No. 16-1548

In the Supreme Court of the United States

ALESTEVE CLEATON, PETITIONER

v.

DEPARTMENT OF JUSTICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was "convicted of a felony" for purposes of mandatory removal from his position as a federal law enforcement officer, 5 U.S.C. 7371(b), when a state court "accepted [his] plea of guilty, and found him guilty" of a felony drug offense, but postponed sentencing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 839 F.3d 1126. The final opinion and order of the Merit Systems Protection Board (Pet. App. 20a-27a) is reported at 122 M.S.P.R. 296. The initial decision of an administrative judge (Pet. App. 9a-19a) is unreported but is available at 2014 WL 4987258.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2016. A petition for rehearing was denied on February 23, 2017 (Pet. App. 28a-29a). On May 15, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 23, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the federal Bureau of Prisons as a correctional officer in Petersburg, Virginia. Pet. App. 1a. While holding that position, he was indicted by the Commonwealth of Virginia on one felony count of possession of marijuana with intent to distribute, in violation of Va. Code Ann. § 18.2-248.1 (2014). Joint Appendix, Dec. 31, 2015, ECF No. 33, at 92 (5/6/14 Order). On March 20, 2014, petitioner appeared in state court and, pursuant to a plea agreement, entered the functional equivalent of a guilty plea to that charge.[*] *Ibid.*; see Pet. App. 1a-2a.

On May 6, 2014, the state court entered an order in which it stated that, in light of petitioner's decision to "plead guilty" to the felony, it had "proceeded to try the case without the intervention of the jury." 5/6/14 Order. The court explained that the prosecution had "summarized its evidence" and that the court, "having heard the evidence, accepted [petitioner's] plea of guilty, and found him guilty of possess[ion of] marijuana with intent." *Ibid.* In a section of the order's caption labeled "Offense Description If Convicted," the court listed "POSSESS MARIJUANA WITH INTENT." *Ibid.*; see *ibid.* ("The caption of this order is made a part of the order.").

The state court granted petitioner's motion "to defer the imposition of sentence, and order a full presentence

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[*] The state-court order described petitioner's plea as a "plea of guilty." 5/6/14 Order. The court of appeals, however, described it as a "no contest" plea. Pet. App. 1a. Petitioner acknowledges (Pet. 4 n.2) that "for purposes of this petition," his plea is functionally equivalent to a guilty plea, and this brief accordingly treats it as such. See, *e.g.*, Pet. i (question presented referring to "guilty plea[s]").

report." 5/6/14 Order. It required that report to be completed within 16 days. *Ibid.*

2. As a federal corrections officer, petitioner was subject to mandatory removal upon conviction of any state or federal felony. Under 5 U.S.C. 7371(b), "[a]ny law enforcement officer who is convicted of a felony shall be removed from employment as a law enforcement officer on the last day of the first applicable pay period following the conviction notice date." The "conviction notice date" is defined as "the date on which an agency that employs a law enforcement officer has notice that the officer has been convicted of a felony that is entered by a Federal or State court, regardless of whether that conviction is appealed or is subject to appeal." 5 U.S.C. 7371(a)(1).

Congress enacted Section 7371 in 2000, after a congressional report revealed that a federal law enforcement officer had been allowed to retain his position and pay for approximately six months after the officer was convicted of a felony. See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(3) [tit. VI, § 639(a)], 114 Stat. 2763, 2763A-168; 146 Cong. Rec. 5387-5388 (2000) (statement of Sen. Grassley). Although removal under the statute is mandatory, the statute provides that "[i]f the conviction is overturned on appeal, the removal shall be set aside retroactively to the date on which the removal occurred." 5 U.S.C. 7371(d).

Section 7371 provides a set of procedural protections for an employee subject to removal following a felony conviction, including an opportunity to administratively contest whether he was in fact "convicted of a felony." 5 U.S.C. 7371(e)(2)(B); see generally 5 U.S.C. 7371(e). An employee may also appeal a removal to the Merit

Systems Protection Board (MSPB or Board), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see 5 U.S.C. 7371(e)(2), 7513(d); see also 5 U.S.C. 1201, 1204; 5 C.F.R. 1201.3.

3. Three days after the state court's order in petitioner's Virginia criminal case, the Bureau of Prisons proposed his removal under Section 7371(b). Pet. App. 2a. Petitioner ultimately exercised his right to appeal his removal to the MSPB, "asserting that he was not convicted on May 6, 2014." *Ibid.* An administrative judge found that petitioner had "offered no persuasive evidence or argument in support" of that assertion and affirmed the removal. *Id.* at 11a.

The administrative judge explained that the Bureau of Prisons had "provided a copy of the Circuit Court of Brunswick County document entering [petitioner's] guilty plea and finding [him] guilty of Possession of Marijuana with Intent to Distribute." Pet. App. 11a. She "therefore * * * f[ound]" that petitioner "was convicted of a felony and his conviction was recorded on May 6, 2014." *Ibid.* She noted in her decision that petitioner had separately "provided a document involving a contempt charge, for which there was a hearing scheduled for June 24, 2014." *Ibid.* But she found that the document "d[id] not relate to his criminal conviction on the Possession of Marijuana with Intent to Distribute charge." *Ibid.*

4. Following the administrative judge's decision, petitioner obtained new counsel in the state criminal proceedings and entered into a revised plea agreement. Pet. App. 2a-3a. The revised agreement "added a misdemeanor charge for contempt, but did not change [petitioner's] previous * * * plea to the felony." *Id.* at

3a. The state court "accepted the [revised] plea agreement," observing that petitioner had "'pled no contest to both charges and stipulated that evidence was sufficient to convict him on both charges.'" *Ibid.* (citation omitted). Pursuant to the terms of the revised plea agreement, however, the state court "withheld a finding of guilt for a period of 2 years." *Ibid.* (brackets and citation omitted). The court placed petitioner "on supervised probation for two years," with the proviso that "upon successful completion of the probation period, the charges against [him] [would] be dismissed." *Ibid.*

Petitioner then sought review of the administrative judge's decision by the full MSPB, "arguing that pursuant to the revised plea agreement the court withheld a finding of guilt and therefore he was not convicted of a felony on May 6, 2014." Pet. App. 3a. The Board rejected that argument and upheld the removal. *Id.* at 20a-27a. The Board disagreed with petitioner's "assertion" that the most recent state-court order had "found that he was not guilty of Possession with Intent." *Id.* at 22a; see *id.* at 22a-26a. The Board observed that the state court's second order "did not * * * expressly address the prior conviction," and the Board found "no indication that the [state] court has expressly vacated that conviction." *Id.* at 25a.

The Board perceived "no dispute that [petitioner] was convicted of a felony." Pet. App. 25a. And it reasoned that "[e]ven assuming * * * the prior conviction is no longer in effect," petitioner would still be subject to removal, because Section 7371 permits relief from removal only when a conviction is "overturned on appeal," not when a new "plea agreement * * * led to a new court order." *Ibid.*

5. Petitioner sought judicial review of the MSPB's decision in the Federal Circuit. See 5 U.S.C. 7703(b)(1)(A). The court of appeals affirmed. Pet. App. 1a-8a.

The court of appeals concluded as an initial matter that "whether one has been 'convicted' within the language of 5 U.S.C. § 7371(b) is necessarily a question of federal law." Pet. App. 5a; see *id.* at 4a-5a. The court then explained, quoting this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that under federal law, "'a guilty plea alone [can] constitute a conviction' in some circumstances." Pet. App. 5a (brackets in original) (quoting *Dickerson*, 460 U.S. at 112). The court of appeals additionally observed that in *Dickerson*, this Court had "determined that a formal judgment was not necessary to establish that an individual had been convicted of a felony for purposes of [a] firearms disability statute." *Ibid.* The court of appeals noted that *Dickerson* had found "no reason whatsoever to suppose that Congress meant [conviction] to apply only to one against whom a formal judgment has been entered." *Id.* at 5a-6a (brackets in original) (quoting *Dickerson*, 460 U.S. at 112 n.6).

Relying on *Dickerson*, the court of appeals similarly determined that, "for purposes of § 7371(b)," a federal employee "can be 'convicted' * * * 'once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence.'" Pet. App. 6a (quoting *Dickerson*, 460 U.S. at 114). The court reasoned that "Congress's main concern in enacting § 7371(b) was prohibiting individuals that were guilty of felonies from serving the public as law enforcement officers." *Ibid.* And it found "[n]othing in the legislative history or statutory text" that would "indicate[] that Congress

was concerned with whether the officer in question actually receives or serves a prison sentence, or whether a state court formally enters a written adjudication of guilt." *Ibid.*

Turning to the facts of this case, the court of appeals reasoned that because petitioner's "guilt was established on May 6, 2014, the Board correctly determined that [he] was convicted of a felony for purposes of § 7371(b) as of that date." Pet. App. 7a. The court rejected petitioner's argument "that even if he was convicted of a felony under the initial plea agreement, the initial plea agreement was withdrawn and therefore the conviction was nullified." *Ibid.* The court observed that Section 7371 "is clear that a removal may only be set aside * * * if the conviction is overturned on appeal, which has not happened in this case." *Ibid.*

The court of appeals additionally explained that this case does not present "a situation where * * * hypothetically, a withdrawal of [a plea] agreement could affect whether there was a conviction." Pet. App. 8a. The court acknowledged that "Virginia law permits a defendant to withdraw a plea agreement" and accepted that withdrawal "could potentially affect whether there was a conviction." *Id.* at 7a. But, on the facts of this case, the court found that "there was a judgment of guilt by the trial court based on the plea agreement," and it reasoned that the "theoretical possibility that [petitioner] could have withdrawn his plea agreement cannot affect that the judgment was entered." *Id.* at 8a.

The court of appeals cited a Virginia appellate decision recognizing that permission to withdraw a plea agreement is not automatic under state law, but instead "rests within the sound discretion of the trial court." Pet. App. 7a (quoting *Hall* v. *Commonwealth*, 515 S.E.2d

343, 346 (1999)). And it found that petitioner had "failed to present any evidence establishing that he filed a motion to withdraw the plea or that the [state] court actually set aside the initial plea agreement." *Ibid.* "Instead, [his] initial plea agreement was simply revised to encompass an additional criminal offense." *Id.* at 8a.

The court of appeals observed that petitioner's "plea from the initial plea agreement did not change in the revised plea agreement—he merely pled no contest to the additional charge." Pet. App. 8a. And the court reasoned that "[i]t would be inconsistent with both the plain language of the statute and Congress's intent if we were to hold that, although [petitioner] was convicted of a felony in May 2014 that has not been overturned on appeal, he must be reinstated and awarded back pay because the initial plea agreement was revised to include additional criminal activity." *Ibid.*

ARGUMENT

Petitioner renews (Pet. 8-23) his contention that he was not "convicted" for purposes of mandatory removal from his position as a federal law enforcement officer under 5 U.S.C. 7371(b). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, the question presented rarely arises, and the idiosyncratic facts of this case make this petition an unsuitable vehicle for addressing it. No further review is warranted.

1. The court of appeals correctly determined that petitioner could not remain a federal law enforcement officer once the state court had "found him guilty" of a state-law felony following a plea. 5/6/14 Order. Under 5 U.S.C. 7371, "[a]ny law enforcement officer who is

convicted of a felony shall be removed from employment" shortly after the employing agency receives "notice that the officer has been convicted of a felony that is entered by a Federal or State court, regardless of whether that conviction is appealed or is subject to appeal." 5 U.S.C. 7371(a)(1) and (b). The Bureau of Prisons' awareness of the state court's May 6, 2014 order constituted such notice.

As the court of appeals recognized, that order was "a judgment of guilt by the trial court based on the plea agreement," Pet. App. 8a, that qualified as a conviction for purposes of Section 7371. The order was conclusive in all respects as to petitioner's guilt of the charged felony offense, and simply deferred sentencing pending a full report from the state probation office. See 5/6/14 Order. Petitioner offers no sound basis for concluding that Congress intended for a federal law enforcement officer to remain on the job, and on the federal payroll, after his guilt of a felony crime has been definitively established, simply because he is awaiting the imposition of a sentence. To the contrary, the evident purpose of Section 7371 is to ensure that federal law enforcement officers who commit felonies are removed from their positions as expeditiously as possible. See 5 U.S.C. 7371(b) (requiring removal at the end of "the first applicable pay period following the conviction notice date"); 146 Cong. Rec. at 5387-5388 (statement of Sen. Grassley).

When a defendant pleads guilty, he is both "stating that he did the discrete acts described in the indictment" and also "admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Particularly in a circumstance where a court has itself "found [the defendant] guilty," 5/6/14 Order, the de-

fendant has been "convicted" for purposes of his removal as a federal law enforcement officer under Section 7371. 5 U.S.C. 7371(b). As this Court observed in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), and as petitioner himself acknowledges (Pet. 13), this Court has "[i]n some circumstances * * * considered a guilty plea alone enough to constitute a 'conviction.'" *Dickerson*, 460 U.S. at 112. "In some statutes," the "terms 'convicted' or 'conviction' * * * specifically are made to apply to one whose guilty plea has been accepted whether or not a final judgment has been entered." *Id.* at 112 n.6. In other statutes, like the firearm statute in *Dickerson* or the employment statute here, a similar definition applies even in the absence of an express definitional provision. See *id.* at 111-114.

The circumstances here are closely analogous to the circumstances in *Dickerson*. In that case, the Court held that an individual had been "convicted" of a felony, for purposes of a ban on possession of firearms by felons, based solely on "the charge of a crime of the disqualifying type," "the plea of guilty to that charge," and "the [state] court's placing [him]on probation." 460 U.S. at 111. Here, as in *Dickerson*, the statute's unqualified language ("convicted of a felony") and underlying purpose (ensuring public safety) support a broad construction. See *id.* at 111-112 & n.6. And here, as *Dickerson*, the underlying state-court proceeding included both a "charge of a crime of the disqualifying type" and a "plea of guilty to that charge." *Id.* at 111.

To the extent that *Dickerson* could be read to define a "conviction" to require "more" than the plea itself, 460 U.S. at 113, the circumstances of this case would satisfy that requirement as well. The state court here

not only accepted petitioner's guilty plea, but also "proceeded to try the case without the intervention of a jury, as provided by law," and "found [petitioner] guilty." 5/6/14 Order. Petitioner emphasizes (Pet. 12) that the state-court order deemed a conviction in *Dickerson* included a sentence of probation. But the Court in *Dickerson* noted that sentence only as substitute verification, in the absence of "written adjudication of guilt," that the state court had in fact "deem[ed] [the defendant] guilty of a crime." 460 U.S. at 113-114. This case involves an explicit "written adjudication of guilt," *id.* at 114, rendering any additional confirmation unnecessary. In any event, the most recent state-court order in this case includes a sentence of "supervised probation," Pet. App. 3a, thereby putting this case on all fours with *Dickerson*. See 460 U.S. at 113-114 ("[O]ne cannot be placed on probation if the court does not deem him to be guilty of a crime.").

2. Petitioner observes (Pet. 5 n.3) that Virginia permits a defendant to withdraw a plea before sentencing if the trial court concludes that such withdrawal would "promote the ends of justice." Contrary to petitioner's contention, however, his adjudication of guilt remains a "conviction" notwithstanding that feature of state law.

Although the Court in *Dickerson* noted that the plea in that case was not subject to withdrawal, see 460 U.S. at 113 n.7, it did not hold that the theoretical possibility of withdrawal precludes a guilty plea accompanied by a judicial finding of guilt from qualifying as a conviction. Indeed, the Court's decision generally indicates otherwise. First, *Dickerson* relied on the holding of *Lewis* v. *United States*, 445 U.S. 55 (1980), that a person "'has been convicted . . . of a felony'" for relevant purposes

even in circumstances where the conviction "was subject to collateral attack on constitutional grounds." *Dickerson*, 460 U.S. at 111 (quoting *Lewis*, 445 U.S. at 60). If a guilty plea can qualify as a conviction notwithstanding its vulnerability to a constitutional challenge—namely, that the defendant "was without counsel," *Lewis*, 445 U.S. at 56—it follows that it can qualify as a conviction notwithstanding the hypothetical possibility that a trial court could elect to permit its withdrawal. Second, *Dickerson* emphasized that the definition of the relevant terms in the firearm statute should turn on federal rather than state law, 460 U.S. at 111-112, and petitioner does not dispute that a uniform federal definition should likewise apply under Section 7371. Accounting for a variety of withdrawal standards would require a federal definition riddled with state-specific exceptions and difficult state-by-state distinctions.

Petitioner errs in characterizing (Pet. 15-16) the court of appeals' interpretation of Section 7371(b) as "absurd." It is hardly absurd for Congress to mandate the immediate removal of a federal law enforcement officer who has acknowledged his factual and legal guilt of a disqualifying crime, notwithstanding the hypothetical possibility that he might later ask to withdraw his plea. And the court of appeals' decision leaves open the possibility that an employee who *actually* requests and is allowed to withdraw his plea may be able to argue that his conviction is eliminated nunc pro tunc. See Pet. App. 7a (noting that "if the plea were withdrawn," it could "potentially affect whether there was a conviction").

Petitioner's own reading of the statute, moreover, would itself produce anomalous results that Congress is unlikely to have intended. On petitioner's view, some-

one who has admitted to committing a felony could remain a law enforcement officer until he is sentenced, even if he has no intention to withdraw (or reasonable grounds for withdrawing) his guilty plea. Under that approach, similarly situated defendants will be treated differently depending upon when their sentencing proceedings are scheduled. And an employee found guilty of a felony could remain on the federal payroll, in a position of responsibility and authority, by delaying his sentencing as long as possible.

3. a. Petitioner errs in contending (Pet. 8) that the decision below "is inconsistent with decisions of this Court." For reasons explained above, the decision below is consistent with—indeed, supported by—the Court's decision in *Dickerson*. As petitioner appears to recognize (Pet. 14), the decision below is also consistent with this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993). That decision held, in the context of a statutory sentencing enhancement for a "'second or subsequent conviction'" of a particular federal crime, that the term "'conviction' *refers to the finding of guilt* by a judge or jury that necessarily *precedes* the entry of a final judgment of conviction." *Id.* at 131, 133 (quoting 18 U.S.C. 924(c)(1) (Supp. V. 1993)) (emphasis added). And petitioner's reliance (Pet. 8-12) on *Lott* v. *United States*, 367 U.S. 421 (1961), cannot be squared with *Dickerson*'s recognition that *Lott* was limited to the construction of Federal Rule of Criminal Procedure 34 (which did not use the same terminology at issue here) in a particular factual context. See *Dickerson*, 460 U.S. at 113 n.7. Nothing required the court of appeals to treat *Lott* as controlling in this case, particularly when petitioner did not cite that decision in his opening brief. Cf., *e.g.*, *Fellhoelter* v. *Department of Agric.*, 568 F.3d

965, 975 (Fed. Cir. 2009) (declining to address argument not raised in opening brief).

b. The decision below also does not conflict with any decision of another court of appeals. As this Court observed in *Dickerson*, and as petitioner acknowledges (Pet. 19), "the terms 'convicted' or 'conviction' do not have the same meaning in every federal statute." *Dickerson*, 460 U.S. at 112 n.6. Thus, petitioner's citation (Pet. 20-21) of decisions of other circuits construing conviction-related terminology in other statutes does not suggest that those courts would reach a result different from the decision below if called upon to apply Section 7371(b) to the facts of this case. For that same reason, petitioner is mistaken in suggesting (Pet. 18-19) that the court of appeals would itself treat the decision below as controlling in other statutory contexts.

4. The interpretation of Section 7371(b) in the circumstances of this case is also not an issue of sufficient importance to warrant this Court's review. Section 7371 applies only to those federal law enforcement officers who have committed a felony, and the government is aware of only four reported cases or administrative decisions, including this one, that involve it. See Pet. App. 1a-8a; *Canava* v. *Department of Homeland Sec.*, 817 F.3d 1348, 1350-1351 (Fed. Cir. 2016) (addressing whether particular state-law offense should be treated as a "felony" under Section 7371); *Sanchez* v. *Department of Homeland Sec.*, 110 M.S.P.R. 573, 578-579 (2009) (addressing Section 7371's consistency with particular settlement agreement); *Sipe* v. *Department of Homeland Sec.*, DA-752-07-212-I-1, 2007 WL 2066759 (M.S.P.B. June 13, 2007) (addressing, in nonprecedential initial decision, a claim for reinstatement and backpay where conviction was overturned on appeal). Al-

though Section 7371(b) is undoubtedly applied in circumstances that do not result in administrative or judicial decisions, the sparsity of decisional law suggests that its application is typically undisputed.

The scarcity of disputes over Section 7371 may well be attributable to the fact that Section 7371 is unnecessary to support the removal of a law enforcement officer who commits a felony offense. See, *e.g.*, 5 U.S.C. 7371(c)(1) and (d) (recognizing the possibility of removal "other than under this section"). As the administrative judge in this case recognized (see Pet. App. 12a), petitioner's guilty plea, which reflects his admission that he committed a crime, would warrant the termination of his employment under a separate statutory provision that authorizes removal of a federal employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see Pet. App. 12a. The MSPB "has long made clear" that "an employee's conviction of a crime casts grave doubt on his reliability, trustworthiness and ethical conduct, all of which naturally affect the efficiency of the service." Pet. App. 13a (citing *Brown* v. *Department of the Treasury*, 34 M.S.P.R. 132, 135 (1987)). Not only has the Board "consistently upheld the penalty of removal in such cases," but it has "consistently observed that law enforcement officers are held to a higher standard of conduct than other employees." *Ibid.* (citing cases). The principal effect of Section 7371 is simply to eliminate an agency's discretion *not* to remove a federal law enforcement officer who is convicted of a felony. But it is far from clear that the agency would otherwise choose to exercise such discretion in any significant number of cases.

5. In any event, this case would be an unsuitable vehicle for addressing the question presented. Petitioner

asserts (Pet. 2) that "[t]his case presents the question whether the term 'convicted' in 5 U.S.C. § 7371 * * * requires something more than the mere entry of a withdrawable guilty plea." But this case does not involve the "mere entry of a withdrawable guilty plea." As petitioner acknowledges elsewhere in the petition, "a Virginia trial court found him 'guilty'" of a felony. Pet. 3. Petitioner has not presented any evidence (or even argued) that he withdrew his initial plea, or that the state court has ever invalidated the order that found him guilty based upon that plea. Pet. App. 7a. Yet petitioner's arguments focus on the legal effect of his plea alone, largely disregarding the state court's order reflecting its consideration of the evidence and determination that petitioner was guilty of a felony.

The core of petitioner's disagreement with the court of appeals' decision in this case is not legal, but factual. His contention (Pet. 8) that the court of appeals erred in affirming the application of Section 7371 "even though no * * * judgment [was] entered" is at bottom a dispute with the court of appeals' finding (Pet. App. 8a) that "there was a judgment of guilt by the trial court based on the plea agreement." For reasons previously explained, that finding was correct. In any event, any fact-bound error in the court of appeals' assessment of this unusual case would not warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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