IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014
NO. _____

BERNARD WEST,
PETITIONER,
v.

UNITED STATES OF AMERICA,
RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code Section 3006A(d)(6) and Rule 39 of this Court, Petitioner Bernard West asks leave to file the attached Petition for Writ of Certiorari to the District of Columbia Court of Appeals without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to D. C. Code 1981 § 11-2601, Rule 44 of the D. C. Rules of Criminal Procedure, in the Superior Court for the District of Columbia and on appeal to District of Columbia Court of Appeals.

Respectfully submitted,

Deborah A. Persico, PLLC
Attorney At Law
5614 Connecticut Avenue NW, #105
Washington DC 20015
(202) 244-7127
Counsel for Petitioner

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

BERNARD WEST

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DECISION BY THE D.C. COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRECEDENT, AS WELL AS PRECEDENT IN OTHER JURISDICTIONS, WHERE THE APPELLATE COURT, IN DETERMINING WHETHER AN INITIALLY LAWFUL TRAFFIC STOP BECAME AN UNLAWFUL SEIZURE, IT FAILED TO FOCUS ON WHETHER THE POLICE DILIGENTLY PURSUED THE PURPOSE OF THE TRAFFIC INVESTIGATION, AND INSTEAD FOCUSED MERELY ON THE TIME IT TOOK POLICE TO CONDUCT AN UNRELATED INVESTIGATION.

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PETITION FOR WRIT OF CERTIORARI

Bernard West respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

CITATION TO OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals ("DCCA") in Record Nos. 12-CF-1657, was published as *Bernard West v. United States*, 100 A.3d 1076 (D.C. 2014), was rendered on September 18, 2014. *See,* Appendix A. Petitioner filed a Petition for Rehearing or Rehearing *En Banc*, and the government filed an opposition. The appellate court denied Petitioner's petition for rehearing on February 23, 2015. *See,* Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The District of Columbia Court of Appeals denied Petitioner's petition for rehearing on February 23, 2015. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of February 23, 2015.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Motion Hearing.

1. Testimony.

A jury convicted Petitioner of possession of PCP and possession of liquid PCP. Prior to trial, on June 7, 2012, the trial court held a hearing on Petitioner's motion to suppress evidence and statements. **MPD Officer James O'Bannon** testified that he was driving a police vehicle,

accompanied by Officers Plumley and Chagnon, in the neighborhood of 1300 Alabama Avenue SE on November 29, 2011 at around 5:30 to 6:00 p.m., when he saw a vehicle run a stop sign (6/7/12: 3-6). The vehicle crossed the intersection and drove into the parking lot of the Capital Heights metro station. *Id* at 6. The police pulled up behind the car and ran the tag number. *Id* at 6-7.

O'Bannon got out of his car and approached the driver's side of the stopped vehicle. *Id* at 7. Only the driver, Petitioner Bernard West, was in the vehicle. O'Bannon asked Petitioner for his license, registration and insurance. Petitioner was "sweating and shaking profusely." O'Bannon asked Petitioner to step out of the vehicle "for safety" before Petitioner had the opportunity to provide his papers to O'Bannon. Petitioner complied. O'Bannon "escorted" Petitioner to the rear of his vehicle. According to O'Bannon, Petitioner was not handcuffed at the time.

O'Bannon asked Petitioner if he had drugs or guns in the car and Petitioner said no. *Id* at 8. O'Bannon then asked Petitioner if he could search Petitioner's vehicle. According to O'Bannon, Petitioner said "go ahead."

O'Bannon walked back to the vehicle and shined his flashlight inside on the rear floorboard. On the floorboard he saw a one-ounce vial containing an amber liquid. He opened the door to "get a closer look at the liquid." When he opened the door and stuck his head inside, he smelled PCP, which he had smelled "thousands" of times in his six years as a police officer. *Id* at 8-9. As he got closer to the vial, it had an odor consistent with PCP. *Id* at 8. Petitioner was then placed under arrest.

On cross-examination, O'Bannon admitted that when he spoke with Petitioner while Petitioner was still inside his vehicle, he did not smell PCP. *Id* at 17. O'Bannon also admitted that although Petitioner was sweating and shaking, he did not see any weapons or bulges on Petitioner's

person. *Id* at 18. O'Bannon had no information that Petitioner was armed and dangerous. *Id* at 18. O'Bannon ordered Petitioner out of the car because Petitioner was sweating, and then he took Petitioner to the back of the vehicle. *Id* at 18-19. O'Bannon admitted that Petitioner was patted down after he was taken to the back of the vehicle but O'Bannon denied that Petitioner was handcuffed before the pat-down. *Id* at 19-22. It was after Petitioner was patted down that O'Bannon asked him if he had any drugs or guns in his car. *Id* at 22-23.

When confronted with his grand jury testimony that Petitioner was taken to the back of the vehicle and handcuffed, then patted down, O'Bannon claimed that the grand jury transcript contained an error. *Id* at 24. O'Bannon reiterated that Petitioner was not handcuffed until after O'Bannon found the PCP. He did not recall which of the officers patted down Petitioner and did not know whether the officer who patted down Petitioner went inside Petitioner's pockets. *Id* at 29-30.

O'Bannon reiterated that he shined his flashlight in the car only after Petitioner consented to a search. *Id* at 30. He did not smell PCP until he stuck his head in the car. *Id* at 32.

MPD Officer Kristopher Plumley approached the passenger side of the car Petitioner was driving at the same time O'Bannon approached the driver's side (6/7/12: 36). He kept his eyes on Petitioner while O'Bannon interviewed him. According to Plumley, "not much" transpired that made this stop any different than any other traffic stop. *Id* at 36. O'Bannon asked Petitioner to step out of the car and to walk to the rear, where Plumley and Officer Chagnon were standing. O'Bannon asked Petitioner if he could search the car and Petitioner consented. After O'Bannon looked in the car, he gave Plumley and Chignon a "signal" to handcuff Petitioner and place him under arrest. *Id* at 37.

Plumley did not recall seeing PCP on the floorboard but testified that when he stuck his head

in the car he smelled PCP. *Id*. Plumley admitted that he did not smell PCP as he stood at the passenger side of the vehicle and he saw nothing unusual occur. *Id* at 42. Plumley was "absolutely positive" that Petitioner was not handcuffed until after O'Bannon found PCP. *Id* at 43. According to Plumley, Petitioner may have been patted down after he was taken to the rear of his vehicle, but he was not searched until after he was arrested. *Id* at 43-44. Plumley did not remember who patted Petitioner down. Police found no weapons or anything illegal on Petitioner's person.

When Petitioner was taken to the rear of his vehicle, three police officers were present, though Plumley claimed they "weren't guarding him from going anywhere." *Id* at 44. When asked if Petitioner was free to go, Plumley responded, "If he wanted to leave without his vehicle." Plumley testified that no one told Petitioner he could not leave. *Id* at 45. When pressed about what he, O'Bannon and Chignon actually did say to Petitioner, Plumley could not remember what anyone said, though he remembered, "I'm sure there were a lot of things said." *Id* at 46.

Petitioner West testified that he was stopped at the metro station and approached by three officers (6/7/12: 49). They swung the door open and pulled him out of the car, searched him and took him to the back of his vehicle, then handcuffed him. An officer asked if he could search Petitioner's vehicle and Petitioner said no. *Id* at 50. They searched it anyway. They did not tell him why they stopped him. *Id* at 51.

2. Arguments and Rulings.

Petitioner asserted that there was no probable cause to justify stopping his vehicle. *Id* at 52; He also denied giving consent to search, but also argued that consent was not voluntary given that he was not free to leave and had been patted down. *Id* at 56. Furthermore, O'Bannon did not have probable cause to search the car merely because he saw a vial which could have been perfume,

especially considering that neither O'Bannon nor Plumley smelled PCP until they stuck their heads inside the car. *Id* at 57.

The prosecutor asserted that even if consent was not voluntary, police had probable cause to search the vehicle under the "plain view" and "plain smell" doctrines (6/7/12: 59). According to the prosecutor, the officers could rely on plain view because O'Bannon saw a vial on the rear floorboard of the passenger seat. *Id* at 59-60. The officers could rely on "plain smell," the prosecutor asserted, because "[b]oth officers testified they could smell PCP in the car." *Id* at 60.

Petitioner responded:

> Both officers testified that they didn't smell the PCP till they were inside the vehicle. Your Honor, inside the vehicle. And so the plain smell doctrine doesn't save the day if they can only have this plain smell once they've made the intrusion inside the vehicle. And so the only reason they're in the position they are is 'cause they've asked him out of the car, handcuffed him, prevented him from leaving, detained him. The only reason they're in that position is because they've been going back to the car and they only make the determination it's PCP once they're inside the car.

Id at 60-61.

The trial court found that: police stopped Petitioner because he failed to stop at an intersection; when O'Bannon approached Petitioner, he appeared nervous and sweating, which prompted O'Bannon to ask him to step out of his vehicle; and that O'Bannon patted down Petitioner and "escorted him to the rear of the vehicle." As to O'Bannon's sighting of the vial, the trial court found as follows:

> Officer O'Bannon testified that he went back to the driver's side using his flashlight, stuck his head inside the car, and at that point he smelled PCP and on the rear floorboard, he found -- spotted a vial on the rear floorboard containing an amber liquid. The smell that he recognized in the vehicle was the smell of PCP.

Id at 63. The court further found that O'Bannon and Plumley were credible and that Petitioner was not handcuffed until after the discovery of PCP. *Id* at 65. The court further found that the officers were permitted to stop the vehicle following the traffic violation and that they were permitted to ask Petitioner to step out of the vehicle based on the O'Bannon's testimony that Petitioner was nervous and sweating. *Id* at 64. The court found that the pat down at that point was also proper. The court did not find Petitioner credible because to do so, according to the court, it would have to believe there were "three rogue officers." *Id* at 65.

B. The Trial.

MPD Officer Kristopher T. Plumley testified after the initiated a traffic stop, Officer O'Bannon went to the driver's side of the vehicle and Plumley went to the passenger side. Petitioner was the only occupant (6/13/12: 33). O'Bannon asked Petitioner to get out of the car and "walked him to the rear of the vehicle where [Plumley] and Sergeant Chagnon were and just talked to him." *Id* at 34. O'Bannon asked Petitioner for consent to search his car and, according to Plumley, Petitioner "said that he could." Plumley and Chagnon "stayed with [Petitioner] at the rear of the rear of the vehicle and O'Bannon approached the car." *Id*.

Before O'Bannon went inside the vehicle he gave Plumley and Chagnon a "signal" to handcuff Petitioner. They complied. Plumley then approached the car and stuck his head inside. *Id* at 35. He did not recall if either the door or the window was open at the time. O'Bannon pointed to what Plumley "believed" was "a one-ounce vial full of . . . amber-colored liquid." *Id* at 36. Plumley put his head inside the car and smelled a smell "consistent with PCP." *Id* at 36-37.

On cross-examination, Plumley testified that he was trained to notice anything out of the ordinary during a traffic stop. *Id* at 49-50. When asked by defense counsel if he would have noticed

if Petitioner were "acting nervous or giving [O'Bannon] some guff or fidgeting or making furtive gestures," he would have noticed. *Id* at 50. Plumley admitted that Petitioner was not acting nervous or breathing heavily. He just saw Petitioner "sitting there." *Id* at 51.

Plumley "assumed" that the Petitioner's window was down because as Petitioner and O'Bannon were having a conversation, which Plumley heard at the time but could not recall at trial. Although the window was down, O'Bannon did not give Plumley any signals at that time as if he smelled something. *Id* at 52-53. Plumley believed that Petitioner was searched when he was taken to back of the car but Plumley could not recall who patted him down. *Id* at 53. According to Plumley, "this wasn't a very significant case." *Id* at 53. But Plumley recalled that Petitioner was "very compliant" and "didn't throw [them] off in any way." Plumley did not recall if the car was open when Petitioner got out and was taken to the rear of the car. *Id* at 55. Plumley did not recall what he and Petitioner spoke about when Petitioner was at the rear of the car. *Id* at 55-56. Plumley did not recall any conversation between O'Bannon and Petitioner. *Id* at 55-57. Yet he claimed to recall that Petitioner consented to the search of his vehicle.

MPD Officer James O'Bannon testified that he asked Petitioner for his license, registration and insurance. *Id* at 74. According to O'Bannon, and contrary to Plumley's testimony, Petitioner was "sweating profusely" and "[h]is breathing was kind of heavy." *Id* at 75. "For safety," O'Bannon asked Petitioner to exit the vehicle. Petitioner complied and O'Bannon "escorted" him to the rear of the vehicle. At the time, Petitioner was not handcuffed.

At the rear of the vehicle O'Bannon asked Petitioner if he had any drugs or weapons in the vehicle. *Id* at 75. Petitioner said no. O'Bannon then asked him for consent to search the vehicle and, according to O'Bannon, Petitioner "gave consent." O'Bannon left Petitioner at the rear of the

vehicle with Plumley and Chagnon. He approached the vehicle and shined a flashlight on the rear passenger side floorboard. *Id* at 75, 77. He saw a "one ounce vial with amber liquid inside of it." He opened the door to inspect the vial and when he stuck his head inside "it had a strong chemical odor of PCP." *Id* at 75, 77. O'Bannon alerted his partners to handcuff Petitioner. O'Bannon signalled the other officers to arrest Petitioner. *Id* at 77. O'Bannon seized $155 from Petitioner's pants pocket. *Id* at 78-79.

On cross-examination, O'Bannon admitted that when he first approached Petitioner and Petitioner's window was down, he [O'Bannon] did not smell anything. *Id* at 85. When Petitioner reached the rear of the vehicle after he was escorted there by O'Bannon, one of the officers patted him down but O'Bannon could not recall who did that. *Id* at 89. Nothing was found during the pat down. *Id* at 90.

O'Bannon denied that he told the grand jury that Petitioner was handcuffed when he was taken to the rear of the vehicle. *Id* at 90-91. When shown his grand jury testimony, he claimed that the grand jury testimony was "inaccurate." *Id* at 91-93.

The parties stipulated that the seized substance contained PCP and that the car Petitioner was driving was registered to him. A government expert testified that the quantity of PCP seized was consistent with intent to distribute.

REASONS FOR GRANTING THIS WRIT

I IN DETERMINING WHETHER AN INITIALLY LAWFUL TRAFFIC STOP BECAME AN UNLAWFUL SEIZURE, THE APPELLATE COURT FAILED TO FOCUS ON WHETHER THE POLICE DILIGENTLY PURSUED THE PURPOSE OF THE TRAFFIC INVESTIGATION, NOT MERELY ON THE TIME IT TOOK TO CONDUCT AN UNRELATED INVESTIGATION, IN CONFLICT WITH SUPREME COURT PRECEDENT.

The DCCA and Petitioner West agreed that he was lawfully stopped by police for a minor

traffic violation. *West* at 1082. Petitioner argued that because the police (three officers) unlawfully frisked him and failed to diligently pursue the purpose of the stop, he was unlawfully seized and, therefore, his consent to search the car was not voluntary and MPD Officer O'Bannon was not lawfully positioned to see a vial in plain view in his car. He further argued that O'Bannon lacked probable cause to search the car. The DCCA agreed, at 1085, that when police stopped Petitioner's vehicle, they shined a flashlight into it, then asked for but did not give Petitioner an opportunity to provide his license, registration and insurance documents. The DCCA agreed, at 1080, that police instead ordered Petitioner from the vehicle and escorted him to the rear of the vehicle. The DCCA assumed, at 1080 and 1083, that police then unlawfully frisked Petitioner with no reasonable suspicion that he was armed or dangerous, and that they found nothing incriminating.[1] The DCCA agreed at 1085 that immediately after the unlawful pat-down, rather than resume the traffic investigation by permitting Petitioner to obtain the necessary documents from his vehicle, Officer O'Bannon asked Petitioner if he had drugs or guns in his car and when Petitioner said "no," O'Bannon asked if he could search the car. The DCCA, at 1083, declined to decide whether consent was voluntary.

The DCCA agreed, at 1080-1081, that O'Bannon then proceeded to shine his flashlight in the car a second time, whereupon he saw a vial containing an amber liquid on the rear passenger floorboard, he opened the door and stuck his head inside the car, smelled what he believed to be PCP, picked up and examined the vial more closely and seized it. The DCCA agreed that Petitioner was then handcuffed and placed under arrest. The DCCA acknowledged, at 1085, that a traffic ticket was not issued until after Petitioner was arrested. According to the DCCA, at 1084-1086, the

[1]The government conceded that the pat-down was unlawful. *West* at 1083.

detention was lawful throughout the stop and therefore, Officer O'Bannon was lawfully positioned to see the vial in plain view when he conducted a flashlight search the second time. It further found, at 1086-1088, that O'Bannon had probable cause to search the car once he saw the vial.

The decision that the detention was lawful conflicts with Supreme Court cases and other legal precedent. In *Florida v Royer*, 460 US 491, 500 (1983), the Supreme Court found that the scope of a seizure "must be carefully tailored to its underlying justification," and that the government bears the burden to "demonstrate that the seizure it seeks to justify ... was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. Courts must evaluate "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 US 675, 686 (1985).

Sharpe explains what the court meant by "diligently pursuing" the traffic investigation. There, two defendants who had been traveling together— one (Savage)driving a truck, the other (Sharpe) in a camper attached to the truck— were stopped by a DEA Agent, who suspected that the truck was overloaded. The truck fled and was pursued and stopped by a local police officer, who immediately obtained Savage's license and registration. *Id* at 678. The DEA Agent immediately checked Sharpe's license, then secured help of local police to stay with Sharpe. He then traveled to investigate Savage, all of which took approximately 15 minutes. The police officer handed the Agent the documents he had obtained from Savage, which the Agent examined. Then the Agent questioned Savage about whether there was marijuana in the truck and asked if he could search it. Savage declined, but a search ensued when the Agent stepped on the rear of the truck, confirming his suspicion that the truck was overloaded. He got closer to the truck and smelled marijuana, then

searched it and found a large number of bales of what he suspected was marijuana based on his previous investigations. Both Savage and Sharpe were arrested. About 30 to 40 minutes had elapsed between the time the camper was stopped and Sharpe was arrested.

The Fifth Circuit reversed the convictions but according to the Supreme Court, it had "[b]as[ed] its decision solely on the duration of the respondents' detentions" and had concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment." *Id* at 680. The Supreme Court disagreed. It wrote: "While it is clear that `the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion,' [citation omitted], we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Sharpe* at 685. The court noted that for most of Sharpe's detention, the DEA Agent was attempting to enlist the help of local police and he had to pursue Savage, who had fled. Moreover, "he proceeded expeditiously: within the space of a few minutes, he examined Savage's driver's license and the truck's bill of sale, requested (and was denied) permission to search the truck, stepped on the rear bumper and noted that the truck did not move, confirming his suspicion that it was probably overloaded"— the reason for the traffic stop. *Id* at 687. The Supreme Court reversed the Fifth Circuit.

Similarly, in *United States v Digiovanni*, 650 F3d 498, 507 (4th Cir 2011), the court explained that "[i]n the context of traffic stops, police diligence [generally] involves requesting a driver's license and vehicle registration, running a computer check, and issuing a ticket." *West* at 13; *also see United States v Beck*, 140 F3d 1129 (8th Cir 1998)(once purpose of traffic stop completed,

officer must have reasonable suspicion to continue to detain defendant). And while the Supreme Court has also held that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop. . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop*," Arizona v Johnson*, 555 US 323, 333 (2009), the focus of the analysis remains whether the police diligently pursued the traffic investigation. In *Johnson*, where a driver and two passengers were stopped, the circumstances differed vastly from those in the present case. "While [Officer] Machado was getting the driver's license and information about the vehicle's registration and insurance. . . [Officer] Trevizo attended to Johnson. *Johnson* at 328. Therefore, when police asked Johnson questions about gangs during the traffic stop, that alone did not make the detention unlawful. The DCCA acknowledged but did not follow the above cases.

The DCCA agreed with Petitioner that at the time the officer searched Petitioner's car—which occurred after police had escorted him to the rear of the vehicle, unlawfully patted him down, asked him whether he had drugs in the car and asked for his consent to search— "they had not yet obtained from [Petitioner] the license, registration, and insurance documents they had requested (and thus had not accomplished their investigative purpose), and they had not yet issued him a ticket." *West* at 1085. Rather than focusing on that failure of the police to actually investigate the reason for the traffic stop as required by *Sharpe* and others, however, the DCCA focused solely on what it guesstimated[2] to be was a "very short time it took for the officers to perform the pat-down,

[2]The DCCA inferred that the duration of the unlawful pat-down, inquiry and search was "very short" but there was no testimony at either the motion hearing or trial as to the time that elapsed between the stop of the vehicle and the issuance of the ticket, or the time between the stop of the vehicle and the end of the unrelated drug investigation, or the time between the end of the drug investigation and the issuance of the ticket. The only testimony as to time was Petitioner's motion hearing testimony that the

to ask Petitioner one time about whether he had guns or drugs in his vehicle, and to request Petitioner's consent. . .," which it concluded "cannot be said to have unreasonably prolonged the traffic stop." *West* at 1085.

Moreover, the DCCA found that because Officer O'Bannon eventually wrote a ticket on the scene after Petitioner had been handcuffed and placed under arrest, he did not abandon the traffic investigation. *West* at 1085. That finding, however, still does not comply with *Sharpe*, *Digiovanni*, *Royer,* or *Johnson* because it did not take into account that there is no evidence whatsoever that any of the three officers diligently pursued the traffic stop investigation until *after* they had completed their unrelated drug investigation.[3] Legal precedent cited herein is clear that in deciding whether a lawful detention has become unlawful the focus of the court must be on whether the officers diligently pursued the traffic investigation, not merely the guesstimated length of time that the diversionary, unrelated investigation took. Here, where there is no evidence that the police officers took any steps to investigate the purpose of the traffic stop prior to completing an unrelated drug investigation, the DCCA's reliance on the duration of the unrelated investigation as the basis for finding that the detention was lawful does not comport with Supreme Court precedent. When the focus is properly placed on the diligence of the officers, the record evidence established that the initially lawful seizure became unlawful. *Sharpe, supra*. Therefore, the officer was not "lawfully positioned to see inside the car," *Mitchell v United States*, 746 A2d 877, 855 (DC 2000), because

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search of his car lasted approximately 5 minutes (6/7/12:50).

[3]Officer O'Bannon testified at the motions hearing: "I wrote the ticket on the scene while he was in handcuffs" and he placed the ticket in the car (6/7/12: 11). Officer Plumley testified at trial that when O'Bannon ordered Petitioner out of the car, he (Plumley) did not start to write a ticket for the violation and he did not recall whether anyone was running a check on Petitioner or on the tag number (6/13/12: 52, 54). The third officer did not testify at either the motions hearing or trial.

he conducted his flashlight search during an unlawful detention, and "plain view" does not apply. This Court should hear Petitioner's claim to assure uniformity with *Sharpe* and resolve the conflict between *West* and other precedent.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his petition.

Respectfully submitted,

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(Appointed by the Court)

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SUPREME COURT OF THE UNITED STATES

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PROOF OF SERVICE

I, Deborah A. Persico, counsel of record, certify that on _____ I caused to be mailed, by first-class mail, postage prepaid, an original and ten copies of the petition for writ of certiorari in the above-captioned case to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari; That I mailed by first class postage prepaid an additional copy of the petition and the statement of proof of mailing of the petition to counsel for respondent: Solicitor General of the United States Department of Justice, Washington, D.C. 20530; Office of the United States Attorney, Appellate Division, 555 4th Street, N.W., Washington, D.C. 20530.

_____
Deborah A. Persico

APPENDIX A

APPENDIX B