**No. 20-_____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**DENNIS MAHON,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

---

**On Petition for Writ of Certiorari**
**to the U.S. Court of Appeals**
**for the Ninth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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28 February 2020

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

Petitioner Dennis Mahon respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. The undersigned counsel represented Mahon in a motion to vacate under 28 U.S.C. § 2255 and on collateral appeal to the Ninth Circuit, having been retained by his family. Mahon has been incarcerated since May 2012 and remains indigent.

Dated: 28 February 2020

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## QUESTION PRESENTED FOR REVIEW

The Court has made clear that the prosecution may not use at trial inculpatory statements stemming from custodial interrogation of the defendant by law enforcement when a defendant has invoked his or her right to silence. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966).

But custodial interrogation can occur, leading to an incriminating statement that is not constitutionally admissible, even when police are not questioning the subject. When government agents create circumstances establishing the "functional equivalent" of interrogation, the defendant's inculpatory statements made while in custody and after invoking the right to silence must likewise be suppressed. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682 (1980). The functional equivalent of interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id*. at 301 (footnote omitted).

Meanwhile, the Court has also made clear that the issuance of a certificate of appealability ("COA") is appropriate, a defendant need only make a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claim or could conclude that the issue is adequate to deserve encouragement to proceed further. *Buck v, Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).

In this case, Petitioner raised the constitutional claim that he was deprived of the right to the effective assistance of appellate counsel when his counsel failed to appeal the district court's ruling that law enforcement had not presented a situation representing the functional equivalent of interrogation. The task force agent had outlined to Petitioner's brother how both men were going to be found guilty, how additional raids of additional addresses to lead to additional evidence were underway, and how the two men needed to cooperate against another party, and then placed the brother with Petitioner in the back of a van wired for video and audio recordings. The recordings of the brothers' discussions that followed yielded inculpating statements of Petitioner.

The magistrate judge ruled that it was arguable that the circumstances were, indeed, the functional equivalent of custodial interrogation. The district court demonstrated that this ruling was necessarily debatable by ruling the exact opposite—that the circumstances did not present the functional equivalent of interrogation—and basing its finding that appellate counsel was effective on that precise finding. And yet despite that direct conflict of rulings, the U.S. Court of Appeals for the Ninth Circuit ruled that Petitioner had not made a substantial showing that jurists of reason could disagree with the district court's decision on a constitutional claim.

The question presented, then, is whether the lower courts err in failing to find that a defendant made a substantial showing that jurists of reason could disagree on a constitutional issue when the magistrate judge and district court judged reached opposite conclusions.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Dennis Mahon respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit, declining to grant a certificate of appealability and thereby affirming the district court's decision to deny his motion under 28 U.S.C. § 2255, is unpublished. *United States v. Dennis Mahon*, No. 19-16147 (9th Cir., Dec. 12, 2019). Pet. App. 1a.

The district court entered a final appealable order through its judgment denying Mahon's § 2255 motion. *United States v. Dennis Mahon*, No. 2:17-cv-02031-DGC-JFM (District of AZ., Apr. 10, 2019). Pet. App. at 6a. The district court's memorandum order, *United States v. Dennis Mahon*, No. 2:17-cv-02031-DGC-JFM (District of AZ., Apr. 10, 2019), Pet App. at 7a, modified the magistrate judge's reasoning, directly disagreed with the magistrate judge on the issue of whether the "functional equivalent" of interrogation had occurred, but adopted the magistrate judge's recommendation that the § 2255 motion be denied and the matter dismissed. *United States v. Dennis Mahon*, No. 2:17-cv-02031-DGC-JFM (District of AZ., Nov. 5, 2018). Pet. App. at 29a.

## STATEMENT OF THE BASIS FOR JURISDICTION

The district court originally had jurisdiction under 18 U.S.C. § 3231, as the indictment charged Petitioner with violations of the U.S. Code including 18 U.S.C. § 844(n). The district court regained jurisdiction when Petitioner timely filed a motion under 28 U.S.C. § 2255(f)(1) within a year of the date his conviction became final. See *Clay v. United States*, 537 U.S. 522, 532, 123 S. Ct. 1072 (2003); U.S. Sup. Ct. R. 13(1).

The district court judgment adopting the magistrate judge's report and recommendation, denied relief and dismissed the action. Pet. App at 6a. The district court later ruled that it would not issue a certificate of appealability. Pet. App. at 2a. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment order denying Petitioner's § 2255 motion, and Petitioner timely appealed from that order. See 28 U.S.C. § 2253(a).

The Ninth Circuit denied Petitioner's request for certificate of appealability. Pet. App. at 1a. Petitioenr is filing this petition within 90 days of that ruling. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254(1). See Sup. Ct. R. 13.1, 13.3, 29.2.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

U.S. CONST., amend. V.

> In all criminal prosecutions, the accused shall enjoy to right * * * to have the assistance of counsel for his defense.

U.S. CONST., amend. VI.

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

## STATEMENT OF THE CASE

This case presents an important question as to whether a district court's rationale for denying relief on an ineffective assistance of counsel claim was debatable among jurists of reason, and whether a defendant has made substantial showings of the denial of that constitutional right to the effective assistance of counsel, when a meritorious Fourth Amendment issue was not raised on appeal. Because the magistrate judge reasonably found that the federal investigators had engaged in the "functional equivalent" of custodial interrogation, and because the district court disagreed and reversed that finding (over Petitioner's objection), the ruling on a constitutional issue was necessarily "debatable among jurists" and deserving of further review.

1. On Thursday, February 24, 2004, a brown cardboard box that had been found at the Scottsdale, Arizona public library and transferred to the Office of Diversity and Dialogue ("Diversity Office") exploded on top of a counter as Donald Logan, the director of that office and the person to whom the package was addressed, opened it. The explosion blew a hole through the counter, shattered windows, and injured Logan and two others. Investigation led authorities to conclude that the explosive device was a pipe bomb.

2. Substantial evidence pointed to a conclusion that the bomb was constructed and planted by someone employed by the city of Scottsdale such as a local police officer. This included that the bomb had been smuggled into the library with the wrong address for the Diversity Office by someone who would have reason to believe that interoffice mail would nevertheless see it delivered to Logan. The Diversity Office, under Logan's direction, issued many decisions that aided or prompted terminations of city workers, and Logan was personally involved with city employee terminations. In particular, Logan was

involved in the reassignment of an angered Scottsdale Police Office Department employee who sued the city for discrimination. A group of angry Scottsdale police officers complained of a "racist" event that the Diversity Office organized.

3. Petitioner and his brother were living in a trailer park in Tempe, Arizona in 2003 and 2004. Petitioner was one of many suspects. He was placed on that list as a result of a voicemail message he had left with the Diversity Office on September 26, 2003 that expressed support for white nationalists. Although Petitioner had no criminal record and bomb debris yielded traces of DNA that excluded Petitioner as a contributor, discovery of the voicemail message led law enforcement to abandon leads as to Scottsdale city employees and other "insiders" with motives to harm Logan and to focus on Petitioner.

4. The government hired an exotic dancer to induce Petitioner to assist her in building an explosive device to harm a fictional character the dancer claimed was abusing a child. She spent five years working to elicit incriminating statements from Petitioner while law enforcement recorded their meetings. The relationship included instances when this undercover agent wore revealing clothing, flirted with Petitioner, sent him suggestive photos with titillating messages, hinted that his assistance would lead to sexual activity, and once grabbed his crotch area. Petitioner initially resisted her requests for an education on explosive devices and even attempted to discourage her from carrying through with her plans. Petitioner became attracted to the undercover agent and bragged (often under the influence of Everclear alcohol) about his past—including claims that could not have been true.

5. As a part of many stories Petitioner told to try to impress the undercover agent, he stated that he had not built or delivered the Scottsdale bomb but had taught Scottsdale police how to make an explosive device. While Petitioner accurately described to the undercover agent the dimensions of the Scottsdale bomb, he incorrectly claimed that the bomb had been mailed, that it had been contained in an envelope, and that Logan had lost three fingers as a result of the bomb. Those details were false.

6. In June 2009, more than five years after the bombing, law enforcement agents arrested Petitioner and his brother in Davis Junction, Illinois at their parents' farm. Search of the residence uncovered no evidence linking Petitioner or his brother to the Scottsdale bomb. Agents then placed Petitioner and his brother in handcuffs and in a circumstance designed to elicit incriminating statements under a "functional equivalent" of interrogation. An agent primed the men to speak about the case by informing them of claimed incriminating evidence (some of which was false) and reporting that he "had" Petitioner "cold." Despite Petitioner invoking his right to an attorney, the agent continued to question him.

7. The agents then placed the men in a van equipped with audio and video recording capabilities and turned on those devices to capture the conversation. During the recording, Petitioner and his brother made incriminating statements, including a saying to his brother, "Three months ago I told you, get rid of the stuff," and revealing knowledge that Logan was located in City Hall, not a library.

8. At trial, the government played the video of the conversation, including these and other incriminating exchanges, for the jury. The prosecution's closing argument expressly

relied upon the video as evidence of Petitioner's consciousness of guilt and to urge the jury to find Petitioner guilty of a conspiracy charge.

9. Petitioner was charged with conspiracy to damage buildings and other real property by means of explosives in violation of 18 U.S.C. § 844(i), (n); malicious damage of a building by means of explosives in violation of § 844(i); and distribution of information related to construction of explosives in violation of § 842(p)(2)(A).

10. Petitioner moved to suppress his statements to his brother while in custody in the van arguing that the circumstances represented the "functional equivalent" of police interrogation. The district court denied the motion. With the video evidence introduced at trial, evidence that the government heavily relied upon in support of the charges in the absence of any DNA or fingerprint evidence, eyewitness accounts, or direct connections to bomb components, see Pet. App. 64a n.8, 65a., the jury found Petitioner guilty.

11. Petitioner appealed; but his appellate counsel did not appeal this suppression ruling. Petitioner filed a motion under 28 U.S.C. § 2255 noting that his appellate counsel had been ineffective for failing to raise this issue on appeal as it was meritorious and clearly stronger than the arguments raised to the Ninth Circuit.

12. No question existed that Petitioner was in custody, that he invoked his right to remain silent and requested counsel before being placed in the van. The magistrate judge concluded that the circumstances particular to the case demonstrated that agents had engaged in the "functional equivalent" of interrogation, Pet. App. 70a-81a, that the remainder of the government's evidence was not otherwise overwhelming, Pet. App. 63a-66a, and therefore that the error of admitting the video evidence was not harmless. Pet.

App. 66a. The magistrate judge demonstrated how debatable the legal issue was by noting that he might have found in the first instance that the video evidence needed to be suppressed. Pet. App. 81a. The magistrate judge did not recommend relief, however, finding that appellate counsel would have been reasonable to conclude that the Ninth Circuit might have agreed with the district court rather than Petitioner's argument. Pet. App. 82a.

13. The district court demonstrated that this mixed question of law and fact, which the Ninth Circuit would have reviewed de novo if it had been raised on appeal, see *United States v. Chen*, 439 F.3d 1037, 1040 (8th Cir. 2006), was indeed "debatable" by reaching a conclusion directly opposite the magistrate judge's finding, ruling that the circumstances did not represent the functional equivalent of interrogation. Pet. App. 13a-16a; see Pet. App. 16a ("The Court * * * will not adopt the R&R's contrary conclusion."). And it was upon that debatable ruling that the district court found in turn that appellate counsel was not ineffective in failing to raise this challenge on appeal. Pet. App. 16a.

14. In sum, the district court's entire reasoning on these constitutional issues (Fifth Amendment right to silence and Sixth Amendment rights to counsel and to the effective assistance of counsel) turned on whether the circumstances were the functional equivalent of interrogation—an issue on which the magistrate judge and district court judge had directly and fully disagreed. And yet both the district court and the Ninth Circuit found that the issue was simply not debatable and foreclosed by law. Pet. App. 1a, 3a-4a.

15. Petitioner remains incarcerated on a sentence of 40 years of imprisonment.

## REASONS FOR GRANTING THE PETITION FOR WRIT

Under Supreme Court Rule 10, the Court will review important questions of law that has not been but should be settled by this Court. Sup. Ct. R. 10(c). The important question presented in this case is whether the U.S. Court of Appeals for the Ninth Circuit erred in finding that Petitioner had not shown that jurists of reason could debate whether the district court was correct in its ruling on a constitutional issue as to whether Petitioner had been denied the right to the effective assistance of appellate counsel.

The district court ruled that the circumstances leading to Petitioner's incriminating statements did not present the functional equivalent of police interrogation and, thus, the statements were not required to be suppressed under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602 (1966). Pet. App. 3a-4a. On that finding that the statements were not required to be suppressed, the district court ruled that appellate counsel was not ineffective for failing to raise the issue on appeal. Pet. App. 4a.

The district court and the Ninth Circuit concluded that no jurists of reason could debate the finding that the circumstances leading to the incriminating statements did not present the functional equivalent of police interrogation. Pet. App. 1a, 4a. But the record shows the opposite. The magistrate judge found that the evidence arguably showed that an agent manipulated Petitioner's brother to act as his interrogator, seeking to evoke incriminating statements, Pet. App. 77a-78a, that it was arguable that the agent knew it was likely that his conversation with Petitioner's brother was reasonably likely to result in incriminating statements, Pet. App. 78a-81a, that it was plausible that Petitioner was subjected to the functional equivalent of interrogation, Pet. App. 81a, and that he might have recommended granting Petitioner's motion

to suppress in the first instance. *Id*. The district court recognized that the magistrate judge had concluded that the agent's conduct meant that Petitioner was subjected to the functional equivalent of interrogation. Pet. App. 16a. It came to the opposite conclusion, however, finding nothing to "support a finding of the functional equivalent of interrogation as a matter of law or fact," and ruled that it would "not adopt the [magistrate judge's] contrary conclusion." *Id*. The opposite findings demonstrate that, not only could reasonable jurists debate the issue, jurists of reason actually ruled contrary to one another on this mixed constitutional question of law and fact in the course of this case.

## I. The Court Should Grant Certiorari to Address whether the Ninth Circuit Erred in Failing to Find that Petitioner Made a Substantial Showing of the Denial of His Constitutional Right when Appellate Counsel Failed to Appeal a Meritorious Fourth Amendment Argument.

### A. A Certificate of Appealability should be Granted when a Defendant Makes a Substantial Showing of the Denial of a Constitutional Right.

To demonstrate that the issuance of a certificate of appealability ("COA") is appropriate, a defendant need only make a substantial showing that jurists of reason could disagree with the district court's resolution of his constitutional claim or could conclude that the issue is adequate to deserve encouragement to proceed further. 28 U.S.C. § 2253(c)(2); *Buck v, Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029 (2003). Stated differently, Petitioner did not need to establish in the Ninth Circuit that he would win on the merits in order to obtain a COA; he needed only to demonstrate that reasonable jurists could debate whether the motion should have been resolved in a different manner. See *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383 (1983). "A prisoner seeking a COA must prove 'something more than the

absence of frivolity' or the existence of mere 'good faith on his or her part." *Miller-El*, 537 U.S. at 337 (quoting *Barefoot*, 463 U.S. at 893).

### B. Petitioner had a Constitutional Right to the Effective Assistance of Trial and Appellate Counsel.

Petitioner had a right to the effective assistance of counsel, as guaranteed by the Sixth Amendment. See U.S. Const. amend. VI; *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574 (1986); *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970); *Montayne v. United States*, 77 F.3d 226 (8th Cir. 1996). To prevail on his claim that he received ineffective assistance of counsel, Petitioner was required to establish that his attorney rendered objectively substandard assistance and that a reasonable probability exists that, but for the unprofessional error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686, 688, 604, 104 S. Ct. 2055 (1984). A reasonable probability is a probability "sufficient to undermine [the Court's] confidence in the outcome.'" *Id.* at 694. Prejudice is shown from even one additional day in prison. See *Glover v. United States*, 531 U.S. 198, 203, 121 S. Ct. 696 (2001).

The right to effective assistance of counsel extends to appeals. The Sixth Amendment right to counsel extends through the direct appeal. See *Douglas v. California*, 372 U.S. 353, 357-58, 83 S. Ct. 814 (1963); *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990 (1987). This right to counsel obligates the attorney to render effective assistance on appeal. See *Evitts v. Lucey*, 469 U.S. 387, 396-97, 105 S. Ct. 830 (1985).

Petitioner recognizes that appellate counsel is not required raise every possible claim. *Jones v. Barnes*, 463 U.S. 745, 751-54, 103 S. Ct. 3308 (1983). To be sure, "'winnowing out

weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661 (1986) (quoting *Barnes*, 463 U.S. at 751-52).

To establish deficient performance of counsel in the context of an appeal, a defendant must demonstrate his counsel made an objectively unreasonable decision by choosing to raise issues other than a meritorious argument, meaning that issue "was clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 285, 288, 120 S. Ct. 746 (2000)). In other words, just as with the typical *Strickland* standard, to show prejudice, a defendant must demonstrate "a reasonable probability that, but for his counsel's unreasonable failure to" raise this issue on appeal, "he would have prevailed" on appeal. *Id*. at 285.

### C. Petitioner Made a Substantial Showing that Jurists of Reason could Disagree with the District Court's Ruling that His Appellate Counsel was Effective Despite Failing to Appeal the Finding that the Circumstances of the Recording of His Incriminating Statements did not Amount to the Functional Equivalent of Interrogation.

#### 1. The Fifth Amendment and custodial interrogation

The Fifth Amendment grants persons the right against self-incrimination. U.S. CONST., amend. V. To protect this right and give it meaning, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id*. Once warnings have been given, and if the person

shows that he intends to exercise his Fifth Amendment privilege, "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id*. at 474. Unless and until the government demonstrates that the warnings were given and the person waived them, "no evidence obtained as a result of interrogation can be used against him." *Id*. at 479.

**2. The Fifth Amendment is violated if, after a person invokes the rights to silence or counsel, law enforcement questions a person under the functional equivalent of interrogation.**

In *Arizona v. Mauro*, 481 U.S. 520, 107 S. Ct. 1931 (1987), the Court was faced with post-invocation incriminating statements made by the defendant to his wife during the arrest process, when police agreed to let them talk, albeit with an officer present. The Court concluded there was no interrogation. But in doing so, the Court observed that the officers had attempted to dissuade the wife from talking to the petitioner, had an officer in the room for legitimate security reasons, and "was not subjected to compelling influences, psychological ploys, or direct questioning." *Id.* at 528-529. The Court also had observed: "There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." *Id.* at 528.

Interrogation is defined not only as express questioning but also as its "functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682 (1980). The functional equivalent of interrogation includes "any words or *actions* on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id*. at 301 (footnote omitted) (emphasis added).

In *Innis*, the Court found that when officers were transporting a suspect in a murder involving a shotgun, they engaged in a short post-invocation conversation about a school for handicapped children in the area, and the potential the children would find the shotgun and be injured. The defendant then volunteered that he would show them where the shotgun was hidden. At the scene, he was again advised of his rights, but replied that he wanted to "get the gun out of the way because of the kids in the area in the school," and revealed its location. *Id*. at 294-95. The Court concluded that while the defendant may have been subjected to "subtle coercion," they could not find "the officers should have known that the respondent would suddenly be moved to make a self-incriminating response," and thus the defendant had not been interrogated. *Id.* at 303.

> That the officers' comments struck a responsive chord is readily apparent * * * [and] the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.

*Id. "*The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* at 301.

**3. In this case, Petitioner was subjected to subtle coercion, and his incriminating response was the product of the agent's words that the agent should have expected to elicit incriminating statements.**

In this case, no question existed that Petitioner was in custody, had requested counsel, and had thereby invoked his right to silence. The questions were whether law enforcement's conduct created a circumstance of subtle coercion reasonably expected to elicit incriminating statements from Petitioner. See *id*. at 301, 303.

Law enforcement did not simply leave the brothers alone with the hopes that they would incriminate themselves. Cf. *Mauro*, 481 U.S. at 529. Instead, the agent informed Petitioner and

his brother of the charges that would be filed against them, made comments to the effect that their convictions were all but assured, mentioned other raids occurring at the same time as to alleged co-defendants, commented that other alleged conspirators would likely abandon them, and suggested that they cooperate against an alleged co-conspirator. Pet. App. 50a-58a. In short, the agent made statements (both true and false) to suggest that it was time for the brothers to work out a strategy of how to best respond, and then placed them in a van wired to record them.

The magistrate judge found that the evidence arguably showed that the agent "went beyond merely permitting contact between" Petitioner and his brother "and use a psychological ploy to manipulate [the brother] into acting as [the agent's] interrogator." Pet. App. 77a. To the magistrate judge, the agent arguably did so by "seeding" the brother "with not just the bare charges or evidence against [them] but with suggestions that the brothers should turn on [another alleged co-conspirator] and other associates to cut a deal." *Id*. Noting that the agent then sent the brother back into the recorded van, noting that he would soon question Petitioner next, the magistrate judge found plausible that the agent anticipated that the brother would speak to Petitioner about all the agent had just said, which would lead Petitioner to react to the claims in ways that could inculpate himself. *Id*. at 78a. "In the context of this case" and a Ninth Circuit case, it was "at least arguable" to the magistrate judge "that a reasonable police officer should have known it was reasonably likely that his conversation with [Petitioner's brother] would have resulted in incriminating responses from" Petitioner. *Id*. at 81a.

**4. The district court's denial of relief on this ineffective assistance of appellate counsel claim, based entirely on a finding that the circumstances did not present a functional equivalent of interrogation, had been debated among reasonable jurists.**

The district court denied Petitioner's claim that his appellate counsel was ineffective for failing to raise this Fifth Amendment, *Miranda*, *Innis* issue on appeal. Pet. App. 16a. This finding was based upon the determination that the agent did not create circumstances presenting the functional equivalent of interrogation. Pet. App. 13a-16a. Thus, Petitioner lost this ineffective assistance of counsel argument (a constitutional issue) entirely based upon a ruling on the "functional equivalent" argument (another constitutional issue).

Despite the reversed ruling, both the district court and Ninth Circuit concluded that the issue of appellate counsel's ineffective assistance in failing to raise the *Miranda* and *Innis*-based argument was not debatable. Pet. App. 1a, 3a-4a. The issue was not just theoretically debatable. The record revealed two equally-reasonable rulings that were in direct conflict.

The district court rejected the magistrate judge's conclusion that "'a highly plausible argument' existed that the agent manipulated Petitioner's brother into acting as an interrogator, amounting to the functional equivalent of interrogation." Pet. App. 12a. The district court disagreed with the magistrate judge's conclusion that the statements and circumstances amounted to the functional equivalent of interrogation. *Id*.

Because the district court completely disagreed with the magistrate judge's reasonable conclusion that the agent's conduct led to a situation representing the functional equivalent of interrogation, the issue was debatable as a matter of definition. Petitioner submits that it was also worthy of further review. As a result, the Ninth Circuit erred in denying Petitioner a COA on the district court's finding that appellate counsel was effective despite failing to raise this *Innis*-based argument on direct appeal. See 28 U.S.C. § 2253(c)(2); *Buck*, 137 S. Ct. at 773; *Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484.

## CONCLUSION

Petitioner Dennis Mahon submits that his petition for writ of certiorari should be granted for the compelling reasons noted above. He asks the Court to grant his petition and order full briefing or to vacate the Ninth Circuit's order denying certificate of appealability and remand with instructions that the Ninth Circuit grant certificate of appealability on the issues of whether law enforcement created a circumstance presenting the functional equivalent of interrogation and whether Petitioner's appellate counsel was prejudicially ineffective in failing to raise that Fifth Amendment issue on appeal.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 28 February 2020

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## CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari and the following appendix were served on the date I reported below by email to the Solicitor's General Office at SupremeCtBriefs@USDOJ.gov and by U.S. Priority Mail upon: the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and Assistant U.S. Attorney Peter S. Kozinets, Two Renaissance Square, 40 N. Central Ave., Suite 1800, Phoenix, AZ 85004.

Dated: 28 February 2020

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt

# APPENDIX