No. _____

In The

Supreme Court of the United States

CHRISTIAN WINCHEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Supreme Court Rule 10(a)**—Whether the Fifth Circuit Court of Appeals has departed from the accepted and usual course of postconviction proceedings under 28 U.S.C. § 2255, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, when:

- **A.** The court failed to give Petitioner's verified § 2255 motion proper consideration as the functional equivalent of an affidavit;
- **B.** The court determined the credibility of witnesses solely from affidavits which contained disputed questions of material fact; and
- **C.** The court failed to grant a hearing pursuant to § 2255(b) for Petitioner's claims which are not conclusively refuted by the record.

II. **Supreme Court Rule 10(c)**—Whether the decision of the Fifth Circuit Court of Appeals conflicts with and/or grossly misapplies this Court's decision in *Lee v. United States*, 582 U.S. 357 (2017), where:

- **A.** The decision assigns Petitioner an evidentiary burden to provide "contemporaneous evidence" in support of his assertion that he would not have entered the plea but for counsel's deficient performance;
- **B.** The decision inherently requires "contemporaneous evidence" to be fully and sufficiently pled within the § 2255 motion; and

QUESTIONS PRESENTED—Continued

C. The decision failed to afford Petitioner a hearing to present evidence in support of his claims and then summarily denied those claims for failing to support them with "contemporaneous evidence."

LIST OF RELATED PROCEEDINGS

This case originated upon criminal indictment filed with the United States District Court for the Northern District of Texas in *United States v. Christian Winchel*, case no. 3:15-cr-079-D-1, July 22, 2016.

Upon conviction, a direct appeal was taken to the Fifth Circuit Court of Appeals in *United States v. Christian Winchel*, case no. 16-11208, July 16, 2018.

Petitioner thereafter filed a motion to vacate, set-aside or correct sentence pursuant to 28 U.S.C. § 2255 with the United States District Court for the Northern District of Texas, which was designated as *Christian Winchel v. United States*, civil case no. 3:19-cv-2290-D-BK, February 25, 2021.

It is the Fifth Circuit Court of Appeals' affirmance of the district court's denial of the § 2255 motion, in *United States v. Christian Winchel*, appellate case no. 21-10233, May 18, 2023, which provides the segue for seeking a writ of certiorari to this Court.

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STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals (Case No. 21-10233) issued its Opinion on May 18, 2023. (App. A). This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 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 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; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 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 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.

Title 28 U.S.C. § 2255—

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground

that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion

as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or of habeas corpus.
>
> **(4)** the date on which the facts supporting the claim or claims presented could

have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Introduction:

The charges in this criminal case issue from the investigation of an online forum which the Government

dubbed "Website 19." The primary purpose of "Website 19" was the advertisement and distribution of child pornography. The website operated throughout 2012-2014 and ceased operating in December of 2014. As of December of 2014, the website contained 416,198 posts and 105,651 registered users. "Website 19" required its users to continually share child pornography in order to gain and keep membership.

"Website 19" operated on the "Tor" computer network that is designed specifically to facilitate anonymous communication over the internet. In order to access the Tor network, a user must install computer software that is publicly available, either by downloading software to the user's existing web browser, downloading free software available from the network's administrators, or downloading a publicly-available third-party application. Using Tor prevents someone attempting to monitor an internet connection from learning what sites a user visits and prevents the sites the user visits from learning the user's physical location. Because of the way Tor routes communication through other computers, traditional IP identification techniques are not viable. Websites that are accessible only to users within the Tor network can also be set up within Tor. "Website 19" was just such a website. A user could only reach websites like "Website l9" if the user was operating within the Tor network.

In June of 2014, a foreign law enforcement agency (now identified as the Queensland Police Service of Australia) arrested the administrator of "Website 19." Queensland Police was able to assume control of

"Website 19" from a computer server located within its own jurisdiction. "Website 19" operated under control of the Queensland Police until December of 2014, when "Website 19" ceased to operate. Queensland Police provided backup copies of "Website 19" and other evidence to the Federal Bureau of Investigations (FBI).

Examination of "Website 19" revealed a profile with the username "austinjim2." Further investigation would eventually link that username with the Defendant in this case. According to the "Affidavit in Support of Search Warrant" submitted by Special Agent Rodney A. Sanchez:

> 16. While accessing "Website 19" in an undercover capacity using an account previously seized by law enforcement, an undercover FBI agent observed the user profile of "Website 19" user "austinjim2." Profile information on "Website 19" may include contact information and other information that is supplied by the user. It also contains information about that user's participation on the site, including statistical information about the user's posts to the site and a categorization of those posts.
>
> 17. The profile page of user "austinjim2" indicated this user originally registered an account on "Website 19" on July 16, 2012. According to the user "austinjim2's" profile, this user was a VIP (Very Important Person) Member of "Website 19" . . .
>
> 18. According to the statistics on user "Austinjim2's" profile page, between July 16, 2012, and December 3, 2014, this user made a total

of approximately 143 postings to "Website 19" . . .

* * *

30. However, because of the [Tor] Network software utilized by "Website 19," any logs of user activity on the site, if they contained IP address information at all, would have only contained the IP addresses of the last computer through which the communications of "Website 19" users were routed before the communications reached their destinations (the destination being "Website 19"). It is not possible to trace such Internet use back through the Network to the actual users who sent the communications or requests for information. Those IP address logs therefore could not be used to locate and identify users of "Website 19."

31. [Foreign law enforcement agency ("FLA 1")] advised the FBI that in early November 2014, acting independently and according to its own national laws, FLA 1 uploaded a hyperlink to a file within a forum on "Website 19" that was accessible only to registered members of "Website 19." The hyperlink was advertised as a preview of a child pornography website with streaming video. When a "Website 19" user clicked on that hyperlink, the user was advised that the user was attempting to open a video file from an external website. If the user chose to open the file, a video file containing images of child pornography began to play, and FLA 1 captured and recorded the IP address of the user accessing

> the file. FLA 1 configured the video file to open an Internet connection outside of the [Tor] Network software, thereby allowing FLA 1 to capture the user's actual IP address, as well as a session identifier to tie the IP address to the activity of a particular "Website 19" user account.
>
> Evidence Related to Identification of user "austinjim2"
>
> FLA 1 reported to FBI that on November 11, 2014, user "austinjim2" signed into "Website 19" and accessed the video file described in the previous [section] from IP address 107.211.10.40.
>
> 32. In December of 2014, an Administrative subpoena was issued to AT&T in regards to IP address 107.211.10.40 on November 11, 2014. A review of the results obtained identified the following account holder:
>
> c. Christian C. Winchell

Upon the foregoing facts, a search warrant issued for the Petitioner's residence. Evidence uncovered during the search resulted in the Petitioner's arrest and the ensuing indictment.

The Case:

Petitioner was charged by indictment with Count I: production of child pornography, in violation of 18 U.S.C. § 2251(a); Count II: transporting and shipping child pornography, in violation of 18 U.S.C. § 2252A(a)(1); Counts III and IV: possession of

prepubescent child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

On September 10, 2015, Petitioner entered a plea of guilty to Counts I, II and III of the indictment. The Government agreed to dismiss Count IV. Sentencing was deferred pending preparation of a presentence investigation report (PSI). Sentencing was held on July 22, 2016. The Honorable Sidney A. Fitzwater, District Judge, sentenced Petitioner to serve 360 months in the Federal Bureau of Prisons (BOP) as to Count I, followed by a consecutive term of 120 months BOP as to Count II, followed by an additional consecutive term of 120 months BOP as to Count III, for a total sentence of 600 months (50 years) imprisonment. Restitution was also ordered in the amount of $1,445,619.63.

Petitioner appealed. On July 16, 2018, the Fifth Circuit Court of Appeals vacated the restitution order and remanded for reconsideration. *United States v. Winchel*, 896 F.3d 387 (5th Cir. 2018) (No. 16-11208).

On September 17, 2018, the district court entered an amended judgment in accordance with the Fifth Circuit's mandate. The amended judgment reduced the restitution award to $2,000.00. The custodial portions of the sentence remained unchanged.

Petitioner thereafter filed a motion to vacate, set-aside or correct sentence pursuant to 28 U.S.C. § 2255,

on September 9, 2019.[1] The motion raised the following three (3) grounds for relief:

> Ground One: Ineffective assistance of counsel—Defendant was denied the effective assistance of counsel as guaranteed by the 6th Amendment to the United States Constitution, where counsel failed to investigate the tactics employed by law enforcement to obtain Defendant's IP address and/or the veracity of the affidavit in support of search warrant;
>
> Ground Two: Ineffective assistance of counsel—Defendant was denied the effective assistance of counsel as guaranteed by the 6th Amendment to the United States Constitution, where counsel failed to move for suppression of the evidence based on a violation of the international silver-platter doctrine;
>
> Ground Three: Defendant received an unwarranted sentencing disparity in comparison with other user/members of "Website 19."

Contemporaneously with the § 2255 motion, Petitioner filed a request for discovery seeking permission to have the computers and electronic devices which were seized by the Government during execution of the search warrant at his residence examined by a forensic expert to retrieve evidence supporting his allegations of ineffective assistance of counsel (IAC).

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[1] An amended § 2255 motion which corrected a procedural deficiency was subsequently filed on October 14, 2019.

The Government filed a response to the § 2255 motion on January 27, 2020. With respect to Ground One, the Government first suggested that, by entering a guilty plea, Petitioner waived any claim that counsel rendered ineffective assistance prior to the plea "by operation of law." The Government cited *United States v. Glinsey*, 209 F.3d 386 (5th Cir. 2000), for the proposition that a voluntary guilty plea waives all nonjurisdictional defects, including IAC claims, except to the extent counsel's ineffectiveness is alleged to have rendered the guilty plea involuntary. The Government asserted that Petitioner made no claim that his plea was involuntary.

The Government further argued that Grounds One and Two should be denied because Petitioner failed to present "contemporaneous evidence" to support the allegations that he would not have entered the plea but for trial counsel's deficient performance.

As to the substance of Grounds One and Two, the Government argued the § 2255 motion should be denied because trial counsel undertook the very investigatory steps which Petitioner claimed should have been taken, but were not. In support, the Government submitted an affidavit of trial counsel wherein counsel attested he retained computer forensics expert Lance Sloves to look into the "computer aspects" of Petitioner's case. Counsel further attested he was aware that Lance Sloves met with FBI Agent Rodney Sanchez to view "computer documents." Counsel further attested that he discussed with Petitioner his

"rights to proceed via motion to suppress," and that the decision to enter the plea was a "joint strategy."

As to Ground Three of the § 2255 motion, the Government argued the claim was precluded by the waiver of appellate and post-conviction remedies that Petitioner agreed to as part of the plea, and otherwise should be considered procedurally defaulted. The Government noted Petitioner had not shown cause and prejudice to overcome the procedural bar.

Petitioner filed his reply to the Government's response on March 27, 2020. Addressing first the Government's argument relating to the facial sufficiency of the IAC claims, Petitioner argued his claims complied with the governing standard set-forth in *Hill v. Lockhart*, 474 U.S. 52 (1985). Petitioner noted it is axiomatic that, where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases," citing *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Petitioner reasoned that when a defendant alleges his counsel's deficient performance affected his decision to plea, he is necessarily challenging the voluntariness of his plea based on IAC.

As to the Government's argument that Petitioner had not presented any "contemporaneous evidence" proving he would have opted for trial instead of taking the plea, Petitioner highlighted that *Lee v. United States*, 582 U.S. 357 (2017)—the first case to discuss a

"contemporaneous evidence" component to a finding of prejudice—was decided after an evidentiary hearing. Petitioner reiterated that the instant IAC claims alleged trial counsel did not investigate a particular line of defense and failed to move for suppression of the evidence; that Petitioner alleged, under oath, that he would not have entered the plea but for counsel's deficiencies; and that Petitioner requested an evidentiary hearing and filed a request for discovery seeking to further substantiate his claims. Petitioner argued it would be unjust to deny his IAC claims for failing to present "contemporaneous evidence" in support of his allegations without affording him the opportunity to do precisely that at an evidentiary hearing.

Petitioner also highlighted several deficiencies in the affidavits attached to the Government's response and explained how they do not conclusively refute his IAC claims.

Insofar as the appeal waiver in relation to Ground Three, Petitioner argued the waiver should not be invoked because he could not have ascertained the alleged disparities between his onerous 600-month sentence and the other member/users of "Website 19" at the time he was sentenced on July 22, 2016.

The Magistrate issued a report and recommendation on January 25, 2021. App. D. The Magistrate first addressed Ground Three of the § 2255 motion regarding the sentencing disparity, finding the claim was waived and procedurally defaulted. App. D.

As to Grounds One and Two relating to IAC, the Magistrate concluded the claims were waived by Petitioner's voluntary guilty pleas. App. D. The Magistrate found that the record of the plea colloquy "refutes [Petitioner's] self-serving assertions that his plea was unknowing and involuntary." App. D. The Magistrate suggested that Petitioner's claims were driven by "buyer's remorse" rather than any defect in the guilty plea procedure. App. D. Citing to *Lee* and *United States v. Crain*, 877 F.3d 637 (5th Cir. 2017), the Magistrate concluded that Petitioner "presents no 'contemporaneous evidence'—only self-serving, belated assertions—that his plea was unknowing and involuntary due to counsel's allegedly ineffective assistance." App. D.

The Magistrate rejected Petitioner's request for an evidentiary hearing, concluding that, "Because Winchel's claims lack merit for reasons wholly supported by the record, as previously noted herein, no evidentiary hearing is required."[2] App. D.

Petitioner filed his objections to the Magistrate's report and recommendation on February 9, 2021. Petitioner objected to the Magistrate's finding that Ground Three was waived because the facts giving rise to the claim were unknown and undiscoverable at the time Petitioner had agreed to the waiver.

Next, Petitioner objected to the Magistrate's finding that Grounds One and Two were waived by entry of Petitioner's guilty plea. Petitioner argued the

[2] Petitioner's request for discovery was also terminated as "moot" by separate order. App. E.

Magistrate's reliance on the "contemporaneous evidence" rule enunciated in *Lee* was misplaced and that prejudice resulting from his particular IAC claims is more appropriately evaluated under *Hill*. Petitioner further argued the Magistrate erred in finding that his IAC claims are not fundamentally related to the voluntary nature of the plea. Petitioner noted that *Hill* does not require a movant to expressly state that counsel's deficient performance "rendered the plea involuntary"; rather, a movant need only demonstrate a reasonably probability he would not have entered the plea but for counsel's deficient performance.

Lastly, Petitioner objected to the Magistrate's conclusion that an evidentiary hearing was not required because Petitioner's claims "lack merit for reasons wholly supported by the record. . . ." Petitioner noted the Magistrate never actually reached the merits of the claims, but instead applied a procedural bar as to all three grounds.

On February 25, 2021, the district judge issued an order overruling Petitioner's objections and adopting the findings, conclusions, and recommendation of the Magistrate. App. C.

Petitioner thereafter filed an application for a certificate of appealability (COA) to the Fifth Circuit. On January 4, 2022, the Fifth Circuit issued an order granting a COA. App. B.

After briefing by the parties, the Fifth Circuit issued its opinion affirming the judgment of the district court on May 18, 2023. App. A. The Fifth Circuit did

conclude that the district court erred in its determination that Petitioner's guilty plea barred consideration of his IAC claims. App. A. Nevertheless, the court affirmed the denial of the § 2255 motion on independent grounds, concluding that Petitioner "failed to provide contemporaneous evidence showing that counsel's alleged deficient performance caused him prejudice." App. A.

This petition timely follows.

REASONS FOR GRANTING THE PETITION

I. Supreme Court Rule 10(a)—Whether the Fifth Circuit Court of Appeals has departed from the accepted and usual course of postconviction proceedings under 28 U.S.C. § 2255, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Section 2255 permits a federal prisoner to bring a collateral challenge by moving the sentencing court to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255(a). Once a petitioner files a § 2255 motion, the district court is required by statute to hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977). A district court abuses its discretion by denying an evidentiary hearing if the motion sets forth specific, controverted issues

of facts that are not conclusively negated by the record and that, if proved at the hearing, would entitle the petitioner to any relief. *United States v. Hayman*, 342 U.S. 205, 220-21 (1972).

Contested fact issues in § 2255 cases must be decided on the basis of evidentiary hearings. As this Court has explained, even if the Government contends that the petitioner's allegations are "improbable and unbelievable," if the petitioner makes specific and detailed assertions in his motion and affidavit that create contested issue of fact that, if true, entitle him to relief, an evidentiary hearing is warranted. *Machibroda v. United States*, 368 U.S. 487, 494-95 (1962); *see also Fontaine v. United States*, 411 U.S. 213, 214-15 (1973) (vacating and remanding for an evidentiary hearing where the petitioner's motion for "relief under § 2255 sets out detailed factual allegations" that, if true, would support his contention that his "confession, his waiver of counsel, and the uncounseled plea of guilty" were all coerced); *Blackledge*, 431 U.S. at 75 (1977) (explaining that "[i]n administering the writ of habeas corpus and its § 2255 counterpart, the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment," and remanding because the "record of the plea hearing did not, in view of the allegations made, conclusively show

that the prisoner (was) entitled to no relief") (footnote and internal citations omitted).

A. The court failed to give Petitioner's verified § 2255 motion proper consideration as the functional equivalent of an affidavit.

In this case, Petitioner filed a verified § 2255 motion containing specific and detailed allegations of fact in relation to his claims of ineffective assistance of counsel. The § 2255 motion was sworn to by Petitioner under penalty of perjury, giving it the same force and effect as an affidavit. *Napper v. United States*, 2020 U.S. App. LEXIS 9816 (6th Cir. March 27, 2020) ("Napper submitted his § 2255 motion under penalty of perjury, and such a verified motion to vacate has the same force and effect as an affidavit."); *Dennis v. United States*, 2011 U.S. App. LEXIS 26543 (6th Cir. August 2, 2011) ("Generally, a verified motion to vacate, submitted under penalty of perjury, has the same force and effect as an affidavit.); *Riddick v. Angelone*, 22 Fed. Appx. 164, 165 (4th Cir. 2001) ("Riddick's verified petition is the equivalent of an affidavit.").

Specifically, Petitioner alleged he informed defense counsel that he never "clicked on a hyperlink" as alleged in paragraph number 31 of the affidavit for search warrant. He alleged that during the time his case was pending trial, the FBI was under intense scrutiny for its employment of Network Investigative Technique (NIT), an invasive type of spyware the FBI

used to obtain the IP addresses of users visiting another high profile website. He alleged an examination of his computer devices would have revealed whether such a tactic was employed by the FBI and/or foreign entity in this case. At minimum, an expert could have determined through inspection of the computer whether Petitioner had indeed clicked on a hyperlink which caused him to exit the protections of the Tor network. Petitioner alleged he requested trial counsel hire an expert to examine the computer devices seized during the search of his residence and to look for evidence to support his theory of government hacking; however, to Petitioner's knowledge such a forensic examination never occurred. He alleged that his computer had been infiltrated by the Queensland Police Service in Australia, who were acting in cooperation with and as agents of the United States as unified members of the Violent Crimes Against Children International Task Force (VCACITF). He alleged that counsel failed to advise him of the "international silver platter" doctrine or discuss the viability of a motion to suppress before counseling him to enter a plea.

To the extent the court had no evidence before it to conclude the Petitioner's sworn allegations were false, the court was required by law to afford the verified § 2255 motion the same force and effect as an affidavit. Accordingly, a hearing was required under § 2255(b) to resolve any issues disputed by the Government.

B. The court determined the credibility of witnesses solely from affidavits which contained disputed questions of material fact.

In its response to Petitioner's § 2255 motion, the Government attached an affidavit of trial counsel, Reed Prospere. In said affidavit, Mr. Prospere alleged he "hired Lance Sloves, a highly recommended, former federal Agent to look into the computer aspects of this case on behalf for Mr. Winchel." Yet, Mr. Prospere offered no explanation as to what the general term "computer aspects" means in this context, neither did he attest to which specific devices Mr. Sloves examined, neither did he attest to what type of information Mr. Sloves was targeting through his examination. Consequently, there is no way of knowing whether Mr. Prospere specifically instructed Mr. Sloves to examine Petitioner's computer for evidence relating to the existence of the alleged hyperlink and of tampering, hacking, or infiltration as set-forth in the § 2255 motion.

With respect to a potential motion to suppress, Mr. Prospere's affidavit alleged:

> Mr. Winchel and I discussed his rights to proceed via motion to suppress as well as entering a plea and hoping to advantage Mr. Winchel by presenting mitigation evidence on his behalf. It was a joint strategy decision between the two of us to do a plea. His signature and initials on the plea papers fully indicate

> that there was full discussion by us and that he voluntarily agreed to do the plea.

Yet, Mr. Prospere offered no insight as to what was specifically discussed regarding Petitioner's "rights to proceed via motion to suppress as well as entering a plea. . . ." Did Mr. Prospere inform Petitioner there were viable grounds to proceed on a motion to suppress? Were any of those grounds premised on the falsified affidavit for search warrant or the infiltration of Petitioner's computer by a foreign law enforcement agency acting as an agent of the United States?

Overall, Mr. Prospere's affidavit was lacking the specificity required to conclusively refute the sworn allegations in Petitioner's § 2255 motion. Conversely, the gaps in Mr. Prospere's affidavit underscored the need for an evidentiary hearing due to the several contested issues of material fact which remained unresolved.

In its opinion affirming the district court's denial of the § 2255 motion, the Fifth Circuit Court of Appeals agreed that the district court erred when it applied the plea waiver to Petitioner's claims of ineffective assistance of counsel. However, rather than remand to permit the district court to consider the claims on their merit, the Fifth Circuit determined that "independent grounds in the record allow us to affirm the district court's denial . . . that is, Winchel has failed to provide contemporaneous evidence showing that counsel's alleged deficient performance caused him prejudice." App. A. (citation omitted). The Fifth Circuit concluded:

> Here, Winchel argues that he would not have pleaded guilty if counsel (1) had hired an expert and investigated the Government's IP evidence, and (2) had moved to suppress evidence, asserting the "international silverplatter doctrine." The record, however, does not support these arguments.
>
> To the contrary, the record shows that counsel *did* investigate the Government's IP evidence and that counsel *did* hire an expert to evaluate Winchel's claims. The Government submitted an unchallenged affidavit from counsel indicating that (1) he was paid to hire a computer expert, and that (2) he hired and consulted with that expert. Counsel's affidavit also indicates that following the expert's investigation, Winchel and counsel discussed options on how to proceed, including filing a motion to suppress. Ultimately, the record shows they jointly decided against filing such a motion.

App. A. (emphasis in original).

The above findings by the Fifth Circuit are erroneous for two primary reasons: (1) Mr. Prospere's affidavit is vague and overbroad with respect to material events which transpired and contested issues of fact. It does not specify whether those matters which Petitioner conveyed to Mr. Prospere relating to the IP address were the target of his investigation, or whether Mr. Sloves specifically examined the Petitioner's personal computer for evidence of hacking or infiltration by a foreign source; and (2) Mr. Prospere's affidavit was

not "unchallenged" because Petitioner's verified § 2255 motion asserted facts which Mr. Prospere either contested or failed to address with specificity.

By ignoring the sworn factual allegations in Petitioner's § 2255 motion and crediting Mr. Prospere's contrary assertions, the Fifth Circuit essentially held a "paper hearing" and deprived Petitioner of the right to present evidence to support his claims. Not only does this run afoul of the plain language of § 2255(b), it is directly contrary to the well-established rule that contested issues of fact may *not* be resolved by affidavits alone. *Thomas v. United States*, 737 F.3d 1202, 1206 (8th Cir. 2013) ("[T]he general rule is that a hearing is necessary prior to the motion's disposition if a factual dispute exists. The district court is not permitted to make a credibility determination on the affidavits alone; thus if the decision turns on credibility, the district court must conduct a hearing."); *Friedman v. United States*, 588 F.2d 1010, 1015 (5th Cir. 1979) ("contested fact issues in § 2255 cases cannot be resolved on the basis of affidavits"). As this Court observed long ago:

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

Machibroda, 368 U.S. at 495 (quoting *Walker v. Johnston*, 312 U.S. 275, 287 (1941)).

C. The court failed to grant a hearing pursuant to § 2255(b) for Petitioner's claims which are not conclusively refuted by the record.

Section 2255 provides a practical and streamlined approach for resolving motions filed under the rule. It requires the court to hold a hearing if the claims are not conclusively refuted by the record. § 2255(b). Contested issues of fact, witness credibility, admission of evidence *de hors* the record, **all these things must be resolved at a hearing**. A court may not find that one particular witness is more credible that another when there exist conflicting affidavits, without first conducting a hearing. Yet, that is precisely what occurred here when the Fifth Circuit declared Mr. Prospere's affidavit "uncontested" and relied on his assertions to deny Petitioner's claims.

Consequently, the Fifth Circuit has departed from the accepted and usual course of postconviction proceedings under § 2255 and this Court should exercise its supervisory power to correct it.

II. Supreme Court Rule 10(c)—Whether the decision of the Fifth Circuit Court of Appeals conflicts with and/or grossly misapplies this Court's decision in *Lee v. United States*, 582 U.S. 357 (2017).

A. The decision assigns Petitioner the additional evidentiary burden to provide "contemporaneous evidence" in support of his assertion that he would not have entered the plea but for counsel's deficient performance.

It is remarkable that, despite having full knowledge that Petitioner had never been afforded an evidentiary hearing on his claims in accordance with the requirements of § 2255(b), the Fifth Circuit nonetheless concluded Petitioner failed to provide "contemporaneous evidence" to support his *post hoc* assertion that, but for counsel's errors, he would have insisted on going to trial. App. A.

In *Lee*, the first case to mention the "contemporaneous evidence" rule, a defendant who was subject to deportation entered a guilty plea based on his counsel's erroneous assurance that he would not be deported. *Id.* at 361-62. Upon learning counsel was mistaken and that he would, in fact, be deported after serving his prison sentence, Lee sought to vacate his conviction arguing he received ineffective assistance of counsel. *Id*. at 362.

In discussing prejudice, this Court acknowledged that "not all errors are of the same sort," and it

distinguished those claims which "turn on [a defendant's] prospects of success and are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession," *Lee*, 582 U.S. at 365, from claims such as Lee's where he "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that." *Id*. In that context—where prejudice cannot be weighed by the likelihood of success of a particular defense or motion—this Court instructed that "**[c]ourts** should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. **Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences**." *Id*. at 369 (emphasis added).

This relevant passage from *Lee* is plain and unambiguous. It is clearly directed to the judiciary. It cautions "courts" from upsetting a plea solely because of a defendant's bald assertions and then encourages "judges" to look for "contemporaneous evidence" to substantiate those assertions.

B. The decision inherently requires "contemporaneous evidence" to now be pled within the § 2255 motion.

Notwithstanding the unambiguous language in *Lee*, the Fifth Circuit is of the view that the relevant passage imposes an additional evidentiary burden **on**

the defendant to provide "contemporaneous evidence" of his or her preferences as a predicate to obtaining relief. In the instant case, the Fifth Circuit affirmed the Petitioner's appeal because he "failed to provide contemporaneous evidence showing that counsel's alleged deficient performance caused him prejudice." App. A. What's more, **this conclusion regarding a want of evidence was reached in summary fashion, with no consideration to the fact that Petitioner was never afforded a hearing pursuant to § 2255(b).** The implication, according to the Fifth Circuit, is that satisfaction of the "contemporaneous evidence" burden must now be demonstrated within the § 2255 motion as a pleading requirement in order to avoid summary denial of the claim.

Essentially, the Fifth Circuit reads *Lee* to mean: (1) It is the Petitioner's evidentiary burden to prove that "contemporaneous evidence" exists to support his assertion that he would not have entered the plea but for counsel's deficient performance; (2) This evidentiary burden must be sufficiently pled and proven within the § 2255 motion; and (3) The claims may be summarily denied without a hearing if Petitioner fails to carry his burden to prove "contemporaneous evidence" through the pleadings. All of this results from a grossly over-expansive reading and misapplication of *Lee*.

As previously mentioned, the relevant passage from *Lee* where this Court announces the "contemporaneous evidence" rule is written directly to and for "judges." *Id* at 369. And logically so; judges are the

ultimate finders of fact in any § 2255 proceeding. As trier of fact, the judge is charged with considering all testimony and evidence presented at the hearing and determining how much weight, if any, to assign it.

When a defendant files an IAC claim alleging he or she would not have entered the guilty plea but for counsel's deficient performance, this assertion necessarily becomes evidence. It is a sworn attestation by a material witness, whether the attestation appears in a verified § 2255 motion, a separate affidavit, or via testimony while under oath at an evidentiary hearing. The judge will determine how much weight to afford the defendant's attestation in light of all other relevant factors. In the majority of cases, those factors include the likelihood that a certain defense and/or legal challenge would have been successful. As explained by this Court in *Hill*:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would

> have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at 60.

In *Lee*, however, this Court was faced with a circumstance where the assessment of prejudice did not "turn on [a defendant's] prospects of success and are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have, but did not, seek to suppress an improperly obtained confession," *Lee*, 582 U.S. at 365. Rather, Lee "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that." Instead, Lee insisted he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. *Id*. at 366.

Essentially, because Lee's IAC claims did not involve the loss of a viable defense or a suppression issue—matters in which prejudice is measured in large part by the likelihood of success at trial—Lee's sworn, *post hoc* assertion alleging he would not have entered the plea but for counsel's deficiencies was the **only evidence** the Court had before it to weigh prejudice with his particular type of claim.

It was under these "unusual circumstances" that this Court announced the "contemporaneous evidence" rule **as a guidepost for judges** who must determine how much weight to assign the evidence of a defendant's *post hoc* assertion that he would not have entered the plea. If a judge determines that actions of the defendant or circumstances at the time of the plea offer tend negate his current assertion, the judge is free to assign it little to no weight and to conclude the defendant has failed to show a reasonable probability he would have forgone the plea.

The Fifth Circuit has taken *Lee*'s "contemporaneous evidence" rule drastically out of context. It was never meant to be an additional evidentiary burden for defendants litigating these types of IAC claims. Had this Court intended to impose an additional evidentiary burden on defendants, it could have plainly done so with language such as "In addition to a defendant's *post hoc* assertion that he or she would not have entered the plea but for counsel's deficient performance, **the defendant** must submit proof of contemporaneous evidence which supports his expressed preferences." (Emphasis added). Yet, for sound reason this Court did not do so.

C. The decision failed to afford Petitioner a hearing to present evidence in support of his claims and then summarily denied those claims for failing to support them with "contemporaneous evidence."

Assuming *arguendo* this Court did intend for the "contemporaneous evidence" rule announced in *Lee* to create an additional evidentiary burden for defendants, how was Petitioner in this case expected to carry this additional evidentiary burden to prove his claim without a § 2255(b) hearing?

Rather than remand the matter to the district court for a proper hearing, the Fifth Circuit essentially held a "paper hearing" and relied solely upon the affidavit of Mr. Prospere to conclude that Petitioner's claims were facially insufficient. The Fifth Circuit completely disregarded Petitioner's verified § 2255 motion and the several contested issues of material fact which remained unresolved between said motion and Mr. Prospere's affidavit. After deciding remand for a hearing would be unnecessary, the Fifth Circuit then faulted Petitioner for failing to "provide[] contemporaneous evidence that but for counsel's errors, he would have insisted on going to trial." App. A.

In other words, the Fifth Circuit concluded Petitioner had no right to an evidentiary hearing at which to submit evidence in support of his claims, **but then denied those very same claims on the basis that Petitioner failed to submit evidence to support them**. Respectfully, the Fifth Circuit's logic here is

tantamount to a judicial "gotcha." Nowhere within the statutory framework of § 2255 or this Court's precedent is this type of "Catch-22" approach authorized. Nor should it be. To deprive a movant of the right to present evidence on his behalf and then, in true "gotcha" fashion, to deny those same claims for failure to present evidence implicates the most basic precepts of due process. Surely, Petitioner has a due process right to procedures in post-conviction that comport with fundamental fairness and are "[ ]adequate to vindicate the substantive rights provided" by § 2255. *DA's Office v. Osborne*, 557 U.S. 52, 69 (2009).

Petitioner should have been granted a hearing on his IAC claims based on the plain language of § 2255(b). Petitioner's claims are predicated upon trial counsel's failure to investigate the veracity of the search warrant and failure to present legal challenges to the evidence via a motion to suppress. These claims were not conclusively refuted by the record, nor by Mr. Prospere's vague affidavit. Of central consideration to the prejudice inquiry is the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea and whether the legal challenges would have been successful. This analysis necessarily required the court to engage in fact-finding and to reach legal conclusions as to those matters before it could properly determine whether Petitioner suffered prejudice resulting from counsel's omissions. Naturally, any determination that a motion to suppress would have a high likelihood of success is precisely the type of evidence which would support a

reasonable probability that Petitioner would not have entered the plea.

Unfortunately, no inquiries into the viability of Petitioner's claims were ever considered in this case, because Petitioner was never afforded an opportunity to submit evidence in support of his claims at an evidentiary hearing. And if proof by "contemporaneous evidence" is to be considered an additional evidentiary burden for the Petitioner, it is but one more reason why the Fifth Circuit's affirmance without a proper hearing in this case must be reversed.[3]

The burden on a § 2255 movant to obtain an evidentiary hearing has been described as "fairly lenient." *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003). For Petitioner, however, attaining a hearing has been quite the struggle. Petitioner, "denied an opportunity to be heard, 'has lost something indispensable, however convincing the [Government's] showing.'" *Hayman*, 342 U.S. at 220 (quoting *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 116 (1934)).

CONCLUSION

For the reasons stated herein, Petitioner prays that the petition for writ of certiorari be **GRANTED** to clarify the proper burden and application of the

[3] Notably, even Lee was afforded an evidentiary hearing on his § 2255 motion in the lower court long before the case found its way to the steps of this Court. *Lee*, 582 U.S. at 362.

"contemporaneous evidence" rule announced in *Lee* and to review whether the Fifth Circuit departed from the accepted and usual course of § 2255 proceedings in deciding this case.

Respectfully submitted,

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