interdependence to support a conspiracy); *United States v. Portela*, 167 F.3d 687, 697 (1st Cir.1999) (noting that the requisite level of interdependence had been established when "there was sufficient evidence for the jury to conclude that [the appellant] understood that his transaction's success depended on the health of the trafficking"). The cases the Fourth Circuit

cited in *Stewart* were consistent in requiring the government to present proof of interdependence, showed that the *Stewart* decision was not an outlier, and arguably showed that *Stewart* was on firmer footing than *Burgos* when it came to this narrow issue. After all the Court was not required to reach for issues not presented to it, see *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868 (1976), and the *Burgos* court was not asked to determine whether the interdependence element was wrongly omitted.

The Tenth Circuit is not ambiguous on this subject. "If the activities of a defendant charged with conspiracy facilitated the endeavors of other alleged coconspirators or facilitated the venture as a whole, evidence of interdependence is present." *United States v. Horn*, 946 F.2d 738, 741 (10th Cir. 1991).

> To obtain a conspiracy conviction, the government must prove: (1) an agreement by two or more persons to violate the law; (2) knowledge of the objectives of the conspiracy; (3) knowing and voluntary involvement in the conspiracy; and (4) interdependence among co-conspirators.

United States v. Foy, 641 F.3d 455, 465 (10th Cir. 2011) (internal quotes omitted). The interdependence prong is "a focal point" of this conspiracy analysis. *United States v. Caldwell*, 589 F.3d 1323, 1329 (10th Cir. 2009) (quotation marks, citation omitted). This remains the Tenth Circuit's position. See *United States v. Alcorta*, 10th Dist. No. 20-3198, 2023 U.S. App. L:EXIS 13975, *7 (10th Cir. Jun. 6, 2023).

C. In this case, the conflict is dispositive; if Tenth Circuit's view is correct, Petitioner has been denied his Fifth and Sixth Amendment rights.

The district court's instructions to the jury in this case failed to list as an element of racketeering conspiracy "interdependence." Petitioner pointed to Fourth Circuit case law listing

this element when arguing that his counsel had been ineffective in failing to object. In response, the district court was able to point to Fourth Circuit case law not listing this element.

If the Fourth Circuit case law stating that "interdependence" is an element is correct, the district court and Fourth Circuit have wrongly ignored that case law here. If the Fourth Circuit's case law instead means that "interdependence" is not an element, a circuit conflict exists, as the Tenth Circuit has definitively found that interdependence is an element of a conspiracy.

Petitioner asks the Court to grant this petition for writ of certiorari and order full briefing on this important legal question that is the subject of a circuit split and an issue that the Court has not addressed but should address.

CONCLUSION

Petitioner James Baxton submits that his petition for writ of certiorari should be granted for the compelling reasons noted above. He asks the Court to grant his petition and grant full briefing in this important matter to address and resolve these important legal questions.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 7 November 2023

by: /s/ Jeffrey M. Brandt

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari and the following appendix were served by U.S. Priority Mail on the date I reported below upon the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and Assistant U.S. Attorneys Elizabeth M. Greenough, Office of the U.S. Attorney, 227 West Trade Street, Suite 1650, Charlotte, NC 28202 and Amy E. Ray, Office of the U.S. Attorney, 100 Otis Street, Room 233, Asheville, North Carolina 28801.

Dated: 7 November 2023

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt

APPENDIX