No. 18-9517

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH ROSHELL ISOM,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Arkansas

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BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ARKANSAS

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QUESTION PRESENTED

Whether a trial judge's past prosecution of a defendant for theft—more than twenty years earlier—required him to recuse from presiding over that same defendant's postconviction challenge to his unrelated conviction for murder.

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JURISDICTION

The judgment of the Arkansas Supreme Court was entered on December 20, 2018; that court denied the petitioner's petition for rehearing on January 31, 2019. This Court granted the petitioner's application to extend the time to file a petition for a writ of certiorari from May 1, 2019 to May 31, 2019. The petitioner filed his petition on May 30, 2019. This Court has jurisdiction under 28 U.S.C. 1257 to review the Arkansas Supreme Court's judgment.

STATEMENT OF THE CASE

On Christmas Eve of 1990, Jay Jones was driving home from Little Rock, Arkansas to Louisiana for Christmas. App. 176, 226. His dog, a white Pomeranian, accompanied him. *Id.* On his way through Arkansas, he was stopped by a hitchhiker on the highway. *Id.* That hitchhiker was the petitioner, Kenneth Isom. App. 177-81. Isom claimed that he had paid a hospital visit to a friend in Little Rock and that afterwards his friends had left him on the highway. App. 176-77. He asked to be driven home to Monticello, Arkansas, some fifty miles southeast. App. 177. Jones agreed to drive him there, departing from his route to do so. *Id.* Along the way to Monticello, Jones stopped to use a restroom. *Id.* When he did, Isom drove away with his car and dog, leaving Jones stranded on the highway hundreds of miles from home on Christmas Eve. Once Isom returned to Monticello, he and two accomplices proceeded to sell the items in the car. *Id.* They left the car at a carwash overnight, where police found it on Christmas Day. App. 178. Jones's dog was never found. *Id.*; App. 226-27.

Isom was arrested and charged with stealing Jones's car and its contents. App. 189. Because he had committed at least four prior felonies, the local prosecutor, Sam Pope, charged him as an habitual offender. *Id.* In September 1991, a jury found Isom guilty and sentenced him to prison for fifteen years. App. 207. A unanimous panel of the Arkansas Court of Appeals affirmed his conviction. *See Isom v. State*, No. CACR 92-397, 1993 WL 53560 (Ark. Ct. App. Feb. 24, 1993).

In February of 1994, however, just two years and five months into his fifteen-year sentence, Isom was paroled. App. 19. Though state law required the parole board to seek Isom's prosecutor's recommendation on whether to grant Isom parole before "grant[ing] any parole," Ark. Code Ann. 16-93-702(a), Pope did not receive notice that the parole board was considering paroling Isom. App. 21. Concerned by Isom's extraordinarily early parole, and the parole board's failure to consult him, Pope sought and obtained a meeting with then-Governor Jim Guy Tucker's criminal justice assistant. App. 321. After that meeting, Governor Tucker's assistant informed Pope that Isom was technically eligible for parole by virtue of his good time credits and that he "kn[e]w of no way to rescind" Isom's parole. *Id.*

Seven years later, on the night of April 2, 2001, in Isom's hometown of Monticello, Dorothy Lawson was watching television with her late husband's elderly brother-in-law, whom she was assisting in his rehabilitation from hip surgery. *See Isom v. State*, 148 S.W.3d 257, 263 (Ark. 2004). A man whom Lawson later identified as Isom knocked on the door. *Id.* When Lawson opened the door, Isom pushed his way in and asked Burton for money. *Id.* When Burton rebuffed him, he

threatened Burton with a pair of scissors he pulled from his pocket. *Id.* But when Burton gave him $240 in cash, Isom only became angrier and demanded more money. *Id.* When Burton was unable to oblige him, he vaginally, orally, and anally raped Lawson, *id.*, a 72-year-old woman. *Id.* at 262. Isom then proceeded to stomp on Burton's head. *Id.* at 263. When Lawson told Isom to stop because Burton was old, Isom said, "I know he's old. That's why I want to hurt him." *Id.* Lawson then attempted to defend her brother-in-law from Isom. Isom responded by beating and choking her. *Id.* When Isom finally left and Lawson awoke from being knocked unconscious, she discovered that she was partially paralyzed and was unable to call the police. *Id.* The following morning, a neighbor heard Lawson crying for help and called the police. When the police arrived, they found Burton dead, killed by multiple blunt force wounds. *Id.*

An "abundance of evidence" linked Isom to Burton's murder and Lawson's rape. *Id.* at 267. Three days after her rape, Lawson identified Isom in a photo lineup, *id.* at 264, and Lawson subsequently identified Isom in court. *Id.* at 267. Two eyewitnesses, one of whom had known Isom for a long time, testified that they saw Lawson talking with Isom around 7:00 p.m. outside Burton's home the night of her rape and Burton's murder; Lawson testified that she had spoken to her assailant outside Burton's home around that time. *Id.* at 262-63. And a pubic hair retrieved from Lawson's body was a match with Isom's DNA; the state expert testified that the likelihood of finding another person with the same DNA bands was one in 57 million. *Id.* at 264.

Isom was charged with capital murder, attempted capital murder, rape, aggravated robbery, and residential burglary in December 2001. *Id.* at 264-65. Sam Pope, who prosecuted Isom for theft in his prior position as local prosecutor and had since been elected a judge, presided over Isom's trial. *Id.* at 257. Isom did not seek Judge Pope's recusal.

Isom was found guilty of all crimes charged and sentenced to death for killing Burton. *Id.* at 262. On appeal, the Arkansas Supreme Court unanimously affirmed, in an opinion that found no error in Judge Pope's conduct of the trial. *See id.* at 265-78. That review included a sua sponte review for any prejudicial error Isom did not raise, as is required by Arkansas law in death cases. *See id.* at 277-78; Ark. R. App. P. Crim. 10(b). This Court denied Isom's petition for certiorari. *See Isom v. Arkansas*, 543 U.S. 865 (2004).

Isom next repaired to postconviction proceedings, where he claimed he received ineffective assistance of counsel. *See Isom v. State*, 370 S.W.3d 491, 493 (Ark. 2010). Judge Pope again presided over those proceedings, *id.* at 491, and again, Isom did not seek his recusal. Judge Pope held Isom did not receive ineffective assistance of counsel. *Id.* at 493. The Arkansas Supreme Court unanimously affirmed Judge Pope's denial of postconviction relief, holding, inter alia, that trial counsel was not ineffective for failing to object to the photo lineup that police showed Lawson because it "was not unduly suggestive." *Id.* at 495.

Isom next launched an attack on his conviction through coram nobis. *See Isom v. State*, 462 S.W.3d 662 (Ark. 2015). The Arkansas Supreme Court, by a 4-3

vote, granted his petition to reinvest jurisdiction in the trial court to consider his coram nobis claims, suggesting that one of those claims had potential merit. *Id.* at 665. That claim involved an allegation that the State had failed to disclose a pair of scissors, found away from the scene, that crime-lab testing showed had no connection with the crime. *See id.* The dissent explained—to no response from the majority—that a *Brady* claim founded on such evidence could not succeed because, in light of the "abundance of evidence" against Isom, "it simply does not stand to reason that the existence of alleged scissors containing no DNA would have been sufficient to prevent rendition of the judgment." *Id.* at 669-70 (Danielson, J., dissenting).

Having succeeded in reinvesting jurisdiction in Judge Pope's court, Isom then moved—for the first time and despite previous appearances before Judge Pope at trial and in postconviction proceedings—to recuse Judge Pope. That request rested on an outlandish claim that Judge Pope's inquiry as prosecutor into Isom's procedurally improper parole more than two decades earlier showed that Judge Pope held a "sincere conviction that Mr. Isom belongs in prison regardless of his legal right to be free." App. 135. Denying Isom's recusal motion, Judge Pope explained that his conduct was typical of "active and th[o]rough prosecutors." App. 34.

On the merits of his coram nobis petition, Isom was unable to prove that the State had, in reality, failed to disclose a pair of scissors. No internal record of an undisclosed pair of scissors was found. App. 44-45. Rather, the sole evidence that

such a pair of scissors was ever recovered was a prosecutor's testimony in postconviction proceedings—given six years after the fact—that conflicted with his pre-trial testimony. *Id*. That testimony was recanted in the coram nobis hearing and found to be non-credible, *id.*, and Isom did not challenge that finding on appeal.

Instead, on both remand and appeal, Isom focused his efforts on a different purported *Brady* violation: a claim that the State suppressed evidence that on April 4, 2001, a day before Lawson identified Isom in a photo lineup, she had failed to identify Isom in a different photo lineup.

In the coram nobis proceedings, there was no dispute about whether police *attempted* to show Lawson a photo lineup on April 4, 2001. A policeman, Scott Woodward, testified that he attempted to show her a lineup that day. App. 9. A nurse's note indicated that the police "[a]ttempt[ed]" an identification that day. App. 6. And Lawson, though indefinite on the date, testified at trial that before her successful identification of Isom, police brought her photographs to review and that she "told them it might be better to wait till I got . . . some glasses," her existing pair having been "all broke up" during her rape. *Id.* The question, then, was not whether police attempted to conduct an identification on April 4. It was whether, as Isom claimed, Lawson was actually "shown the . . . photographs" on April 4 and "failed to identify [Isom] as her attacker." App. 5. Judge Pope found that no such event occurred, because Isom offered absolutely no evidence or testimony that it did. App. 5-7. Rather, the evidence showed that Lawson declined to review the photos that police brought her on April 4, because she had no glasses and had just suffered

severe eye injuries. App. 6-7. Judge Pope, therefore, denied Isom coram nobis relief on this claim. App. 7.

On appeal, the Arkansas Supreme Court unanimously affirmed Judge Pope's merits decisions on Isom's coram nobis petition; though two Justices dissented, both did so only on the issue of recusal. App. 24-32 (Hart, J., dissenting; Wood, J., dissenting). On the issue of recusal, a five-Justice majority rejected Isom's argument that Judge Pope's inquiry into Isom's parole in 1994 concluded that Judge Pope harbored actual bias against Isom decades later. The court explained that, in contacting the governor's office about Isom's parole eligibility after the parole board failed to consult him on Isom's parole as state law required, Judge Pope was merely "carrying out his ordinary duties as a prosecutor[.]" App. 21. The court also rejected Isom's argument that various rulings and comments Judge Pope made at the hearing—none of which the court held were even incorrect or prejudicial—exhibited bias against Isom. App. 22.

In dissent, Justice Hart argued that Judge Pope's meeting with the governor's assistant regarding Isom's parole was extraordinary because the parole board's failure to give Judge Pope notice did not provide a basis to revoke Isom's parole. App. 26 (Hart, J., dissenting). From that, Justice Hart speculated that Judge Pope must have held "some special animus . . . toward Mr. Isom" and continued to do so more than two decades later. *Id.* Mischaracterizing the record, Justice Hart also claimed that Judge Pope displayed actual bias against Isom by "taki[ng] it upon himself to rehabilitate a witness and then order[ing] a recess that

could reasonably be interpreted as giving the State a chance to wood-shed that witness." App. 29. In reality, as explained in further detail below, *see infra* at 15-16, Judge Pope remarked in response to an objection by the State to Isom's counsel's leading questions that those questions were permissible because the witness was hard of hearing, and then called a lunch recess, to no objection from counsel, after both sides passed the witness.

Justice Wood, separately dissented on narrower grounds, claiming that Judge Pope's 1994 meeting with the governor's assistant was "extraordinary" and created "at least an appearance of bias[.]" App. 31 (Wood, J., dissenting).

Isom petitioned for rehearing. Only Justice Hart voted to grant rehearing. App. 33.

REASONS FOR DENYING THE WRIT

I. The Arkansas Supreme Court's decision does not conflict with any other decision.

Isom asks this Court to grant certiorari to decide whether Pope's prior prosecution of Isom in a series of *theft* cases "created an unconstitutional risk of bias under the due process clause when Pope later sat as the trial judge in Isom's unrelated coram nobis hearing" in Isom's *murder* case. Pet. i. That request does not satisfy any of this Court's criteria for granting certiorari.

Isom does not suggest that there is any conflict between the Arkansas Supreme Court's decision and the decisions of *any* state or federal court. Nor could

he because, as discussed below, *see infra* at 11-12, every court to consider the question has held that a prosecutor-turned-judge's past prosecution of a defendant in one matter does not "create[] an unconstitutional risk of bias" when that judge later presides over the defendant's trial in an "unrelated" matter. Pet. i.; *see, e.g.*, *Del Vecchio v. Ill. Dep't of Corr* ., 31 F.3d 1363, 1375 (7th Cir. 1994) (en banc) ("[N]o per se rule disqualifies a judge because he has prosecuted a defendant in the past . . . Prosecuting a defendant in one case is not the kind of action from which we can presume bias or prejudgment in a future case.") (citations omitted) (citing *Corbett v. Bordenkircher*, 615 F.2d 722, 723-24 (6th Cir. 1980); *Murphy v. Beto*, 416 F.2d 98, 100 (5th Cir. 1969)).

Lacking a conflict between the decision below and those of lower courts, Isom appears to suggest that the Arkansas Supreme Court's decision conflicts with *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). *See* Pet. 20-24. *Williams* involved a state supreme court justice who had previously been a prosecutor and had authorized seeking the death penalty against a defendant who later sought review of that sentence from the Pennsylvania Supreme Court. *See id.* at 1903-04. That justice did not recuse, and this Court held that the Due Process Clause "disqualif[ies] a former prosecutor from sitting in judgment of *a prosecution in which he or she made a critical decision*." *Id.* at 1906 (emphasis added). This Court's holding was limited to situations like that one where a prosecutor-turned-judge subsequently presided over or reviewed a prosecution in which he *participated*. It did not hold that a former prosecutor who prosecuted a defendant

in one matter, decades earlier cannot preside over that defendant's trial in completely unrelated matters. *See id.* at 1905 (while this Court's prior precedents did not "set forth a specific test governing recusal when . . . a judge had prior involvement in a case as a prosecutor," the Court "now h[e]ld[] that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case"); *id.* at 1906 ("When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge . . . could set aside any personal interest in the outcome.").

The other cases from this Court on which Isom relies are even wider of the mark than *Williams*. For instance, in *In re Murchison*, 349 U.S. 133 (1955)—whose holding this Court expanded in *Williams*—a judge presided over a "one-man judge-grand jury" proceeding, concluded that witnesses in that proceeding had committed perjury, and then tried and convicted those witnesses of contempt. *See id.* at 134-35. This Court held that "the judge's dual position as accuser and decisionmaker in the contempt trials violated due process." *Williams*, 136 S. Ct. at 1906 (citing *Murchison*, 349 U.S. at 137). No such dual role was present here.

Isom's reliance on *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), is misplaced for essentially the same reasons. *See id.* at 466 (holding that under the Due Process Clause "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor"). Indeed,

far from involving a similar relationship, the matters in which Judge Pope prosecuted Isom and the coram nobis hearing over which he presided are—in the words of Isom's question presented—"unrelated." Pet. i.

Nor does *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), support Isom's claim. There, this Court held that a state supreme court justice could not sit in judgment of his primary contributor's appeal, because the contributor "had a significant and disproportionate influence in placing [him] on the case . . . when the case was pending or imminent." *Id.* at 884. No similar "serious risk of actual bias" (*id.*) is presented where, as here, a judge presides over a trial of one of hundreds of defendants whom he prosecuted in his former service as prosecutor. Nor could Isom plausibly claim such a risk.

And finally, *Tumey v. Ohio*, 273 U.S. 510 (1927), is inapposite because this is not a case where a judge "ha[d] a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case." *Id.* at 523.

There is no conflict between any decision of this Court and the decision below. The Petition should be denied.

II. The decision below is correct.

This Court should also decline review because the decision below is correct. Every court to consider, post-*Williams*, whether the Due Process Clause requires recusal of a judge who has previously prosecuted a defendant in unrelated matters has held it does not. *See Keahey v. Bradshaw*, No. 3:16CV1131, 2018 WL 6174297, at *24 (N.D. Ohio Apr. 17, 2018), *report and recommendation adopted*, 2018 WL

4851017 (N.D. Ohio Oct. 5, 2018) (habeas petitioner had no claim under *Williams* where he only alleged that trial judge acted as prosecutor in a prosecution preceding the conviction challenged in his habeas petition); *Rogers v. Aldridge*, No. 15-CV-0069-JED-PJC, 2018 WL 1569497, at *7 (N.D. Okla. Mar. 30, 2018) (no due process violation under *Williams* where trial judge prosecuted defendant in a prior drug case, even though the state relied on the conviction in that case to support a sentence enhancement in the case over which the judge presided); *Butler v. Dauphin Cty. Dist. Attorney's Office*, 163 A. 3d 1139, 1144 (Pa. Commw. Ct. 2017) ("*Williams* is inapposite to a separate . . . proceeding."); *Mumphrey v. State*, 509 S.W.3d 565, 569 (Tex. Crim. App. 2016) ("[A] trial judge is not disqualified merely because he previously represented the State in a prior case against the defendant[.]"). Pre-*Williams* cases reached the same conclusion. *See, e.g.*, *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1375 (7th Cir. 1994) (en banc) (holding that "[p]rosecuting a defendant in one case is not the kind of action from which we can presume bias or prejudgment in a future case" and collecting cases in accord from the Fifth and Sixth Circuits).

Indeed, the point is an uncontroversial one. While there is logically a serious risk that a judge who has previously "served as an advocate for the State in the very case [he] is now asked to adjudicate" will have a "personal interest in the outcome," *Williams*, 136 S. Ct. at 1906, no such risk exists where a judge prosecuted a defendant in matters entirely "unrelated" to the one before him. Pet. i. And the consequences of a contrary rule would be profoundly destabilizing. In small

communities—like the one Judge Pope serves—there will often be just one judge or a handful of judges, and those judges will often have served as prosecutors in those communities. A rule of disqualification in cases where a judge previously prosecuted a defendant in an unrelated matter would unsettle countless convictions on direct review, and constantly force small communities, like Monticello, to bring in judges from different jurisdictions.

Further, insofar as Isom's petition rests on Judge Pope's inquiry into Isom's parole, it is equally meritless. That inquiry is no basis to conclude that Judge Pope harbored "a special animus" against Isom at any point, Pet. 20, much less more than two decades after the fact. The limited record of Judge Pope's inquiry into Isom's parole suggests that Judge Pope was "concern[ed] about not being notified [of] the possibility of Mr. Isom being paroled or given a chance to oppose it," App. 321, and that he was concerned that Isom had been prematurely paroled two-and-a-half years into a 15-year sentence. Those concerns were perfectly legitimate.

In dissent below, Justice Hart stressed that, even if Judge Pope did not receive notice of the possibility of Isom's parole, as state law required, Isom's parole could not be revoked on that ground. App. 25 (Hart, J., dissenting). That does not show that Judge Pope's request was "extraordinary," *id.*; it only shows that Judge Pope reasonably misunderstood state law to provide for parole revocation when mandatory procedural requirements for granting parole were violated. And however unusual Judge Pope's inquiry was—though a five-Justice majority of the Arkansas Supreme Court found Judge Pope was merely "carrying out his ordinary

duties as a prosecutor," App. 21—it hardly demonstrates such a degree of animus that it warranted recusal more than two decades later in a completely unrelated case.

Finally, Isom argues that Judge Pope exhibited actual bias at the coram nobis hearing through several of his rulings and comments. But none of those rulings were erroneous or prejudicial. As this Court has held, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"; "[a]lmost invariably, they are proper grounds for appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Likewise, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* Only remarks or rulings that "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible" are bases for recusal. *Id.* Logically, then, rulings and remarks that are not even sufficiently erroneous or prejudicial to form the basis for a successful appeal cannot mandate recusal. That said, the conduct on which Isom relies is particularly un-troubling.

Both Isom and Justice Hart make much of an exchange in which Judge Pope supposedly explained away testimony adverse to the State by interjecting to suggest that the witness was having hearing problems and then called a recess that gave "the State a chance to woodshed that witness." Pet. 24 (quoting App. 29 (Hart, J., dissenting)). But that is not what happened.

Instead, Isom's counsel— through a series of confusing leading questions— got a police officer to testify that he found five or more pairs of scissors in his investigation of the crime rather than four. Supp. App. 5-6. When Isom's counsel asked why only four pairs were submitted to defense when he found at least five, he testified that he only recalled four. Supp. App. 6. Isom's counsel then noted that the witness had previously testified that he found five. *Id.* Counsel for the state objected, arguing that the witness had only agreed to Isom's counsel's leading questions. Supp. App. 6-12. In response, Judge Pope noted that Isom's counsel's leading questions were *permissible* because the witness was having hearing problems,[1] and that the witness had, in fact, *agreed* with some of the questions. Supp. App. 12. Thus, rather than explaining away the witness's adverse testimony by reference to his hearing problems in a sua sponte "interjection," Judge Pope actually relied on the witness's hearing problems in support of considering his adverse testimony.[2]

Then, after Isom's counsel completed her examination, Supp. App. 13, the State cross-examined the witness and passed him back to Isom. Supp. App. 14 Isom's counsel said she had no further questions. *Id.* The court excused the

[1] Isom's counsel agreed that the witness was having hearing problems, later stating on redirect that "during the time that I was taking your testimony, you told me a number of times that you were having trouble hearing me." Supp. App. 17-18.

[2] Additionally, given that Judge Pope was entitled to make decisions about credibility based on his observation of a witness's testimony—which would include observing the witness's difficulty hearing—Isom cannot plausibly claim any interjection was prejudicial.

witness, and then asked counsel, at a quarter to noon, if they would like to take "a little bit of an early lunch break and then come back a little early[.]" *Id.* Without objection from counsel, the court recessed. *Id.* The court simply called a lunch recess, with counsel's agreement, after the witness was excused; it did not, as Isom and Justice Hart suggest, call a recess mid-testimony to give the State an opportunity to reorient the witness's testimony. And the mere fact that the State later recalled the witness and he clarified his testimony does not—as Isom outlandishly suggests—suggest Judge Pope intended to give the State an opportunity to "woodshed" the witness.

Isom—echoing Justice Hart's solo dissent—also claims that when Isom sought discovery, Judge Pope "'threaten[ed] Mr. Isom's attorney with Rule 11 sanctions.'" Pet. 24 (quoting App. 28 (Hart, J., dissenting)). This too is a misreading of the record. Judge Pope actually explained that under Arkansas's version of Rule 11 and its Rules of Professional Conduct, Isom could only have alleged prosecutorial nondisclosure in his coram nobis petition if he had "evidentiary support" for those allegations. App. 35. He then reasoned that given those allegations and the rules, Isom must have "already ha[d] the evidence to support his contentions" and denied Isom discovery, while allowing him to subpoena documents. *Id.* Thus, rather than threaten Isom's counsel with sanctions, Judge Pope relied on Isom's counsel's presumed compliance with Rule 11 to deny discovery. And while that reasoning might not carry weight in an ordinary civil proceeding, it is unexceptionable under Arkansas coram nobis law, which requires,

as Justice Hart recently explained in an opinion for the Arkansas Supreme Court, that coram nobis allegations must be substantiated by "factual support" and documentation. *Alexander v. State*, 575 S.W.3d 401, 406 (Ark. 2019) (Hart, J.). Review should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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