No. 15-7384

IN THE SUPREME COURT OF THE UNITED STATES

FERNANDO CAZARES, et al., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners waived their Sixth Amendment right to a public trial for portions of voir dire conducted outside the presence of the public.

2. Whether a structural error affects a defendant's substantial rights -- and therefore satisfies the third prong of the plain-error standard -- even in the absence of a showing that the error affected the outcome of the district court proceedings.

3. Whether the court of appeals correctly held that an expert's testimony that she had determined that bullets and casings were fired using the same firearm to a "scientific certainty" -- rather than to a "reasonable degree of certainty in the ballistics field" -- was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A68) is reported at 788 F.3d 956.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2015. A petition for rehearing was denied on September 9, 2015 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on December 8, 2015. 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 Central District of California, petitioners Fernando Cazares, Gilbert Saldana, Alejandro Martinez, and Porfirio Avila were convicted of conspiring to violate federally protected rights, in violation of 18 U.S.C. 241. Cazares, Saldana, and Martinez were also convicted of interfering with federally protected activities, in violation of 18 U.S.C. 245(b)(2)(B), and of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1). Petitioners were sentenced to life imprisonment. The court of appeals affirmed. Pet. App. A1-A68.

1. Petitioners were members of the Avenues 43 gang in the Highland Park neighborhood of Los Angeles. Between 1995 and 2001, they engaged in a campaign of harassment, assaults, and murders to drive African-Americans off the public streets and out of the neighborhood. Pet. App. A6-A7. Three murders are relevant to the issues petitioners raise in this Court.

a. In April 1999, several Avenues 43 gang members killed Kenneth Wilson, an African-American man, on a public street in Highland Park. Cazares, Saldana, and Martinez, along with two other gang members, were returning home in a van at approximately 3:30 a.m. when they spotted Wilson in a car. Martinez pointed at Wilson and said, "Hey, * * * [y]ou guys

want to kill a nigger?" The other Avenues members agreed. As Wilson drove by, Saldana and two other gang members shot at him. Saldana used a 9 mm Ruger semiautomatic handgun. A bullet fired from a different gun struck and killed Wilson. Gov't C.A. Br. 9-12.

At trial, the two other gang members involved in Wilson's murder described the crime and implicated Cazares, Saldana, and Martinez. Gov't C.A. Br. 12-14. The government also introduced evidence that Saldana had purchased a 9 mm weapon from a person who had used the gun to kill Rene and Jaime Cerda two months before the Wilson murder. Pet. App. A43, A48-A49. A government firearms expert compared the bullet casings found at the Cerda murder scene with casings found at the Wilson murder scene and concluded that they had been fired from the same gun, a 9 mm Ruger. Id. at A60; Gov't C.A. Br. 12-14.

b. In December 2000, Avila shot and killed Christopher Bowser, an African-American man, while Bowser was waiting at a bus stop. For years, Bowser had been a victim of racial harassment and assaults by petitioners and by other Avenues 43 gang members. Eventually, after Martinez threatened him with a gun, Bowser notified the police and Martinez was arrested. Eight days after the arrest, Avila shot and killed Bowser. Pet. App. A27-A28; Gov't C.A. Br. 15-17.

c. In November 2000, Anthony Prudhomme, an African-American man, was shot and killed in his Highland Park home. Based on a comparison of bullets and casings, the government's firearms expert determined that Prudhomme was killed with the same .25 caliber firearm that Avila used to murder Bowser a month later. Pet. App. A60-A61; Gov't C.A. Br. 17-18 & n.10.

2. Petitioners were charged with federal civil rights offenses based on the assaults and murders of African-Americans in Highland Park. Petitioners pleaded not guilty and were tried jointly. Pet. App. A6-A7; Gov't C.A. Br. 3-6. The issues petitioners raise in this Court are based on the jury-selection process and the testimony of the government's firearms expert.

a. The jury-selection process spanned six days. Appearances, instructions, scheduling, admonitions, general voir dire, and the exercise of peremptory challenges all took place in open court. But the individual voir dire that would ordinarily have been conducted at sidebar -- including questioning about prospective jurors' hardships and biases -- was instead conducted in an adjacent room outside the presence of petitioners and the public, but with counsel and the court reporter present. In adopting that procedure, the district court explained that if prospective jurors had been called to the bench to be questioned at sidebar, they likely would have

been able to see the shackles used to restrain petitioners during the proceedings. Pet. App. A16.[1]

Neither petitioners nor their counsel objected to the conduct of portions of voir dire in the adjacent room rather than at sidebar. Pet. App. A17. To the contrary, at one point Avila's counsel asked the court to continue to take jurors into the adjacent room for questioning. Ibid. On another occasion, the court advised counsel that it intended to use another courtroom to ask prospective jurors about their vacation plans and stated that it would need to "get a waiver from your clients" before doing so. Ibid. One of petitioner's counsel responded: "I can't imagine my client would have an objection." Ibid. Before moving to the other courtroom, the court instructed petitioners to consult with their attorneys and then asked whether they objected "to the court and counsel going over [to the other courtroom] to make that announcement to the prospective jurors while you remain here in the courtroom." C.A. E.R. 2099; see id. at 2096-2099. Petitioners responded that they did not object. Id. at 2100; see Pet. App. A17.

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[1] Petitioners were shackled for security reasons. Pet. App. A9-A10. They argued below that the shackling violated their due process rights, but the court of appeals rejected that argument because the shackles were not visible to the jury and because petitioners could not have been prejudiced in any event given the "overwhelming" evidence of their guilt. Id. at A14-A15 & n.1. Petitioners do not challenge that holding here.

b. At trial, the government called the firearms expert who had examined the casings from the Wilson and Cerda murders and the bullets and casings from the Bowser and Prudhomme murders. Pet. App. A59-A61. The expert testified that she compared the bullets and casings using "toolmark identification," a forensic method that relies on the markings left on bullets and casings by the gun that fires them. Id. at A62-A63. Using that method, the expert concluded that the casings from the Wilson and Cerda scenes were fired from the same gun, a 9 mm Ruger, and that the bullets and casings from the Bowser and Prudhomme scenes were fired from the same .25 caliber weapon. Id. at A60-A61. The expert stated that she was "completely certain" about the matches, but acknowledged that she meant a "scientific certainty" and that "[t]here is no absolute certainty in science." Id. at A61. During cross-examination, she also conceded that "the conclusion that a particular bullet was fired by the same firearm as another bullet is ultimately a subjective evaluation." Ibid.

c. The jury convicted on all counts, and petitioners were sentenced to life imprisonment. Pet. App. A6-A7.

3. The court of appeals affirmed. Pet. App. A1-A68.

a. As relevant here, the court of appeals first held that petitioners waived their right to a public trial for the portions of voir dire conducted outside the public's view. Pet.

App. A15-A26.[2] The court explained that the Sixth Amendment right to a public trial extends to voir dire proceedings and requires district courts to make specific findings on the need for closed proceedings before excluding the public. Id. at A20-A21 (citing Presley v. Georgia, 558 U.S. 209, 213 (2010) (per curiam)). The court stated that if petitioners had asserted their right to a public trial, the reasons articulated by the district court for conducting portions of the voir dire outside the courtroom would not have been "sufficient to avoid a determination that [petitioners'] rights to a public trial were violated." Id. at A22. But the court held that "[t]he facts of this case support finding a valid waiver * * * of the right to a public trial" because petitioners never objected to the district court's voir dire procedure, because "counsel for one of the [petitioners] requested that the private voir dire continue in the manner it was proceeding," and because "[petitioners] each gave [a] waiver on the record" when the district court sought a waiver before questioning the jurors about vacation plans in another courtroom. Id. at A26.

[2] In the court of appeals, petitioners asserted that the voir dire procedure violated both their Sixth Amendment right to a public trial and their right to be present during trial proceedings. Pet. App. A15. In this Court, petitioners renew only their public-trial claim.

b. The court of appeals also rejected petitioners' challenge to the firearms expert's testimony that she matched bullets and casings to a "scientific certainty." Pet. App. A57-A64. Although petitioners had failed to object to much of the testimony at issue, the court treated their challenge as preserved because "it appear[ed] that the 'scientific certainty' issue was brought to the district court's attention." Id. at A64. The court noted that the government had not argued on appeal that "'scientific certainty' is a proper characterization for toolmark identification expert testimony," and the court stated that it believed that "'a reasonable degree of certainty in the ballistics field' is the proper expert characterization of toolmark identification." Ibid. But the court held that "[a]ny error in this case from the 'scientific certainty' characterization was harmless." Ibid. The court emphasized that the expert's testimony was subject to extensive cross-examination, "which resulted in acknowledgement of subjectivity in [her] work." Ibid. The court also noted that "the district court properly instructed as to the role of expert testimony" and that "there was substantial evidence otherwise linking [petitioners] to the Wilson and Bowser murders." Ibid.

4. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. B1-B2.

ARGUMENT

Petitioners renew their contention (Pet. 7-15) that they did not waive their Sixth Amendment right to a public trial. The court of appeals correctly rejected that argument, and its factbound assessment of the trial record does not conflict with any decision of this Court or another court of appeals. Petitioners also contend (Pet. 15-24) that this Court should grant review to decide whether structural errors automatically satisfy the third prong of the plain-error standard and to address the degree of certainty that may be expressed by a firearms expert testifying based on toolmark identification. But those questions are not presented here, and this case would in any event be a poor vehicle in which to consider them. No further review is warranted.

1. The court of appeals correctly held that, to the extent the district court's voir dire procedure otherwise would have violated the Sixth Amendment's public-trial requirement, petitioners validly waived their Sixth Amendment rights. That case-specific holding does not conflict with any decision of this Court or another court of appeals.

a. The Sixth Amendment right to a public trial "extends to the jury selection phase of trial." Presley v. Georgia, 558 U.S. 209, 212 (2010) (per curiam). A defendant thus has "a right to insist that the voir dire of the jurors be public"

unless the interest in public access is outweighed in a particular case by "'other rights or interests,'" such as "'the government's interest in inhibiting disclosure of sensitive information.'" Id. at 210 (quoting Waller v. Georgia, 467 U.S. 39, 45 (1984)). Like other procedural rights afforded to criminal defendants, however, the Sixth Amendment right to a public trial is "subject to waiver." Peretz v. United States, 501 U.S. 923, 936 (1991).

In general, a "waiver" is the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733 (1993) (citation omitted). If a defendant has validly waived a procedural right, then a departure from the applicable legal rule "is not 'error'" at all and cannot be reviewed on appeal. Ibid. If, in contrast, a defendant has merely forfeited an issue through the "failure to make the timely assertion of a right," then the forfeited claim may be reviewed on appeal for plain error. Ibid.; see Fed. R. Crim. P. 52(b). To prevail under that standard, a defendant must show (1) an "error or defect" (2) that is "clear or obvious," and (3) that "affected the [defendant's] substantial rights, which in the ordinary case means * * * that it 'affected the outcome of the district court proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting Olano, 507 U.S. at 734). If the defendant does so, "the court of appeals has the discretion to

remedy the error -- discretion which ought to be exercised only if the error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" Ibid. (quoting Olano, 507 U.S. at 736).

b. In this case, the court of appeals correctly held that petitioners waived any claim that the district court's voir dire procedure violated their Sixth Amendment right to a public trial. Whenever a need arose to discuss a matter with a prospective juror outside the presence of the rest of the panel, the district court conducted the questioning in a room adjacent to the courtroom rather than at sidebar. Pet. App. A16. Each time, petitioners' counsel accompanied the judge and the court reporter into the adjacent room. Ibid. Neither petitioners nor their counsel raised any objections to this procedure. To the contrary, at one point Avila's counsel affirmatively requested that the court continue "taking [each] juror individually into the jury room" to discuss hardships and other matters that would ordinarily be addressed at sidebar. C.A. E.R. 1953. And when the court later proposed to take a large group of prospective jurors to another courtroom to question them about their vacation plans, Martinez's counsel stated that she could not "imagine [that her] client would have an objection to us going over and doing that," id. at 2064, and each petitioner expressly

consented to that procedure, id. at 2096-2100. See Pet. App. A17, A25-A26.

c. Petitioners challenge the court of appeals' waiver holding on several grounds. All lack merit.

First, petitioners contend (Pet. 7-10) that the Sixth Amendment right to a public trial cannot be waived by a defendant's counsel and must instead be waived by the defendant personally, following the stringent procedures like the ones that apply when a defendant pleads guilty or waives his right to counsel. But "whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." Olano, 507 U.S. at 733. "For certain fundamental rights," such as the right to counsel or the right to plead not guilty and demand a trial, "the defendant must personally make an informed waiver." New York v. Hill, 528 U.S. 110, 114 (2000). "For other rights, however, waiver may be effected by the action of counsel" because "'the lawyer has -- and must have -- full authority to manage the conduct of the trial.'" Id. at 114-115 (quoting Taylor v. Illinois, 484 U.S. 400, 417-418 (1988)).

Petitioners cite no authority requiring a personal waiver of the right to a public trial, and several courts of appeals have held that "[a] defendant's attorney's waiver of the right

to a public trial is effective on the defendant." United States v. Hitt, 473 F.3d 146, 155 (5th Cir. 2006), cert. denied, 550 U.S. 969 and 550 U.S. 1360 (2007).[3] Indeed, the Sixth Circuit recently stated that it was aware "of no precedent" requiring a personal waiver of the public-trial right. United States v. Whalen, 578 Fed. Appx. 533, 539, cert. denied, 135 S. Ct. 505 (2014).

Sound reasons support a rule permitting defense counsel to waive the right to a public trial. Among other things, counsel may have strategic reasons to prefer particular voir dire or trial procedures -- here, for example, counsel may well have agreed with the district court that voir dire should be conducted in an adjacent room rather than at sidebar in order to prevent prospective jurors from seeing that petitioners were

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[3] See, e.g., Addai v. Schmalenberger, 776 F.3d 528, 534 (8th Cir.), cert. denied, 136 S. Ct. 73 (2015); United States v. Acosta-Colon, 741 F.3d 179, 187 (1st Cir. 2013), cert. denied, 134 S. Ct. 2823 and 135 S. Ct. 689 (2014); see also 6 Wayne R. LaFave et al., Criminal Procedure § 24.1(a), at 352 (4th ed. 2015) ("Waiver of the right to public trial is considered a tactical decision that may be made by defense counsel and need not be made personally by the defendant."). Petitioners quote (Pet. 7) this Court's statement that the Sixth Amendment right to a public trial is "personal to the accused." Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979) (citation omitted). But that statement merely indicated that the Sixth Amendment right to a public trial exists "for the benefit of the defendant" and does not establish "any correlative right in members of the public." Id. at 380-381. The Court did not address counsel's authority to waive the right on a defendant's behalf.

restrained by shackles. Pet. App. A16; see, e.g., Bucci v. United States, 662 F.3d 18, 31-32 (1st Cir. 2011) (recognizing the possibility of a "strategic decision" to forgo a Sixth Amendment objection to a partial closure of the courtroom). In this context, "[a]s with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation" that could "distract from more pressing matters as the attorney seeks to prepare the best defense." Gonzalez v. United States, 553 U.S. 242, 250 (2008).

Second, petitioners contend (Pet. 10-11) that the court of appeals erred in relying on this Court's decision in Levine v. United States, 362 U.S. 610, 619 (1960), because that case involved the due process right to insist on public access to criminal contempt proceedings rather than the analogous Sixth Amendment right at issue here. But the court of appeals cited Levine only for the uncontroversial proposition that "[t]he right to a public trial can * * * be waived." Pet. App. A24. This Court has similarly cited Levine for the proposition that "failure to object to closing of [the] courtroom is [a] waiver of [the] right to [a] public trial." Peretz, 501 U.S. at 936. And although the criminal-contempt posture meant that "the public trial right in Levine was provided by the Fifth Amendment Due Process Clause," Levine is nonetheless instructive on the scope of the corresponding Sixth Amendment right because this

Court's decision recognized that "the values protected are the same in each case." United States v. Christi, 682 F.3d 138, 143 n.1 (1st Cir.) (Souter, J.), cert. denied, 133 S. Ct. 549 (2012); see Levine, 362 U.S. at 616.

Third, petitioners contend (Pet. 11) that the court of appeals conflated waiver and forfeiture because it "held that [their] right to public voir dire was waived by the failure to assert their rights." That argument mischaracterizes the decision below. The court of appeals began its waiver analysis by stating that "[a] waiver is an 'intentional relinquishment or abandonment of a known right or privilege.'" Pet. App. A25 (citation omitted). Consistent with that understanding, the court did not hold that petitioners waived their rights merely by failing to object. To the contrary, the court emphasized that "counsel for one of the [petitioners] requested that the private voir dire continue in the manner it was proceeding" and that petitioners "each gave [a] waiver on the record" when the court sought their consent to hold a portion of the voir dire in another courtroom, outside the presence of petitioners and the public. Id. at A26. Based on all of those circumstances, the court concluded that "[t]he facts of this case support finding * * * a valid waiver of the right to a public trial." Ibid. That conclusion was supported by the record, and petitioners do not cite any decision reaching a different result in a case

involving analogous circumstances. Their factbound challenge to the court of appeals' assessment of trial record does not warrant further review. See Sup. Ct. R. 10.[4]

d. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider the issue because petitioners could not prevail on their Sixth Amendment claim even if it were reviewed for plain error rather than treated as waived.

First, the district court's voir dire procedure did not constitute error at all, much less plain error. The only portion of the voir dire conducted outside the public's presence was the individual questioning of jurors about hardships and biases. Pet. App. A16. Even if that questioning had been conducted in the courtroom, it would have been done at sidebar, where members of the public would not have been able to hear anything in any event. Ibid. The court of appeals appeared to assume, without analysis, that conducting individual voir dire

[4] This Court recently denied a petition for a writ of certiorari that contended that the lower courts are divided on the question whether a defendant's inadvertent failure to object to the closure of the courtroom waives the Sixth Amendment right to a public trial. See Stackhouse v. Colorado, 136 S. Ct. 1513 (2016) (No. 15-550). Whatever the merits of the Stackhouse petitioner's characterization of the state of the law in the lower courts, that question is not presented here because the court of appeals did not find a waiver based on petitioners' mere inadvertent failure to object.

in an adjacent room rather than at sidebar constituted a denial of public access implicating the Sixth Amendment right to a public trial. Id. at A21-A22. But other courts of appeals have held that similar procedures are "the functional equivalent of a sidebar conference" and thus pose no Sixth Amendment problem. Wilder v. United States, 806 F.3d 653, 660 (1st Cir. 2015) (internal quotation marks omitted), cert. denied, No. 15-8799, 2016 WL 1305890 (May 16, 2016). Indeed, the Third Circuit stated that it was "aware of no case holding" that individual questioning of jurors in an adjacent room "violate[s] the Sixth Amendment." United States v. Bansal, 663 F.3d 634, 661 (2011), cert. denied, 132 S. Ct. 2700 and 133 S. Ct. 225 (2012). Given that precedent, petitioners could not establish that the district court plainly erred in using the same procedure here. See United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (holding that a district court ruling supported by out-of-circuit precedent does not constitute plain error), cert. denied, 549 U.S. 911 (2006).

Second, even if petitioners could satisfy the other prongs of the plain-error standard, they could not establish that the conduct of portions of the voir dire in an adjacent room "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Olano, 507 U.S. at 736 (citation and internal quotation marks omitted). The public was

denied the ability to observe only a limited portion of voir dire that would have been conducted at sidebar in any event; neither petitioners nor any member of the public objected to the procedure employed by the district court; and "[t]he evidence of guilt in this case was overwhelming." Pet. App. A15 n.1. Under the circumstances, overturning the result of the lengthy trial based on an unpreserved challenge to the voir dire procedure would confer an unwarranted windfall on petitioners.

2. Petitioners briefly contend (Pet. i, 15-16) that this Court should grant review to decide whether a structural error affects a defendant's substantial rights -- and therefore satisfies the third prong of the plain-error standard -- even absent a showing that the error affected the outcome of the district court proceedings. This Court has declined to resolve that issue on several occasions. See United States v. Marcus, 560 U.S. 258, 263 (2010); Puckett, 556 U.S. at 140. But the issue is not presented here. The court of appeals recognized that this Court has characterized the denial of the right to a public trial as a "structural defect." Pet. App. A22 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006)). But because the court held that petitioners waived their Sixth Amendment rights, it had no occasion to decide whether the limited denial of public access at issue here qualified as a structural error. And for the same reason, the court also had

no occasion to decide whether structural defects automatically satisfy the third prong of the plain-error standard. Accordingly, this case is not an appropriate vehicle in which to consider the issue. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[This Court is] a court of review, not of first view.").

3. Finally, petitioners contend (Pet. 17-24) that the Court should grant review to determine the degree of certainty that a firearms expert may express in testifying based on toolmark identification. That question is not presented here and would not warrant this Court's review in any event.

a. The court of appeals accepted petitioners' contention that the district court erred in allowing the government's firearms expert to testify that her conclusions reflected a "scientific certainty." Pet. App. A64. Instead, the court suggested that "'a reasonable degree of certainty in the ballistics field' is the proper expert characterization of tookmark identification." Ibid. But the court held that "[a]ny error in this case from the 'scientific certainty' characterization was harmless" given the extensive cross-examination of the expert and the other evidence corroborating her testimony. Ibid. Petitioners do not challenge that harmless-error holding, and the question they seek to have this

Court resolve would therefore have no effect on their convictions.

b. The question presented would not warrant this Court's review in any event. Petitioners contend (Pet. 22-23) that the lower courts are divided on the proper framing of toolmark identification testimony, but they do not cite any other court of appeals decision addressing the issue. A disagreement among district courts does not warrant this Court's intervention. See Sup. Ct. R. 10.[5] And even if the issue otherwise warranted review, this case would be a poor vehicle in which to consider it. Although the court of appeals expressed a view on the proper standard for toolmark identification testimony, it neither analyzed the issue in any detail nor definitively concluded that the testimony here was erroneous -- and it had no reason to do so because it held that "[a]ny error" was harmless. Pet. App. A64. The court also noted the limitations of the district court record, explaining that petitioners had arguably failed to preserve the issue and that "[a] more thorough Daubert hearing could have been helpful" in considering the degree of certainty that the government's firearms expert should have been

[5] Petitioners also cite (Pet. 23) one decision by the Supreme Judicial Court of Massachusetts, but that decision could not establish the existence of a conflict warranting this Court's review because it applied state law rather than the Federal Rules of Evidence. See Commonwealth v. Heang, 942 N.E.2d 927, 937-947 (2011).

permitted to express. Ibid. Even if this Court were inclined to take up the question presented, therefore, it should do so in a case with a more developed record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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