

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON GARCIA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI
APPLICATION FOR CERTIFICATE OF APPEALABILITY

RAMON GARCIA

(Your Name)

FCI McKean-Post Office Box 8000

(Address)

Bradford, Pennsylvania 16701

(City, State, Zip Code)

N/A

(Phone Number)

RECEIVED

OCT 31 2017

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED

JUN 20 2017

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- (A) Whether counsel's deficient performance rendered the trial proceedings constitutionally inadequate, in violation of petitioner's Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to Due Process of law.
- (B) Whether counsel was ineffective for failing to object to the district court's drug quantity determination in violation of U.S.S.G. subsection §1B1.3(a)(2)(Relevant Conduct) and §2D1.1, application note 12.
- (C) Whether counsel provided ineffective assistance of counsel when he did not request a variance due to the fact that other judges in the Eight Circuit have policy disagreements with the methamphetamine guidelines as being excessively harsh, in violation of Kimbrough v United States, 552 U.S. 85(2007).

LIST OF PARTIES

- ☒ 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

Page:

AFFIDAVIT TO PROCEED IN FORMA PAUPERIS.	.I-V
TABLE OF AUTHORITIES.	.VI
QUESTIONS PRESENTED.	VII
OPINIONS BELOW.	.1
PARTIES TO THE PROCEEDING.	2
JURISDICTION.	.3
CONSTITUTIONAL PROVISIONS.	4
INTRODUCTION.	.5
A) Collateral Challenge To Judgment.	.5
B) Statement of the Case.	5-7
C) Statement of Fact.	7-9
REASONS FOR GRANTING WRIT.	10-12
CONCLUSION.	.11
CERTIFICATE OF SERVICE.	.13
APPENDIX.	.A-I

TABLE OF AUTHORITIES

Page:

Cases Cited:

Carter v. Hopkins , 151 F.3d 872(8th Cir.1998).	10-11
Cox v. Norris , 133 F.3d 565(8th Cir.1997).	11
Flieger v. Delo , 16 F.3d 878(8th Cir.1994).	11
Garret v. United States , 211 F.3d 1075(8th Cir.2000)..	11
Hahn v. United States , No.96-8986(June 15, 1998).....	10
Kimbrough v. United States , 552 U.S.85(2007).	5-6
Miller-El v. Cockrell , 537 U.S.322,123 S.Ct.1029, 154 L.Ed 2d 931(2003).	11
Tiedeman v. Benson , 121 F.3d 518(8th Cir.1997).	11

STATUTE AND RULES

21 United States Code §841(a)(1).	5
21 United States Code §846.	5
28 U.S.C. §1254(1).	3
28 U.S.C. §2255(c)(2).	10
28 U.S.C. §2253(c)(3).	10

OTHER AUTHORITIES

Fifth Amendment.	4
Sixth Amendment.	4
United States Sentencing Guidelines §1B1.3(a)(2). . . .	6,12
United States Sentencing Guidelines §2D1.1 commentary note 12(2005).	6,12

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

The Fifth Amendment provides in pertinent part: "No person shall be deprived of life, liberty, or property without due process of law...." [1791].

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

INTRODUCTION

A) Collateral Challenge To Judgement:

Petitioner Ramon Garcia(Petitioner), hereby respectfully petitions this Honorable Court on petition for Writ of Certiorari for a Certificate of Appealability. Petitioner seeks to collaterally appeal (28 U.S.C.§2255) his 292 month sentence and conviction of one count of conspiracy to distribute 500 grams or more of a mixture containing methamphetamine; in violation of 21 U.S.C. §§846 and 841(a)(1); on the grounds that the district court erred in applying the Sentencing Guidelines for methamphetamine, that his counsel's deficient performance deprived him of his Sixth Amendment right to effective assistance of counsel where he failed to object to the district court's drug quantity determination, and his failure to request a variance due to the Eighth Circuit policy disagreement with the methamphetamine Guidelines as being excessively harsh in violation of **Kimbrough v. United States**, 552 U.S.85(2007), and that of similarly situated defendants who received disproportionate sentences.

B) Statement of the Case:

On October 23, 2013, the government filed a one-count indictment against Petitioner and six co-defendants charging them with conspiracy to distribute 500 grams or more of a mixture containing methamphetamine; in violation of 21 U.S.C. §§841(a), 846. Petitioner pled guilty without a plea agreement on November 12, 2013 in front of Magistrate Judge Cheryl R. Zwart. On February 19, 2014 Petitioner was sentenced to 292 months of imprisonment and 5 years of supervised release by the Honorable Judge John M. Gerrard, United States District Judge. On June 18, 2014 Defendant appealed to the United States Court of Appeals For

The Eighth Circuit and his conviction and sentence was affirmed on December 17, 2014. Defendant requested of Korey L. Reiman to file for a Petition of Certiorari to the United States Supreme Court. Petitioner never received any correspondence from counsel in reference to his Petition for the Supreme Court.

Thereafter, petitioner filed a \$2255 motion to vacate, set aside, and/or correct his sentence to the district court with the following issues:

- A) DEFENSE COUNSEL'S DEFICIENT PERFORMANCE RENDERED THE TRIAL PROCEEDINGS CONSTITUTIONALLY INADEQUATE, IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW
- 1) COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DISTRICT COURT'S DRUG QUANTITY DETERMINATION IN VIOLATION OF U.S.S.G. SUBSECTIONS 1B1.3(a)(2)(RELEVANT CONDUCT) AND 2D1.1, APPLICATION NOTE 12
- 2) COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT REQUEST A VARIANCE DUE TO THE FACT THAT OTHER JUDGES IN THE EIGHTH CIRCUIT HAVE POLICY DISAGREEMENTS WITH THE METHAMPHETAMINE GUIDELINES AS BEING EXCESSIVELY HARSH IN VIOLATION OF **KIMBROUGH V. UNITED STATES**, 552 U.S.85(2007), AND SIMILARLY SITUATED DEFENDANTS WERE RECEIVING DISPROPORTIONATE SENTENCES.

On October 31, 2016 the district denied petitioner's motion to vacate, set aside, and or correct his sentence pursuant to 28 U.S.C. §2255.

On December 28, 2016 petitioner filed a "Notice of Appeal and Request for a Certificate of Appealability" pursuant to 28 U.S.C. §2253. In Petitioner's motion, he clearly identified specific allegation(s) which presented significant questions as to counsel's

ineffective assistance and which should have produced at least an evidentiary hearing in light of the onerous sentence petitioner received, (292 months imprisonment) which was the direct result of counsel's deficient performance; thus, a Certificate of Appealability should issue to provide the appellate court with the opportunity to decide the issue and remove all doubt as to the fairness of the trial (plea) proceeding; as well as the reliability of the judgement of conviction.

On March 15, 2017 the United States Court of Appeals for the Eighth Circuit denied petitioner's request for a Certificate of Appealability.

C) Statement of Facts:

On October 23, 2013 an indictment was filed in the District of Nebraska alleging that Ramon Garcia (hereinafter Petitioner) was involved in a conspiracy to distribute over 500 grams of methamphetamine. On November 12, 2013 Petitioner entered a plea of guilty to the charge.

On January 29, 2014, Petitioner filed his objections to the presentence report. Petitioner objected to the base offense level, weight attributed to him; an enhancement for maintaining a 'stash house'; and the enhancement for his role in the offense. In addition, Petitioner requested the Court to deviate from any guidelines sentence based upon his remarkable acceptance of responsibility; essentially using the same facts to provide an enhancement for his role and the stash house; as well as the individual characteristics of the Petitioner and the totality of the circumstances.

On February 11, 2014, the District Court heard evidence regarding the appropriate sentence in this case and objections to the pre-sentence report. The issues the Court addressed were drug quantity, role in the offense, and a two level increase for a 'stash house'.

The prosecution called a felon who repeatedly and illegally reentered the United States; who was employed by transporting methamphetamine to Nebraska, and who was selling her testimony for less time in prison as a witness. The witness went by the name of Yara Martinez who stated in early 2013, Martinez was hired by Flaco in Phoenix, Arizona to run drugs to Nebraska. Flaco told Martinez he would pay her \$1000 per pound to transport methamphetamine. Martinez testified that when she arrived in Lincoln she met a man she knew as Iancho, and identified the Petitioner as the person she knew as Iancho. Martinez stated she was paid a total of \$15,000 to transport drugs to Nebraska, not counting travel expenses. Martinez did not actually see what she was transporting or how much and Martinez testified that she did not know what was in the vehicle each time she was paid to drive the care to Lincoln. Martinez testified that Flaco told her that Defendant was not in charge.

The prosecution called Josue Zamora as their final witness. Zamora had been removed twice from the United States for illegal entry. Zamora also sold his testimony to get a lower sentence. Zamora stated that in May or June of 2013 he drove a car from Phoenix, Arizona to Lincoln, Nebraska. Zamora testified he made 8 or 12 trips from Phoenix to Lincoln. Zamora also did not see what he was transporting to Lincoln.

The Court issued it's findings on the objections from the bench. The Court found Defendant responsible for over 15 kilograms of methamphetamine(Level 38), plus 3 points enhancement for managerial role, and 2 points enhancement for maintaining a stash house. The Court sentenced Petitioner at an offense level of 40 with a criminal history category of I. The Court sentenced Petitioner to a guideline sentence of 292 months of imprisonment and 5 years of supervised release.

REASONS FOR GRANTING THE PETITION

Title 28 U.S.C. §2253(c)(2), as revised by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No.104-132, 110 Stat.1214, Apr.24, 1996("the Act"), requires a §2255 movant who appeals a denial of his motion by the district court to obtain a certificate of appealability from a circuit justice or judge by making a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The Act further requires that certificates of appealability "indicate which specific issue or issues" are found to be appealable. 28 U.S.C. §2253(c)(3) see **Carter v. Hopkins**, 151 F.3d 872(8th Cir.1998)

This Court held on June 15, 1998 that it has statutory authority to review a denial, by a single circuit judge or panel of judges, of an unsuccessful habeas corpus petitioner's application for a certificate of appealability. **Hahn v. United States**, U.S. Sup.Ct., No.96-8986 (6/15/98); The decision focused on what it means for a "case" to be "in" the court of appeals under the most frequently invoked jurisdictional statute in the Supreme Court, 28 U.S.C. §1254(1) gives the Supreme Court certiorari jurisdiction to review "[c]ases in the courts of appeals....." Justice Anthony M. Kennedy stated that the application for a certificate of appealability falls within the reach of that phase. The fact that §2253(c)(2) permits the certificate to be issued by a circuit justice or judge "does not mean that the action of the circuit judge in denying the certificate is his or her own action, rather than the action of the court of appeals....." the majority said. In support of this point, the majority stressed that the application "moved through the Eighth Circuit in the same manner as cases in general do." The majority also pointed to indications that the

appeals court's view such applications as cases, including the court's adoption of local rules and directives to govern the disposition of certificate applications, and the Eighth Circuit's adoption of a rule allowing individual judges' grants of certificates to be revised by the entire court.

Petitioner's wishes to emphasize to this Court that the Eighth Circuit Court of Appeals, in making its decision whether to grant the application for a certificate of appealability failed to examine the record in its entirety which clearly shows that petitioner made a serious and substantial showing of the denial of his constitutional right to effective assistance of counsel. See **Miller-El v. Cockrell**, 537 U.S.322,335-36,123 S.Ct.1029,1039,154 L.Ed 2d 931(2003); **Cox v. Norris**,133 F.3d 565,569(8th Cir.1997), **Garret v. United States**, 211 F.3d 1075,1076-77(8th Cir.2000); **Carter v. Hopkins**, 151 F.3d 872,873-74(8th Cir.1998); **Tiedeman v. Benson**, 121 F.3d 518,523(8th Cir.1997); to make such a showing, the issues must be debatable among reasonable jurist; a court could resolve the issues differently, or the issues deserve further proceedings. **Cox**, at 569.(citing **Flieger v. Delo**, 16 F.3d 878, 882-83(8th Cir.1994)).

Petitioner's §2255 motion at pp.5-8 contested his conviction on the ground that he was denied the effective assistance of counsel during the trial proceedings, in derogation of his rights under the Sixth Amendment, and that he was deprived of a fair trial(plea proceeding) in violation of his Fifth Amendment right to due process. Petitioner argued the specific errors and omissions that prejudiced his defense byutrial counsel:

- 1) Counsel was ineffective for failing to object to the district court's drug quantity determination in violation of U.S.S.G. subsection 1B1.3(a)(2) (relevant conduct) and 2D1.1 Application note 12. (Petitioner's \$2255 motion at pgs.9-19).
- 2) Counsel provided ineffective assistance when he did not request a variance due to the fact that other judges in the Eighth Circuit have policy disagreements with the methamphetamine guidelines as being excessively harsh, in violation of **Kimbrough v. United States**, 552 U.S.85(2007), and similarly situated defendant's were receiving disproportionate sentences (Petitioner's \$2255 motion at pgs 20-26).

In sum, had the Eighth Circuit Court of Appeals taken into consideration each of these, factual claims, petitioner submits it would have ordered a Certificate of Appealability to be issued.

CONCLUSION

The petitioner for a writ of certiorari should be granted.

Respectfully submitted,

Ramon Garcia

Date: 6-11-17