

IN THE SUPREME COURT OF THE UNITED STATES

BLAIR THOMAS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

KENNETH A. BLANCO
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether attempted robbery of a postal employee while putting the employee's life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a), qualifies as a "crime of violence" under 18 U.S.C. 924(c).

2. Whether the district court abused its discretion in denying petitioner's motion for a mistrial based on comments made by the prosecutor in rebuttal closing argument.

3. Whether the government violated the Fourth Amendment by obtaining business records pertaining to petitioner's online retail transaction from a third-party merchant.

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No. 17-6025

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not published in the Federal Reporter but is available at 2017 WL 3028606.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2017. The petition for a writ of certiorari was filed on September 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of attempted robbery of a postal employee while putting the employee's life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a); one count of bank robbery, in violation of 18 U.S.C. 2113(a); one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g); one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i); and one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Petitioner was sentenced to a total term of 384 months of imprisonment, to be followed by three years of supervised release. C.A. App. 3-5. The court of appeals affirmed. Pet. App. A1-A14.

1. On January 22, 2014, petitioner entered a post office in Yeadon, Pennsylvania, wearing a mask with a fake mustache, a hat, and a pair of glasses. Pet. App. A2, A5. Petitioner handed the postal clerk a note indicating that he had a gun and demanding \$10,000 in money orders. Id. at A2. The postal clerk fled the office, and petitioner left empty-handed. Ibid.

Later the same day, petitioner entered a post office in nearby Darby, Pennsylvania. Pet. App. A3. Wearing the same mask, petitioner demanded \$10,000 in money orders from the postal clerk.

Id. at A3, A5. When the clerk asked for identification, petitioner pointed a gun at her and told her it was a robbery. Id. at A3; Presentence Investigation Report (PSR) ¶ 13. When a customer and postal carrier entered the office, petitioner fled. Pet. App. A3.

The next morning, petitioner entered a Wells Fargo Bank in nearby Springfield, Pennsylvania, wearing the same mask. Pet. App. A3, A5. Petitioner handed the bank greeter a note announcing that he was committing a robbery; the greeter took him to a bank teller. PSR ¶¶ 16-17. Petitioner demanded that the teller put money in his duffel bag and escort him to the bank vault. Pet. App. A3. Bank employees stuffed nearly \$2,000 into the duffel bag, but refused to take petitioner to the vault. Ibid.; PSR ¶¶ 17-18. Petitioner fled with the cash. PSR ¶ 18.

After law enforcement officers disseminated surveillance photos to the media, they received an anonymous tip to contact the owner of a special effects mask company. Pet. App. A3; PSR ¶ 20. Officers contacted the owner, who recognized the mask used in the robberies as a "Raj" mask, which his company sold over the internet. Pet. App. A3-A4. The owner provided the officers with records showing that he had sold a Raj mask to petitioner in late December 2013, and included the mailing address associated with the purchase. Id. at A4; PSR ¶ 21.

Using that information, law enforcement officers obtained a search warrant for petitioner's residence. Pet. App. A4. As they

approached the residence to execute the warrant, petitioner arrived in his vehicle. Ibid. An officer directed petitioner to stop and to show his hands, but petitioner did not comply. Ibid. Instead, the vehicle moved three to five feet toward the officer before another officer pulled petitioner from the driver's seat. Ibid.

In a search of petitioner's residence, officers found a U.S. Postal Service box containing the mask from the special effects company, a loaded pistol, and \$3,000 in cash. Pet. App. A4; PSR ¶ 25. In petitioner's car, officers found a notebook with imprinted writing on the cover, which read: "This is a robbery. I have a gun. Stay calm and print ten money orders, \$1,000." Pet. App. A4-A5; PSR ¶ 26.

Upon arrest, petitioner waived his right to remain silent. In a written confession, petitioner admitted that he had committed the two attempted robberies at the post offices and the robbery at the bank; that he had purchased the "Raj" mask online and wore that mask in all of the robberies; and that he had used a gun at the two post offices. Pet. App. A5.

2. A federal grand jury charged petitioner with two counts of attempted robbery of a postal employee while putting the employee's life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a); one count of bank robbery, in violation of 18 U.S.C. 2113(a); one count of possession of a

firearm by a felon, in violation of 18 U.S.C. 922(g); one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i); and one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). C.A. App. 36-42.

A four-day trial was held. In her closing argument, petitioner's counsel referenced the testimony of two law enforcement officers that, when petitioner was arrested, his vehicle had rolled toward one of the officers after he disregarded the officer's command to stop. Pet. App. A6. Petitioner's counsel claimed that "[t]hat's not what happened" and asserted that the officers' testimony was "just irresponsible." Ibid. The government, which had not referred to the incident in its initial closing argument, stated on rebuttal that the jury had heard "no evidence to suggest anything different other than [the officers'] testimony" and that "the defense ha[d] not presented any evidence." Id. at A6-A7 (emphasis omitted). After a sidebar at which the court informed the parties that it would instruct the jury to disregard the prosecutor's latter statement, the government told the jury that its point was that defense counsel's assertions were mere "argument," inasmuch as the jury "did not hear evidence suggesting that that's not what happened." Id. at A7 (emphasis omitted). The court then instructed the jury that "any suggestion

that the defense needs to put on any evidence should be completely disregarded” because petitioner “ha[d] zero, and I repeat zero, obligation to present any evidence on any issue.” Ibid. Following that instruction, the government stated to the jury that defense counsel’s assertions in closing were “argument and not evidence” and that “there was no evidence to show anything other than what the agents told you about what happened with the car.” Ibid. (emphasis omitted). After closing arguments, the court “emphasize[d] one more time” to the jury that petitioner had “zero obligation to present any evidence with respect to any element or any accusation in this case.” Id. at A8.

The district court instructed the jury that, to find petitioner guilty on the two Section 2114(a) counts for attempted robbery of a postal employee, it had to find that petitioner “put the life of a postal employee * * * in jeopardy by use of a dangerous weapon.” C.A. Supp. App. 399. The court further instructed the jury, without objection by petitioner, that “[t]he offenses alleged in [the two Section 2114(a) counts] are crimes of violence” within the meaning of Section 924(c). Ibid. The jury found petitioner guilty on all counts. Pet. App. A8.

Petitioner moved for a mistrial based on the prosecutor’s statements in rebuttal, and the district court denied the motion. Pet. App. A8; C.A. App. 20. Although the court stated that the prosecutor’s comments had “improperly suggested a shift of the

burden of proof from the government to [petitioner]," the court found it "highly probable" that the comments had not affected the verdict. C.A. App. 20 n.1. In finding the statements harmless, the court emphasized "the context of the [prosecutor's] remarks"; the court's "forceful curative instruction[s]"; and the "overwhelming" evidence of petitioner's guilt. Id. at 20-21 n.1.

The district court sentenced petitioner to concurrent terms of 24 months of imprisonment on the non-Section 924(c) counts, a consecutive term of 60 months on the first Section 924(c) count, and a consecutive term of 300 months on the second Section 924(c) count, for a total term of 384 months of imprisonment, to be followed by three years of supervised release. C.A. App. 3-5.

3. The court of appeals affirmed. Pet. App. A1-A14.

Petitioner argued for the first time on appeal that his Section 924(c) convictions were invalid because he had not committed a predicate offense that qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3). Section 924(c)(3) defines a "crime of violence" as a felony "offense" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A); or (2) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B). Petitioner argued that attempted robbery in violation of 18 U.S.C.

2114(a) does not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. C.A. Br. 35-52.

The court of appeals rejected petitioner's argument. Following circuit precedent, the court analyzed whether the "jury's determination of the facts" established that petitioner committed a predicate offense involving the use, attempted use, or threatened use of physical force under Section 924(c)(3)(A). Pet. App. A13 (quoting United States v. Robinson, 844 F.3d 137, 141 (3d Cir. 2016), cert. denied, No. 17-5139 (Oct. 2, 2017)). The court noted that, under the jury instructions, the jury specifically found that petitioner had "put the life of a postal employee . . . in jeopardy by use of a dangerous weapon." Ibid. The court therefore concluded that the jury "had an adequate factual basis" to determine that petitioner's offense qualified as a crime of violence under Section 924(c)(3)(A) and did not reach petitioner's arguments concerning Section 924(c)(3)(B). Ibid.

The court of appeals also rejected petitioner's claim that the district court abused its discretion in declining to declare a mistrial based on the prosecutor's rebuttal comments. Pet. App. A9-A11. The court of appeals expressed doubt about whether the prosecutor's comments "even constituted impermissible burden shifting." Id. at A10. And it determined that even if they were

improper, a new trial was not required because the "remarks pertained to a collateral issue"; the district court had given appropriate curative instructions; and the evidence against petitioner, which included "extensive witness testimony, physical evidence, and a written confession," was "'overwhelming.'" Id. at A10-A11 (quoting C.A. App. 21 n.1).

Finally, the court of appeals rejected petitioner's claim that the search warrant for his residence was invalidly premised on information obtained from the owner of the mask company without a warrant. Pet. App. A13-A14. Noting this Court's holding in Smith v. Maryland, 442 U.S. 735, 743-744 (1979), that an individual has "no legitimate expectation of privacy in information he voluntarily turns over to third parties," the court reasoned that petitioner had voluntarily disclosed his name and address when purchasing the mask. Pet. App. A14.

ARGUMENT

Petitioner contends (Pet. 11-13) that his Section 924(c) convictions are invalid because he did not commit a crime of violence within the meaning of 18 U.S.C. 924(c)(3)(A). Petitioner's claim lacks merit, and he cannot satisfy the plain-error standard applicable to that forfeited claim. The predicate offense at issue -- attempted robbery of a postal employee while putting the employee's life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a) -- necessarily involves

"the use, attempted use, or threatened use of physical force against the person or property of another" and therefore qualifies as a crime of violence under Section 924(c)(3)(A). Petitioner suggests (Pet. 12) that the court of appeals erred by failing to conduct its analysis using the categorical approach, but his methodological criticism makes no difference because the same result would obtain under the categorical approach.

Petitioner's other arguments also do not warrant review. The court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's motion for a mistrial and that the government did not violate the Fourth Amendment by acquiring petitioner's name and address from the third-party mask seller. And those rulings do not conflict with any decision of this Court or another court of appeals.

1. a. As petitioner acknowledged below (Pet. C.A. Br. 3-4, 50-52), his argument attacking his Section 924(c) convictions was not raised in district court and thus is reviewable only for plain error. To establish plain error under Federal Rule of Criminal Procedure 52(b), petitioner must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious"; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (citations

omitted). Petitioner cannot show any error, much less clear or obvious error, in the district court's instruction to the jury that petitioner's Section 2114(a) offenses were crimes of violence.

As noted, Section 924(c)(3) defines a "crime of violence" as including, inter alia, a felony "offense" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A). This Court has held that identical language in another statute requires a categorical approach under which courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime," to determine whether the offense fits that definition. Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (interpreting 18 U.S.C. 16(a)). Where, as here, a defendant is convicted under a statute that enumerates several offenses with different penalties, the court may look to specified record materials, including "jury instructions," to "determine what crime, with what elements, a defendant was convicted of." Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

The predicate offense at issue in this case is attempted robbery of a postal employee while putting the employee's life in jeopardy by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a). Section 2114(a) provides that "[a] person who * * * attempts to rob" any "person having lawful charge, control, or

custody of any mail matter or of any money or other property of the United States" shall be punished as set forth in the statute. 18 U.S.C. 2114(a). If only those elements are satisfied, the maximum sentence is ten years of imprisonment. But if the defendant, in "attempting to effect such robbery," also "puts [the employee's] life in jeopardy by the use of a dangerous weapon," the maximum sentence increases to 25 years of imprisonment. Ibid. Because a finding that the defendant put an employee's life in jeopardy by use of a dangerous weapon increases the penalty for the crime, that finding "must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013); see Apprendi v. New Jersey, 530 U.S. 466 (2000).

Petitioner was convicted of the aggravated version of attempted robbery under 18 U.S.C. 2114(a). Consistent with Alleyne and Apprendi, the district court instructed the jurors that, in order to "find [petitioner] guilty" on the Section 2114(a) counts, they had to find that petitioner "put the life of a postal employee * * * in jeopardy by use of a dangerous weapon." C.A. Supp. App. 399. Because using a dangerous weapon to place an employee's life in jeopardy involves the use, attempted use, or threatened use of physical force against the employee, petitioner's offense necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of 18 U.S.C. 924(c)(3)(A). See United

States v. Enoch, 865 F.3d 575, 580-582 (7th Cir. 2017) (concluding that same offense categorically qualifies as a crime of violence under Section 924(c)(3)(A)). The district court therefore correctly instructed the jury that “the offenses alleged in [the Section 2114(a) counts] are crimes of violence.” C.A. Supp. App. 399.

b. Petitioner suggests (Pet. 10-13 & n.2) that the court of appeals erred in declining to apply the “categorical approach” in addressing whether petitioner had committed a crime of violence under Section 924(c). But petitioner’s methodological criticism provides no sound reason for this Court’s review. Although the court of appeals disclaimed reliance on a categorical approach to the application of Section 924(c)(3)(A) in United States v. Robinson, 844 F.3d 137, 141-143 (3d Cir. 2016), cert. denied, No. 17-5139 (Oct. 2, 2017), and relied on Robinson here, see Pet. App. A12-A13, any focus on the particular (noncategorical) facts of petitioner’s own offense did not affect the result. Cf. California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) (“This Court reviews judgments, not statements in opinions.”) (citation omitted). As explained above, attempted robbery of a postal employee while putting the employee’s life in jeopardy by use of a dangerous weapon categorically qualifies as a crime of violence under Section 924(c)(3)(A), and petitioner has not shown that any other circuit would reach a different result on these facts. This

Court recently denied certiorari in Robinson under similar circumstances, and the same course is warranted here.¹

c. Petitioner notes (Pet. 11 & n.3) that this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), is unconstitutionally vague, and observes that this Court has granted certiorari in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to consider whether the definition of “crime of violence” in 18 U.S.C. 16(b) is similarly unconstitutional. The pendency of Dimaya has no effect on this petition, because petitioner does not seek this Court’s review of any constitutional question. Moreover, as explained, petitioner’s Section 2114(a) offenses qualify as “crime[s] of violence” under Section 924(c)(3)(A), the language of which is not at issue in Dimaya. Holding this petition for Dimaya is therefore not warranted.

2. Petitioner’s assertion (Pet. 16-19) that the government “improperly shifted the burden of proof” during its rebuttal closing argument also does not warrant this Court’s review. Petitioner does not challenge the legal standard employed by the court of appeals in reviewing petitioner’s claim, but instead argues (Pet. 17) that the court misapplied its standard in concluding that the district court did not abuse its discretion in

¹ A similar issue is raised in the pending petition in Galati v. United States, No. 17-5229 (S. Ct.).

denying petitioner's motion for a mistrial. That factbound claim does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

In any event, the court of appeals correctly determined that the district court acted within its discretion in denying petitioner's motion. As an initial matter, as the court of appeals observed, it is "debatable" whether the prosecutor's remarks in rebuttal closing argument were even improper. Pet. App. A10. Those remarks were made only in response to assertions by petitioner's counsel that law enforcement officers had testified untruthfully and "irresponsibl[y]," and this Court has recognized that, if fairly invited by a defendant's arguments, a prosecutor may permissibly comment upon a defendant's failure to tender evidence. See United States v. Robinson, 485 U.S. 25, 26, 32 (1988); Lockett v. Ohio, 438 U.S. 586, 594-595 (1978). Even if the prosecutor's comments were improper, the court of appeals correctly affirmed the denial of petitioner's motion for a mistrial, reasoning that the prosecutor's comments "pertained to a collateral issue"; the district court gave the jury multiple curative instructions; and the evidence of petitioner's guilt was

“‘overwhelming’” and included “extensive witness testimony, physical evidence, and a written confession.” Pet. App. A11 (quoting C.A. App. 21 n.1); cf. United States v. Mastrangelo, 172 F.3d 288, 297 (3d Cir. 1999). That analysis is correct and consistent with the approach taken by other circuits. See, e.g., United States v. Wilkes, 662 F.3d 524, 537-539 (9th Cir. 2011) (refusing to direct new trial where government’s rebuttal comments were “invited” by defense counsel, the district court “admonished” the jury that “comments by counsel are not evidence,” and the verdict was supported by “overwhelming evidence”), cert. denied, 566 U.S. 981 (2012); United States v. Simon, 964 F.2d 1082, 1086-1087 (11th Cir. 1992) (holding that the government’s comments upon the defendant’s failure to produce exculpatory evidence were “probably improper,” but cured by district court instructions), cert. denied, 507 U.S. 1033 (1993).

3. Finally, petitioner argues (Pet. 13-16) that the government violated the Fourth Amendment by acquiring petitioner’s name and address from the owner of the company that sold him the mask used during the robberies, then using that information to obtain a search warrant for petitioner’s residence. That argument is foreclosed by this Court’s precedent, as petitioner acknowledges (Pet. 13).

Nothing in the Fourth Amendment prevents a witness from voluntarily providing information to the government that

implicates wrongdoing by another. See, e.g., United States v. Jacobsen, 466 U.S. 107, 117 (1984) (“[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities.”). More generally, “[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” Smith v. Maryland, 442 U.S. 735, 743-744 (1979). Third parties who transact business with a customer are free to create business records of that transaction, and the government’s subsequent acquisition of those records does not constitute a Fourth Amendment search of the customer. See id. at 744-745; United States v. Miller, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities.”). In Miller, which involved a subpoena for bank records, this Court reasoned that because the defendant could assert “neither ownership nor possession” of the banks’ business records, and because those records “contain[ed] only information voluntarily conveyed to the banks * * * in the ordinary course of business,” no search of the defendant had occurred. 425 U.S. at 440, 442.

Those principles resolve petitioner’s claim, as the court of appeals recognized. See Pet. App. A14. When petitioner purchased the mask, he voluntarily provided his name and address. As with

the bank records in Miller, petitioner “can assert neither ownership nor possession” of the mask company’s records of its transaction with him. 425 U.S. at 440. And as in Smith, customers in online retail transactions do not have a “general expectation” that the information they provide in completing a purchase “will remain secret.” 442 U.S. at 743.

Petitioner’s assertion (Pet. 13) that this Court should “overrule[]” the third-party doctrine in light of United States v. Jones, 565 U.S. 400 (2012), is unsound. In Jones, the Court concluded that the surreptitious installation and use of a GPS tracking device on a vehicle to continuously monitor its movements over the course of 28 days constituted a Fourth Amendment search. Id. at 402-404. In reaching that conclusion, the Court relied on the fact that the government had “physically intrud[ed] on a constitutionally protected area” -- the suspect’s automobile -- to attach the device. Id. at 407 n.3. Here, by contrast, petitioner does not contend that any such physical intrusion occurred.

Nor do the broader privacy concerns discussed in Justice Sotomayor’s concurring opinion in Jones justify creating a novel Fourth Amendment rule for the business records of online retail transactions. Whereas the GPS device in Jones allowed law-enforcement officers to use “signals from multiple satellites” to continuously track the movements of the defendant’s vehicle over the course of 28 days, accurate to “within 50 to 100 feet,” 565

U.S. at 403, the information obtained by the government here consisted only of merchant records from a single online purchase, which the mask seller voluntarily provided to law enforcement.² Petitioner urges (Pet. 14) that he had a “subjective and objectively reasonable expectation of privacy regarding the information” he provided to the mask seller, but fails to identify any basis for his assumption that Fourth Amendment principles apply differently to the records of voluntary retail transactions that occur via the internet than to records of such transactions occurring through other channels. Moreover, as petitioner acknowledges (Pet. 16), “there is no circuit split regarding this issue.”³

² In Carpenter v. United States, No. 16-402 (oral argument scheduled for Nov. 29, 2017), this Court granted certiorari to consider whether the government’s acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain. The facts here do not warrant holding this case for Carpenter, and petitioner does not so request.

³ Petitioner’s argument would not entitle him to suppression in any event. “Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” Davis v. United States, 564 U.S. 229, 241 (2011). Here, petitioner does not dispute (Pet. 13) that the officers’ actions in obtaining petitioner’s information from the mask seller were authorized by precedent and undertaken in good faith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

KENNETH A. BLANCO
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

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