Docket No. _____

In the
UNITED STATES SUPREME COURT

JUSTIN LYLE IZATT
Petitioner,

v.

UNITED STATES of AMERICA
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court of Appeals committed error by denying the Petitioner's 28 U.S.C. §2255 petition ?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings appear in the caption of the case on the cover page.

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The petitioner, Justin L. Izatt, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit that was entered on May 29, 2018.

1. Opinions Below

The District Court of Idaho denied Mr. Izatt's 28 U.S.C. §2255 petition on February 1, 2017. *Izatt v. United States*, ID.D.Ct. No. CV 13-00431-S-EJL. A copy of the Order is included in the Appendix at "App. 2". The District Court issued Judgment in favor of the Respondent on the same date. The Judgment of the District Court is included in the Appendix at App. 3.

The Court of Appeals for the Ninth Circuit affirmed the Order and Judgment

of the District Court on May 29, 2018, in an unpublished opinion. A copy of that Memorandum Opinion is included in the Appendix at App. 1.

2. Jurisdictional Statement

This Court has jurisdiction to consider this request for certiorari to the Court of Appeals under 28 U.S.C. § 1254(1).

3. Constitutional and Statutory Provisions

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. §3161

See attached.

28 U.S.C. §2255

See attached.

4. Statement of the Case

Mr. Izatt appeals a ruling of the Ninth Circuit Court of Appeals, entered on May 29, 2018. In the Ninth Circuit, Mr. Izatt had appealed a final Judgment and

Order, entered by the District Court for the District of Idaho on February 1, 2017, which denied Izatt's Petition To Vacate or Set Aside Conviction and entered judgment against him and in favor of the United States. Izatt had previously been convicted of Possession With Intent To Distribute Methamphetamine following a jury trial which occurred on December 14 - 16, 2010. The original Judgment of Conviction from the criminal case entered on March 29, 2011.

In the underlying criminal case proceedings, a grand jury returned an indictment against Izatt in the United States District Court, District of Idaho, on May 11, 2010. The Indictment charged Izatt with Possession With Intent To Distribute Methamphetamine, a violation of Title 21 of the U.S. Code, §841(a)(1) and §841(b)(1)(A). The Honorable Edward J. Lodge presided over the case.

Izatt pleaded not guilty, and retained Idaho attorneys Douglas Nelson and Scott Gatewood to represent him in the trial court proceedings. The case was scheduled for Jury Trial on July 13, 2010, which was later rescheduled to December 14, 2010.

Izatt filed a Motion To Suppress on June 10, 2010, challenging the probation search of his residence. The District Court issued its Order denying the motion on July 20, 2010.

The government filed a Notice of Sentencing Enhancement on August 19, 2010. In the Notice, the government informed Izatt of its intention to seek an enhanced penalty of a mandatory minimum term of life imprisonment without release, based on two prior felony drug-related convictions.

Mr. Izatt proceeded to jury trial on December 14, 2010. Following a three-day trial, the jury found Izatt guilty.

Mr. Izatt was sentenced on March 28, 2011. The District Court sentenced Mr. Izatt to life in prison, without the possibility of parole or early release, basing its ruling on 21 U.S.C. §841(b)(1)(A). The Court issued its "Judgment in a Criminal Case" on March 29, 2011.

Izatt filed a direct appeal with the District Court on April 7, 2011. Izatt's appeal to the Ninth Circuit (Case No. 11-30089) was denied on May 10, 2012. *See United States v. Izatt,* 480 Fed. Appx. 447 (9th Cir. 2012). Izatt filed a Petition For Panel Rehearing, which the Ninth Circuit denied on June 5, 2012.

Izatt filed a Petition For Writ of Certiorari to the United States Supreme Court on July 13, 2012. The Supreme Court denied Izatt's Petition For Writ of Certiorari (Case No. 12-5294) on October 1, 2012.

Izatt filed a Motion For New Trial on January 23, 2013. After significant briefing by the parties, the District Court entered an Order denying the motion on May 28, 2013.

Izatt appealed from that Order, on June 6, 2013. The Ninth Circuit Court of Appeals denied that appeal on December 11, 2014.

Izatt filed a Motion To Vacate or Set Aside Conviction on October 1, 2013. *See* Appx. 4. In his Petition, Izatt alleged ineffective assistance of counsel against his trial counsel, and asserted several different claims. The Government answered by generally denying all of Izatt's claims, and submitted affidavits from trial

counsel in support. In those affidavits, Izatt's trial counsel disagreed with most of Izatt's claims but admitted to significant trial errors. *See* Appx. 5.

The District Court determined that Izatt was not entitled to an evidentiary hearing on his Petition. The District Court denied Izatt's Petition To Vacate or Set Aside Conviction on February 1, 2017. Izatt appealed from that Order to the Ninth Circuit Court of Appeals, on February 13, 2017. The Ninth Circuit denied Mr. Izatt's appeal in a memorandum opinion dated May 29, 2018. *See* Appx. 1. This Petition follows.

Appellant Justin Lyle Izatt was indicted by a grand jury for possession with intent to distribute methamphetamine. The amount of methamphetamine at issue was 77 grams of actual methamphetamine (approximately 123.4 grams of a mixture). The case involved a residence search of Mr. Izatt's home, based on his Idaho misdemeanor probationary status.

Mr. Izatt retained Idaho attorneys Douglas Nelson and Scott Gatewood to represent him in the district court.

Prior to trial, Mr. Izatt unsuccessfully challenged the search and seizure in the case. Following the denial of his motion to suppress, Mr. Izatt proceeded to jury trial.

At Mr. Izatt's jury trial, the key witnesses were Brandon Harvey, an informant for the government, and Mariah Pace, a witness offered immunity by the Government but who eventually testified for the defense. The Government offered Ms. Pace immunity for her testimony, but after debriefing her, decided not to call

her as a witness. After the interview and debriefing, the Government did not provide a supplemental discovery response to the defense, nor did defense counsel make a formal discovery demand or request a continuance to investigate the newly-revealed information. Instead, the defense called her to the stand, and Ms. Pace admitted to ownership and possession of the drugs at issue. The Government put on witnesses to impeach Ms. Pace's credibility.

The jury found Mr. Izatt guilty of possession with intent to distribute 50 grams or more of actual methamphetamine. Mr. Izatt had two previous controlled substance felony convictions. Based on the federal "three strikes" provision of 21 U.S.C. §841(b)(1)(A)(viii) and §851, the District Court sentenced Mr. Izatt to life imprisonment. He has no possibility of parole.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231, and the Court of Appeals for the Ninth Circuit properly exercised jurisdiction over the appeal under 28 U.S.C. §1291. Izatt now petitions this Court for issuance of a writ of certiorari to the Court of Appeals for the Ninth Circuit under 28 U.S.C. §1254(1).

5. Reasons For Granting the Writ

a. The Ninth Circuit Court of Appeals decided an important federal question in a manner that conflicts with relevant decisions of this Court, by ignoring important facts supporting Izatt's claims and cases supporting Izatt's allegations of Ineffective Assistance of Counsel.

In his appeal to the Ninth Circuit Court of Appeals, Izatt challenged the District Court's judgment against him on his 28 U.S.C. §2255 petition in which he alleged ineffective assistance of counsel against his attorneys. The Ninth Circuit's

panel decision overlooked material points of fact and law. In doing so, they decided an important question of federal law in a manner that conflicts with existing relevant law from the Ninth Circuit and from this Court.

Both this Court and the Ninth Circuit have outlined the legal standards governing ineffective assistance of counsel claims. Mr. Izatt's §2255 claims are based on allegations of ineffective assistance of counsel by his trial counsel.

This Court's landmark case on ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Strickland, the United States Supreme Court first defined the right to counsel contained within the Sixth Amendment as the right to the effective assistance of counsel. *Id.*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render "adequate legal assistance." *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The purpose of the right is, simply, to ensure a fair trial. *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

The *Strickland* case established a two-prong test for analyzing ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, a petitioner must demonstrate (1) that trial counsel's performance was

"deficient", and (2) that the petitioner was prejudiced by counsel's performance. *Strickland*, 466 U.S. at 687.

To establish that trial counsel's performance was deficient, a petitioner must show that the attorney's representation fell below an objective standard of reasonableness. *Id*. at 688; *Stanley v. Cullen,* 633 F.3d 852, 862 (9th Cir. 2011). The benchmark measure of attorney performance is "reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688. The petitioner must overcome a presumption that the attorney's conduct falls within a wide range of reasonable professional assistance and sound trial strategy. *Id*. at 689.

Proving "prejudice" requires a showing that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Moore v. Czerniak*, 574 F.3d 1092, 1100 (9th Cir. 2009). A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Moore*, 574 F.3d at 1100, 1109.

The *Strickland* decision outlines specific duties that trial counsel must honor in representing criminal defendants. Counsel must assist the defendant and owes the defendant a duty of loyalty. *Strickland*, 466 U.S. at 688. Counsel's "overarching duty" to advocate the defendant's cause includes the duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course" of the case. *Id*. Counsel has a duty to make "reasonable investigations" regarding the case. *Id*. at 691. Counsel has a duty to

"bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688.

The United States Supreme Court has declared that the "ultimate focus of the inquiry must be on the fundamental fairness" of the proceedings throughout the case. *Id*. at 696. They further declared that

> "In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id*.

The plain language of 28 U.S.C. §2255 requires a district court to provide a hearing on a petition "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief … ." A district court must grant a federal habeas petitioner an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003). A Petitioner bringing a claim for post-conviction relief under 28 U.S.C. §2255 must be granted an evidentiary hearing if a factual dispute exists between the parties over the contested issues, and the petitioner's version of events, if true, would warrant post-conviction relief. *See United States v. Chacon-Palomares,* 208 F.3d 1157, 1159 (9th Cir. 2000). A hearing must be granted unless the petitioner's claims "when viewed against the record, either fail to state a claim for relief or are "so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Schaflander,* 743 F.2d 714, 717 (9th Cir. 1984). To avoid summary

dismissal of a §2255 motion, the petitioner "must make specific allegations which, if true, would entitle him to relief on his claim." *United States v. Keller,* 902 F.2d 1391, 1395 (9th Cir. 1990).

Mr. Izatt asserts that the Ninth Circuit disregarded the law on ineffective assistance of counsel claims from both the United States Supreme Court and its own circuit court case law, as set forth in detail below.

Izatt's appeal to the Ninth Circuit focused on three major points, each demonstrating significant ineffective assistance of counsel. The Ninth Circuit's memorandum decision addressed those points in summary fashion, but failed to explain their legal reasoning or reconcile the cases with Ninth Circuit and United States Supreme Court precedent. *See* Appx. 1, ps. 3-4.

First, the Ninth Circuit failed to adequately address Izatt's supported claim that his counsel committed significant errors concerning defense witness Mariah Pace, errors that his counsel fully *admitted to* in the District Court proceedings. Given that this witness could have fully exculpated Mr. Izatt in the criminal case, the importance of these trial errors cannot be overemphasized.

In summary, Ms. Pace was called to the stand on the afternoon of the second day of Mr. Izatt's jury trial. Based on the District Judge's direction, the witness was examined outside the presence of the jury. After a break, the Court reconvened, and recessed for the remainder of the afternoon. That evening, the witness was interviewed by the Government, who subsequently offered her

immunity for her testimony. During the Government's debriefing of Ms. Pace, they apparently learned that she was going to claim ownership of the drugs at issue, and claim that her source of supply was a person named Chris Ayers. The Government then utilized the additional time that evening to investigate Ms. Pace's claims, and were prepared to debunk them in trial the next day. The Government did not provide the defense a supplemental discovery response regarding this witness' interview, the offer of immunity or their subsequent investigation.

When defense counsel learned that the witness was being interviewed by the Government, and unexpectedly being offered immunity for her testimony, they failed to request a continuance on the record to investigate the facts behind this series of events. Counsel failed to conduct any additional interviewing or investigation of the witness at that time. Counsel failed to demand a supplemental discovery response from the United States Attorney. Most importantly, counsel failed to request a continuance to locate and interview, or at least investigate, the witness' source of drug supply, Chris Ayers, to dispute or counter the government's evidence and theory that Ayers could not possibly have been the witness' source of the drugs at issue.

Mr. Izatt eventually obtained this evidence on his own and provided it to the District Court in the form of a Motion For New Trial. Specifically, Mr. Izatt determined that Chris Ayers was indeed a methamphetamine dealer who was subsequently indicted in Federal Court for Conspiracy of Possession with Intent To Distribute Methamphetamine and other drug-related charges. (*See United States v.*

Izatt, ID.D.Ct. case no. CR-10-0112-S-EJL, Dkt. No. 98 (denied 05/28/2013, *see id.,* Dkt. No. 103)). The District Court dismissed the evidence as insufficient to merit further proceedings. However, trial counsel failed to make the appropriate request to the District Court for a continuance to obtain this vital information, which could have countered the government's attack on Ms. Pace's credibility and could have significantly aided Mr. Izatt's defense.

This was a crucial witness and an absolute key to obtaining an acquittal for Mr. Izatt. Counsels' failures in this regard went well beyond "sound trial strategy" and constituted crucial errors in Mr. Izatt's representation. Counsels' performance and decisions concerning this issue fell below objective standards of reasonableness. *See Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Stanley v. Cullen,* 633 F.3d 852, 862 (9th Cir. 2011). At a minimum, the District Court should have granted an evidentiary hearing on this issue to further examine the merits of this claim. *See United States v. Chacon-Palomares,* 208 F.3d 1157, 1159 (9th Cir. 2000).

Mr. Izatt's counsel *admitted* to significant errors in his representation on this particular issue, and admitted that Izatt was severely prejudiced as a result**.** Pursuant to the District Court's direction, Mr. Izatt's counsel submitted affidavits to the Court which addressed the issues raised in Mr. Izatt's §2255 Petition. In the affidavits, counsel spoke in general terms of trial strategies and decisions he made during the course of Mr. Izatt's representation. Nelson's affidavit is included as an appendix at App. 5. Particularly noteworthy, for purposes of determining whether

to grant Mr. Izatt an evidentiary hearing on the issues, was the following:

"Mr. Izatt asserts in his pleadings that your Affiant should have asked for a continuance once it was learned that the government had given Mariah Pace immunity. Mr. Izatt is right. Your affiant was stunned when, for the first time on the last day of trial, he was told that Ms. Pace was in fact granted immunity the night before, but that the Government would not use her as a witness. Your affiant had no idea of the level of debriefing that occurred during the night, and because the Court had appointed her an attorney, your affiant was unable to talk to her directly about any of this. Your affiant did try to get details about what had gone on during the night from the Assistant United States Attorney handling the case but all he said was 'wait and see once court starts.' But it wasn't until the Government began its cross-examination of Ms. Pace that it became obvious what the extent of the problem was. The government was able to learn from Ms. Pace what she was going to say on the stand and then investigate her story during the night. The government did not produce any witness statement to your affiant, nor did they produce anything that was later used in the cross-examination of Ms. Pace. Your affiant should have demanded both a supplemental discovery response and a continuance of the trial so that he could independently try to verify Ms. Pace's testimony. Your affiant did not do either of these things *which did deprive Mr. Izatt of a fair trial.* It is unknown what Judge Lodge would have done with this mess, but your affiant should have at least tried to get time to deal with Ms. Pace's testimony." (Appx. 2, para 14)(emphasis added).

In simplest terms, Mr. Izatt's counsel admitted to mistakes which, in his informed opinion, *did in fact deprive his client of a fair trial.* This admission of error goes well beyond trial strategy and decision-making to the realm of ineffective assistance of counsel. Mr. Izatt's counsel freely admitted to the ineffective assistance he provided, and admitted to the substantial prejudice (deprivation of Mr. Izatt's right to a fair trial) which followed. In essence, Mr. Izatt's counsel admitted that he violated the basic tenant of criminal defense representation set forth in *Strickland*, that counsel has a duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 688. Counsel admits that this did not occur, and Mr. Izatt

was deprived of a fair trial by his omissions. Mr. Izatt was entitled to post-conviction relief based thereon. The District Court erred by denying such relief. At a bare minimum, the District Court should have ordered an evidentiary hearing to address these issues on their merits.

On *de novo* review, the District Court's decision denoted clear error. The Court of Appeals should have reversed the District Court on this issue, and by affirming the District Court, ruled in conflict with existing Circuit and U.S. Supreme Court precedent. This Court should grant certiorari to remedy this error.

Second, Mr. Izatt's counsel made a false, unfulfilled promise to the jury to produce a key witness at trial, which he failed to do. This was in direct contradiction to established Ninth Circuit precedent. Nevertheless, the Ninth Circuit ignored this precedent and ruled against Mr. Izatt.

Mr. Izatt's counsel, during his opening statement, promised the jury that they would hear directly from Mr. Izatt. Counsel stated "Justin Izatt is going to testify and he is going to tell you [facts about the case]". This was an unequivocal promise (and not merely "an expression of hope", a key point of differentiation in the *Saesee* opinion) that this particular witness, the most important possible witness, the defendant himself, would talk to the jury and deny the allegations against him. Counsel broke that promise to the jury, and never called Mr. Izatt as a witness.

The Ninth Circuit Court of Appeals previously held that such a broken

promise to the jury constituted ineffective assistance of counsel. *Saesee v. McDonald,* 725 F.3d 1045, 1049-1050 (9th Cir. 2013). In *Saesee,* the Ninth Circuit held that "[w]hile a defendant's denials are not the strongest evidence, the failure to make those denials, when the jury was promised that he would, left the strong inference that everything [the defendant] failed to deny must, in fact, be true." *Id.* at p. 8. The Ninth Circuit further noted that

> "A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. When counsel promises a witness will testify, the juror expects to hear the testimony. If the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences. In addition to doubting the defense theory, the juror may also doubt the credibility of counsel." *Id.* at pp. 9-10.

Mr. Izatt's case was essentially identical to *Saesee.* Counsel made an unfulfilled promise to the jury that the key witness, the person on trial, would testify and talk directly to the jury. Counsel's failure to follow through with his promise to the jury was not simply "trial strategy", and instead prejudiced Mr. Izatt with the jury's rendering of a guilty verdict. Mr. Izatt's counsel violated the dictates of established Ninth Circuit precedence, and provided ineffective assistance of counsel.

The District Court erred by ignoring the Ninth Circuit's *Saesee* decision. The Ninth Circuit erred by ignoring its own established precedent. This Court should grant certiorari to address this error.

Third, Mr. Izatt's counsel requested continuances, and thereby waived Mr. Izatt's speedy trial rights, under the Speedy Trial Act and under the Sixth Amendment, without consulting with Mr. Izatt. As a result, Mr. Izatt lost the ability to challenge the dismissal of his case for constitutional and statutory speedy trial rights.

Mr. Izatt had the right to a speedy trial under the Sixth Amendment to the United States Constitution and pursuant to the Speedy Trial Act, 18 U.S.C. §3161. However, constitutional speedy trial rights are deemed waived, and statutory speedy trial time is deemed "excludable time", when the defense requests a continuance. Mr. Izatt asserts that his counsel essentially surrendered Izatt's constitutional and statutory speedy trial rights by requesting a continuance of the proceedings, without first consulting with him and obtaining his consent. Mr. Izatt swore under oath that he did not learn of the waiver and request for continuance until after it had occurred. This evidence was not objected to nor countered by conflicting evidence, by the Government. Mr. Izatt further indicated that he would not have surrendered his constitutional or statutory speedy trial rights absent a compelling reason, which he asserted did not exist.

Mr. Izatt was prejudiced because important constitutional and statutory rights were waived without his knowledge or consent. The results of the proceedings would have been different had counsel not waived these rights. *See Strickland, supra,* 466 U.S. at 694. Based thereon, Mr. Izatt asserts that his counsel's actions in this regard fell below objective standards of reasonableness and

constituted ineffective assistance of counsel.

In the District Court, Mr. Izatt's counsel and the Government responded to this allegation by focusing on the continuance requested by defense counsel on October 15, 2010, which was based entirely on a serious and unfortunate medical issue experienced by Mr. Izatt's counsel just prior to the commencement of the jury trial. The Government offered the sworn affidavit of defense counsel in support of its position, in which counsel explained his medical issue and response.

The Ninth Circuit Court latched onto this response, and repeated it in its Memorandum Decision.

However, Mr. Izatt pointed out that the District Court, the Government and trial counsel were all ignoring the fact that counsel inexplicably surrendered Izatt's speedy trial rights *long before* this medically-necessary continuance. The record reflects that counsel for both sides had requested continuances on at least three previous occasions. Mr. Izatt's counsel either requested the continuance, or failed to object to the Government's requests for continuance, in each instance. According to Mr. Izatt's sworn and uncontradicted testimony, his counsel never consulted with him regarding a waiver of his speedy trial rights. The Government's response to Izatt's §2255 petition allegations, including counsel's affidavits, did not refute Mr. Izatt's allegations.

If counsel did in fact waive Mr. Izatt's speedy trial rights without Izatt's consent and without any consultation, counsel directly violated the dictates of *Strickland*. See *Strickland, supra*, 466 U.S. at 688 (declaring that counsel's

"overarching duty" to advocate the defendant's cause includes the duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course" of the case). Mr. Izatt, as a criminally-accused person, had the right to a speedy trial under the Sixth Amendment to the United States Constitution and pursuant to the Speedy Trial Act, 18 U.S.C. §3161. Mr. Izatt was prejudiced by counsel's actions and/or omissions in that he was deprived of important constitutional and statutory protections, which could have ultimately resulted in dismissal of the criminal action if violated.

Based thereon, Mr. Izatt asserts that his attorney provided ineffective assistance of counsel regarding the speedy trial matter. At a minimum, Mr. Izatt was entitled to an evidentiary hearing to further address this issue. *See United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003). He respectfully asserts that this Court should reverse the District Court and remand for further proceedings on this issue.

The Ninth Circuit's panel decision overlooked material points of fact and law directly relating to these three post-conviction issues, and decided an important federal question in a manner that appears to conflict with the relevant decisions of this Court. Certiorari should be granted.

In short, Mr. Izatt laid out a cogent argument that his counsel provided ineffective assistance of counsel which severely prejudiced Izatt, in violation of clearly-established post-conviction law. However, the Ninth Circuit decision failed

to address these violations. In fact, it contained no analysis whatsoever under 6th Amendment / Ineffective Assistance of Counsel jurisprudence, despite the Ninth Circuit Court clearly recognizing *Strickland* and its progeny, and clearly-delineated IAC analysis in its own prior circuit cases. In doing so, the panel opinion appears to conflict with established circuit law in the Ninth Circuit. Mr. Izatt strongly encourages this Court to grant certiorari to address and remedy this problem, and to provide guidance to the Ninth Circuit thereon.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted this 24th day of August, 2018.

/s/ Paul E. Riggins
PAUL E. RIGGINS, Counsel for Petitioner Justin Izatt
Appointed under the Criminal Justice Act

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using 12 point Century Schoolbook font, and containing approximately 8,294 words and 35 pages, which includes all tables.

Dated this 24th day of August, 2018.

/s/ Paul E. Riggins
PAUL E. RIGGINS
Counsel for Petitioner Justin Izatt

18 U.S.C. §3161

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d) (1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial

becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that

he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k) (1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

28 U.S.C. §2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review,

the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.