

# 2007

On August 10<sup>th</sup> 2006, Judge Hatter denied (without giving a reason) attorney Ronald Kaye's Habeas Petition to reopen Darnell Garcia's case in light of new evidence of Jackson's perjury and Jackson's two sworn recantations.

**June 12<sup>th</sup> 2007**, a Habeas Corpus Petition was filed concerning parole and the lack of creditable reasons given to deny parole. The Habeas Petition raises three grounds:

Ground One: Garcia is denied the benefit of the 9<sup>th</sup> Cir. Courts of Appeals written opinion in his case (37F.3d 1359 9<sup>th</sup> cir. 1994) which reduced Count One. The U.S. Parole Commissions calculations of Count One added at least 18 years to actual time in custody, far more than the maximum sentence of 4 years prescribed by Congress for Count One under 21U.S.C. 843(b). Parole Commission's rules, as applied to Garcia has the effect of imposing a longer sentence for Count One than allowed by law. In addition, category '8' severity enhances prison custody and classification which prevents proper placement of confinement.

Ground Two: Three court sentence reductions (1994, 1995, 2003) are not reflected in the current pre-sentence report (used by the parole commission), and reasons for reductions. Without the benefit of a factual updated pre-sentence report, there is no way for the Parole Commission and Bureau of Prisons to properly evaluate time in custody, and placement, which violates due process.

Ground Three: The Parole Commission's last decision (March 2007) violates ex post facto principles under Lyons v. Mendez, 303 F3d 285 (3<sup>rd</sup> Cir. 2002). Virtually all overt acts alleged in Third Amended Superseding Indictment (which charged Garcia) occurred within the window between the Oct. 12<sup>th</sup> 1984, enactment of section 235 (b) (3) of the Sentencing Reform Act and its amendment effective on Dec. 7<sup>th</sup> 1987. Since Garcia was still under the jurisdiction of the commission on Oct. 31, 1992, (the day before the expiration of 5 years after the effective date [Nov 1, 1987] of this act), Garcia is entitled to a release date within the range that applies to him under applicable parole guidelines Pub.L. 98-473, 98 stat.2032 (1984).

United States District Court, on June 22<sup>nd</sup> 2007 ordered the U.S. Government to answer the Garcia petition.

FILED

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MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARNELL GARCIA,

Defendant - Appellant.

No. 08-50161

D.C. No. 2:88-cr-00983-TJH

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Terry J. Hatter, Jr., District Judge, Presiding

Submitted May 25, 2010\*\*

Before: CANBY, THOMAS, and W. FLETCHER, Circuit Judges.

California state prisoner Darnell Garcia appeals pro se from the district court's judgment dismissing his habeas petition. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Garcia contends that he has served more time than is necessary because the district court did not modify his presentence investigation report (“PSR”), or order a supplemental report, to reflect the sentence reduction that he received on direct appeal. Garcia’s petition challenges the legality, rather than the execution, of his sentence, and his claims do not qualify for the savings clause of 28 U.S.C. § 2255, whereby a prisoner may challenge his sentence in a 28 U.S.C. § 2241 petition. We therefore construe this appeal as a successive § 2255 motion, which must be certified by this court before it can be presented to the district court. *See Harrison v. Ollison*, 519 F.3d 952, 956, 959-960 (9th Cir. 2008). The district court therefore lacked jurisdiction to consider this claim. *See* 28 U.S.C. § 2244(b); *see also United States v. Allen*, 157 F.3d 661, 664 (9th Cir. 1998).

We construe Garcia’s notice of appeal as a request for a certificate of appealability on the issue of whether his motion was properly dismissed as second or successive without authorization. So construed, the motion is denied. *See* 9th Cir. R. 22-1(d); *see also Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000).

**AFFIRMED.**

Clarification note:

Darnell Garcia is not now and has never been a "state prisoner".  
The 9th Circuit, in their haste to deny the motion, mislabeled Garcia's status.