No. 19-5747

IN THE

SUPREME COURT OF THE UNITED STATES

JAMALL GIBSON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Jamall Gibson #48262-039
(Your Name)

FCI-Milan/ P.O. Box 1000
(Address)

Milan, MI. 48160-0190
(City, State, Zip Code)

None (Incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

QUESTION # ONE: Whether Petitioner Gibson's counsel provided him with ineffective assistance of counsel by failing to effectively investigate his HYTA dismissed and expunged charge via MCL § 762.11 and not objecting to the assignment of being assessed 1-Criminal History Point, however when under Michigan Law it does not constitute a conviction of a crime, thus did counsel violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION # TWO: Did Petitioner Gibson's counsel provide him with ineffective assistance of counsel during the sentencing phase by failing to object to Gibson's Supervisory Role Adjustment via § 3B1.1 as part of the drug conspiracy, therefore did counsel violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION # THREE: Whether Petitioner Gibson's counsel rendered ineffective assistance of counsel by failing to advise him of his Speedy Trial Rights and failing to seek dismissal of the Indictment on the ground that he was deprived of his right to a Speedy Trial via 18 U.S.C. § 3161 (c) (1), thus did counsel violate his Sixth Amendment Rights of the U.S. Constitution ?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Continuation of Cases

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

⋈ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 11, 2019.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 18, 2019, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 (c) (2)

28 U.S.C. § 2255

Sixth Amendment of the U.S. Constitution

Speedy Trial Act of 1974

18 U.S.C. § 3161 (c) (1)

18 U.S.C. § 3161 (h) (1) (G), and (H)

18 U.S.C. § 3162 (a) (2)

STATEMENT OF THE CASE

On March 20, 2013, Petitioner Gibson was originally charged, in a two count second superseding indictment, with conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 841 (a) (1); § 846 (Count One); and health care fraud conspiracy in violation 18 U.S.C. § § 1347; and 1349 (Count Two). On June 23, 2014, Gibson pleaded guilty, pursuant to a Rule 11 plea agreement, to count one of the second superseding indictment.

The Rule 11 plea agreement contemplated a sentence at the midpoint of the guideline range of 135 to 168 months of imprisonment. The accompanying worksheets contemplated a base offense level of 32 after a two level reduction attributable to the 2014 amendments to the sentencing guidelines. On May 8, 2015, the petitioner was sentenced to 151 months of imprisonment, followed by three years of supervised release. The Rule 11 plea agreement contained an appeal waiver provision barring petitioner from seeking an appeal if he was sentenced in accordance with the guideline calculations in the Rule 11 plea agreement. The petitioner did not seek an appeal.

On February 26, 2016, the petitioner filed the instant 28 U.S.C. § 2255 Motion, thus on May 31, 2016, the Government filed its response brief then due to a few typographical errors and omissions the Government filed a Amended Response Brief on June 1, 2016. A Reply Brief was submitted thereafter; and on August 6, 2018, the District Court denied his 2255 Motion To Vacate and GRANTED a C.O.A. in part as to Ground One- Failure to Investigate Prior Convictions.

A timely Notice of Appeal was filed and on January 11, 2019, the the Sixth Circuit construed Gibson's Notice of Appeal as an Application To Expand The COA and did not give Petitioner Gibson the opportunity to file an COA application but denied Application to Expand COA; and Gibson filed a Motion For Panel Rehearing Or Rehearing En Banc in February of 2019, thereafter on April 18, 2019, the Sixth Circuit denied Panel Rehearing Or Rehearing En Banc. Now Mr. Gibson, asserts that he filing his Writ of Certiorari Petition with this Honorable U.S. Supreme Court in the case herein.

Petitioner Gibson, contends that this Honorable U.S. Supreme Court should GRANT Jamall Gibson a Certificate of Appealability as to all three Questions Presented as it meets the requirements of 28 U.S.C. § 2253 (c) (2), in the case herein. (emphasis added).

REASONS FOR GRANTING THE PETITION

Petitioner Gibson, contends that the U.S. Supreme Court held in Hohn v. United States, 524 U.S. 236 (1998), that this Court has jurisdiction to review Federal Court of Appeal's denial of certificate of appealability concerning Federal District's denial of accused's motion under 28 U.S.C.S. § 2255 to vacate federal conviction. Thus, Petitioner Gibson, asserts that this Honorable U.S. Supreme Court should GRANT Jamall Gibson's Certificate of Appealability as to the three Questions presented herein as he will demonstrate a substantial showing of a denial of constitutional right in which entitles Mr. Gibson to issuance of a C.O.A. consistent with U.S. Supreme Court precedents in Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000).

Standard for Issuance of C.O.A.

Jamall Gibson's claims deserve a certificate of appealability. Under 28 U.S.C. § 2253(c)(2), a certificate may issue "if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has explained that a substantial showing means "a demonstration that...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, 529 U.S. 473, 483-84 (2000).

Question # ONE:

Whether Petitioner Gibson's counsel provided him with ineffective assistance of counsel by failing to effectively

investigate his HYTA dismissed and expunged via MCL § 762.11 and not objecting to the assignment of being assessed 1-Criminal History Point, however, when under Michigan Law it does not constitute a conviction of a crime, thus did counsel violate his Sixth Amendment Rights of the U.S. Constitution?

Burden of Proof

To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable, see **Hill v. Lockhart**, 474 U.S. 52, 57 (1985). To show prejudice in the context of a guilty plea, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial." **Hill v. Lockhart**, 474 U.S. 52, 59 (1985).

Question # One Merits Issuance of a C.O.A.

(1) that counsel's performance was objectively unreasonable, see Hill, 474 U.S. at 57;

Mr. Gibson, asserts that although classifying sentence as diversionary under the Guidelines is a question of federal law, see **United States v. Williams**, 176 F.3d 301, 311-312 (6th Cir. 1999), determining the actual terms of a juvenile's sentence requires careful analysis of the state laws under which a defendant was sentenced, see **Howard v. United States**, 485 Fed. Appx. 125, 130-31 (6th Cir. 2012). (emphasis added).

Pursuant to U.S.S.G. § 4A1.2(f) Diversionary Dispositions **Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted.** See **People v. Bobek**, 217 Mich. App. 524, 553 N.W. 2d 18, 21 (Mich. Ct. App. 1996).

("Once compliance is achieved; a youthful trainee will not be deemed convicted of a crime and proceedings regarding the disposition of the criminal charge will be closed to public inspection (sealed)."); and People v. Cochran, 155 Mich. App. 191, 399 N.W. 2d 44 (1986) (Under the amended statute the trial judge may, within his or her discretion, revoke the trainee status and proceed to sentence, entering an adjudication of guilt on the plea."). "Hence, the plea tendered is vacated at this point regardless of acceptance." See Carr v. Midland County Concealed Weapons Licensing Bd., 259 Mich. App. 428, 436; 674 N.W. 2d 709 (2003). The Carr court stated that successful completion of deferred sentencing makes the guilty plea "a nullity," as if it never happened." (emphasis added).

In People v. Benjamin, 283 Mich. App. 526; 769 N.W. 2d 748 (2009), the Michigan Court of Appeals echoed the Carr opinion:

> For individuals enjoying deferral status...there is no record resolution of whether guilt has been established beyond a reasonable doubt upon the successfull completion of the terms of probation. In fact, the predicate determination that the defendant is actually guilty of the charged offense becomes, in essence, a nullity.

Id. at 536, See also Kercheval v. United States, 272 U.S. 220, 224 (1927) ("When the plea was annulled it ceased to be evidence."); People v. George, 69 Mich. App. 403, 407; 245 N.W. 2d 65 (1976) ("[W]hen a guilty plea is vacated it is a nullity.") (citing People v. Street, 288 Mich. 406, 408; 284 N.W. 926 (1939). (emphasis added). See Appendix C (A copy of HYTA Dismissal Order issued by 16th Judicial Circuit Judge Edward A. Servitto, Jr. signed on March 15, 2005), moreover this 2002 Stolen Property-Receiving and Concealing has been sealed, see Appendix D (A copy

of Jamall Gibson's Michigan Criminal History Record date printed April 2, 2018), thus counsel provided Appellant Gibson with 'deficient performance' by failing to investigate and research prior conviction in which has been DISMISSED and EXPUNGED from his criminal history record, thus the erroneous assessment of one (1) Criminal History point satisfies the first prong of Strickland, 466 U.S. 668, 687-88 (1984).

Actual prejudice exists as the result of Gibson's ex-lawyer's 'deficient performance' as absent counsel's performance in which fell below an objective standard of reasonableness, thus there is a reasonable probability that, but for his ex-lawyer's unprofessional error, the result of the proceeding would have been different, see Strickland, 466 U.S. 668, 687 (1984), as this is established by the fact that the district court relied upon **false misinformation of constitutional magnitude**, see Appendix E (A copy of Gibson's PSR at page 15-16, Para. #32, prepared by the U.S. Probation Department), which clearly states that Gibson was place on two years HYTA probation and on March 15, 2005, was discharged from **probation** and **his case was closed**, however this is FALSE as the state court records clearly reflect that on March 15, 2005, the criminal cause was DISMISSED, see Appx. C, thus the Court relied upon erroneous information concerning Gibson's criminal history in violation of his due process of law rights of the Fifth Amendment, see **United States v. Tucker**, 404 U.S. 443 (1972); and **Townsend v. Burke**, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948). (emphasis added). Thus, Mr. Gibson, argues firmly that under Strickland, 466 U.S. at 691-92 (1984), thus in the matter herein Gibson's ex-lawyer's incompetence affected

the outcome of the proceedings, thus warranting his 151-month federal sentence as the district court relied upon misinformation of constitutional magnitude, thus a prompt Evidentiary Hearing should be conducted on this claim in the case at bar. See **Ryder v. Morris**, 752 F.2d 327, 332-33 (8th Cir. 1984) (The Eight Circuit stated that sentences based on material misinformation or erroneous assumpations may violate due process. The Eighth Circuit concluded that counsel's failure to object to inaccuracies in PSR amounts to ineffective assistance of counsel and requires a [prompt] evidentiary hearing); and **United States v. Rone**, 743 F.2d at 1173 n.2 (7th Cir. 1984) (Although the court in Rone did not specifically address the issue concerning ineffective assistance of counsel, it did note in dicta the following: We note that if the defense counsel was given an adequate time to review the report but did not contest the report's apparent inaccuracies, his performance might appear to fall below the minimum standards of professional competence...The Supreme Court in **Strickland v. Washington**, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), recently articulated the analysis to be applied to determine effective assistance of counsel. Judged under that standard, appellant's allegations seem to support a belief that defense counsel's apparent incompetence affected the outcome of the present case. These allegations might thus seem to warrant at least a remand for hearing on the issue whether appellant's Sixth Amendment Right to effective assistance of counsel has been violated.). Thus, Petitioner Gibson, argues firmly that his Writ Certiorari to this Court should be granted and a COA, therefore should be GRANTED as the issue presented herein was "adequate to

deserve the encouragement to proceed further," see Slack, 529 U.S. at 483-84 (2000). (emphasis added).

Question # TWO:

Did Petitioner Gibson's counsel provide him with ineffective assistance of counsel during the sentencing phase by failing to object to Gibson's Supervisory Role Adjustment via § 3B1.1 as part of the drug conspiracy, therefore did counsel violate his Sixth Amendment Rights of the U.S. Constitution?

Burden of Proof

To prove ineffective assistance of counsel at the sentencing phase, a petitioner must show that his attorney's performance was objectively unreasonable, see Strickland, 466 U.S. 668, 687 (1984). To show actual prejudice exists when there is a reasonable probability that petitioner would have avoided even "a minimal amount of time in prison" were it not for counsel's performance at sentencing. Glover v. United States, 531 U.S. 198, 203 (2001).

Question # Two Merits Issuance of a C.O.A.

(1) that counsel's performance was objectively unreasonable, see Strickland, 466 U.S. at 687;

The District Court denied Gibson's second claim based upon the plea hearing record in which reflects that Gibson admitted that his role in the conspiracy included organizing "parties"- and recruiting "patients" and arranging for their attendance at the parties - where doctors or individuals posing as doctors woul write dozens of prescriptions for large quantities of Oxycodone in order for him and his co-conspirators to obtain drugs. Thus, the

district court determined that, in light of this testimony, the sentencing court properly concluded that Gibson was a manager or supervisor in the conspiracy. The Sixth Circuit denied a C.O.A. as to Gibson's second claim by holding that: "Given Gibson's admission in recruiting "patients" and organizing "parties" for the purpose of obtaining large amounts of Oxycodone in furtherance of the conspiracy, reasonable jurists could not disagree with the district court's conclusion that Gibson failed to show that counsel was ineffective for failing to challenge the § 3B1.1 enhancement for his role as a manager or supervisor. See U.S. v. Morales-Martinez, 545 Fed. Appx. 495, 498 (6th Cir. 2013) ("[I]t is not necessary that the court find evidence of each factor in order to assess the propriety of an enhancement under U.S.S.G. § 3B1.1...").

Although it is true that the district court does not have to find evidence of each factor to support application of an enhancement pursuant to § 3B1.1, however the Sixth Circuit requires that the district court makes its enhancement determination by consulting these factors and providing a statement of reasons for its determination regarding these factors, see U.S. v. Alexander, 59 F.3d 36, 38-40 (6th Cir. 1995); U.S. v. Caseslorente, 220 F.3d 727, 736 (6th Cir. 2000); and Dupree, 323 F.3d at 493-94 (6th Cir. 2003). Moreover, Petitioner Gibson, argues had his ex-lawyer objected to the § 3B1,1 adjustment within the PSR, thus the Government would have had the burden of proving Gibson's aggravating role by a preponderance of the evidence, see U.S. v. Dupree, 323 F.3d 480, 491 (6th Cir. 2003).

Petitioner Gibson, asserts that the Sixth Circuit relied

upon the District Court and supports the basis of a denial of C.O.A. by this Honorable Appellate Court, however Solorio is distinguishable as articulated below herein.

In Solorio, the Sixth Circuit Ruling relied upon by the district court to deny 2255 Motion as to claim two as to the application of three-level adjustment for Supervisor/Manager under § 3B1.1, however in Solorio, the Sixth Circuit specifically considered the following factors to decide whether to affirm the application of the three-level adjustment as follows:

(1) the defendant's exercise of decision-making authority;
(2) any recruitment of accomplices;
(3) the claimed right to a larger share of the fruits of the crime;
(4) the degree of participation in planning the offense; and
(5) the degree of control the defendant exercised over others.

See Solorio, 337 F.3d at 601 (6th Cir. 2003).

In Solorio, the government notes, there is uncontroverted evidence that Solorio recruited Moises Picos-Picos as an accomplice and exercised control over him. Solorio arranged for Picos-Picos to come from Tijuana to help Solorio and leased an apartment for him. In return, Picos-Picos worked for Solorio, delivering bags of cocaine and money, and keeping records of drug transactions for Solorio. Solorio planned and directed all of Picos-Picos's drug activities. The Sixth Circuit held in Solorio, that: "This is sufficient to establish that Solorio was a supervisor within the meaning of the Guideline," see Solorio, 337 F.3d at 601 (6th Cir. 2003). Thus, Petitioner Gibson argues that his facts and circumstances are distinguishable from Solorio, because he actually exercised control over a co-defendant or co-conspirator, however there is no evidence that Jamall Gibson exercised control over any co-defendant or co-

conspirator, see United States v. Walker, 160 F.3d 1078, 1092 (6th Cir. 1998) ("The inference we draw from the reading testimony is that McKinley answered to Edwards, and we find nothing to suggest that anyone answered to McKinley. In our view, the government has produced far below what it needs in order to sustain this [§ 3B1.1] enhancement, and we conclude that the district court's finding was clearly erroneous." Id. 1092); and United States v. Burgos, 324 F.3d 88, 92 (2d Cir. 2003) (manager or supervisor enhancement requires only that the defendant exercised "some degree of control over others involved in the commission of the offense," and "[i]t is enough to manage or supervise a single other participant." The Second Circuit held that: The Court found no evidence of control over a co-conspirator, thus holding there is nothing to create an inference that Dyckman controlled Dominguez, whose role was like Alejo's therefore the Second Circuit held the facts do not support the aggravating role adjustment the matter vacated and remanded for re-sentencing); and U.S. v. Graham, 162 F.3d 1180, 1183 (D.C. Cir. 1998) (holding that the defendant was not a manager under U.S.S.G. § 3B1.1(b) where a co-conspirator's vague, non-specific testimony showed only that the defendant "was sometimes a lieutenant," and that the defendant referred potential drug buyers to fellow conspirators who actually sold the drugs. The D.C. Circuit VACATED and REMANDED for resentencing specifically holding that: "Because the mere act of directing buyers of crack cocaine to sellers did not constitute "management" or supervision of the illegal conspiracy under sentencing guidelines."). Lastly, Petitioner Gibson, argues that the district court's reasoning and

the Sixth Circuit's denial of a C.O.A. as to the second claim herein is incorrect, thus the record is devoid of any evidence that Gibson had control over a co-conspirator and planned and organized a co-conspirator's entrance into the conspiracy in which is required to support application of U.S.S.G. § 3B1.1, see United States v. Castilla-Lugo, 699 F.3d 454, 461 (6th Cir. 2012) (It is evident that recruiting co-conspirators and planning and organizing their entrance into the conspiracy suffices to warranting the enhancement, even though the Government did not prove each of the other factors, such as receiving a larger share of the profits or exercising decision-making authority.). (emphasis added).

Thus, Petitioner Gibson, asserts that his ex-lawyer provided him with 'deficient performance' by failing to object to the PSR and at sentencing to the § 3B1.1 adjustment, see Strickland, 104 S.Ct. at 2064.

Actual prejudice exists because Petitioner Gibson, argues that there is a reasonable probability of any decrease in the sentence, thus establishing actual prejudice, see Glover v. U.S., 531 U.S. 198 (2001).

Therefore, Petitioner Gibson, argues that absent his ex-lawyer's 'deficient performance' there is a reasonable probability that his 151-month sentence would have been 30 to 74 months lesser, thus actual prejudice exists in violation of Gibson's Sixth Amendment Rights of the U.S. Constitution, see Glover, 531 U.S. 198, 200 (2001).

Thus, Petitioner Gibson, argues firmly that he has established his burden of proof as required by 28 U.S.C. § 2253(c)(2),

therefore a C.O.A. should be GRANTED as the issues presented herein as to Question # Two were "adequate to deserve ther encouragement to proceed further," see Slack, 529 U.S. at 483-84 (2000). (emphasis added).

Question # THREE:

Whether Petitioner Gibson's counsel rendered ineffective assistance of counsel by failing to advise him of his Speedy Trial Rights and failing to seek dismissal of the Indictment on the ground that he was deprived of his right to a Speedy Trial via 18 U.S.C. § 3161(c)(1), thus did counsel violate his Sixth Amendment Rights of the U.S. Constitution?

Burden of Proof

To satisfy the deficient performance prong, a petitioner must show that the representation his attorney provided fell below an objective standard of reasonableness, see Strickland, 466 U.S. 668, 688 (1984). Thus, to satisfy the actual prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's [deficient performance] unprofessional errors, the result of the proceeding would have been different, see Harrington v. Richter, 562 U.S. 86, 178 L.Ed. 2d 624, 642 (2011).

Question # Three Merits Issuance of a C.O.A.

The Sixth Circuit held that Gibson's claim that his attorney was ineffective for failing to advise him of his Speedy Trial rights or seek dismissal of the Indictment on speedy trial grounds, thus holding that reasonable jurists could debate the district court's denial of a C.O.A. as Gibson's third claim and

the Sixth Circuit explained in part: "Gibson's conclusory and unsupported assertion that counsel failed to advise him of his speedy trial rights is insufficient to establish that counsel's performance was deficient. See **Wogenstahl v. Mitchell**, 668 F.3d 307, 335 (6th Cir. 2012)." However, Mr. Gibson, asserts that his Sworn Affidavit filed with this 2255 Motion to Amend, see Doc. # 1471, states at pg. 1, Para. #4 as follows:

> 4. I was not informed about the Speedy Trial Act my right to a speedy trial pursuant to 18 U.S.C. § 3161(c)(1), to be brought to jury trial within seventy days and had I been aware of such a right, I would have insisted upon a Formal Request being made to request a Speedy Trial within 70 days from the day, I was indicted on March 20, 2013.

Thus, Petitioner Gibson, argues that his factual allegations must be taken as **true**, see **Lambright v. Stewart**, 220 F.3d 1022, 1026-27 (9th Cir. 2000) (quoting **Conley v. Gibson**, 355 U.S. 41, 45-46 (1957)), thus failing to apprise Gibson of his Speedy Trial Right constitutes 'deficient performance.'

The speedy trial clock commenced on **March 20, 2013** through **May 22, 2013**, in which totals **61 days**, however the seventy-day requirement applies when Mr. Gibson was arraigned, see **U.S. v. O'Dell**, 154 F.3d 358, 360-61 (6th Cir. 1998) (70-day limit triggered upon not guilty plea). Pursuant to 18 U.S.C. § 3161(a), in which states as follows: (a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, **shall**, after consultation with 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; 18 U.S.C. § 3161(c)(1),

in which states in relevant part as follows: 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; and 18 U.S.C. § 3162(a)(2), in which states in relevant part as follows: If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. Congress enacted 3161 Speedy Trial Act to comply with due process, see H.R. Rep. No. 93-1508, p.15 (1974) (the Act seeks to achieve "efficiency in the processing of cases which is commensurate with due process."). (emphasis added). In the instant case, Petitioner Gibson, contends that under Brady the Government handed over to his ex-lawyer one blacked out paragraph allegedly implicating Gibson in the conspiracy then 1 year or so later the Government permitted his ex-lawyer to review for 10 to 15 minutes the Jencks Act material in which would be utilized to convict Mr. Gibson.

Petitioner Gibson, contends that on February 4, 2014, his ex-lawyer entered a Stipulation to Trial date to May 5, 2014; and excluding time from January 29, 2014 through March 8, 2014 from the Speedy Trial Clock pursuant to § 3161(h)(1)(G), and (H) to review voluminous discovery and continue plea negotiations, see Doc. #636, Filed 02/04/14. See Appendix F (A copy of Stipulation to Extend Cutoff Date and Trial to May 6, 2014, thus excluding

1-29-14 through March 8, 2014 from the Speedy Trial Clock, see Doc. #636, Filed 02/04/14). However, Petitioner Gibson, argues firmly that the ORDER is invalid because the district court judge did not make any of the findings required for an ends-of-justice continuance; and the time is not automatically excludable under § 3161(h)(1) for plea bargaining process, thus a C.O.A. should issue because it is debatable whether the 37 days were properly excluded as Mr. Gibson, argues that they are not excludable, therefore his Speedy Trial Rights were violated as 98 elapsed but he was not afforded a Speedy Trial in violation of 18 U.S.C. § 3161(c)(1), thus his Indictment should have been dismissed. See **Zedner v. United States**, 547 U.S. 489 (2006). The U.S. Supreme Court recently Summary Vacated and Remanded to the Sixth Circuit Court of Appeals on this issue herein, see **White v. United States**, 138 S. Ct. 641, 199 L. Ed. 2d 522 (2018).

Thus, Petitioner Gibson, argues that he received 'deficient performance' by his counsel establishing the first prong of the **Strickland** test in the case at bar.

Actual prejudice exists as the result of there is a reasonable probability absent counsel's 'deficient performance' that the outcome of the proceedings would have been different, Jamall Gibson's Indictment would have been dismissed as required for a Speedy Trial 70-Day violation, see 18 U.S.C. § 3161(a)(1). (emphasis added).

Therefore, Petitioner Gibson, argues firmly that Question # Three is debatable amongst jurists of reason as to whether Gibson's Sixth Amendment constitutional rights were violated, thus a C.O.A. must issue, see **Miller-El**, 537 U.S. 322, 327 (2003).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Jamall Gibson

Date: 07/15/2019