No. 19-_____

In The
Supreme Court of the United States

JOSEPH A. CARAMADRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a Writ of Habeas Corpus issue to the United States Court of Appeals for the First Circuit ("Court of Appeals") on the grounds that the showing that Petitioner made before the United States District Court for the District of Rhode Island ("District Court"), in support of his motion pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence, satisfied the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366 (1985) and their progeny, and therefore, that Court of Appeals erred in denying Petitioner's motion for a Certificate of Appealability ("COA") permitting him to appeal the District Court's Decision and Order denying Petitioner's motion and denying him a COA.

2. Should a Writ of Habeas Corpus issue to the Court of Appeals because that Court erred in failing to grant Petitioner's Motion for a COA on the grounds that in the proceedings below, the District Court abused its discretion by failing to hold a hearing pursuant to 28 U.S.C. §2255 (b), even though Petitioner's Motion alleged reasonably specific, non-conclusory facts that, if true, would have entitled him to relief.

3. Should a Writ of Habeas Corpus issue to the Court of Appeals because that Court erred in failing to grant Petitioner's Motion for a COA on the grounds that the District Court did not apply the proper standard in adjudicating Petitioner's request for a COA, because the District Court did not base its decision upon the standard of "debatability," but rather on a full merits analysis, in violation of this

Court's holding in *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).

LIST OF PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Joseph Caramadre, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Order of the Court of Appeals for the First Circuit denying Petitioner's Motion for a Certificate of Appealability appears at Petitioner's Appendix (appendix at pp. 1a-2a). The opinion of the United States District Court for the District of Rhode Island denying Petitioner's Motion pursuant to 28 U.S.C. § 2255 is reported at *Caramadre v. United States*, 2018 U.S. Dist. LEXIS 180494 (D. R.I. 2018).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 13.1. Pursuant to Supreme Court Rule 29.4(a), service was made on the Solicitor General of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES and GUIDELINES

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be... deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right… to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Procedural Background

On November 17, 2011, a grand jury sitting in and for the District of Rhode Island returned an indictment against the Petitioner, Joseph Caramadre, and his co-defendant Raymour Radhakrishnan. Trial commenced on November 13, 2012. After four days of trial, on November 19, 2012, Petitioner and his co-defendant entered guilty pleas pursuant to a plea agreement with the United States Attorney's Office. On January 10, 2013, Petitioner's trial attorneys moved to be relieved as counsel. On January 11, 2013, Petitioner's new counsel moved to "Stay Proceedings to Permit Adjudication of Motion to Withdraw Plea by Joseph Caramadre." On February 28, 2013, prior to sentencing, Petitioner filed a motion to withdraw his guilty plea pursuant to Fed. R. Crim. P. 11(d)(2)(B).

Following an evidentiary hearing conducted by the trial court – in which both of Petitioner's trial attorneys testified as witnesses for the government – on May 20, 2013, the District Court denied Petitioner's Motion to Withdraw his Plea from the bench. (Smith, J.) On August 1, 2013, the District Court issued a formal Memorandum Decision. *United States v. Caramadre*, 957 F. Supp. 2d 160 (D.R.I. 2013).

Petitioner appealed the District Court's denial of his motion to withdraw his guilty plea to the United States Court of Appeals for the First Circuit. On December 7, 2015, the Court of Appeals affirmed

the decision of the District Court. *United States v. Caramadre*, 807 F.3d 359 (1st Cir. 2015). A Petition for Rehearing was denied by the Court of Appeals on January 12, 2016. A subsequent *Petition for a Writ of Certiorari* was denied by this Court on May 23, 2016. *Caramadre v. United States*, 136 S. Ct. 2455 (2016).

On May 15, 2017, while Petitioner was incarcerated at the U.S. Bureau of Prisons facility at FMC Devens, he filed a timely motion with the United States District Court for the District of Rhode Island, pursuant to 28 U.S.C. § 2255, to vacate his conviction and sentence on ineffective assistance of counsel grounds, never previously raised either before the District Court or in his direct appeal to the Court of Appeals. On June 27, 2017, the government filed a Memorandum in Opposition to Petitioner's Motion. On August 3, 2018, Petitioner filed a Reply Memorandum. On August 8, 2017, without obtaining leave of the Court, the government filed a Sur-Reply Memorandum. On August 9, 2017, Petitioner filed a motion to be permitted to respond to the government's Sur-Reply. On August 23, the District Court issued a summary order denying Petitioner's Motion to Respond to the government's Sur-Reply Memorandum.

On October 22, 2018, the District Court (Smith, J., Chief Judge) issued a Memorandum and Order denying Petitioner's Habeas Corpus Petition. In the Court's Memorandum and Order, it held that no hearing was necessary pursuant to 28 U.S.C. §2255 (b) and further denied Petitioner's request to issue a Certificate of Appealability.

Caramadre v. United States, 2018 U.S. Dist. LEXIS 180494 (D. R.I. 2018).

On December 10, 2018, Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the First Circuit. In conjunction therewith, Petitioner filed a Motion asking that Court to issue a COA. On April 18, 2019 the Court of Appeals denied Petitioner's Motion for a Certificate of Appealability and dismissed Petitioner's appeal. On June 10, 2019 the Mandate of the Court of Appeals issued.

Factual Background and Travel

In his habeas corpus petition before the District Court, Petitioner asserted that his trial counsels' performance was constitutionally defective because they; (1) failed to make appropriate pre-trial inquiries of Petitioner's co-defendant concerning his knowledge of, and his willingness to testify to, critical exculpatory information regarding Petitioner, and as a consequence thereof; (2) they failed to move before the District Court for a severance pursuant, *inter alia*, to Petitioner's right to present a complete defense; all in violation of Petitioner's rights guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

In support of his assertion that his counsels' performance was constitutionally deficient, Petitioner made an uncontroverted factual showing before the District Court that his co-defendant, Raymour Radhakrishnan, was in possession of compelling exculpatory information, and further, that Mr. Radhakrishnan would have been willing to

testify to such information in the event that the trial court would have ordered separate trials.

In addition, in a declaration submitted by Petitioner in support of his § 2255 motion (reproduced in the appendix at pp. 12a-16a), he averred that had he known that his co-defendant was willing to testify on his behalf and that his counsel could have moved for a severance on those grounds, he would not have plead guilty, but rather, would have gone to trial. Petitioner asserted before the District Court that his plea was therefore not the product of a knowing and informed decision, but rather, was uninformed and involuntary, and that under the standards established by this Court in *Hill v. Lockhart, supra*; *Lee v. United States*, 137 S. Ct. 1958 (2017), *Lafler v. Cooper*, 566 U. S. 156, 132 S. Ct. 1376 (2012) and their progeny, that his conviction should be vacated as constitutionally infirm.

Petitioner respectfully asserts that the showing that he made before the District Court not only warranted vacature of his conviction, but that the uncontroverted factual proffers that he made – at the very least – surely met the threshold for the issuance of a COA. *Welch v. United States*, 136 S. Ct. 1257, 1269 (2016), (Thomas, J. dissenting on other grd's.), "[the COA] inquiry [is] whether the movant's claims... warrant further proceedings - not whether there is any conceivable basis upon which the movant could prevail. Courts must ask whether 'reasonable jurists would find the district court's assessment of the constitutional claims debatable.' " *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct.

1595 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336-38, 123 S. Ct. 1029 (2003); *Buck v. Davis, supra* at 773.

The Evolution and Nature of the Underlying Criminal Case

Axiomatically, the nature and substance of the exculpatory evidence that Mr. Radhakrishnan possessed is a critical component to any merits analysis of the relevance and probative value of the factual proffers made by Petitioner in support of his motion to vacate. Accordingly, and to place into context why Mr. Radhakrishnan's testimony would have been so powerfully exculpatory under the facts of this particular case, some brief explanation of the allegations contained in the indictment and the government's theory of prosecution is warranted.

At the time of his indictment, Petitioner, Joseph Caramadre, was a 53-year-old lifelong resident of Rhode Island, married with three children. He was a certified public accountant, an attorney, and an acknowledged expert in the insurance annuities and bonds fields. After carefully studying the language of several annuity policies which had come on the market, Mr. Caramadre was able to discover an investment opportunity that would not have been apparent to anyone without Mr. Caramadre's expertise (in fact, it would appear that even the insurance companies who were marketing these variable annuity products did not realize what they had created). As Judge Selya, writing the opinion for the Court of Appeals for the First Circuit in a companion civil case, *W. Reserve Life Assurance Co. Of Ohio, Plaintiff, Appellant, v. Adm Associates,*

LLC, 737 F.3d 135, 136 (1st Cir. 2013), explained the circumstances:

> Joseph Caramadre believed that he had found the Holy Grail of investment strategies: a way to speculate in high-risk securities while shielding himself from the adverse effects of losses... Caramadre figured out that if an individual named himself (or an entity he controlled) as both the owner and the beneficiary of a WRL Freedom Premier III annuity and elected the death benefit, that individual could engage in high-risk market speculation without any downside exposure... if the speculation backfired, the death benefit guaranteed that he would fare no worse than a full return of premiums paid (plus interest)...
>
> Despite the cleverness of Caramadre's scheme, there was a rub: one had to be sure that the death benefit would be triggered within a relatively short time after the risky investments were made. That timing would ensure that the owner/beneficiary of the annuity (Caramadre or his nominee) would receive either the benefit of a strike-it-rich investment gamble or, at worst, the return of his bet. Thus, the linchpin of the scheme was locating and recruiting potential annuitants whose lifespans were predictably short: the terminally ill... **Although the [District] court acknowledged that "the whole point of the [scheme] was to capitalize on the death benefits," it concluded that the "[d]efendants [had]**

> **figured out how to game a flaw in the product."** *Id.* at 138-139, emphasis added.

Once the insurance companies finally realized the vulnerability in the variable annuity contracts they had been marketing, they sent their counsel to speak with the Office of the U.S. Attorney for the District of Rhode Island. The insurance company lawyers complained that what Petitioner was doing – using terminally-ill individuals as the "measuring-life" annuitants in these variable annuity policies – must somehow be illegal or fraudulent. In response, the government began an aggressive criminal investigation.

However, the government soon came to realize that Petitioner was doing nothing wrong by recruiting terminally-ill individuals to serve as the measuring life annuitants. He had simply identified an innovative – and perfectly legal way – to take advantage of the terms and provisions of these variable annuities policies that the insurance companies had created and brought to market.

Realizing that the investment strategy devised by Petitioner was not illegal, the U.S. Attorney's Office focused its attention on the activities involved in recruiting the terminally-ill individuals who might potentially serve as an annuitant "measuring life" for an annuity contract or bond.

After a very lengthy investigation, the government ultimately returned a multi-count indictment charging Petitioner Caramadre and Raymour Radhakrishnan (an employee of Petitioner Caramadre's firm Estate Planning Resources,

"EPR"). Mr. Radhakrishnan had been the individual who had been assigned by EPR to meet with each of the terminally-ill potential annuitants (and/or their family members) for the purpose of fully explaining to that person what was involved if he or she elected to become an annuitant in one of these variable annuity policies.

Thus the gravamen of the criminal case ultimately brought by the government was not any claim that using individuals with predictably short life spans to serve as the annuitants was somehow illegal or improper. Rather, the government charged that misrepresentations and omissions had been made to various individuals who had been recruited to serve as annuitants; and/or that other individuals that Mr. Radhakrishnan had interviewed had their identities stolen because they had not in fact fully agreed to serve as an annuitants but Mr. Radhakrishnan had nonetheless forged their signatures or got them to sign blank forms.

As the government explained the theory of its case to the petit jury in its opening statement:

> Now, I want to stop here and emphasize this important point to you. **The indictment does not contend that it is illegal for a terminally ill person to be the annuitant on an annuity.** The insurance companies wrote the annuity contracts and the bond issuers set the terms of the bonds. If they wanted to make sure that terminally ill people wouldn't be used, they could have written that into their contracts. **So it is simply not illegal to use terminally ill people on annuities or bonds.** In fact, even

> though it may be very uncomfortable or troubling for you individually, there's nothing per se illegal about profiting from another person's death. But that is not what this case is about. What is illegal is how the Defendants went about orchestrating this scheme because, as I said earlier, it is not a loophole if you have to lie to get through it.
>
> In this case, the evidence will show that the Defendants did the following. **They repeatedly lied and deceived terminally ill people in order to get them to serve as annuitants or to open brokerage accounts in their names. They forged the signatures of some of the terminally ill people on application forms. They had terminally ill people sign blank signature pages without explaining to them what it was that they were signing.** They told the terminally ill people that they were just giving them a charitable gift intentionally withholding and concealing from them that they were using their identify information for their own profit. (*United States v. Caramadre*, 11-186-S, Transcript of proceedings on November 13, 2012, at pp. 34 & 35, emphasis supplied).

Thus, as the government's opening remarks confirm, the heart of its case rested on what had purportedly transpired in the meetings and transactions between Mr. Radhakrishnan and the prospective measuring life annuitants.

The Radhakrishnan Declaration
Why Petitioner's Co-Defendant's Testimony
Would Have Been So Powerfully Exculpatory

In support of his habeas petition before the District Court, Petitioner submitted a declaration from his former co-defendant, Raymour Radhakrishnan (see "Radhakrishnan Declaration," appendix at pp. 3a-11a). In his declaration, Mr. Radhakrishnan set out in detail the specific exculpatory testimony he would have been willing to provide at a separate trial. (appendix at pp. 6a-11a, ¶¶ 9-23). Bearing in mind that the *sine qua non* of the government's case was the contention that Petitioner and Mr. Radhakrishnan had conspired to make misrepresentations and to steal the identities of these terminally-ill individuals – what made the information that could have been supplied by Mr. Radhakrishnan so exculpating to the Petitioner – was that, as Radhakrishnan explained in his declaration, the misrepresentations and omissions made to these putative annuitants had been made by Radhakrishnan without the knowledge of Petitioner. Mr. Radhakrishnan goes on to confirm that there was no conspiracy or agreement between Petitioner and him, and that it was he alone who was the one responsible for the misrepresentations, omissions, forgeries and/or falsifications that had been made to, or in connection with, the potential annuitants. Further, Mr. Radhakrishnan expressly represented that had a severance been sought and granted by the trial court, he would have agreed to testify to these facts at a separate trial. Reproduced below are several relevant excerpts from the Radhakrishnan declaration:

If I had testified at a separate trial on Mr. Caramadre's behalf, I would have provided the following facts and information:

I would have explained that part of my role was to actually meet with terminally ill individuals (and/or their families and representatives) and explain to them the process and procedures that were involved in connection with these applications/transactions. I would have testified that it was my duty to fully explain everything to the applicants and to answer any questions that they or any of their family members or representatives had concerning these transactions. (Radhakrishnan Declaration ¶ 12)

I would have testified that Mr. Caramadre directed me to thoroughly read and explain all of the documents to the terminally ill individuals, and if they (or their any of their family members, representatives or lawyers) had any questions about the process and/or documents that they were being asked to sign (and which I could not explain), that I should tell them that they should speak to one of our lawyers or to their own attorney. (Radhakrishnan Declaration ¶ 13)

I would further have testified that I was directed by Mr. Caramadre, that on each and every occasion, I was to provide any terminally ill person (or their family members or representative) a complete explanation of the transaction, the reason they were receiving money from Mr. Caramadre's business, what obligations, if any, they had in exchange for the receipt of any funds and what the purpose of the

transaction was. (Radhakrishnan Declaration ¶ 14)

I would have admitted that there were occasions where I did not offer a complete explanation of a transaction to a terminally ill individual (or their family members or representatives). There were several reasons why I did not make the required full explanations. In most instances, it was because the terminally ill person indicated (by words or actions) that they simply didn't want to sit through a long explanation. They were only concerned that they were getting several thousand dollars, that they did not have to do anything other than agree to serve as an applicant, and that there were no potential adverse financial consequences to them or potentially to their estate (i.e. they would not incur any tax liability, they did not have to pay the insurance company any money or premiums, etc.). In such cases I simply did not see the purpose in making them sit through a long explanation that they did not want to hear and were not interested in. In some instances, I simply made the unilateral decision that making a long explanation was unnecessary because of critical health conditions that would have prohibited such a long explanation from even being considered. In my view, these individuals were being paid several thousand dollars for doing nothing other than signing on as an applicant and they were not being asked to (and did not) bear any risk. (Radhakrishnan Declaration ¶ 15)

I would have testified however that on no occasion (with one exception) did I ever make Mr. Caramadre aware that I had failed or decided it was unnecessary – for whatever reason – to fully explain to any terminally ill individual(s) (and/ or to his or her family and/or representatives) the nature and terms of the transaction he or she was being asked to participate in. To my knowledge Mr. Caramadre was only aware of only one instance where I had failed to provide any applicant with a full explanation of the transaction that I was asking them to become involved in. (Radhakrishnan Declaration ¶ 16).

I would have testified that when Mr. Caramadre was made aware that I had not fully explained the nature and details of the transaction to Mrs. Larivee, the aunt of Jamie Bradley. He had Walter Craddock Esq. accompany me back to meet with Mrs. Larivee and remained present while I fully explained the transaction to Mr. Larivee. (Radhakrishnan Declaration ¶ 17).

I would have testified that after accompanying me for several meetings to ensure that I was properly explaining the program to all potential applicants – Mr. Craddock reported to Mr. Caramadre that he was satisfied that my explanations were complete and accurate and that I was performing my job correctly. (Radhakrishnan Declaration ¶ 18).

I would further have testified that on some occasions I put down incorrect information concerning a terminally ill person's financial

condition. I did this as a shortcut, because understanding the process, I did not view the false/incorrect information as meaningful or material to the transaction(s). I thought that the financial condition of the joint tenant was irrelevant to the application because Mr. Caramadre was putting in 100% of the money into the accounts and the joint tenant was enjoying a risk free, upfront payment. (Radhakrishnan Declaration ¶ 19).

I would have testified however that, once again, Mr. Caramadre did not know that I had done this. The true facts are that Mr. Caramadre never asked me to put down any false information on any insurance or bond applications, option trading agreements, or forms or documents of any kind. If I utilized or supplied false/incorrect information, I did not tell Mr. Caramadre that the information I had put down was false or incorrect, and to the best of my knowledge he never knew that. (Radhakrishnan Declaration ¶ 20).

I would also have testified that there was one instance where I had established a bond trading account (over the internet) and then several days later requested a wire transfer to fund the account. In a meeting with Mr. Caramadre regarding the account, I let it be known that the signature on the account was not valid. When Mr. Caramadre found out that the signature was not authentic, he ordered me to immediately close the account, to make no deposits to the account and to conduct no transactions through

> that account. I think the name of the person involved was Bertha Howard. (Radhakrishnan Declaration ¶ 23).

It would be difficult to imagine more powerfully exculpating testimony than that laid out by Mr. Radhakrishnan in his declaration.

It is respectfully asserted that the uncontroverted showing made in the Radhakrishnan declaration met all of the elements required to establish a defendant's right to have a separate trial so that he might have the benefit of a co-defendants exculpatory testimony, See *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933 (1993): "[A] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. *Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979) (per curiam)." Also see, *United States v. DiBernardo*, 880 F.2d 1216, 1228 (11th Cir. 1989): "[T]o succeed on such a motion, the movant must demonstrate: (1) a bona fide need for the co-defendant's testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) the likelihood that the co-defendant will in fact testify if the cases are severed."

The Government Offered No Testimony, Affidavits or Evidence of Any Kind to Controvert the Sworn Declarations Proffered by the Petitioner and/or Mr. Radhakrishnan

As remarkable and compelling as the factual presentations made in both the Radhakrishnan and the Caramadre declarations were, equally remarkable was the fact that the representations contained therein went completely uncontroverted by the government.

In fact, the government made no factual proffers of any kind in opposition to Petitioner's habeas petition. The government offered no affidavit(s), no testimony, no evidence of any sort, repudiating any of the factual representations made in the Radhakrishnan and/or Caramadre declarations. The government called no witnesses and specifically did not call either of Petitioner's two trial lawyers, even though both attorneys had previously testified for the government at Petitioner's plea withdrawal hearing. In fact, the government specifically argued to the District Court that no hearing should be held. See: *Osuji v. United States*, 2014 U.S. Dist. LEXIS 140984, *21 (W.D.N.C. 2014): "[T]he Government submitted no affidavits from defense counsel explaining his trial strategy or his decision not to pursue plea negotiations and that, without such a statement, no evidence existed that counsel acted reasonably or strategically in his representation." Accord: *United States v. Jasin*, 292 F. Supp. 2d 670, 678 (E.D. Pa. 2003): "The Court noted that the government presented no contrary evidence – the government produced no affidavit from trial counsel

explaining his strategic decision-making process… [b]ased on the uncontested evidence, the Court concluded … that trial counsel conducted no pre-trial investigation and interviewed neither of the witnesses the defendant asked him to interview nor the witnesses he actually presented;" *Watts v. United States*, 703 F.2d 346, 353 (9th Cir. 1983): "Legal memorandum and argument are not evidence and cannot, by themselves, create a factual dispute sufficient to defeat summary judgment;" *United States v. Longmore*, 2008 U.S. Dist. LEXIS 3523, *3 (D. Conn. 2008): "Conclusory, non-particularized allegations… do not suffice to meet that burden… [w]hat is required for an evidentiary hearing to resolve disputed issues of fact is an affidavit based on personal knowledge."

In this regard it is appropriate to note that, without seeking prior approval of the District Court, and after all the briefing had been concluded, the government, acting unilaterally, filed a Sur-Reply Memorandum.[1] In that Memorandum, the government claimed, for the first time, that it had not interviewed Petitioner's trial attorneys because years previously, in connection with an entirely separate proceeding, the District Court had directed the government not to interview Mr. Caramadre's lawyers. Of course, the habeas proceeding then pending before the District Court was a completely different and new proceeding.

[1] It is further noted that a request by habeas counsel to Reply to the government's contentions in its Sur-Reply Memorandum was denied by the District Court by summary order without opinion.

And, as this Court recognized over a hundred years ago, when a litigant puts at issue the conduct of his counsel, he waives any privilege with respect to those issues. See, *Hunt v. Blackburn*, 128 U.S. 464, 470-71, 9 S. Ct. 125 (1888) ("When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and [her lawyer,] she waived her right to object to his giving his own account of the matter."). Indeed, as the Court in *Shamblen v. United States*, 2018 U.S. Dist. LEXIS 70924, *6 (S.D. W. Va. 2018) recently pointed out: "Federal courts have long held that when a 'habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer....' [in fact], Rule 502 of the Federal Rules of Evidence was enacted to explicitly deal with the effect and extent of a waiver of the attorney-client privilege in a federal proceeding."

It is asserted that the government's Sur-Reply Memorandum was simply a last-ditch (and disingenuous) effort to offer some excuse for not interviewing (or seeking the District Court's permission to interview) Petitioner's trial counsel.

In any event, there is no mention of the assertions contained in the government's Sur-Reply Memorandum (much less reliance shown) by the District Court in its Memorandum and Order denying Petitioner's § 2255 motion.

Thus as the record conforms, the government merely relied upon its *ipse dixit* contentions in its unsworn Memorandum of Law that the petition was

somehow "procedurally barred,"[2] and then retreated to the barren, but predictable, defensive claim that Petitioner had not made the necessary two-part showing of ineffective assistance and prejudice required under *Strickland v. Washington*, *supra*, and its progeny.

The District Court Did Not Call For or Conduct a Hearing

Perhaps equally as remarkable as was the government's failure to make any factual proffer in opposition to Petitioner's motion to vacate, was the fact that the District Court failed to call for or conduct a hearing.

As part of the statutory framework of the federal habeas statute, Section 2255 (b) expressly provides that: "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..." (emphasis supplied).

The decision not to hold a hearing is particularly perplexing since the District Court was aware that the government had never interviewed Petitioner's trial counsel about the issues presented in the habeas petition, and therefore the government had no idea why his trial lawyers had failed to approach

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[2] The District Court did not find or hold that the instant habeas petition was "procedurally barred." *Caramadre v. United States*, 2018 U.S. Dist. LEXIS 180494, *supra* at pp. *10 -*15 (D. R.I. 2018).

Radhakrishnan to ascertain whether he had exculpatory evidence, or why they had failed to file a motion to sever on that basis. Indeed, the record was completely undeveloped as to why trial counsel had failed to pursue (and act upon) this indisputable source of highly exculpatory evidence.

Because the government never interviewed Petitioner's trial lawyers, it had no knowledge of why they actually did, or didn't do, anything. And since the District Court chose not to call for a hearing to examine Petitioner trial counsel about these issues, neither the government nor the Court had any direct knowledge of Petitioner's trial counsels' motives or reasoning (if any). Accordingly, any conclusions that the Court ultimately reached, were necessarily based on an unresolved factual substructure. *PNY Techs., Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 46500, *9 (D.N.J. 2011): "The... brief rests on the foundation of genuine disputes of material fact. This Court having found that this foundation is absent, the remaining structure collapses of its own weight."

It is most respectfully asserted that the failure of the District Court to hold a hearing under the circumstances presented, constituted an "abuse of discretion." As the Court in *Griffith v. United States*, 871 F.3d 1321, 1329 (11th Cir. 2017) observed:

> **Under 28 U.S.C. § 2255(b) an evidentiary hearing must be held on a motion to vacate "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."** "[I]f the petitioner alleges facts that, if true, would entitle

him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." [citations omitted] "**[A] petitioner need only allege — not prove — reasonably specific, non-conclusory facts that, if true, would entitle him to relief. If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing**." (emphasis supplied).

The Memorandum and Order of the District Court

One of the reasons stated by the District Court in its decision denying Petitioner's Writ was that: "**Further, there is no evidence in the record that Caramadre asked trial counsel to contact Radhakrishnan's counsel or, after Radhakrishnan determined to represent himself, contact him directly, with respect to testifying for Caramadre.**" (*Caramadre v. United States*, 2018 U.S. Dist. LEXIS 180494, *supra* at pp. *20 [D. R.I. 2018]).

With all due respect, as the declaration of Petitioner before the District Court explained at some length, Petitioner had made his counsel well aware of the nature and kind of exculpatory evidence that Mr. Radhakrishnan could have provided. This was not an instance where the lawyers had no reason to know or believe that Mr. Radhakrishnan was a source of exculpatory evidence.

And, as Petitioner Caramadre's declaration confirmed, he fully briefed his lawyers concerning the information that Mr. Radhakrishnan possessed. He specifically told his lawyers that it was Mr. Radhakrishnan who had conducted the interviews and meetings with the terminally-ill individuals and their families and that he had no knowledge of any malfeasance by Mr. Radhakrishnan. ("Caramadre Declaration," appendix at pp. 14a-15a, ¶ 6). Nothing more was required of Petitioner. The blame for the failure to contact and interview Mr. Radhakrishnan (and/or to petition for a severance) lies at the feet of his counsel, not Petitioner, and no case has ever held otherwise.

To the extent that the government and the District Court suggested that failing to interview Mr. Radhakrishnan – and/or moving for a severance based on the need to present exculpatory evidence – was somehow a "strategic decision" – one might fairly ask: "And what conceivable rational strategy could that have been?" See, *Sparman v. Edwards*, 26 F. Supp. 2d 450, 464 (E.D.N.Y. 1996): "While a petitioner must overcome 'the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy...' **[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny.**" (emphasis supplied); *Schulz v. Marshall*, 528 F. Supp. 2d 77, 97 (E.D.N.Y. 2007): "**Levine's failure to conduct this interview had no conceivable strategic justification and was based on no apparent**

reasonable judgment. Levine's '[duty] was to investigate, not to make do with whatever evidence fell into his lap." (emphasis added); *Henry v. Scully*, 918 F. Supp. 693, 715 (S.D.N.Y. 1995) (finding "no possible strategy" that could have justified defense counsel in allowing co-defendant's confession to be used against petitioner at trial).

Standard for Determining Whether A Certificate of Appealability Should Issue

Petitioner/Appellant respectfully asserts that the District Court did not undertake the proper protocol and/or apply the controlling standard in determining whether Petitioner had made a sufficient showing to warrant a Certificate of Appealability, and therefore that a COA should have been issued by the Court of Appeals.

In this regard, as this Court made clear in *Miller-El v. Cockrell, supra* at 336, and as reaffirmed in *Buck v. Davis, supra* at 773-775, the COA inquiry is not coextensive with a full merit's analysis. It is not an inquiry as to the ultimate likelihood of success of the habeas petition. Rather the COA inquiry is far more circumscribed: "[A] COA determination is a separate proceeding, one distinct from the underlying merits... [d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id. Miller-El, supra* at 342, 348. The COA inquiry is delimited to the single question of "debatability," that is; whether "reasonable jurists could debate whether the petition should have been

resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further." *Slack v. McDaniel, supra* at 483-484; *Buck v. Davis, supra* 773; *Miller-El, supra* at 336.

It is Petitioner's contention at bar that the only conclusion that obtains from an examination of the Memorandum and Order issued by the District Court, was that the decision to deny a COA was predicated on a full merits-based evaluation and not on the more limited standard of whether the constitutionally based issues Petitioner had raised (and factually established) were "debatable." In this regard, the language of the District Court's opinion is probative:

> **Caramadre has not met his burden of showing that counsel provided less than "reasonably effective assistance under the circumstances then obtaining,"** *Natanel*, 938 F.2d at 310, or a reasonable probability that, but for counsels' alleged errors, "**the result of the proceeding would have been different**," *Strickland*, 466 U.S. at 694, that is, he would not have pled guilty but instead would have insisted on continuing the trial... [b]ased on the foregoing, Caramadre's ineffective assistance of counsel claim is rejected in its entirety... [accordingly] this Court hereby finds that this case is not appropriate for the issuance of a certificate of appealability (COA) because Caramadre failed to make a substantial showing of the denial of a constitutional right as to any claim, as required by 28 U.S.C.

§ 2253(c)(2). (*Caramadre v. United States*, 2018 U.S. Dist. LEXIS 180494, *supra* at pp. *36 - *37 [D. R.I. 2018]).

Most respectfully, the reasoning described by the District Court as the basis for denying Petitioner's application for a COA seems to clearly confirm that because it was the Court's view that Petitioner had not met the dual standards of *Strickland*, that consequently, no Certificate of Appealability should issue. Petitioner asserts that resolving the COA issue on that basis improperly conflated the standard for determination of the merits of the motion to vacate with the different (and lesser) standard which governs whether a COA should have been issued.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the United States Court of Appeals for the First Circuit has entered a decision that has so far departed from the accepted and usual course of judicial proceedings, and that it has sanctioned such a departure by the United States District Court for the District of Rhode Island, as to call for the exercise of this Court's supervisory powers. The failure of the Court of Appeals to Order that a COA issue – given the uncontroverted showing made before the District Court in support of Petitioner's Motion to vacate pursuant to 28 U.S.C. § 2255 – was a manifest injustice.

CONCLUSION

For the reasons set forth above, Petitioner Joseph Caramadre prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit.

July 9, 2019

Respectfully submitted,

/s/ John W. Mitchell, Esq.

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United States Court of Appeals
For the First Circuit

No. 18-2216

JOSEPH A. CARAMADRE,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Howard, Chief Judge,

Torruella and Kayatta, Circuit Judges.

JUDGMENT

Entered: April 18, 2019

Petitioner Joseph A. Caramadre seeks a certificate of appealability in relation to the district court's denial of his 28 U.S.C. § 2255 motion. After careful consideration, we conclude that the district court's ultimate denial of Caramadre's § 2255 claim(s) was neither debatable nor wrong and that Caramadre "has [not] made a substantial showing of the denial of a constitutional right."

Accordingly, Caramadre's application for a certificate of appealability is **DENIED**. Any remaining pending motions are moot. The appeal is hereby **TERMINATED**.

By the Court:

Maria R. Hamilton, Clerk

cc:
John Wylie Mitchell, Lee H. Vilker,
John P. McAdams, Donald Campbell Lockhart

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

JOSEPH A, CARAMADRE
Petitioner,

v. **Dkt. No. 13-CR-150 (M) (PAS)**

UNITED STATES OF AMERICA
Respondent.

Raymour Radhakrishnan, pursuant to 28 U.S.C. S 1746, hereby declares under penalty of perjury under the laws of the United States of America that the foregoing statements set forth below are true and correct.

1. It is my understanding that my former co-defendant, Joseph A. Caramadre, is submitting a Petition for a Writ of Habeas Corpus to this Court. His counsel has asked me to provide this declaration describing certain events that took place prior to and during the trial/plea. I give this declaration of my own free will, I have not been given, nor promised any sort of inducement, financial or otherwise, nor have I been threatened in any way to make this declaration.

2. In November of 2011, Mr. Caramadre and I were charged in a sixty-five count Indictment. At the time of my arraignment Mr. Olin W. Thompson, Esq. from the Federal Defender's Office was appointed by Magistrate Martin to serve as my counsel. Mr. Caramadre was intitally represented by Michael Lepizzera, Esq. and subsequently, Anthony Traini, Esq. joined Mr. Lepizzera and they served as co-defense counsel for Mr. Caramadre.

3. In early August of 2012, after considerable discussion with my then trial counsel Mr. Thompson, and following the July 25, 2012 denial of my motion for a severance and separate trial form Mr. Caramadre, I made the decision that I wanted to try my own case and that I wanted to proceed *pro se*.

4. On August 7, 2012, the Court conducted a hearing on my *pro se* application. During the course of that hearing, Judge Smith asked me if there were any undisclosed or ulterior motives underlying my request to proceed *pro se*. I assured Judge Smith that there were no undisclosed or ulterior motives, that the decision had been mine and mine alone, and I stand by those representations to this day. At the conclusion of that hearing, Judge Smith granted my motion.

5. Both of Mr. Caramadre's lawyers, Mr. Lepizzera and Mr. Traini, were opposed to my proceeding *pro se* because they feared that as a person inexperienced in the procedures and rules

governing criminal trials, I would not only do harm to my case, but to Mr. Caramadre's case as well. In fact, after Judge Smith granted my motion to proceed *pro se*, Mr. Caramadre's counsel made a motion asking the Court to grant Mr. Caramadre a severance on the grounds that I would make errors that would unfairly prejudice Mr. Caramadre's rights to a fair trial.

6. At the conclusion of the hearing that the Court conducted in connection with my application to proceed *pro se*, Judge Smith also made it clear to Mr. Caramadre's attorneys that since I was now acting as my own counsel, they were free to talk to me directly without violating any ethical principles. The Court explained that Mr. Caramadre's counsel could talk to me and discuss matters with me, in the same manner that they would talk to and/or discuss matters of common interest with any lawyer for any co-defendant.

7. I have no memory of Mr. Caramadre's counsel inquiring or discussing with me what I might say in my opening statement nor did they discuss potential common cross examination strategies or inquire what I intended to ask when questioning any witness on cross examination.

8. I do not remember ever being asked by either attorney whether I would be have been willing to provide testimony regarding Mr. Caramadre at a separate trial. Had I been asked by Mr. Caramadre's counsel, I would have told

them that I would have agreed to testify for Mr. Caramadre at a separate trial.

9. If I had testified at a separate trial on Mr. Caramadre's behalf, I would have provided the following facts and information:

10. Among other background facts, I would have explained that I became associated with Mr. Caramadre in July of 2007. At that time I was hired by Mr. Caramadre as an office intern. After the conclusion of my internship, I eventually became an employee of Mr. Caramadre's business, Estate Planning Resources. My position was account manager and my duties included managing the firms retail brokerage accounts and servicing insurance instruments held by the firm's clients.

11. I would have explained my understanding of what the Variable Annuities and the so-called "Death-Put Bond" programs were, how they operated and why I believed that participation in such programs was lawful. I would have explained what my role was supposed to be, who had trained me with regard to what my duties and obligations were and what I was required to do in connection with administering and processing applications for these programs.

12. I would have explained that part of my role was to actually meet with terminally individuals (and/or their families and representatives) and explain to them the process and procedures that

were involved in connection with these applications/transactions. I would have testified that it was my duty to fully explain everything to the applicants and to answer any questions that they or any of their family members or representatives had concerning these transactions.

13. I would have testified that Mr. Caramadre directed me to thoroughly read and explain all of the documents to the terminally ill individuals, and if they (or their any of their family members, representatives or lawyers) had any questions about the process and/or documents that they were being asked to sign (and which I could not explain), that I should tell them they should speak to one of our lawyers or to their own attorney.

14. I would further have testified that I was directed by Mr. Caramadre, that on each and every occasion, I was to provide any terminally ill person (or their family members or representative) a complete explanation of the transaction, the reason they were receiving money from Mr. Caramadre's business, what obligations, if any, they had in exchange for the receipt of any funds and what the purpose of the transaction was.

15. I would have admitted that there were occasions where I did not offer a complete explanation of a transaction to a terminally ill individual (or their family members or representatives). There were several reasons why I did not make the required full explanations. In most

instances, it was because the terminally ill person indicated (by words or actions) that they were simply didn't want to sit through a long explanation. They were only concerned that they were getting several thousand dollars, that they did not have to do anything other than agree to serve as an applicant, and that there were no potential adverse financial consequences to them or potentially to their estate (i.e. they would not incur any tax liability, they did not have to pay the insurance company any money or premiums, etc.). In such cases I simply did not see the purpose in making them sit through a long explanation that they did not want to hear and were not interested in. In some instances, I simply made the unilateral decision that making a long explanation was unnecessary because of critical heath conditions that would have prohibited such a long explanation from even being considered. In my view, these individuals were being paid several thousand dollars for doing nothing other than signing on as an applicant and they were not being asked to (and did not) bear any risk.

16. I would have testified however that on no occasion (with one exception) did I ever make Mr. Caramadre aware that I had failed or decided it was unnecessary - for whatever reason - to fully explain to any terminally individual(s) (and/or to his or her family and/or representatives) the nature and terms of the transaction he or she was being asked to participate in. To my knowledge Mr. Caramadre was only aware of only one instance where I had failed to

provide any application with a full explanation of the transaction that I was asking them to become involved in.

17. I would have testified that when Mr. Caramadre was made aware that I had not fully explained the nature and details of the transaction to Mrs. Larivee, the aunt of Jamie Bradley. He had Walter Craddock Esq. accompany me back to meet with Mrs. Larivee and remained present while I fully explained the transaction to Mr. Larivee.

18. I would have testified that after accompanying me for several meetings to ensure that I was properly explaining the program to all potential applicants - Mr. Craddock reported to Mr. Caramadre that he was satisfied that my explanations were complete and accurate and that I was performing my job correctly.

19. I would further have testified that on some occasions I put down incorrect information concerning a terminally ill person's financial condition. I did this as a shortcut, because understanding the process, I did not view the false/incorrect information as meaningful or material to the transaction(s). I thought that the financial condition of the joint tenant was irrelevant to the application because Mr. Caramadre was putting in 100% of the money into the accounts and the joint tenant was enjoying a risk free, upfront payment.

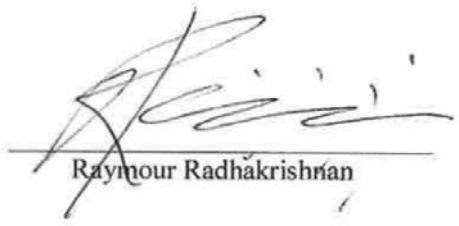
20. I would have testified however that, once again, Mr. Caramadre did not know that I had done this. The true facts are that Mr. Caramadre never asked me to put down any false information on any insurance or bond applications, option trading agreements, or forms or documents of any kind. If I utilized or supplied false/incorrect information. I did not tell Mr. Caramadre that the information I had put down was false or incorrect, and to the best of my knowledge he never knew that.

21. I would also have testified that on an application for a variable annuity, Mr. Caramadre gave me the funds, which I deposited in a checking account and used to purchase a the annuity. Upon redeeming the death benefit proceeds, I paid all of the proceeds back to Mr. Caramadre and prepared a federal tax 1099 form reflecting that the income earned on this transaction was attributable Mr. Caramdre.

22. I would have testified that on another occasion I applied for an annuity, and in that application I used information that ultimately turned out to be incorrect concerning my finances; however, I never told Mr. Caramadre that the information was incorrect and to my knowledge he never knew those events occurred.

23. I would also have testified that there was one instance where I had established a bond trading account (over the internet) and then several days later requested a wire transfer to fund the account. In a meeting with Mr. Caramadre regarding the account, I let it be known that the signature on the account was not valid. When Mr. Caramadre found out that the signature was not authentic, he ordered me to immediately close the account, to make no deposits to the account and to conduct no transactions through that account. I think the name of the person involved was Bertha Howard.

Dated: May 9, 2017



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

JOSEPH A, CARAMADRE
Petitioner,

v. **Dkt. No. 13-CR-150 (M) (PAS)**

UNITED STATES OF AMERICA
Respondent.

Joseph A. Caramadre, pursuant to 28 U.S.C. S 1746, hereby declares under penalty of perjury under the laws of the United States of America that the foregoing statements set forth below are trued and correct.

1. Pursuant to the Sentence and Judgment of Conviction imposed by this Court, I am presently incarcerated at the U.S. Bureau of Prisons facility, FMC Devens, 42 Patton Road Ayer, Massachusetts 01432.

2. I make this declaration in support of my petition that a Writ of Habeas Corpus issue, pursuant to 28 U.S.C. § 2255, vacating my guilty plea and vacating the Judgment of Conviction entered in the docket of this Court on December 27, 2013, and further, granting Petitioner a new trial.

3. As more fully set forth in the accompanying Memorandum of Law, it is my respectful contention that I was deprived of my both my Fifth Amendment right to due process of law, including my constitutional right to present a complete defense (and in particular, the right to present witnesses in my own defense), as well as my Sixth Amendment right to the effective assistance of counsel, as a result of my trial counsels' failure to undertake the steps necessary during the period prior to the commencement of the trial in this case, to have determined that my co-defendant, Raymour Radhakrishnan, was willing to provide compelling exculpatory testimony on my behalf, if he were tried at a separate trial. The failure of my trial counsel to pursue this course of inquiry resulted, *inter alia*, not only in their failure to discover that Mr. Radhakrishnan would have agreed to testify at a separate trial but the nature and substance of the testimony he would have provided. Had my counsel taken the steps necessary to discover this information, I believe that they could have developed a compelling basis to move to sever my case from that of my co-defendant's, so that I might have had the benefit of the testimony of this witness. I would most respectfully assert that as the result of the failure of my attorneys to pursue this information and to move for a severance on my behalf, their conduct fell below an objective standard of reasonableness, and therefore constituted constitutionally ineffective assistance.

4. As a result of my counsels' failure to inquire of my co-defendant's whether he; (1) would be willing to testify on my behalf at a separate trial, (2) the substance of such testimony and whether it would be exculpatory in nature; (3) and their failure to move for a severance on the basis of my *bona fide* need for such testimony – I was induced to enter a guilty plea. Had I known of the potential availability for such testimony, I would not have terminated the trial with a guilty plea, but rather I would have directed my counsel to petition for a severance, and proceeded with the trial.

5. After the indictment was returned, I was told by my counsel, Messrs. Lepizzera and Traini, that once Mr. Radhakrishnan had counsel assigned (as well as subsequently when he obtained the Court's permission to represent himself), I was "banned" from speaking any further with him. So I never had any opportunity to speak directly to Mr. Radhakrishnan, to discuss what his position was with regard to the allegations in the Indictment, how he intended to defend the charges, whether he intended to testify, or whether he would have testified on my behalf at a separate trial.

6. Although I met with a limited number of families (mostly people I knew or families that were referred by attorneys to me directly), my lawyers were aware that I had not been involved in any of the transactions that were the basis of the charges in the Indictment. My lawyers also knew that it was Mr. Radhakrishnan who had met with

the individuals and family members and who had prepared the associated paperwork in all of the charged transactions. My lawyers further knew that I had no knowledge as to what Mr. Radhakrishnan had told (or not told) any of those people. I explained to my lawyers that – with a single exception – I had no knowledge that any misrepresentations or omissions had ever been made to any applicants by Mr. Radhakrishnan or any information that Mr. Radhakrishnan had recorded on the forms was not accurate or had been forged. In the one instance that Mr. Radhakrishnan did make it known to me that the signature on a particular account that he had opened was not authentic, I immediately ordered Mr. Radhakrishnan to close the account, make no deposits and conduct no transactions in the account.

7. Nevertheless, and against this background and being aware of all of these circumstances, my counsel inexplicably never pursued any discussions with Mr. Radhakrishnan as to whether he would be willing to testify to those matters if they were able to secure a severance from the Court.

8. I have read the declaration that was executed by Mr. Radhakrishnan on May 8, 2017. I find it to be accurate in all respects. It fairly describes the events at issue and confirms that I was unaware of any misrepresentations, omissions or forgeries that Mr. Radhakrishnan may have engaged in. if I had known that Mr. Radhakrishnan

would have provided the exculpatory testimony outlined in his declaration, I would never have terminated the trial and I would never have pleaded guilty. Because I was to aware that this compelling exculpatory testimony was available and might well have been secured had a proper motion for a severance been prosecuted by my counsel, my plea was not a knowing and/or informed decision and it was therefore not voluntary.

WHEREFORE, for the foregoing reasons and for those legal and factual arguments presented in the accompanying Memorandum of Law, it is respectfully asserted that a Writ of Habeas Corpus should issue, pursuant to 28 U.S.C. § 2255, vacating my plea of guilty, vacating the Judgment of Conviction and granting a new trial, and such other relief as to this Court seems just and proper; and in the event that a Petition for a Writ of Habeas Corpus is denied, that a Certificate of Appealability issue.

Dated: May 12, 2017
Ayers, Massachusetts

Joseph A. Caramadre, Petitioner