Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ZAVIEN BRAND,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit
(USDC No. 8:13-CV-02103 (M.D. Fla.); USCA No. 17-12227-E)

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

ALTHOUGH NOT ARGUED BY DEFENSE COUNSEL NOR NOTICED BY THE DISTRICT COURT DURING THE 28 U.S.C. §2255 PROCEEDING, WAS THE ELEVENTH CIRCUIT COURT OF APPEALS COMPELLED TO CONSIDER PETITIONER'S SUBSEQUENT PRO SE DEMONSTRATION OF APPARENT ACTUAL INNOCENCE PRESENTED FOR THE FIRST TIME IN HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY?

II.

IS AN INDIGENT PRO SE PETITIONER DEPRIVED OF A FULL, FAIR, AND MEANINGFUL OPPORTUNITY TO PREPARE AND PRESENT HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO THE COURT OF APPEALS WHEN THE DISTRICT COURT REFUSES TO PROVIDE ESSENTIAL TRANSCRIPTS OF THE CRIMINAL PROCEEDINGS AND SECTION 2255 EVIDENTIARY HEARING BASED ON ITS OWN BELIEF THAT PETITIONER WILL NOT PREVAIL — AND THE DISTRICT COURT NEVER CONSIDERED ANY APPLICATION FOR A CERTIFICATE OF APPEALABILITY FROM PETITIONER?

III.

IN LIGHT OF LEE v. UNITED STATES, 137 S.CT. 1958 (2017), WHICH HELD THAT A PETITIONER MAY RELY ON CONTEMPORANEOUS EVIDENCE TO SUPPORT HIS CLAIM THAT HE WOULD HAVE PROCEEDED TO TRIAL RATHER THAN PLED GUILTY BUT FOR COUNSEL'S MISADVICE, DID THE ELEVENTH CIRCUIT COURT OF APPEALS, IN CONSIDERATION OF PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY, ERR IN FAILING TO FIND DEBATABLE OR WRONG THE DISTRICT COURT'S FAILURE TO WEIGH CONTEMPORANEOUS EVIDENCE THAT SUPPORTED PETITIONER'S CLAIM THAT HE WOULD HAVE WANTED TO FILE AN APPEAL AND INSTRUCTED COUNSEL TO DO SO?

LIST OF PARTIES

All parties appear in the caption of the case on the cover-page.

TABLE OF AUTHORITIES

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DECISIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit denying Mr. Brand's Application for a Certificate of Appealability appears at **Appendix A**, and is unpublished.

The Judgment of the United States District Court for the Middle District of Florida, at Tampa, appears at **Appendix B**, and is unpublished.

JURISDICTION [1/]

The decision of the United States Court of Appeals for the Eleventh Circuit denying Mr. Brand's Application for a Certificate of Appealability was filed on **MARCH 21, 2018.** SEE: **Appendix A**

A subsequent Petition For Panel Rehearing was denied on **MAY 15, 2018.**

The instant petition is timely filed because, prior to the 90-day deadline following the denial of the Petition for Panel Rehearing, Mr. Brand filed a Motion for Extension of Time to File Petition For A Writ of Certiorari with the Supreme Court that was granted...requiring Brand to file his petition on or before **September 27, 2018.** Mr. Brand affirms that he timely mailed the instant Petition for a Writ of Certiorari on **September 26, 2018.** SEE: PROOF OF SERVICE submitted herewith.

This Honorable Court has jurisdiction to entertain this cause pursuant to 28 U.S.C. §1254(1).

1/ Brand, proceeding pro se, respectfully requests the Court to liberally construe his pleadings so as to best achieve substantial justice. SEE: HAINES v. KERNER, 404 U.S. 519, 520-21 (1972); TANNENBAUM v. UNITED STATES, 148 F.3d 1262, 1263 (11th Cir. 1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, as well as the statutory provision of 28 U.S.C. §2253(c)(2). Each of which, state:

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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 deprived of life, liberty, or property without due process of law;** nor shall private property be taken for public use, without just compensation." (emphasis added).

AMENDMENT VI

"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 ad 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.**" (emphasis added).

28 U.S.C. §2253(c)(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.**" (emphasis added).

STATEMENT OF THE CASE[2/]

A.) Nature of the Case.

This case involves important constitutional questions related to a pro se petitioner's ability to obtain judicial review at the COA stage ("certificate of appealability") following the denial of his 28 U.S.C. §2255 motion in the District Court. Specifically, the Court is respectfully asked to decide whether the Eleventh Circuit Court of Appeals was obligated to assess a claim of apparent actual innocence raised for the first time in an application for a COA when it was not presented below but discovered by Petitioner when he was abruptly left to proceed pro se following the denial of his Section 2255 motion. Petitioner demonstrated in his COA that the record of the criminal proceedings made clear that he was erroneously convicted of an 18 U.S.C. §924(c) offense under COUNT 14 of the superseding indictment because the offense lacked an essential element of an underlying predicate offense. Although COUNT 14 alleged that COUNT 12 (Poss. w/intent to Dist. Cocaine, 21 U.S.C. §841) was purportedly the predicate, the record of the criminal proceedings make unequivocally clear that Petitioner had been permitted to withdraw his plea to COUNT 12 ... and when he later pled to a plea agreement based on the COUNT 14 §924(c) offense ... COUNT 12 was already dismissed. There was no underlying offense element in this case. Although presented in Petitioner's COA, the Eleventh Circuit never addressed the issue. Nor did the Eleventh Circuit address the matter in a subsequent Motion for Panel Rehearing.

2/ Brand, for the sake of brevity, respectfully asks the Court to fully incorporate into its considerations the entirety of the records below. SEE: UNITED STATES v. BRAND, Case No. 8:11-CR-380 (M.D. Fla.); BRAND v. UNITED STATES, Case No. 8:13-CV-02103 (M.D. Fla.)(28 U.S.C. §2255); BRAND v. UNITED STATES, Appeal No. 17-12227-E (11th Cir.)(COA).

Secondly, this case additionally asks this Court to decide whether the indigent pro se Petitioner was deprived of a full, fair, and meaningful opportunity to prepare and present his application for a COA to the Eleventh Circuit Court of Appeals when the District Court refused to provide transcripts that were essential to Petitioner's ability to prepare and present his COA — and the District Court's denial was based on its own belief that Petitioner would not prevail without ever having considered any COA from Petitioner. This circumstance created a situation in which the Petitioner was deprived of the ability to prepare and present his COA to the court of appeals as permitted by 28 U.S.C. §2253(c)(1). This Court should speak clearly to make certain that the District Court's denial of transcripts to prepare a COA — without even knowing what Petitioner will show and based only on the District Court's own belief — implicates Petitioner's due process rights.

Thirdly, this case involves an important question of whether this Court's decision in LEE v. UNITED STATES, 137 S.Ct. 1958 (2017) extends to credibility determinations related to Petitioner's desire to have wanted to file an appeal and claim that he instructed his counsel to file an appeal. In LEE, the Court held in the plea context that a petitioner may rely on contemporaneous evidence to support his claim that he would have proceeded to trial rather than pled guilty but for counsel's misadvice. Petitioner Brand now asks if the Eleventh Circuit erred in failing to find debatable or wrong the District Court's failure to have weighed contemporaneous evidence that supported Petitioner's claim that he instructed his counsel to file a direct appeal but he failed to do so, and that he desired to appeal. Because Brand's claim depended completely on a credibility determination, the

District Court should have taken into account the contemporaneous evidence that supported Petitioner's claim. Instead, the District Court applied contemporaneous evidence that supported counsel — and excluded any contemporaneous evidence that supported Petitioner. This was all the more evident where the District Court nevertheless weighed contemporaneous evidence that was purported to undermine Petitioner's claim that he wanted to appeal and asked counsel to do so. It is respectfully urged that the Court should clarify whether the principles and reasoning of LEE also apply to a claim that Petitioner would have filed a timely direct appeal but for counsel's failure do so when instructed, requiring a Court to weigh contemporaneous evidence that the Petitioner relies upon. The circumstances in LEE, as well as that of the present Petitioner's case, both depended upon credibility determinations.

This case is compelling because it raises significant questions of federal law, as well as issues of importance beyond the particular facts and parties involved, that touch closely the fair administration of justice. Criminal defendants and other litigants have a reasonable expectation that the due process protections afforded them by the Constitution and this Court's precedents will be abided by and enforced. Both the public and criminal defendants alike have a substantial interest in the congruent and consistent application of this Court's precedents, establishing federal law, amongst our domestic courts. Based on the points and authorities set forth herein Petitioner respectfully beseeches this Honorable Court to grant certiorari review and vacate the prior judgment.

B.) Salient Summary of Background Facts.

Petitioner Brand's troubles began when a federal grand jury in the

Middle District of Florida, at Tampa, indicted him on July 21, 2011 for his involvement in a series of incidents where he possessed firearms; selling both firearms and cocaine base ("crack") to an undercover officer. (Indictment, CR-DOC. 1); UNITED STATES v. ZAVIEN BRAND, Case No. 8:11-CR-380 (M.D. Fla.). Subsequently, on October 27, 2011, the grand jury returned a fourteen-count **superseding** indictment. (CR-DOC. 23). COUNTS 1, 4, 5, 6, 9 and 12 charged Brand with various distributions of cocaine base ("crack"), in violation of 21 U.S.C. §841(a)(1), (b)(1)(C); COUNTS 2, 7, 10 and 13 charged Brand with separate instances of being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1); and COUNTS 3, 8, 11 and 14 charged Brand with separate instances of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §924(c)(1)(A). (Superseding Indictment, CR-DOC. 23).

Brand's Plea/Plea Agreement

Without benefit of a plea agreement, Brand initially pled guilty to COUNTS 1, 2, 3, 4, 5, 7, 9, 10, **12** and 13 of the **superseding** indictment. (CR-DOC. Nos. 39, 45, 67)(emphasis added). Brand initially asserted that he would not elect to enter a guilty plea to COUNTS 6, 8, 11, 14 **because he believed that he was not guilty of those charges.** (CR-DOC. 67, at 21).

Later, by permission of the Court and upon consent of the Government, Brand subsequently **withdrew his guilty plea to COUNT 12.** (CR-DOC. Nos. 52; 60; 69 at 34).

Later still, in return for the United States' agreement to dismiss **"all unresolved counts,"** (which necessarily included **COUNT 12**), Brand agreed to plead guilty to a proffered plea agreement to COUNT 14, on advisement of

his counsel. (CR-DOC. Nos. 53, at 1-2; 55; 69, at 2-3, 34). Notably, Brand's plea agreement, filed April 3, 2012,(CR-DOC. 53), included a broad waiver of his rights to appeal or collaterally challenge his sentence **"on any ground"** except upon ground that the sentence exceeds the applicable guidelines range determined by the Court, exceeds the statutory maximum penalty, or violates the Eighth Amendment.(CR-DOC. 53, at 11-12). **Significantly,** the Court did nevertheless advise Brand at sentencing that he had the right to appeal.

Sentencing

Mr. Brand was sentenced on August 10, 2012. In accord with the plea agreement, COUNTS 6, 8, 11 and **12** were dismissed — and Brand was sentenced to concurrent 1-year terms of imprisonment as to COUNTS 1, 2, 4, 5, 7, 9, 10 and 13; a consecutive 5-years imprisonment as to COUNT 3; and a consecutive 25-year term of imprisonment as to COUNT 14.(CR-DOC. 70, at 19-20). Brand's aggregate sentence totaled 372-months imprisonment — with the Court's additional imposition of a 3-year term of supervised release and a $1,000 special assessment fee. No direct appeal was taken, and Brand's conviction became final on August 20, 2013.

28 U.S.C. §2255 Motion

On August 14, 2013, Mr. Brand filed a timely 28 U.S.C. §2255 motion to vacate, set aside, or correct sentence. ZAVIEN BRAND v. UNITED STATES OF AMERICA, Case No. 8:13-CV-02103 (M.D. Fla.)(CV-DOC. 1). Brand argued, inter alia, that his counsel rendered ineffective assistance when he failed to file a Notice of Appeal after being requested to do so; that the Court lacked jurisdiction to impose a 25-year mandatory minimum "second or subsequent" 18 U.S.C. §924(c) sentence; and, that counsel was ineffective for failing

to object to the 25-year mandatory minimum sentence pursuant to §924(c).

The Government filed its response in opposition on April 9, 2014, (CV-DOC. 10), arguing that Brand waived his right to appeal his sentence in his plea agreement, and additionally argued that Brand had provided no evidence substantiating that he told his counsel to appeal his sentence. (CV-DOC. 10, at 6-9, 11-12). The Government also submitted an affidavit from Brand's counsel, Brent Armstrong, stating that Brand told him **not** to file an appeal. On July 7, 2014, Brand filed a reply to the Government's response in which he unequivocally maintained that he had indeed instructed his counsel to file an appeal. (CV-DOC. 13).

Section 2255 Evidentiary Hearing

On February 9, 2015, pursuant to the Court's Order, (CV-DOC. 15), an evidentiary hearing was held to determine whether Mr. Brand was entitled to a belated appeal. Only two witnesses testified: Mr. Brand and his prior counsel, Mr. Brent Armstrong.

Brand testified that his counsel was instructed to file a Notice of Appeal when counsel visited him at the Citrus County Jail, following his sentencing. Moreover, Brand testified that despite the existence of an appeal waiver provision in the plea agreement, counsel had reassured him that he could yet file an appeal. Brand explained that as he understood it from counsel Armstrong there remained for the potential to appeal on **actual innocence** and /or **jurisdictional** grounds. **CF.** (Magistrate's R & R, CV-DOC. 26, at 5 n. 2). Brand had also explained that the most important concern of his defense was the §924(c) firearms offenses ... particularly COUNT 14, which he and counsel Armstrong had routinely talked about a defense to.

According to Brand, in the end, counsel failed to file the appeal that counsel told him he could still pursue when he pled guilty under the plea agreement — and after Brand had specifically asked him to do so. Brand said he would have filed an appeal but for counsel's failure to have done so.

On the other hand, counsel Armstrong testified that Mr. Brand had told him **not** to file an appeal. Counsel Armstrong said that following Brand's August 10, 2012 sentencing, he visited him at the Citrus County Jail on August 22, 2012. Armstrong said that he had recorded on his own **time-sheet** a notation that Brand did **not** want to file an appeal. Counsel Armstrong additionally explained that, prior to Brand's guilty plea under the plea agreement, he had indeed discussed a defense to the more onerous §924(c) violations under COUNTS 8, 11, 14. Specifically, counsel explained that Brand's defense was going to be that because Brand had only brought the guns at issue to the transactions **at the undercover agent's request** in order to sell them to the undercover agent, then **he could not be guilty under Section 924(c)(1)(A)** — since the guns were not "in furtherance" of the drug transactions. **Significantly,** counsel Armstrong's "**time-sheet**" notation indicating Brand did not want to appeal was a highly contested point of contention at the evidentiary hearing. Because the time-sheet had also been possessed by the Government or others it was conceded by the Government that it was less than certain that counsel Armstrong actually wrote the notation. In fact, the Government had even urged the Court to err in favor of Brand.

The outcome of the evidentiary hearing was that the Magistrate Judge deemed counsel Armstrong to be credible, and discounted as incredible Brand's testimony. (Mag. R & R, CV-DOC. 26, at 8-10). The Magistrate recommended denial

of the claim. The credibility determinations were resolved by the Magistrate weighing contemporaneous evidence that supported counsel's evidence, but did not do so with respect to Brand's testimony. Indeed, the Magistrate held Brand's testimony to be inconceivable and incredible without ever weighing contemporaneous evidence that supported and rendered plausible Brand's testimony. The Magistrate also resolved the disputed and ambiguous "**time-sheet**" notation that Brand would not be filing an appeal without ever explaining how the Court came to credit it to counsel Armstrong when the Government itself acknowledged that this was less than certain.

Through appointed counsel in the §2255 proceeding, Brand filed objections to the Magistrate's R & R. (CV-DOC. 27, para. 12 at 3).

The Court subsequently adopted the Magistrate's R & R on July 1, 2015 related to Brand's GROUND ONE claim that counsel failed to file an instructed Notice of Appeal,(Order, CV-DOC. 28), and later, on March 29, 2017, denied Brand's §2255 motion in all other respects, including the denial of any Certificate of Appealability, because his claims lacked merit and because he waived each claim when he pleaded guilty. (CV-DOC. 34).

Notice of Appeal/AMENDED Notice of Appeal

On May 16, 2017, Brand's court-appointed §2255 attorney, Peter A. Sartes, filed a timely Notice of Appeal,(CV-DOC. 36), and submitted his motion to withdraw from further representation. (CV-DOC. 37). The Court granted counsel's motion to withdraw on May 18, 2017. (CV-DOC. 40).

Now proceeding pro se, Mr. Brand filed a Motion for Preparation of Transcripts on June 29, 2017. (cv-DOC. 43). Brand explained that his ability to meaningfully prepare his application for a Certificate of Appealability ("COA")

to the Eleventh Circuit depended on his having a transcript of the §2255 evidentiary hearing and other proceedings. On July 11, 2017, the Court denied the motion, **basing its denial on the fact that the Court had already denied a COA as part of its Order denying Brand's Section 2255 motion.** (CV-DOC. 44).

However, the Court's denial of a COA as part of its §2255 denial Order occurred without having ever received any COA briefing from Brand and merely represented a perfunctory aspect of the Order. The Court was basically presuming upon its own belief that Brand could not prevail. Moreover, the denial did not reflect an appreciation for Brand's opportunity to apply to the Eleventh Circuit Court of Appeals for a COA. **Notably,** prior to the Court's denial of Brand's transcript request, on June 5, 2017, the Court **granted** Brand's request for documents from the Court record **for the very reason of being able to prepare a COA.** SEE: (Order, CV-DOC. 41)(directing the Clerk to send documents requested by Brand).

Mr. Brand then filed an **AMENDED** Notice of Appeal timely on July 21, 2017 (mailed pursuant to HOUSTON v. LACK, 487 U.S. 266, 275-276 (1988), but filed in the Clerk's Office on July 26, 2017, (CV-DOC. 45), to include the issue of the Court's July 11, 2017 Order denying the requested transcripts. (CV-DOC. 44).

Brand's Application for a COA to the Eleventh Circuit Court of Appeals

Without benefit of the transcripts — denied by the District Court — Brand filed a pro se application for a Certificate of Appealability ("COA") to the Eleventh Circuit Court of Appeals. Appeal No. 17-12227-E Brand argued, inter alia, that he was entitled to a COA because jurists of reason

would find debatable or wrong: (1) the District Court's denial of Brand's request for transcripts from the Court record to enable him to file a COA, when the basis of the transcript denial was solely the District Court's own belief that Brand would not prevail (COA, at 9-13); (2) the District Court's credibility determination between Brand and his counsel on the issue of whether Brand had wanted to appeal and instructed counsel to do so contravened the Supreme Court's decision in LEE v. UNITED STATES, 137 S.Ct. 1958 (2017) because the District Court did not weigh contemporaneous evidence supporting Brand's claim — but did weigh contemporaneous evidence **against** him and also that which supported counsel Armstrong's testimony (COA, at 19-23); and (3) the District Court nor counsel considered in the §2255 proceeding that the record demonstrated an apparent instance of **actual innocence** in relation to the COUNT 14 §924(c) offense because the offense lacked an essential element of an underlying predicate offense — and the District Court lacked **jurisdiction** to impose the §924(c) conviction(s) because there was an insufficient factual basis (COA, at 24-29). Brand also explained that his appeal waiver provision in the plea agreement was not enforceable under the circumstances — and that these issues were due to be considered by the Court of Appeals at the COA stage in order to prevent a manifest miscarriage of justice.

Ultimately, the Eleventh Circuit never answered any of these issues that were presented for the first time in the pro se COA, and denied the COA based solely on the issues originally set forth in the Section 2255. SEE: **Appendix A.**

Brand then filed a Motion for Panel Rehearing to urge review of the unadressed COA claims. The Eleventh Circuit denied any reconsideration. SEE:

Appendix C.

The instant Petition for a Writ of Certiorari now timely follows.[3/]

Law and Argument in Support of Granting Certiorari

QUESTION ONE

ALTHOUGH NOT ARGUED BY DEFENSE COUNSEL NOR NOTICED BY THE DISTRICT COURT DURING THE 28 U.S.C. §2255 PROCEEDING, WAS THE ELEVENTH CIRCUIT COURT OF APPEALS COMPELLED TO CONSIDER PETITIONER'S SUBSEQUENT PRO SE DEMONSTRATION OF APPARENT ACTUAL INNOCENCE PRESENTED FOR THE FIRST TIME IN HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY?

As explained below, this case involves the important question of whether Petitioner Brand was entitled to review of an apparent actual innocence claim that was presented for the first time in an application for a certificate of appealability ("COA"), pursuant to 28 U.S.C. §2253(c)(2). Although the record supports Brand's claim(s), neither his §2255 defense counsel nor the District Court addressed them. Proceeding pro se for purposes of presenting an application for a COA to the Eleventh Circuit Court of Appeals, Petitioner Brand demonstrated that he was actually innocent of the 18 U.S.C. §924(c) offense under COUNT 14, and that the District Court lacked jurisdiction to convict him of the Section 924(c) offenses under COUNTS 3 and 14 because there was an apparent insufficient factual basis. CF.(COA, at 24-29); (Petition for Panel Rehearing, at 1-2, 4-5).

3/ The Court granted Brand's Motion for Extension of Time to file his petition, requiring Brand to file it on or before September 27, 2018, which he has done accordingly. SEE: Affidavit of Mailing; Proof of Service

The Eleventh Circuit denied Petitioner's application for a COA. SEE: **Appendix A.** The Eleventh Circuit did not address Petitioner's claims, so Petitioner then filed a Petition for Panel Rehearing, arguing that the Court was at least required to address the debatability of his actual innocence and jurisdictional claim(s) at the COA stage. Without additional consideration the Eleventh Circuit denied the petition. SEE: **Appendix C.**

Although the Eleventh Circuit's unwillingness to entertain Brand's actual innocence and jurisdictional claim(s) at the COA stage — when they were presented for the first time at that point — was consistent with the precedent in WALKER v. JONES, 10 F.3d 1569, 1572 (11th Cir 1994)[4/] (holding that an argument not raised in the District Court and raised for the first time "**on appeal**" will not be considered), Brand urges that the circumstances and substance of his claim(s) compelled consideration **at the COA stage.**

Petitioner Brand submits that the Eleventh Circuit erred in failing to permit COA review of an unpreserved actual innocence/jurisdictional claim(s) because, under the applicable precedents, the rule that an argument can be waived if not raised in the District Court applies to the raising of a new argument "**on appeal**" — strictly speaking — and it is clear that an application for a COA is **not** an appeal but a mere application seeking permission to file an appeal.

Petitioner Brand additionally submits that his actual innocence claim and jurisdiction claim were cognizable at the COA stage under this Court's long recognized "miscarriage of justice" exception. This Court has held that a colorable claim of actual innocence may be used as a gateway to review an otherwise barred constitutional claim. **CF.** MCQUIGGIN v. PERKINS,

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4/ **CF.** ABRAMS v. WARDEN, No. 16-15449-F, 2017 U.S. App. LEXIS 16713 (2017) (applying WALKER to bar consideration of a claim raised for first time in a COA following denial of a Section 2255 motion).

569 U.S. 383, 386 (2013). SEE ALSO: SCHLUP v. DELO, 513 U.S. 298, 329(1995); HOUSE v. BELL, 547 U.S. 518 (2006). This Court's case law establishes that the "actual innocence" and "miscarriage of justice" exception(s) serve as a gateway to review despite a variety of impediments. Petitioner Brand respectfully urges that, consistent with the Court's precedents, there is no reason that the gateway exception(s) should not apply at the COA stage. Indeed, in Petitioner's case, the failure of counsel to bring the issues to the attention of the District Court ultimately left him with no other option at that point than to make his argument pro se in the application for a COA. Under the current way of treating a previously unraised claim by failing to consider it outright, an otherwise debatable actual innocence claim would not receive consideration at the COA stage. Such a categorical treatment at the COA stage is inconsistent with this Court's "actual innocence" and "miscarriage of justice" exception(s) jurisprudence.

Petitioner Brand presented two claims in his pro se application for a COA that he contends to have warranted consideration by the Eleventh Circuit. **First**, Brand demonstrated that he was actually innocent of the Section 924(c) offense under COUNT 14 because it lacked an essential element of an underlying predicate offense. **Secondly**, Brand contended that the District Court had lacked jurisdiction to convict him of the 18 U.S.C. §924(c) offenses under COUNTS 3 and 14 because there was an insufficient factual basis. As demonstrated below, it was debatable whether "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." SCHLUP, 513 U.S. at 329. Despite Brand having entered a guilty plea, the following demonstration makes clear that he could not

have been convicted beyond a reasonable doubt nor admitted facts essential to such a conviction:

A.) The District Court lacked jurisdiction to convict and sentence Brand under COUNT 14, an 18 U.S.C. §924(c) offense, because the absence of an essential element rendered him actually innocent.

In his COA, Petitioner Brand explained that the District Court had adopted the Magistrate Judge's Report & Recommendation ("R & R"), and that the record demonstrated an apparently debatable claim of actual innocence warranting a COA. **CF.** (COA, at 24-26). **CF. ALSO:** (Pet. for Panel rehear., at 1-2).

As the Magistrate's R & R recounts, Brand initially pled guilty to COUNTS 1-5, 7, 9, 10, **12** and 13. (CV-DOC. 26, at 2)(emphasis added). However, he pled **not guilty** to the 18 U.S.C. §924(c)(1)(A) offenses in COUNTS 6, 8, 11 and 14 "**because he believed he was not guilty of those charges.**" Id. (emphasis added).

Thereafter, with consent of the District Court and the Government, Brand **withdrew his guilty plea on COUNT 12**. Id. Brand contended that he was not guilty of **COUNT 12**.

Later, pursuant to a proffered plea agreement,[5/] the Government agreed to dismiss "**all unresolved counts**[,] since Brand would plead guilty to COUNT 14, a §924(c)(1)(A) offense. **CF.** (Mag. R & R, CV-DOC. 26, at 2); (Order, CV-DOC. 28, at 2, 5); (Order, CV-DOC. 34, at 1-2).[6/] **Notably**, however, COUNT 14 had

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5/ There was no plea agreement in relation to COUNTS 1-5, 7, 9, 10 and 13, which were resolved by an open-plea. The subsequent plea agreement pertained to COUNT 14, a Section 924(c) offense.

6/ SEE: (COA, at 21-22, 27-28, 33-34)(providing authorities supporting each of the reasons why the appeal waiver provision was not enforceable). Brand had also argued that the appeal waiver did not apply to the counts that were resolved outside/before the plea agreement.

been dependent upon the underlying drug offense alleged in **COUNT 12** — which Brand had specifically been allowed to withdraw his plea to — and had specifically been dismissed by the Government as being amongst "**all unresolved counts**." Moreover, COUNT 12 was not pled to under the plea agreement. Here, the District Court and Brand's counsel during the Section 2255 proceeding (as well the criminal proceedings) failed to recognize that there was no underlying offense as a result of the circumstances of the proceedings. An underlying offense, however, is an essential element required for conviction of the §924(c) offense under COUNT 14. That this is not an intended oversight is evidenced by the fact that Brand's Judgment & Commitment plainly lists a conviction for COUNT 1 as the predicate for the COUNT 3 Section 924(c) offense ... while the COUNT 14 Section 924(c) offense appears on the Judgment & Commitment and COUNT 12 that would have been the intended underlying predicate does not.

Brand cannot be guilty of the Section 924(c) offense under COUNT 14 for lack of the essential underlying predicate offense element. The underlying offense is an element as opposed to a mere means because a jury must find the fact in order to convict or the defendant specifically admit. The difference between elements and alternative means were recently recognized as such in MATHIS v. UNITED STATES, 136 S. Ct. 2243, 2254-58 (2016)(explaining the legal difference in distinguishing elements and means).

Petitioner Brand explained that, in order to sustain a conviction under 18 U.S.C. §924(c)(1)(A) in COUNT 14, an essential element was the existence and conviction of an underlying offense (**not mere conduct**). SEE: UNITED STATES v. WILLIAMS, 731 F.3d 1222, 1232 (11th Cir. 2013)(stating that underlying offense is an element). The Eleventh Circuit has held that, "There

can be no violation of §924(c) without a predicate offense." UNITED STATES v. BELFAST, 611 F.3d 783, 814-15 (11th Cir. 2010). SEE ALSO: TANNENBAUM v. UNITED STATES, 148 F.3d 1262 (11th Cir. 1998). "Section 924(c) is plainly an ancillary statute that relies on the existence of **a separate substantive crime**." BELFAST, 611 F.3d at 814 (emphasis added). **However**, in Brand's case, the District Court (as well as counsel) overlooked the fact that his initial plea to **COUNT 12** was withdrawn ... and then specifically excluded from the plea agreement to the §924(c) offense under COUNT 14. While COUNT 14 charges in the **superseding** indictment that **COUNT 12** was intended to be the underlying offense, the District Court specifically found that, "Under the terms of the plea agreement the United States dismissed additional counts [and] allowed Brand to withdraw the guilty plea to a count [i.e., **COUNT 12**,] **that was not the subject of the plea agreement** [.]" (Order, CV-DOC. 28, at 5)(emphasis added).

Because any conviction and sentence under COUNT 14 was necessarily dependent upon the underlying offense of **COUNT 12** — but **COUNT 12** was the subject of a withdrawn plea, then categorically dismissed, not the subject of the COUNT 14 plea agreement, never pled to by Brand, and never indicated in the Judgment & Commitment (as the COUNT 3 §924(c) has an underlying predicate of COUNT 1 indicated), it was apparently debatable that Brand was actually innocent of the COUNT 14 §924(c) offense and that the District Court lacked jurisdiction to convict and sentence Mr. Brand in relation thereto. The District Court's judgment depends upon the fact that Brand was convicted of an underlying drug offense, when he actually was not. This error was not harmless because it resulted in a consecutive 25-year mandatory minimum sentence. Brand's criminal proceeding counsel rendered ineffective assistance as well — and Brand's rights of due process were

violated. Because Brand's actual innocent/jurisdictional claim(s) were raised for the first time in his pro se application for a COA did not preclude the Eleventh Circuit from considering them at the COA stage. This Court, it is respectfully submitted, should clarify that the COA stage is not an "appeal" for purposes of rendering a first time argument inconsiderable — and the "actual innocence" and "miscarriage of justice" exception(s) provide a gateway for the consideration of such claims at the COA stage despite not having been raised below.

QUESTION TWO

IS AN INDIGENT PRO SE PETITIONER DEPRIVED OF A FULL, FAIR, AND MEANINGFUL OPPORTUNITY TO PREPARE AND PRESENT HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO THE COURT OF APPEALS WHEN THE DISTRICT COURT REFUSES TO PROVIDE ESSENTIAL TRANSCRIPTS OF THE CRIMINAL PROCEEDINGS AND SECTION 2255 EVIDENTIARY HEARING BASED ON ITS OWN BELIEF THAT PETITIONER WILL NOT PREVAIL — AND THE DISTRICT COURT NEVER CONSIDERED ANY APPLICATION FOR A CERTIFICATE OF APPEALABILITY FROM PETITIONER?

Following the filing of a timely Notice of Appeal in relation to the Final Order denying Petitioner Brand's 28 U.S.C. §2255 motion, Brand subsequently filed an AMENDED Notice of Appeal to include the specific issue that the District Court had denied a request for transcripts. SEE: (CV-DOC. 45). Brand had requested transcripts of the criminal proceedings and the Section 2255 evidentiary for purposes of preparing an application for a COA to the Eleventh Circuit Court of Appeals.(Mot. for Preparation of Trans., CV-DOC. 44). Brand specifically mad e detailed showing of his need, including the fact that he was left to proceed pro se abruptly and that his ability to meaningfully prepare the COA depended on the record

transcripts. Although the AMENDED Notice of Appeal made the District Court's denial of the request for the transcripts — as well the affect of the denial upon Brand's COA preparations and presentation — an appropriate consideration, the Eleventh Circuit never considered the debatability of this issue during the COA consideration. Indeed, when presented again in the Petition for Panel Rehearing,(pages 3-4), the Eleventh Circuit totally declined to address the matter. In the COA,(pages 9-13), Brand extensively detailed the debatability of the transcript denial and demonstrated how his meaningful ability to prepare and present his COA was unfairly impacted. Brand explained that the District Court's denial of the transcripts was contradicted by the record and unfairly based on its own personal belief that Brand could not prevail — arriving at the determination without ever having received any COA briefing from Petitioner Brand.

Petitioner Brand asks this Court to decide whether his opportunity to present a pro se application for a COA to the Court of Appeals, in accord with 28 U.S.C. §2253(c)(1), was fundamentally unfair based on the District Court's **own belief** that Brand would not prevail, and by stymieing his fair ability to present the COA to the Eleventh Circuit Court of appeals based on its **own belief.** In other words, may a District Court deprive an indigent pro se defendant from discovering and presenting issue to the Court of Appeals in a COA simply because it does not believe that he will prevail? Petitioner Brand contends that it was err for the District Court to interfere and obstruct him from supporting his claims by the records of the proceedings.

The District Court's denial of Brand's request for transcripts.

On the COA below,(pages 9-13), Brand demonstrated that the District

Court's denial of his Motion for Preparation of Transcripts would be found to be debatable or wrong by jurists of reason, warranting the issuance of a COA. The denial of the requested transcripts undermined the COA process itself. The denial of the the requested transcripts unfairly compromised Brand's ability to meaningfully prepare his application for a COA — and was completely inconsistent with the District Court's having granted Brand's previous request for documents from the record. SEE: (Order, denying trans. request, CV-DOC. 44); (Order, granting request for documents, CV-DOC. 41).

Following the District Court's March 29, 2017 Order denying Brand's Section 2255 motion and a certificate of appealability,(CV-DOC. 34), Mr. Brand's court-appointed §2255 counsel filed a Notice of Appeal,(CV-DOC. 36), and abruptly withdrew from representation.(CV-DOC. 37, 40).

Proceeding pro se for purposes of filing an application for a COA to the Eleventh Circuit Court of Appeals, Mr. Brand filed an advisory to the District Court on May 18, 2017 requesting documents from the Court record that he required.(CV-DOC. 39). On June 5, 2017, the District Court granted the request for documents, and directed the Clerk to send them to Brand. (CV-DOC. 41).

Upon receiving the requested documents, which had previously only been possessed by Brand's appointed §2255 counsel, it became apparent that obtaining the transcripts from the plea colloquy, sentencing, and Section 2255 evidentiary hearing were essential to any meaningful preparation of the COA — since the Magistrate's R & R,(CV-DOC. 26, at 4-6, 8-10), the Order adopting the Magistrate's §2255 evidentiary hearing determinations, (CV-DOC. 28, at 1-6), annd the final order denying the Section 2255 motion, (CV-DOC. 34), were all substantially based on testimony and statements that

occurred during the events that Brand had requested. In order to make a sufficient demonstration that a COA was warranted, **particularly with respect to the Court's credibility determinations and references to other proceedings**, Brand knew that he needed to show that the Court's references were debatably undermined by other portions of the record not mentioned in either the Magistrate's R & R nor the Court's Orders. Brand's problem, however, was that he otherwise had only his tangential recollection of which to avail himself.

Accordingly, on June 29, 2017, Mr. Brand filed a follow-up request for transcripts of his plea colloquy, sentencing, and the §2255 evidentiary hearing. (CV-DOC. 43). On July 11, 2017, the District Court denied the motion, saying that the **transcripts were not transcribed**,[7/] and stating, "**Having previously declined to issue a certificate of appealability, the district court declines to authorize the requested transcripts at government expense**."(Order, CV-DOC. 44, at 1)(emphasis added). Brand then filed an **AMENDED** Notice of Appeal to include the denial of the transcript Order. (CV-DOC. 45).

Petitioner Brand submitted to the Eleveth Circuit in his application for a COA,(pages 9-13), that the District Court's denial of the transcript request would be found to be debatable or wrong for purposes of warranting a COA. Brand explained that the District Court's only reason for denying the transcripts was that it had previously declined to issue Brand a COA when it denied the Section 2255 motion. So, in essence, because the District

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7/ The District Court's acknowledgment that there were no transcripts was also argued in the COA to have undermined the reliability of the Court's de novo review of the Magistrate's §2255 credibility determinations from the evidentiary hearing. CF. (COA, at 13-16). De nove review of such credibility determination required having a transcript. SEE: 28 U.S.C. §636(b)(1)(C). The Eleventh Circuit never addressed this issue as well.

Court did not believe that Brand would prevail, it was not going to facilitate his application to the Eleventh Circuit Court of Appeals. Petitioner Brand explained that the District Court denial of the transcripts was unfair and unreasonable for the following reasons:

First, as was previously explained, the District Court had **already** granted Brand's initial request for documents from the Court record. Statutory authority also authorizes Brand to apply directly to the court of appeals — 28 U.S.C. §2253(c)(1) — irrespective of the District Court's denial of a COA (particularly when, as here, no COA briefing was considered by the District Court). **Second**, at the time that the District Court denied issuance of a COA, it is apparent that it did so as part of its perfunctory obligation in denying Brand's §2255 motion — and never received nor considered any COA briefing. The District Court did not truly know whether Brand might be able to make a sufficient COA showing, but decided upon its own belief alone that he could not. The Supreme Court has long emphasized that a court "**should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief.**" MILLER-EL v. COCKRELL, 537 U.S. 322, 337 (2003)(emphasis added). Doubtlessly, this principle applies to a petitioner's ability and opportunity to even prepare a COA. While the District Court has discretion to deny a COA, it another matter all together for it to then prevent a petitioner from having the ability to prepare and present a COA to the court of appeals ... based upon its own belief alone. **Third**, Brand had previously enjoyed the appointment of counsel on the Section 2255 motion who had been the sole recipient of the District Court's Orders and the Government's filings. Brand did not anticipate counsel's abrupt withdrawl

without ever having provided him with any of the records of his case. **Fourth**, Brand's COA preparation depended in great measure upon records of testimony, statements, and circumstances of which everyone — the Government, the District Court, and even the Court of Appeals — had access to except Mr. Brand. In essence, the practical reality was that Brand had to fight with one arm behind his back. Such a process is presumptively unfair.

Based on mere recollection alone, Petitioner Brand would submit by way of example several instances in which the §2255 evidentiary hearing transcript would have assisted him in preparing the COA: (1) At the evidentiary hearing, a significant point of contention relating to Brand's claim that his counsel failed to file an instructed appeal was a "**time-sheet**" that contained a notation purportedly made by counsel indicating that Brand would **not** be appealing. The Magistrate's R & R — which was fully adopted by the District Court — emphasized this. (Mag. R & R, CV-DOC. 26, at 6-7, 9). **CF.** (Order, CV-DOC. 28, at 3, para. 6)(adopting R & R, and stating, "[T]hat Brand did not want to appeal is supported by counsel's contemporaneously maintained notes.") **HOWEVER,** the actual transcript of the evidentiary hearing will reveal that there was actually an uncertainty as to whether the notation on the "**time-sheet**" was made by Brand's attorney ... **or** ... the Assistant United States Attorney. The possibility was even acknowledged by the Government at the evidentiary hearing. (2) Additionally, the District Court's final Order denying the §2255 motion, (CV-DOC. 34, at 7 n. 2), says that Brand's actual innocence claim "appears nowhere else." **HOWEVER,** the Magistrate's R & R says clearly that Brand asserted during the §2255 evidentiary hearing testimony that "Brand did state that he wanted to file an appeal based upon jurisdictional and **actual innocence** arguments." (CV-DOC. 26,

at 5 n. 2)(emphasis added). Moreover, the Magistrate's R & R readily recounts counsel's own evidentiary testimony that Brand's defense was that he was **actually innocent** of the 18 U.S.C. §924(c) offenses since the firearms were **not** "in furtherance of drug trafficking.(CV-DOC. 26, at 6). SEE ALSO: (Order, adopting R & R, CV-DOC. 28, at 3, para. 5)(acknowledging such a defense).

The foregoing instances are illustrative of how the requested transcript(s) would have likely assisted Brand's preparation of the COA, but are in no way exhaustive since Brand submitted that these instances were based upon an assembly and synthesis of recollections and the references contained in the Magistrate's R & R and the District Court's Orders.

The **fifth** reason that the District Court's denial of Brand's request for transcripts was unfair is because the transcripts requested were neither voluminous nor expensive, and the Government had incurred no previous transcript expenses since there was no appeal filed. The fact that Brand's Section 2255 motion had warranted the appointment of counsel in connection with an evidentiary hearing was a circumstance that militated in favor of granting Brand's transcript request. **Sixth,** the transcripts requested by Brand coincided with proceedings supporting both the Magistrate's and District Court's determinations — requiring that the Magistrate provide the Court with a transcript anyway to facilitate a de novo review of the Magistrate's credibility determinations from the §2255 evidentiary hearing. CF. 28 U.S.C. §636(b)(1)(C)(requiring that magistrate's provide a transcript of the evidentiary hearing or other proceedings that were the basis of the magistrate's recommendation). The District Court had to have had an available

transcript pertaining to each of the proceedings Brand needed since they were all referenced and relied upon in the Magistrate's R & R. Since the transcripts would have been a required consideration for the District Court from the Magistrate, Brand's transcript request not unreasonably burdensome.

Because such circumstances occasioned a reasonable, debatable probability that Brand was deprived of a full, fair, and meaningful opportunity to prepare and present his application for a COA, it is submitted that the Eleventh Circuit's to forego review of this cognizable claim and failure to issue a COA constituted error which presumptively stymied Brand's due process interests. Absent the availability of the requested transcripts, it is impossible to gage the likely affect this has had upon Brand's ability to meaningfully prepare and present his issues. The the COA process has been unreasonably undermined, the outcome of the COA process is inherently unreliable. Petitioner Brand respectfully asks the Court to grant certiorari review to resolve the important issue of whether the District Court may deprive a petitioner from obtaining transcripts necessary for preparing a COA based only upon its own belief that he or she will not prevail ... and whether the Eleventh Circuit erred in failing to review this claim or grant a COA thereon.

QUESTION THREE

IN LIGHT OF LEE v. UNITED STATES, 137 S. CT. 1958 (2017), WHICH HELD THAT A PETITIONER MAY RELY ON CONTEMPORANEOUS EVIDENCE TO SUPPORT HIS CLAIM THAT HAVE PROCEEDED TO TRIAL RATHER THAN PLED GUILTY BUT FOR COUNSEL'S MISADVICE, DID THE ELEVENTH CIRCUIT COURT OF APPEALS, IN CONSIDERATION OF PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY, ERR IN FAILING TO FIND DEBATABLE OR WRONG THE DISTRICT COURT'S FAILURE TO WEIGH CONTEMPORANEOUS EVIDENCE THAT SUPPORTED PETITIONER'S CLAIM THAT HE WOULD HAVE WANTED TO FILE AN APPEAL AND INSTRUCTED COUNSEL TO DO SO?

Petitioner Brand asks the Court to decide whether the holdings of LEE v. UNITED STATES, 137 S.Ct. 1958 (2017) extend to the direct appeal context. Specifically, whether the holding in LEE that the petitioner may rely on contemporaneous evidence to support his claim that he would have proceeded to trial rather than pled guilty but for counsel's misadvice ... would also mean that a petitioner can rely on contemporaneous evidence in order to support his claim that he would have wanted to file a direct appeal, instructed his counsel to do so, and would have timely appealed but for counsel's failure to do so? If so, did the Eleventh Circuit fail to find debatable or wrong the District Court's failure to weigh the contemporaneous evidence that supported Petitioner Brand's claim?

In Petitioner Brand's case, the District Court relied upon the Magistrate's credibility determinations following the Section 2255 evidentiary hearing. The Magistrate's R & R held that Brand's GROUND ONE claim should be denied, finding his counsel's testimony credible and discounting Brand's. (R & R, CV-DOC. 26, at 8-10).

The Magistrate began his determination with a presumption that Brand was less credible "because he is a convicted felon, and has the most to gain in this matter." Id. at 8. The Magistrate stated his belief that attorney Brent Armstrong "has no no vested interest in the outcome of this matter, and has no known reason to mislead the Court." Id. at 8. The Magistrate emphasized that Brand's recollection of the circumstances of the plea agreement and plea were contradicted by the record so that this undermined his credibility in regards to the claim that he had asked his counsel to file an appeal.(Mag. R & R, CV-DOC. 26, at 9). Further the Magistrate found it incredible that attorney Armstrong would have advised

Brand that he would still be able to pursue an appeal despite the plea agreement appeal waiver provision ... since Mr. Armstrong was a seasoned attorney who had defended many federal criminal defendants before the Court, and knows an appeal "waiver forecloses a defendant's right to appeal, **absent very limited circumstances.**" (Mag. R & R, CV-DOC. 26, at 9)(emphasis added).

The Magistrate concluded his findings by saying that he finds it more plausible that Brand pled guilty to avoid the potential danger of a longer sentence in conjunction with the 18 U.S.C. §924(c) charges, hoped to reduce his sentence through a purported cooperation with the Government that he did not want to disturb by filing an appeal contrary to the plea agreement, and that it was "simply inconceivable that Brand instructed Mr. Armstrong to file an appeal, and Mr. Armestrong disregarded his instructions." (Mag. R & R, CV-DOC. 26, at 10). On July 1, 2015, the District Court fully adopted the Magistrate's Report and Recommendation, denying Brand's GROUND ONE claim. (Order, CV-DOC. 28). The District Court depended entirely upon the Magistrate's credibility determinations.

In Brand's application for a COA to the Eleenth Circuit, he clearly demonstrated that the District Court had failed to adequately consider contemporaneous evidence that necessarily supported his claim that he would have wanted to appeal and instructed counsel to do so. Indeed, the District Court was said to have failed to weigh important corroborating evidence that supported his claim(s), but nevertheless weighed contemporaneous evidence that discredited him and supported only counsel's testimony. **CF.** (COA, at 19-23). Brand demonstrated that the tangential and comparatively weaker contemporaneous evidence that the District Court weighed against him and in favor of

counsel would have been debatably undermined by the much more compelling contemporaneous evidence that the Court did not properly consider, but that Petitioner Brand should have been permitted rely upon. Brand showed that the outcome of the credibility determination and §2255 would have debatably been different — which also would have satisfied the debatability threshhold to warrant the issuance of a COA.

In ROE v. FLORES-ORTEGA, 528 U.S. 470 (2000), the Supreme Court advised that an important consideration is whether there is reason to think "that a rational defendant would want to appeal[.[" More recently, in LEE v. UNITED STATES, 137 S.Ct. 1958 (2017), the Supreme Court held that a defendant may rely on contemporaneous circumstances and evidence to establish a reasonable probability and likelihood that he would have gone to trial rather than pled guilty if his attorney had not misadvised him about deportation consequences. The Supreme Court rejected the Government's argument that the defendant's claim was not plausible in light of the overwhelming evidence of guilt and the probability of receiving a greater term of imprisonment. Indeed, the Supreme Court recognized that, "**[T]he possibility of even a highly improbable result may be pertinent to the extent it would have affected the defendant's decision making.** LEE, 137 S.Ct. at 1967(emphasis added). LEE teaches that even the "**smallest chance**" of success may look attractive to the defendant under the circumstances,(LEE, 137 S.Ct. at 1961), even a "Hail Mary" attempt at obtaining relief. LEE, 137 S.Ct. at 1966-1967. **Significantly**, despite the fact that the defendant in LEE had consented to an appeal waiver provision in his plea agreement — and was additionally warned of the consequences by the judge during the plea colloquy — the waiver was **not** enforceable since the misadvice of counsel undermined the

validity of the waiver itself. LEE, 137 S.Ct. at 1968 n. 4. Brand's case is remarkably similar, although involving the circumstance of a requested appeal. The District Court in Brand's case heavily discredited him by citing the appeal waiver and the fact of the judge's warning during the plea colloquy. Brand had also claimed that he pled guilty based on counsel's advisement that there was still a chance to file an appeal based on actual innocence and jurisdictional grounds. The misadvice of LEE's counsel, although involving deportation consequences, rendered the appeal waiver invalid based upon the affect upon his decision — which is similar to the invalidity of Brand's waiver because counsel's misadvice about the ability to file an appeal affected his decision making, which is a separate issue from whether or not counsel failed to file an appeal that Brand requested.

Contrary to the District Court's subjective determinations, a variety of unconsidered contemporaneous factors substantiated Brand's claim and rebutted the Court's determination that Brand's claim(s) was "implausible" or "inconceivable." Bearing in mind that Brand was given a sentence of more than 30-years — the near equivalent of a life sentence considering his age — Brand's claim that his decision to plead guilty under the plea agreement was in reliance upon his counsel's advice that he could still try to pursue an appeal, despite the appeal waiver provision, was plainly conceivable and plausibly supported by: (1) Attorney Armstrong readily admitting to visiting Brand almost 2-weeks after sentencing to discuss pursuing an appeal; (2) Attorney Armstrong's §2255 evidentiary hearing testimony made clear that the defense strategy had always been to try and resolve or fight the charges in pieces — which was consistent with Brand's claim that entry into the plea agreement occurred with the hope of yet pursuing an actual innocence/jurisdictional

claim(s) that would potentially fall into an exception to the appeal waiver provision; (3) Attorney Armstrong's evidentiary hearing testimony that Brand's defense was that he was **actually innocent** of the Section 924(c) offense(s) is consistent with, and supported by, Brand's own evidentiary hearing testimony that he had wanted to appeal on **jurisdictional** and **actual innocence** grounds.

Here, contrary to the "inconceivable" belief of the District Court, even the existence of an appeal waiver does not necessarily render implausible Brand's claim that he still thought he could appeal based on counsel's advisements of this potential. The Eleventh Circuit and other courts of appeals are replete with examples of routine appeals being filed by defendants — **including their attorneys** — with the existence of appeal waivers and the potential for denial. **CF.** GOMEZ-DIAZ v. UNITED STATES, 433 F.3d 788 (11th Cir. 2005); CAMPUSANO v. UNITED STATES, 442 F.3d 770 (2d Cir. 2006); UNITED STATES v. POINDEXTER, 492 F.3d 263 (4th Cir. 2007); UNITED STATES v. TAPP, 491 F.3d 263 (5th Cir. 2007); UNITED STATES v. SANDOVAL-LOPEZ, 409 F.3d 1193 (9th Cir. 2005). In Brand's case the District Court completely discounted such contemporaneous evidence that supported his claim ... just because of the mere existence of an appeal waiver provision.

Additionally, contrary to the District Court's determination that Brand waived his appeal rights under the plea agreement and in the plea colloquy before the Court, is the fact that Brand specifically affirmed that he did so under the misguided belief of his counsel's advice that he could still pursue an appeal of the §924(c) offense(s) on **jurisdictional** and **actual innocence** grounds. Thus, Brand's claim that his decision depended on, and was affected by counsel's advice that he could still appeal undermines

the appeal waiver itself — as recognized in the LEE decision above. **CF.** WILLIAMS v. UNITED STATES, 396 F.3d 1340, 1342 n. 2 (11th Cir. 2005). Indeed, in LEE, supra, the Supreme Court said that when it comes to the misadvice of counsel "a claim of ineffective assistance of counsel extends to advice specifically undermining the judge's warning themselves[,]" with respect to a plea colloquy and appeal waiver provisions. LEE, 137 S.Ct. at 1968 n. 4.

Two other points are also pertinent to demonstrate that the District Court did not properly weigh contemporaneous factors that tended to reasonably support Brand's claim(s). **First,** the Magistrate's R & R credited attorney Armstrong's testimony that Brand did **not** want to file an appeal by referencing a notation on a "**time-sheet**" that purportedly memorialized Brand's decision by noting that Brand would not be appealing. (Mag. R & R, CV-DOC. 26, at 6-7). SEE ALSO: (Order, adopting R & R, CV-DOC. 28, at 3, para. 6)(referencing this as "contemporaneously maintained notes"). **HOWEVER,** what the Magistrate and Court do not mention is that the purported "**time-sheet**" notation was actually a significant point of contention (which Brand affirms that a transcript of the evidentiary hearing would have revealed) because there was a reasonable uncertainty as to whether the note that Brand was not going to be appealing had been made by the government AUSA. This point is not mentioned, nor is it explained anywhere how that the determination was made that counsel dispositively made the notation. Indeed, the matter had been so contested and the uncertainty so plausible that the Government AUSA had asked the Court to err in favor of Brand.

Second, the Magistrate expressed a personal belief that it was implausible that Brand had wanted to appeal — since he a "hope" of reducing his sentence through **potentially** cooperating with the Government. (Mag. R & R, CV-DOC. 26,

at 6, 10). SEE ALSO: (Order, adopting R & R, CV-DOC. 28, at 4, para. 7; 5). **HOWEVER**, this does not contradict or render implausible Brand's claim that his guilty plea decision was substantially influenced by counsel's advice that he could still pursue an appeal on grounds of **jurisdiction** and **actual innocence** of the §924(c) offense(s) despite the waiver — nor does it diminish the plausibility that when counsel visited Brand **to consult about an appeal** (per counsel's own testimony) nearly 2-weeks after sentencing, that Brand had not changed his mind about the supposed potential to cooperate and instead elected to pursue the appeal. It is a common practice for plea agreements to at times contain provisions saying that the defendant agrees to be truthful and "cooperate" with the government under the agreement — when in reality no cooperation has or was going to necessarily occur. The District Court's conclusion that Brand would have opted to take a chance on an uncertain cooperation agreement was definitely to be accorded less weight than the testimony of both Brand and his attorney about the existence of grounds of **jurisdiction** and **actual innocence** that was consistent with wanting to appeal. In other words, the District Court's emphasis on the potential for cooperation was not more plausible than Brand's claim that he wanted to appeal and would have but for counsel's failure to do so. The District Court did not weigh the contemporaneous evidence that Brand was entitled to rely on and have the Court weigh. Instead, the District Court just suggested an alternative reason that it deemed more credible, but was not necessarily the case.

In the end, had the District Court fully credited the circumstances of contemporaneous evidence in accord with the principles set forth in LEE, supra, Brand's claims that his counsel advised him of the potential

to still file an appeal despite the appeal waiver, and then failed to initiate the appeal when asked to do so, were plausibly debatable for purposes of warranting a COA. The Eleventh Circuit erred in not finding the District Court's failure to weigh the contemporaneous evidence that supported Brand's claim(s), in contravention of LEE.

The contemporaneous evidence that this Court in LEE had been improperly discounted was likewise discounted in Brand's case. The Eleventh Circuit failed to recognize under LEE that the District Court failed to appreciate as pertinent circumstances — even seemingly small factors that would have supported Brand's testimony and decision making. For instance, it doesn't make sense that when Brand had more than a 30-year sentence, and there existed a potential ground for appeal — even the smallest ... Hail Mary chance — of which Attorney Armstrong and Brand's evidentiary hearing testimony clearly established they were both considering as to the §924(c) offense(s) — that Brand would not have wanted to appeal and did instruct his attorney to appeal. Mr. Brand had everything to gain and nothing to lose if the Eleventh Circuit enforced the appeal waiver. This happens all the time in the appellate courts. It's not plausible that the Government would argue any breach of the plea agreement since Brand could have only been allowed to appeal if the Eleventh Circuit found the waiver was not enforceable. As was explained in the COA below, and readily corroborated by the Section 2255 evidentiary hearing and records of the criminal proceedings, Brand's claim(s) that he had wanted to appeal, as well that counsel had advised him that he could still pursue and appeal (without promise of success), was consistent with the defense strategy all along to try and resolve the charges in pieces, including counsel's testimony of a believed

meritable §924(c) argument of **actual innocence** and **jurisdictional** ground. The availability of pursuing an appeal in spite of the existence of the appeal waiver provision was further corroborated and ratified, at least in Brand's recollection, by the fact that the District Court specifically told him following sentencing that he could file an appeal.

Given the importance to many other criminal defendants throughout this country who are sure to encounter the same or similar circumstances that exist in Petitioner Brand's case, it is respectfully submitted the the Court's granting of certiorari review would be both justified and equitable.

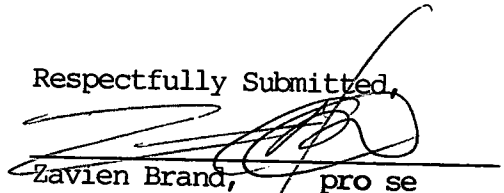
CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Mr. Brand respectfully prays that this Honorable Court grants his Petition for a Writ of Certiorari.

I, ZAVIEN BRAND, declare under the penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is both true and correct.

Dated this 26th day of September, 2018.

Respectfully Submitted,



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