

 ORIGINAL

No.

Supreme Court of the United States

GILLMAN RODDY LONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

**Gillman Roddy Long
Petitioner
10527-273
P.O. Box 24550
Tucson, AZ 85734**

QUESTIONS PRESENTED

In 2009, Petitioner Gillman Long voluntarily met with an FBI agent, at the agent's request. The FBI agent's purpose for the meeting was to investigate an allegation of sexual abuse against him by his stepdaughter. When Mr. Long realized the purpose of the meeting, he stated to the FBI agent, "I do not want to incriminate myself. I would like to stop talking." He was subsequently charged with 3 counts of sexual abuse of a minor. At trial, Mr. Long did not testify but the prosecutor introduced Mr. Long's statement and also argued that it provided proof of Mr. Long's guilt. No objection was made by counsel for Mr. Long, the evidence and argument were allowed to stand, and he was found guilty on 2 of the 3 counts. On direct appeal, the Court of Appeals held that no plain error occurred because the admissibility of the statement was an open question in the Eighth Circuit in spite of the fact that other Circuits had held that such evidence was inadmissible and violative of the Fifth Amendment self incrimination clause. Mr. Long subsequently filed a motion pursuant to 28 U.S.C. § 2255 alleging, *inter alia*, ineffective assistance of counsel due to counsel's failure to object to the admission of the statement and argument. The district court denied the motion, holding that, since the admissibility of the statement and argument had been and still were an open question in the Eighth Circuit, counsel's performance could not by law have been below the objective standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). While the district court granted a Certificate of Appealability, the Court of Appeals affirmed the dismissal of the Section 2255 motion and claim.

1.) Does a bright line rule, that an attorney only fails the performance prong of the *Strickland* test for failure to raise an objection based on binding circuit or Supreme Court precedent, violate the Sixth Amendment?

2.) Is the performance of an attorney is professionally unreasonable where the attorney fails to object to critical, inculpatory evidence and argument when (i) there is no binding circuit or Supreme Court precedent, (ii) there is a conflict among the circuits as to admissibility, and (iii) the defendant was facing and is now serving life in prison?

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Gillman Roddy Long and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	<u>Page:</u>
Questions Presented	i
List of Parties to the Proceedings in the Courts Below	iii
Table of Contents	iv
Table of Authorities	vi
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	3
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
1.) THIS COURT SHOULD GRANT MR. LONG'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER A BRIGHT LINE RULE, THAT AN ATTORNEY ONLY FAILS THE PERFORMANCE PRONG OF THE STRICKLAND TEST FOR FAILURE TO RAISE AN OBJECTION BASED ON BINDING CIRCUIT OR SUPREME COURT PRECEDENT, VIOLATES THE SIXTH AMENDMENT	8
1A.) The Federal Courts of Appeals Are Divided As To Whether A Bright Line Rule, That An Attorney Only Fails The Performance Prong Of The Strickland Test For Failure To Raise An Objection Based On Binding Circuit Or Supreme Court Precedent, Violates The Sixth Amendment	9

1B.) The Performance Of Petitioner’s Attorney Was Professionally Unreasonable When The Attorney Failed To Object To Critical, Inculpatory Evidence And Argument When (i) There Was No Binding Circuit Or Supreme Court Precedent, (ii) There Was A Conflict Among The Circuits As To Admissibility, And (iii) The Defendant Was Facing And Is Now Serving Life In Prison	11
Conclusion.....	16
Appendix	17
USCA Opinion Dated 11-9-17	A
USDC Judgment & Commitment Order Entered 4-20-12.....	B
USCA Denial of Rehearing Dated 1-9-18.....	C
USCA Opinion Dated 7-25-13	D
USDC Denial of Section 2255 Motion Dated 5-19-16.....	E
Order Granting Request for Certificate of Appealability Dated 5-19-16	F
Magistrate R&R Deny Motion to Suppress Entered 6-3-11	G
USDC Order Denying Motion to Suppress Entered 6-27-11.....	H
USDC Order Denying New Trial Entered 4-9-12	I
Supreme Court Denial of Certiorari Entered 10-15-13	J

TABLE OF AUTHORITIES

Cases	<u>Page:</u>
<i>Bailey v. United States</i> , 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995)	15
<i>Batson v. Kentucky</i> , 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)	10, 14
<i>Braxton v. United States</i> , 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991)	15
<i>Chavez v. McKinna</i> , 41 Fed. Appx. 319, 320; 2002 U.S. App. LEXIS 9824 (10 th Cir. 2002)	9, 13
<i>Combs v. Coyle</i> , 205 F.3d 269, 283 (6 th Cir. 2000), cert. denied, 121 S.Ct. 623 (2000)	6, 12
<i>Coppola v. Powell</i> , 878 F.2d 1562, 1568 (1 st Cir. 1989), cert. denied, 110 S.Ct. 418 (1989)	6, 12
<i>Government of Virgin Islands v. Forte</i> , 865 F.2d 59, 64-65 (3 rd Cir. 1989)	10, 14

Lawrence v. Chater,

516 U.S. 163, 167-68, 133 L. Ed. 2d 545,

116 S. Ct. 604 (1996) 16

Long v. United States,

875 F.3d 411, 412;

2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17)..... *passim*

Mayo v. Henderson,

13 F.3d 528 (2nd Cir. 1994)..... 10, 14

Montana v. Hall,

481 U.S. 400, 406,

95 L.Ed.2d 354, 107 S.Ct. 1825 (1987)..... 14

Nichols v. United States,

501 F.3d 542,

2007 U.S. App. LEXIS 19476 (6th Cir. 2007)..... 10, 14

Powell v. United States,

430 F.3d 490, 491 (1st Cir. 2005)..... 10, 14

Ragland v. United States,

756 F.3d 597, 601 (8th Cir. 2014)..... 9, 13

Salinas v. Texas,

___ U.S. ___, 133 S. Ct. 2174,

186 L. Ed. 2d 376 (2013) 15

Smith v. Robbins,

528 U.S. 259, 284-285;

120 S. Ct. 746; 145 L. Ed. 2d 756 (2000) 15

Stinson v. United States,

508 U.S. ___, ___, and [n.],

123 L.Ed.2d 598, 605 and [n. 2],

113 S.Ct. 1913 (1993) 15

Strickland v. Washington,

466 U.S. 668, 80 L.Ed.2d 674,

104 S.Ct. 2052 (1984) *passim*

United States ex. Rel. Savory v. Lane,

832 F.2d 1011, 1017-18 (7th Cir. 1987) 6, 12

United States v. Ardley,

273 F.3d 991, 993 (11th Cir. 2001) 9, 13

United States v. Long,

721 F.3d 920, 921-922;

2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) 5, 9, 11, 12

United States v. Mendoza,

464 U.S. 154, 78 L.Ed.2d 379,

104 S.Ct. 568 (1984) 15

Vasquez v. United States,

454 U.S. 975, 70 L.Ed.2d 396,

102 S.Ct. 528 (1981) 15

Statutes

<i>18 U.S.C. § 1153</i>	5, 11
<i>18 U.S.C. § 2241(c)</i>	5, 11
<i>18 U.S.C. § 2246(2)</i>	5, 11
<i>28 U.S.C. § 1254(1)</i>	3
<i>28 U.S.C. § 2255</i>	i, 6, 12

Other Authorities

<i>U.S.C.A. Fifth Amendment</i>	<i>passim</i>
<i>U.S.C.A. Sixth Amendment</i>	<i>passim</i>

Rules

<i>Supreme Court Rule 10</i>	8
<i>Supreme Court Rule 10(a)</i>	14

PETITION FOR A WRIT OF CERTIORARI

Gillman Roddy Long, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 11-9-17.

OPINIONS BELOW

The 11-9-17 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 875 F.3d 411 *; 2017 U.S. App. LEXIS 22444 **, and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 1-9-18. This opinion is an unpublished decision reported at 2018 U.S. App. LEXIS 549 and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District of South Dakota, was entered on 4-20-12, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Eighth Circuit in the direct appeal in this case, was entered on 7-25-13, is reported at 721 F.3d 920 *; 2013 U.S. App. LEXIS 15109 and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the District of South Dakota, denying Mr. Long's motion pursuant to 28 U.S.C. § 2255, was entered on 5-19-16, is an unpublished decision reported at 2016 U.S. Dist. LEXIS 65801 and is reprinted in the separate Appendix E to this Petition.

The prior opinion and judgment of the United States District Court for the District of South Dakota granting a Certificate of Appealability, was entered on 5-19-16, is an unpublished

decision reported at 2016 U.S. Dist. LEXIS 65801 and is reprinted in the separate Appendix F to this Petition.

The prior Magistrate Report & Recommendation of the United States District Court for the District of South Dakota recommending denial of Mr. Long's motion to suppress was entered on 6-3-11, is an unpublished opinion reported at 2011 U.S. Dist. LEXIS 72589 and is reprinted in the separate Appendix G to this Petition.

The prior opinion and judgment of the United States District Court for the District of South Dakota denying Mr. Long's motion to suppress was entered on 6-27-11, is an unpublished decision reported at 2011 U.S. Dist. LEXIS 68698 and is reprinted in the separate Appendix H to this Petition.

The prior opinion and judgment of the United States District Court for the District of South Dakota denying Mr. Long's motion for new trial was entered on 4-9-12, is an unpublished decision reported at 2012 U.S. Dist. LEXIS 49539 and is reprinted in the separate Appendix I to this Petition.

The prior opinion and judgment of the Supreme Court denying certiorari on direct appeal was entered on 10-15-13, is reported at 134 S. Ct. 448; 187 L. Ed. 2d 299 and is reprinted in the separate Appendix J to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 11-9-17. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 1-9-18. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,
RULES AND REGULATIONS INVOLVED**

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

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

STATEMENT OF THE CASE

In 2009, Petitioner Gillman Long voluntarily met with an FBI agent, at the agent's request. The FBI agent's purpose for the meeting was to investigate an allegation of sexual abuse against him by his stepdaughter. When Mr. Long realized the purpose of the meeting, he stated to the FBI agent, "I do not want to incriminate myself. I would like to stop talking." *Long v. United States*, 875 F.3d 411, 412; 2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17) (Appendix A) (quoting *United States v. Long*, 721 F.3d 920, 921-922; 2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) (Appendix D)).

He was subsequently charged in federal court on 7-21-09 with violation of 18 U.S.C. § 1153, 18 U.S.C. § 2241(c), and 18 U.S.C. § 2246(2) (did knowingly engage and attempt to engage in a sexual act with [name redacted], a person who had attained the age of 12 years but had not attained the age of 16 years, and was at least four years younger than Gillman Roddy Long ... by using force) (Counts 1-3).

At trial, Mr. Long did not testify but the prosecutor introduced Mr. Long's prearrest statement to the FBI: "I do not want to incriminate myself. I would like to stop talking." The prosecutor also argued that it provided proof of Mr. Long's guilt. No objection was made by counsel for Mr. Long, the evidence and argument were allowed to stand, and he was found guilty on 2 of the 3 counts. *Long v. United States*, 875 F.3d 411, 412; 2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17) (Appendix A) (quoting *United States v. Long*, 721 F.3d 920, 921-922; 2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) (Appendix D)).

On direct appeal, the Court of Appeals held that no plain error occurred because the admissibility of the statement was an open question in the Eighth Circuit in spite of the fact that

other Circuits had held that such evidence was inadmissible and violative of the Fifth Amendment self incrimination clause. *Id.*

On 10-15-13, this Court denied certiorari. (Appendix J)

On 4-1-14, Mr. Long subsequently filed a motion pursuant to 28 U.S.C. § 2255 alleging, *inter alia*, ineffective assistance of counsel due to counsel's failure to object to the admission of the statement and argument on grounds they were violative of the self incrimination clause of the Fifth Amendment. Mr. Long pointed out that, at the time of trial, there was uniformity among the circuits to have addressed the issue of whether the government may present during its case-in-chief evidence of a defendant's prearrest, pre-Miranda warnings invocation of the Fifth Amendment privilege against self-incrimination. Each had held that it may not constitutionally do so. See *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 418 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 623 (2000); *United States ex. Rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987).

No trial tactic or strategy was ever advanced for counsel's failure either at trial or in the Section 2255 proceedings. It was simply an abdication of counsel's duty to advocate for Mr. Long.

In spite of the support for Mr. Long by all the circuits to have addressed the issue, the district court denied the motion, holding that, since the admissibility of the prearrest statement and the prosecutor's argument had never been decided by the Supreme Court and the question had been and still was an open question in the Eighth Circuit, counsel's performance could not by law have been below the objective standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). While the district court granted a Certificate of Appealability, the Court of Appeals affirmed the dismissal of the Section 2255 motion and claim.

Long v. United States, 875 F.3d 411, 413-414; 2017 U.S. App. LEXIS 22444 **3-5 (8th Cir. 11-9-17) (Appendix A)

Mr. Long is currently serving a life sentence without possibility of parole. (Appendix B)

Mr. Long demonstrates within that (A) this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to whether a bright line rule, that an attorney only fails the performance prong of the Strickland test for failure to raise an objection based on binding circuit or Supreme Court precedent, violates the Sixth Amendment; and (B) the performance of an attorney is professionally unreasonable where the attorney fails to object to critical, inculpatory evidence and argument when (i) there is no binding circuit or Supreme Court precedent, (ii) there is a conflict among the circuits as to admissibility, and (iii) the defendant was facing and is now serving life in prison.

REASONS FOR GRANTING THE WRIT

- 1.) **THIS COURT SHOULD GRANT MR. LONG'S PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER A BRIGHT LINE RULE, THAT AN ATTORNEY ONLY FAILS THE PERFORMANCE PRONG OF THE STRICKLAND TEST FOR FAILURE TO RAISE AN OBJECTION BASED ON BINDING CIRCUIT OR SUPREME COURT PRECEDENT, VIOLATES THE SIXTH AMENDMENT.**

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

- (a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

1A.) The Federal Courts of Appeals Are Divided As To Whether A Bright Line Rule, That An Attorney Only Fails The Performance Prong Of The Strickland Test For Failure To Raise An Objection Based On Binding Circuit Or Supreme Court Precedent, Violates The Sixth Amendment.

As set forth in the Statement of the Case, *supra*, the Court of Appeals for the Eighth Circuit held that, (i) in spite of the fact that, at the time of trial, there was uniformity among the circuits to have addressed the issue of whether the government may present during its case-in-chief evidence of a defendant's prearrest, pre-Miranda warnings invocation of the Fifth Amendment privilege against self-incrimination, and (ii) in spite of the fact that each had held that it may not constitutionally admit such evidence or argument that the evidence was incriminating, and (iii) since the admissibility of the prearrest statement and the prosecutor's argument had never been decided by the Supreme Court, and (iv) the question had been and still was an open question in the Eighth Circuit, therefore (v) counsel's performance could not by law have been below the objective standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).¹

This decision by the Eighth Circuit is consistent with the holdings of the Tenth Circuit² and the Eleventh Circuit.³ All three of these circuits enforce a *bright line rule* that an attorney

¹ See *Long v. United States*, 875 F.3d 411, 412; 2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17) (Appendix A) (quoting *United States v. Long*, 721 F.3d 920, 921-922; 2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) (Appendix D) and quoting *Ragland v. United States*, 756 F.3d 597, 601 (8th Cir. 2014) (“[g]iven this split of authority at the time [Long] was tried, and the complete lack of Eighth Circuit or Supreme Court authority on the subject it must be said counsel’s performance fell within the wide range of professionally competent assistance.”).

² See *Chavez v. McKinna*, 41 Fed. Appx. 319, 320; 2002 U.S. App. LEXIS 9824 (10th Cir. 2002) (“..in evaluating counsel’s performance, the focus is not what is prudent or appropriate, but only what is constitutionally compelled.”).

³ *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (“we have a wall of binding precedent that shuts out any contention that an attorney’s failure to anticipate a change in the law constitutes ineffective assistance of counsel”)

only fails the performance prong of the Strickland test for failure to raise an objection based on binding circuit or Supreme Court precedent, violates the Sixth Amendment. *Id.*

By contrast, the First⁴, Second⁵, Third⁶, and Sixth⁷ Circuits reject any bright line rule and follow the mandate of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), where this Court instructed that, “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” 466 U. S., at 688-689.

Based on the foregoing, the split in the circuits on this important and recurring question is clear cut and the opposing positions are hardening instead of harmonizing.

⁴ *Powell v. United States*, 430 F.3d 490, 491 (1st Cir. 2005) (competent counsel, without predicting future changes in the law, may nevertheless have a duty to challenge existing law in “unusual circumstances”)

⁵ *Bloomer v. United States*, 162 F.3d 187; 1998 U.S. App. LEXIS 30627 (2nd Cir. 1998) (an attorney may be held responsible for failing to raise an issue when precedent supported a “reasonable probability” that a higher court would rule in defendant’s favor); *Mayo v. Henderson*, 13 F.3d 528 (2nd Cir. 1994) (“attorney’s omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it”).

⁶ *Government of Virgin Islands v. Forte*, 865 F.2d 59, 64-65 (3rd Cir. 1989) (ineffective assistance of counsel where *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), was pending before the Supreme Court, but defense counsel failed to raise an objection to racially motivated peremptory jury strikes; had counsel objected, the objection would have been overruled but would have preserved an issue which would have prevailed on appeal).

⁷ *Nichols v. United States*, 501 F.3d 542, 2007 U.S. App. LEXIS 19476 (6th Cir. 2007) (Attorney’s performance below objective standard of *Strickland* by failing to preserve a future-change-in-the-law argument in the hope that the Supreme Court will strike down the existing law while that defendant’s case is still pending on direct appeal), vacated on grounds of no prejudice, 563 F.3d 240 (6th Cir. 2009).

1B.) The Performance Of Petitioner's Attorney Was Professionally Unreasonable When The Attorney Failed To Object To Critical, Inculpatory Evidence And Argument When (i) There Was No Binding Circuit Or Supreme Court Precedent, (ii) There Was A Conflict Among The Circuits As To Admissibility, And (iii) The Defendant Was Facing And Is Now Serving Life In Prison.

As set forth above, in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), this Court instructed that, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U. S., at 688-689.

In Mr. Long's case, as also set forth above, in 2009, he voluntarily met with an FBI agent, at the agent's request. The FBI agent's purpose for the meeting was to investigate an allegation of sexual abuse against him by his stepdaughter. When Mr. Long realized the purpose of the meeting, he stated to the FBI agent, "I do not want to incriminate myself. I would like to stop talking." *Long v. United States*, 875 F.3d 411, 412; 2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17) (Appendix A) (quoting *United States v. Long*, 721 F.3d 920, 921-922; 2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) (Appendix D).

He was subsequently charged in federal court on 7-21-09 with violation of 18 U.S.C. § 1153, 18 U.S.C. § 2241(c), and 18 U.S.C. § 2246(2) (did knowingly engage and attempt to engage in a sexual act with [name redacted], a person who had attained the age of 12 years but had not attained the age of 16 years, and was at least four years younger than Gillman Roddy Long ... by using force) (Counts 1-3).

At trial, Mr. Long did not testify but the prosecutor introduced Mr. Long's prearrest statement to the FBI: "I do not want to incriminate myself. I would like to stop talking." The prosecutor also argued that it provided proof of Mr. Long's guilt. No objection was made by

counsel for Mr. Long, the evidence and argument were allowed to stand, and he was found guilty on 2 of the 3 counts. *Long v. United States*, 875 F.3d 411, 412; 2017 U.S. App. LEXIS 22444 **2 (8th Cir. 11-9-17) (Appendix A) (quoting *United States v. Long*, 721 F.3d 920, 921-922; 2013 U.S. App. LEXIS 15109 (8th Cir. 7-25-13) (Appendix D).

On direct appeal, the Court of Appeals held that no plain error occurred because the admissibility of the statement was an open question in the Eighth Circuit in spite of the fact that other Circuits had held that such evidence was inadmissible and violative of the Fifth Amendment self incrimination clause. *Id.*

On 10-15-13, this Court denied certiorari. (Appendix J)

On 4-1-14, Mr. Long subsequently filed a motion pursuant to 28 U.S.C. § 2255 alleging, *inter alia*, ineffective assistance of counsel due to counsel's failure to object to the admission of the statement and argument on grounds they were violative of the self incrimination clause of the Fifth Amendment. Mr. Long pointed out that, at the time of trial, there was uniformity among the circuits to have addressed the issue of whether the government may present during its case-in-chief evidence of a defendant's prearrest, pre-Miranda warnings invocation of the Fifth Amendment privilege against self- incrimination. Each had held that it may not constitutionally do so. See *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 418 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 623 (2000); *United States ex. Rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987).

No trial tactic or strategy was ever advanced for counsel's failure either at trial or in the Section 2255 proceedings. It was simply an abdication of counsel's duty to advocate for Mr. Long.

In spite of the support for Mr. Long by all the circuits to have addressed the issue, the district court denied the motion, holding that, since the admissibility of the prearrest statement and the prosecutor's argument had never been decided by the Supreme Court and the question had been and still was an open question in the Eighth Circuit, counsel's performance could not by law have been below the objective standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). While the district court granted a Certificate of Appealability, the Court of Appeals affirmed the dismissal of the Section 2255 motion and claim. *Long v. United States*, 875 F.3d 411, 413-414; 2017 U.S. App. LEXIS 22444 **3-5 (8th Cir. 11-9-17) (Appendix A)

Mr. Long is currently serving a life sentence without possibility of parole. (Appendix B)

Based on the foregoing, the lower courts' disposition of Mr. Long's claim of ineffective assistance of counsel was consistent with the prior holdings of the Eighth Circuit⁸, the Tenth Circuit⁹ and the Eleventh Circuit.¹⁰ All three of these circuits enforce a *bright line rule* that an attorney only fails the performance prong of the Strickland test for failure to raise an objection based on binding circuit or Supreme Court precedent, violates the Sixth Amendment. *Id.*

⁸ *Ragland v. United States*, 756 F.3d 597, 601 (8th Cir. 2014) (“[g]iven this split of authority at the time [Long] was tried, and the complete lack of Eighth Circuit or Supreme Court authority on the subject it must be said counsel’s performance fell within the wide range of professionally competent assistance.”).

⁹ See *Chavez v. McKinna*, 41 Fed. Appx. 319, 320; 2002 U.S. App. LEXIS 9824 (10th Cir. 2002) (“..in evaluating counsel’s performance, the focus is not what is prudent or appropriate, but only what is constitutionally compelled.”).

¹⁰ *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001) (“we have a wall of binding precedent that shuts out any contention that an attorney’s failure to anticipate a change in the law constitutes ineffective assistance of counsel”)

By contrast, the lower courts' holding was contrary to First¹¹, Second¹², Third¹³, and Sixth¹⁴ Circuits which all reject any bright line rule and follow the mandate of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), where this Court instructed that, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U. S., at 688-689.

While it would seem that this Court's *Strickland* decision is clear enough¹⁵, the Court has never resolved this specific question which divides the Courts of Appeals and, as is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See: Supreme Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568

¹¹ *Powell v. United States*, 430 F.3d 490, 491 (1st Cir. 2005) (competent counsel, without predicting future changes in the law, may nevertheless have a duty to challenge existing law in "unusual circumstances")

¹² *Bloomer v. United States*, 162 F.3d 187; 1998 U.S. App. LEXIS 30627 (2nd Cir. 1998) (an attorney may be held responsible for failing to raise an issue when precedent supported a "reasonable probability" that a higher court would rule in defendant's favor); *Mayo v. Henderson*, 13 F.3d 528 (2nd Cir. 1994) ("attorney's omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it").

¹³ *Government of Virgin Islands v. Forte*, 865 F.2d 59, 64-65 (3rd Cir. 1989) (ineffective assistance of counsel where *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), was pending before the Supreme Court, but defense counsel failed to raise an objection to racially motivated peremptory jury strikes; had counsel objected, the objection would have been overruled but would have preserved an issue which would have prevailed on appeal).

¹⁴ *Nichols v. United States*, 501 F.3d 542, 2007 U.S. App. LEXIS 19476 (6th Cir. 2007) (Attorney's performance below objective standard of *Strickland* by failing to preserve a future-change-in-the-law argument in the hope that the Supreme Court will strike down the existing law while that defendant's case is still pending on direct appeal), vacated on grounds of no prejudice, 563 F.3d 240 (6th Cir. 2009).

(1984); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

Additionally, this case presents an opportunity for this Court to resolve this unsettled question in a case which can be broadly applied in the courts below¹⁶. This is a further and important consideration which strongly militates for grant of certiorari. *Vasquez v. United States*, 454 U.S. 975, 70 L.Ed.2d 396, 102 S.Ct. 528 (1981).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Mr. Long's case.

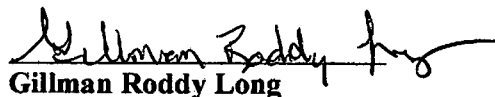
¹⁵ See also *Smith v. Robbins*, 528 U.S. 259, 284-285; 120 S. Ct. 746; 145 L. Ed. 2d 756 (2000) (Attorney's failure to raise "arguable issue" can fall below objective standard of *Strickland*).

¹⁶ Petitioner respectfully suggests that a GVR in this case could well be sufficient to resolve the Sixth Amendment question and could also at least partially answer the Fifth Amendment admissibility issue referenced in dicta in this Court's decision in *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).

CONCLUSION

For all of the foregoing reasons, Petitioner Gillman Roddy Long respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming denial of his Section 2255 motion, and **REMAND**¹⁷ to the court of appeals for reconsideration in light of *Strickland v. Washington*, 466 U.S. 668, 688-689, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).



Gillman Roddy Long

Petitioner

10527-273

P.O. Box 24550

Tucson, AZ 85734

Date: 3-19-18

¹⁷ For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).