No. 18-29

In the Supreme Court of the United States

SHAILENDRA BHAWNANI, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that petitioners were not victims entitled to restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30a-31a) is not published in the Federal Reporter but is available at 2018 WL 2459564. The memorandum and order of the district court (Pet. App. 1a-29a) is reported at 284 F. Supp. 3d 262.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2018. The petition for a writ of certiorari was filed on July 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Falgun Dharia was convicted pursuant to a guilty plea on two counts of bank fraud, in violation of 18 U.S.C. 1344; one count of subscribing to a false income tax return, in violation of 26 U.S.C. 7206(1); and

one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 5a, 32a-40a. Petitioners sought restitution under the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, asserting that they should be classified as victims in Dharia's criminal case. The district court denied petitioners' request. Pet. App. 27a. The court of appeals denied a petition for a writ of mandamus. *Id.* at 30a-31a.

1. The MVRA governs restitution in most cases involving federal crimes with an identifiable victim. See 18 U.S.C. 3663A(c)(1). The statute provides that a sentencing court "shall order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). "[V]ictim" is defined as "a person directly and proximately harmed as a result of the commission of" an offense covered by Section 3663A, "including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663A(a)(2).

The MVRA does not require restitution where the district court finds either that "the number of identifiable victims is so large as to make restitution impracticable" or that "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3)(A)-(B).

Under the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, Tit. I, 118 Stat. 2261 (18 U.S.C. 3771 (2006 & Supp. III 2009)), "crime victim[s]" have various statutory rights, including "[t]he right to full and timely

restitution as provided in law." 18 U.S.C. 3771(a)(6). Although the crime victim is not a party to the criminal prosecution, either the victim or the United States can seek to enforce the victim's CVRA rights by filing a motion in the district court. See 18 U.S.C. 3771(d)(1) and (3). The district court is required to "take up and decide" the motion "forthwith." 18 U.S.C. 3771(d)(3) (2012 & Supp. V 2017).

If the district court "denies the relief sought, the movant" (*i.e.*, the victim or the government) "may petition the court of appeals for a writ of mandamus." 18 U.S.C. 3771(d)(3) (2012 & Supp. V 2017). The court of appeals must generally "take up and decide" any mandamus petition within 72 hours after it is filed. *Ibid.* In deciding the petition, the court of appeals "shall apply ordinary standards of appellate review." 18 U.S.C. 3771(d)(3) (Supp. V. 2017). If the court of appeals denies mandamus relief, it must "clearly state []" "the reasons for the denial * * * on the record in a written opinion." 18 U.S.C. 3771(d)(3) (2012 & Supp. V. 2017) The government may also "assert as error the district court's denial of any crime victim's right" through an "appeal" in the underlying criminal case. 18 U.S.C. 3771(d)(4).

2. a. Dharia and his business partners engaged in bank fraud from 2003 to 2010. Between 2003 and 2009, they obtained Small Business Administration loans from PNC Bank in order to develop several Houlihan's restaurant franchises, including one in Brooklyn, New York. Pet. App. 6a-7a. The loan applications materially misrepresented Dharia's ownership interest in the franchises, allowing him to avoid certain reporting and personal guarantee requirements. *Id.* at 6a-8a. Dharia and his partners used some of the loan proceeds for other investments, and they eventually defaulted on the loans,

causing millions of dollars in losses to PNC Bank and the Small Business Administration. *Id.* at 8a-9a.

In addition, between 2006 and 2010, Dharia and others obtained loans from Fidelity Bank of Florida to purchase approximately five hotels in need of renovation. Pet. App. 6a, 9a. The loan applications that Dharia submitted minimized his ownership interest in the hotels, allowing him to avoid providing personal guarantees. *Id.* at 9a. Dharia and his business partners defaulted on the loans, causing millions of dollars of losses to Fidelity Bank of Florida. *Ibid.*

Dharia waived indictment and pleaded guilty to an information charging two counts of bank fraud, in violation of 18 U.S.C. 1344, as well as one count of subscribing to a false income tax return, in violation of 26 U.S.C. 7206(1), and one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 5a, 32a-40a. The first bank-fraud count was based on the scheme to defraud PNC Bank in loan applications related to three Houlihan's restaurants. *Id.* at 34a-35a, 37a. The second bank-fraud count was based on the scheme to defraud Fidelity Bank of Florida in loan applications related to five hotels. *Id.* at 35a-37a. As part of his plea agreement, Dharia agreed to pay restitution of more than $11 million to PNC Bank, the Small Business Administration, and Fidelity Bank of Florida. *Id.* at 4a, 6a.

On the day of Dharia's sentencing, several individuals and entities (other than petitioners) appeared and claimed they were entitled to restitution from Dharia under the MVRA. Pet. App. 5a. The district court referred the restitution issue to a magistrate judge for discovery. *Ibid.* While discovery was ongoing, petitioners sought to intervene, arguing that they were also entitled to restitution under the MVRA because Dharia

had defrauded them through conduct involving a hotel—a Holiday Inn in North Carolina—that was not involved in either of the charged bank-fraud schemes. *Ibid.*; Pet. C.A. App. 26-31. Petitioners had entered into a contract with Dharia in 2006 to lease that Holiday Inn, with an option to purchase the hotel. Pet. App. 46a-47a. A company in which Dharia held an interest had acquired the hotel property in 2004 and had a franchise agreement with Holiday Inn's management company. *Id.* at 45a-46a. Petitioners made a down payment to Dharia and began operating the Holiday Inn and making monthly payments. *Id.* at 47a-49a. But Dharia breached the lease agreement, including by failing to convey ownership after petitioners exercised the option to purchase, refinancing the hotel property so that petitioners could not maintain financing, and failing to make payments on the property, resulting in its foreclosure. *Id.* at 47a-53a. Before seeking to intervene in Dharia's criminal case, petitioners brought a claim against Dharia in arbitration, and prevailed on claims for breach of contract, breach of the covenant of fair dealing, and unjust enrichment, obtaining an award of $775,000, plus interest. *Id.* at 6a, 54a.

b. The district court denied restitution to petitioners. Pet. App. 1a-27a. The court explained that "not every person with a grievance against a defendant is entitled to criminal restitution." *Id.* at 20a. Instead, the court observed, "[o]nly those 'directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered' may obtain restitution." *Ibid.* (quoting 18 U.S.C. 3663A(a)(2)). The court further explained that whether a person was directly and proximately harmed by an offense depended on

"whether the fraudulent conduct that harmed a defendant was an 'integral part of the single scheme the defendant devised.'" *Id.* at 21a (quoting *United States* v. *Archer*, 671 F.3d 149, 172 (2d Cir. 2011)) (brackets omitted).

The district court noted that the crime of bank fraud focuses on "a person's conduct as it relates to a financial institution" and that "[t]he conduct for which [Dharia] was charged and pled guilty was that he misrepresented ownership interests to obtain loans from banks and then misappropriated the funds." Pet. App. 21a. The court explained that "[t]he harm claimed by" petitioners "'was not among'" the harms "'that served as a basis for either of the two bank fraud schemes, which involved three Houlihan's franchises and five other hotels.'" *Id.* at 22a (citation omitted). While it recognized that "an individual need not be named in a criminal indictment in order to be entitled to restitution," *ibid.*, the court determined that petitioners "were not harmed by this bank fraud scheme, even if they were victims of some bank fraud scheme," *id.* at 23a. "Without a nexus to the criminally charged schemes," it wrote, "these claimants have no entitlement to restitution." *Ibid.*

The district court also concluded, in the alternative, that petitioners should not be classified as victims entitled to restitution under the MVRA because the MVRA's "mandatory restitution scheme does not apply when 'determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim *is outweighed by the burden on the sentencing process*.'" Pet. App. 23a (quoting 18 U.S.C. 3663A(c)(3)(B)). The court noted the government's representation that if the court were

to accept petitioners' "position on restitution entitlement, it 'would require the investigation of upwards of fifty different properties, which would not be practicable for the government or the Court to accomplish without seriously impeding the sentencing process.'" *Id.* at 25a (citation omitted). The court wrote that it would "not impose this burden on the government or the sentencing process." *Ibid.*

c. The court of appeals denied petitioners' petition for a writ of mandamus directing the district court to designate them as victims under the MVRA or to order additional discovery. Pet. App. 30a-31a. The court found that "[t]he district court did not abuse its discretion in determining the petitioners were not 'victims' of Falgun Dharia's bank frauds" or in "determining that ordering restitution to 'victims' under the Petitioners' definition of the term would unduly impede the sentencing process." *Id.* at 31a.

ARGUMENT

Petitioners contend that this Court should grant review to decide "[w]hether the definition of 'victim' under the [MVRA] includes all victims directly and proximately harmed by the same scheme, conspiracy, or pattern as the offense of conviction," Pet. i, or only victims "named in an indictment or information," Pet. 17 (capitalization and emphasis omitted). See Pet. 3, 7, 21, 25. The district court, however, properly declined to classify petitioners as victims under the MVRA because petitioners were not directly and proximately harmed by the bank-fraud schemes underlying the defendant's convictions, and did not rely on the fact that petitioners were not named in the charging instrument. The decisions below accordingly do not implicate any disagree-

ment over whether a victim must be named in a charging instrument to qualify for restitution under the MVRA. Moreover, petitioners' case would be an unsuitable vehicle for considering the definition of "victim" under the MVRA because the district court's denial of restitution also rests on independent alternative grounds. The petition for a writ of certiorari should be denied.

1. a. Before the MVRA, federal restitution was primarily governed by the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1253-1255, which provides that a court "may order" a defendant convicted of certain offenses to "make restitution to any victim of such offense," 18 U.S.C. 3663(a)(1)(A). In *Hughey* v. *United States*, 495 U.S. 411, 413, 416-417 (1990), this Court held that "offense," as used in the VWPA, referred to the defendant's "offense of conviction," and that the VWPA therefore "authoriz[ed] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey* concluded that the VWPA did not permit a court to order restitution for conduct that formed the basis of counts that were dismissed as part of a plea agreement. Rather, the Court concluded, "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order." *Id.* at 420.

After *Hughey*, Congress amended the VWPA to broaden the definition of "victim." It provided that "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity," the term "victim" includes "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4863;

18 U.S.C. 3663(a)(2). When Congress created new restitution rights for crime victims by enacting the MVRA in 1996, Congress similarly defined "victim" for purposes of both the VWPA and the MVRA as "a person directly and proximately harmed as a result of the commission of an offense," including, "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." MVRA, Pub. L. No. 104-132, Tit. II, § 205, 110 Stat. 1229-1232; 18 U.S.C. 3663(a)(2), 3663A(a)(2).

That expanded definition of "victim" "created an exception to *Hughey*" where the offense "includes as an element a scheme, conspiracy or pattern of criminal activity," *United States* v. *Batson*, 608 F.3d 630, 637 (9th Cir. 2010). But the courts of appeals agree that *Hughey* "continues to 'require the court to exclude injuries caused by offenses that are not part of the scheme of which the defendant has been convicted.'" *United States* v. *Jones*, 641 F.3d 706, 714 (6th Cir. 2011) (brackets and citation omitted). Accord *United States* v. *George*, 403 F.3d 470, 474 (7th Cir.), cert. denied, 546 U.S. 1008 (2005); *United States* v. *Hughey*, 147 F.3d 423, 437 (5th Cir.), cert. denied, 525 U.S. 1030 (1998).

b. Petitioners contend that courts below "ignored the plain text of the MVRA and adhered to the * * * view that, in essence, *Hughey* still controls" "by finding that petitioners were not victims simply because they were not named in the Information." Pet. 21-22; see Pet. i, 25. Petitioners are incorrect.

The district court recognized that the MVRA's definition of "victim" includes "any person directly harmed by the defendant's criminal conduct *in the course of the*

scheme, conspiracy, or pattern." Pet. App. 10a (quoting 18 U.S.C. 3663A(a)(2)). It accordingly recognized that "an individual need not be named in" the charging instrument "in order to be entitled to restitution" under this definition. *Id.* at 22a. It further recognized that determining whether a claimant is a victim requires the court to "go[] beyond looking simply at the elements of the crime, and instead focus[] on whether the fraudulent conduct that harmed a [victim] was an 'integral part of the single scheme the defendant devised.'" *Id.* at 21a (quoting *United States* v. *Archer*, 671 F.3d 149, 172 (2d Cir. 2011)) (brackets omitted). The court then concluded that petitioners were not entitled to restitution because they had not established they were directly and proximately harmed by the relevant bank-fraud schemes. Specifically, it explained that "[a] bank fraud scheme—even if broadly viewed—must have some limit," and that petitioners had "made no showing that, if the defendant caused them losses, their losses were *in any way related* to the charged offense conduct with respect to specified banks." *Id.* at 23a (emphasis added); see *ibid.* (stating that petitioners "have no entitlement to restitution" because there was no "nexus to the criminally charged schemes").

The unpublished order of the court of appeals likewise did not suggest that the MVRA extends only to victims "named in the Information" or indictment, Pet. 21. See Pet. App. 30a-31a. The order simply stated that "[t]he district court did not abuse its discretion in determining that petitioners were not 'victims' of Falgun Dharia's bank frauds." *Id.* at 31a (citing 18 U.S.C. 3663A(a)(2); *In re Local # 46 Metallic Lathers Union & Reinforcing Iron Workers*, 568 F.3d 81, 87 (2d Cir. 2009) (per curiam), cert. denied, 559 U.S. 938 (2010)).

Petitioners principally argue (Pet. 22-25) that the lower courts misapplied the MVRA because, in their view, Dharia defrauded them through conduct that was "indisputably" part of the bank-fraud scheme of which Dharia was convicted. They rely (Pet. 22) on Dharia's having "defrauded petitioners during the same time frame" as the bank-fraud schemes described in the information and they assert that Dharia also "used the same methods and means" to defraud petitioners as he did in the conduct described in the information. But the district court's finding that petitioners failed to show "their losses were in any way related to the charged" bank fraud, Pet. App. 23a, and the court of appeals' decision upholding that determination on abuse-of-discretion review, *id.* at 31a, are fact-specific determinations that do not warrant review by this Court.

In any event, the district court's determination was not erroneous. The "scheme" that is an element of bank fraud is a "scheme * * * to defraud a financial institution." 18 U.S.C. 1344 (elements of bank fraud); see 18 U.S.C. 3663A(a)(2) (providing that "in the case of an offense that *involves as an element a scheme*, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's conduct in the course of the scheme, conspiracy, or pattern" qualifies as a "victim") (emphasis added). Assuming that private persons can be victims of a bank-fraud scheme, petitioners cannot show that they were "directly harmed" by the bank-fraud schemes that gave rise to Dharia's convictions. 18 U.S.C. 3663(a)(2). The hotel that petitioners leased was not one of the five hotels involved in Dharia's defrauding of Fidelity Bank, and the loss that petitioners incurred resulted from Dharia's breach of his contract with them, not from his fraudulently obtaining funds

from a bank. See Pet. App. 54a; Pet. C.A. App. 79, 240. There was accordingly no error, let alone an abuse of discretion, in the district court's determination that petitioner's losses were not proximately and directly caused by the relevant bank-fraud schemes.

2. Contrary to petitioners' contention (Pet. 8-17), the courts of appeals are not divided regarding the MVRA's definition of "victim." Petitioners assert that six circuits "have correctly * * * held that restitution should be broadly available to victims harmed by the defendant's scheme," Pet. 9, but that the Fifth and Tenth Circuits "have clung to the abrogated, narrow reading of the MVRA's 'victim' definition employed by the Court in *Hughey*" and that the Second and Third Circuits "have evidenced intra-circuit confusion," Pet. 13, 14. Petitioners are mistaken in claiming a conflict over the extent to which *Hughey* remains good law.

Petitioners cite (Pet. 13) the Fifth Circuit's statement that "[t]h[e] part of *Hughey* which restricted the award of restitution to the limits of the offense * * * still stands." *Hughey*, 147 F.3d at 437. That statement, which accompanied the court's recognition that Congress had eliminated *Hughey*'s limitations in respect to schemes, conspiracies, and patterns, see *ibid.*, is consistent with the conclusion of the other circuits. Indeed, the six circuits that petitioners view (Pet. 13) as having interpreted the MVRA have all correctly recognized that *Hughey* remains good law except to the extent that it excluded harm resulting from a scheme, conspiracy, or pattern that is an element of the offense of conviction. See *Batson*, 608 F.3d at 637; *George*, 403 F.3d at 474; *United States* v. *Acosta*, 303 F.3d 78, 87 (1st Cir. 2002); *United States* v. *Broughton-Jones*, 71 F.3d 1143, 1147 n.1 (4th Cir. 1995); *United States* v. *Chalupnik*, 514 F.3d 748,

752 (8th Cir. 2008); *United States* v. *Dickerson*, 370 F.3d 1330, 1341 (11th Cir.), cert. denied, 543 U.S. 937 (2004).

Petitioners next cite the Fifth Circuit's unpublished decision in *United States* v. *Bevon*, 602 Fed. Appx. 147, 153-154 (2015) (per curiam), which reversed a restitution award to HSBC because the loss to HSBC resulted from a "scheme to defraud" that was not part of the "schemes underlying [the defendant's] offenses of conviction." Contrary to petitioner's assertion (Pet. 9), *Bevon* did not "ignore[] the clear congressional intent" that restitution be imposed for losses incurred as part of a scheme or conspiracy. Rather, *Bevon* found that HSBC was not "directly harmed by the defendant's criminal conduct in the course of the scheme," 18 U.S.C. 3663A(a)(2), "because the conduct relating to HSBC was not a part of the schemes underlying Bevon's offenses of conviction," 602 Fed. Appx. at 154. In any event, *Bevon* is an unpublished decision that does not create binding circuit precedent. And, as petitioners recognize (Pet. 14), the Fifth Circuit has concluded in published decisions that restitution was proper for victims who were harmed in the course of a defendant's scheme. See *ibid.* (citing *United States* v. *Pepper*, 51 F.3d 469, 473 (1995); *United States* v. *Stouffer*, 986 F.2d 916, 928-929, cert. denied, 510 U.S. 837 and 510 U.S. 919 (1993)).

Petitioners next suggest (Pet. 14-15) that the Tenth Circuit disregarded the language of the MVRA in *United States* v. *Alisuretove*, 788 F.3d 1247, 1257, cert. denied, 136 S. Ct. 370 (2015). Petitioners are mistaken. *Alisuretove* reversed an order of restitution that was based on losses to 12 financial institutions. The court expressly acknowledged that the MVRA's "language does not limit the term 'victim' to any person or entity

specifically listed in the charging document." *Ibid.* The court reversed the district court's restitution order concerning financial institutions not listed in the indictment only because "neither the [presentence investigation report] nor the district court made any factual findings" regarding whether the defendant, "in the course of carrying out the conspiracy * * * , directly harmed other financial institutions in addition to the five that were the specific targets of the conspiracy." *Id.* at 1257-1258. Accordingly, contrary to petitioners' suggestion (Pet. 13-15), *Alisuretove* did not conclude that restitution was limited to the institutions listed in the indictment. The court simply required proof that the conspiracy "directly harmed" the institutions not named. See 18 U.S.C. 3663A(a)(2).

Finally, petitioners claim (Pet. 14) that "[t]he Second and Third Circuit[s] have evidenced intra-circuit confusion about how to apply the MVRA's definition of victim." Intracircuit confusion would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). But, in any event, no intracircuit confusion exists. The Second Circuit in *In re Local # 46* acknowledged that the MVRA's definition of "victim" "expands what * * * will give rise to a compensable loss when a scheme, conspiracy or pattern is involved." 568 F.3d at 87. But the court explained that "the reference point * * * remains the 'offense' of which the defendant has been convicted," and it declined to order restitution based on a scheme or conspiracy other than the one to which the defendant pleaded guilty. *Ibid.* And in *United States* v. *Oladimeji*, 463 F.3d 152, 158-159 (2d Cir. 2006), the court relied on the MVRA's expansive definition of "victim" to

uphold a restitution award that included losses sustained as part of a scheme.

Nor is *United States* v. *Fallon*, 470 F.3d 542 (3d Cir. 2006) "contrary to" the Third Circuit's other cases upholding restitution for the harm caused by the entire scheme. Pet. 16. *Fallon* acknowledged "Congress' clear intent to broaden the * * * authority to grant restitution for crimes involving a scheme or conspiracy." 470 F.3d at 549 n.12. The court there vacated a restitution order because it found inadequate evidence that certain losses were "directly related to [the defendant's] fraud." *Id.* at 549; see *id.* at 549 n.12 (stating that the court was "unaware of any cases holding that the definition of 'victim' for scheme-based crimes diminishes the requirement that losses be 'directly' caused by the defendant's actions").

3. In any event, this case would be an unsuitable vehicle for reviewing the question presented. Resolution of that question would not affect the outcome in this case because the district court determined that petitioners were also not entitled to restitution based on an alternative ground—the application of the MVRA's separate complexity prong. Pet. App. 23a-25a. The court of appeals found no abuse of discretion in the complexity determination, *id.* at 31a, and petitioners have not sought review of that case-specific conclusion, see Pet. i.

Petitioners' suggestion in a footnote (Pet. 24 n.5) that the complexity determination is "intertwined with" the lower courts' "definition of victim" is misplaced. The district court noted the government's submission that petitioners' "position on restitution entitlement" would require "'investigation of upwards of fifty different properties, which would not be practicable for the government or the Court to accomplish without seriously

impeding the sentencing process,'" and then determined that it was not appropriate to "impose this burden on the government or the sentencing process." Pet. App. 25a (citation omitted); see *id.* at 23a-25a, 31a. That complexity-based determination was not "intertwined" with the separate determination that petitioners did not qualify as victims of the relevant bank-fraud schemes. And while petitioners assert that the lower courts' complexity analysis was "wrong" because they "had an arbitration award that detailed the amount lost and owed," Pet. 24 n.5, petitioners overlook that the district court would have been required not simply to determine the loss that Dharia caused petitioners overall but the loss directly and proximately caused by the charged bank-fraud schemes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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