No:

In the
Supreme Court of the United States

LEON FREDERICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Eleventh Circuit's Ruling that Frederick had Waived an Issue Not Raised in the District Court, but Based Instead Upon a Perceived Concession in his Application for a Certificate of Appealability ("COA"), Constitutes a Merits Determination at the COA Stage in Violation of this Court's Decision in *Buck v. Davis*, 137 S.Ct. 759 (2017), Which Held That When a Court of Appeals Considers a COA it Lacks Jurisdiction to First Decide the Merit of an Appeal.

A Granting of a Writ of Certiorari Should be Permitted to Determine Whether the Manifest Injustice Required Vacating of the Conviction in Light of this Court's Decision in *United States v. Jones*, 132 S. Ct. 945 (2012).

Writ of Certiorari Should be Granted to Determine Whether Trial Counsel Rendered Ineffective Assistance in his Failure to Object to Agent Vattiato's Use of the Witherspoon Material.

A Writ of Certiorari Should be Granted to Determine Whether this Court's Discretion Should be Exercised in Light of the Court's Decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

A Writ of Certiorari Should be Granted to Determine Whether the District Court Erred in Not Permitting Frederick to Expand the Record as to Grounds 4, 5 and 7 Based on Prosecutorial Misconduct.

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the Eleventh Circuit and the United States District Court, Southern District of Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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Leon Frederick, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit whose judgment is herein sought to be reviewed is an unpublished opinion in *United States v. Frederick*, Docket No: 16-10550-F (June 13, 2017) and is reprinted as Appendix A to this petition.

The opinion of the Court of Appeals for the Eleventh Circuit for rehearing and suggestion for rehearing *en banc* whose judgment is herein sought to be reviewed is an unpublished opinion in *United States v. Frederick*, Docket No: 16-10550-F (August 28, 2017) and is reprinted as Appendix B to this petition.

The opinion in the denial of Frederick's Title 28 U.S.C. § 2255 is an unpublished opinion in *United States v. Frederick*, Docket No. 14cv23225, (December 14, 2015) and is reprinted as Exhibit C to this petition.

The Report and Recommendation of the Magistrate Judge in the denial of Frederick's Title 28 U.S.C. § 2255 in *United States v. Frederick*, Docket No. 14cv23225 (August 8, 2015) is reprinted as Exhibit D to this petition.

STATEMENT OF JURISDICTION

The Eleventh Circuit's denial of Frederick's Title 28 U.S.C. § 2253 was entered on August 28, 2017.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

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

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

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> 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.
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> * * * * *
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> 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.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

On August 4, 2009, a Grand Jury sitting in the Southern District of Florida returned an indictment against Leon Frederick and multiple co-defendants.

In the first indictment, the United States alleged several different conspiracies and dozens of substantive offenses involving the sale and possession of cocaine and cocaine base. The crimes, for the most part, occurred in the Coconut Grove area of the City of Miami. Frederick was particularly charged with Counts 1, 2-3, 5-7, 9, 11-12, 15-16, 20-23, 25, 29, 31-32 and 39.[1] Several allegations of entitlement of forfeiture were also charged.

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[1] In Count 1, the Government alleged that between April 2007 and August 6, 2009, Frederick participated with others in a conspiracy involving possession with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base in violation of Title 21 U.S.C. § 841(a)(1) and 846. Count 2 alleged that Frederick and Witherspoon possessed cocaine on April 11, 2007 in violation of Title 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count 3 alleged that on or about May 23, 2007 Frederick and Witherspoon possessed cocaine. In Count 5, the indictment alleged that on July 23, 2008 Frederick possessed with the intent to distribute crack. Count 6 alleged that Frederick and Donaldson possessed crack with the intent to distribute on or about July 30, 2008. Count 7 alleged that Frederick and Burke on November 18, 2008 possessed crack with the intent to distribute, Count 9 alleged that Frederick and Burke possessed crack on November 25, 2008 with intent to distribute. In Count 11 the Government alleged Frederick and Burke possessed crack on December 5, 2008 with intent to distribute. On December 9, 2008, alleged Frederick and Burke also possessed with intent to distribute crack cocaine. Count 15 alleged Frederick and Burke possessed crack with intent to distribute on January 8, 2009. Count 16 alleged that from around April 2007 through July 29, 2009 Frederick and several co-Defendants, conspired to possess with intent to distribute 500 grams or more of cocaine. Count 20 alleged that Frederick, Burke and Brock possessed with intent to distribute crack on or about February 9, 2009. Count 21 alleged Frederick and several co-

On August 25, 2009, a first superseding indictment was filed adding co-Defendant Larry Little and also an additional charge in Count 51 alleging that on or about August 6, 2009, Frederick possessed with intent to distribute 500 grams or more of cocaine.

On January 7, 2010, as part of the defense strategy, Frederick filed a motion to suppress wiretap evidence and other evidence under the "fruits of the poisonous tree" doctrine. Several defense motions followed as well, including the request that the confidential informant who made the controlled buys be disclosed in preparation for trial. The motion to suppress wiretap was referred to a Magistrate Judge who held a hearing on the matter along with a second motion to suppress evidence Frederick filed on March 19, 2010.[2] By this time, a second superseding

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Defendants from around April 2007 through on or about July 29, 2009 conspired to possess with intent to distribute 500 grams or more of cocaine. Count 22 alleged Frederick and several co-Defendants agreed on or about March 10, 2009 to possess with intent to distribute 500 grams or more of cocaine. Count 23 alleged Frederick and Donaldson on March 11, 2009 possessed with intent to distribute cocaine. Count 25 alleged that on or about March 12, 2009 Frederick and Barber possessed with intent to distribute 500 grams or more of cocaine. In Count 29 it alleged on April 2, 2009 Frederick and Burke possessed with intent to distribute crack. Count 31 alleged that on or about April 8, 2009 Frederick and Burke possessed with intent to distribute crack. Count 32 alleged Frederick on or about April 15, 2009 possessed with intent to distribute crack. Finally, Count 39 alleged that on or about May 20, 2009 Frederick and Broomfield possessed with intent to distribute crack.

[2] By this time most of the co-Defendants had already pled guilty or had agreed to plead guilty. As such, only Frederik, Butler, Capers, Fance, Sams, Smith and Little were charged with the second superseding indictment.

indictment was filed where the Government alleged in Counts 42 and 43 that firearms were possessed by Frederick in violation of Title 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 922(g)(1). On April 15, 2010, the Magistrate Judge issued a Report Recommendation that Frederick's motion to suppress be denied. Objections to the Report were filed on April 22, 2010. The Court adopted the Report on May 12, 2010.

On June 7, 2010, the first day of trial, the Government filed an information pursuant to Title 21 U.S.C. § 851 which it sought enhanced penalties for Frederick if he were convicted under certain drug counts. During the trial, Frederick filed three written motions for mistrial. The Court denied the first motion for mistrial via a written order. After the Government rested its case in chief, Frederick moved for a judgment of acquittal and provided the Judge with a Memorandum of Law on the matter, however, the same was denied. On June 23, 2010, the jury returned a verdict of guilty on all counts charged.

On September 8, 2010, Frederick was sentenced to concurrent terms of life imprisonment on Counts 1, 10 and 31; 360 months imprisonment as to Counts 11-13, 16-24, 28, 30, 33, 39 and 41; and 120 months imprisonment as to Counts 43 with a consecutive term of 60 months imprisonment as to Count 42.

A timely notice of appeal was filed, however, on February 14, 2013, the Eleventh Circuit Court of Appeals affirmed Frederick's sentence and conviction.

On March 4, 2013, Frederick filed a timely petition for rehearing *en banc*, which the Court denied on April 13, 2013. (See *United States v. Capers,* 708 F.3d 1286 (11th Cir. 2013)). Frederick proceeded to the United States Supreme Court with a request for a petition for writ of certiorari, which the Supreme Court ultimately denied on October 7, 2013. (See, *Frederick v. United States,* 134 S. Ct. 239 (2013)).

On August 29, 2014, Frederick filed his timely Title 28 U.S.C. § 2255, alleging multiple allegations of ineffective assistance of counsel. After briefing the matter, the District Court denied the petition by adopting the Magistrate's Report and Recommendation.

On June 13, 2017, the Eleventh Circuit Court of Appeals denied the request for a certificate of appealability and a request for rehearing was denied on August 28, 2017.

STATEMENT OF THE FACTS

1. Overview of the Offense

This case followed a two-year investigation into a cocaine trafficking organization operating out of the Coconut Grove neighborhood in Miami, Florida. United States Drug and Enforcement ("DEA") Agent Nicholas Vattiato was one of the lead agents in the investigation that culminated in the arrest of the defendants in this case. During the investigation, agents used various methods to gather information, including working with confidential informants ("CIs"), surveillance, and obtaining wiretap authorizations for some of the Defendants' phones. Frederick was the leader of the Coconut Grove drug distribution operation.

From 2007 to 2009, co-defendant Laman Witherspoon sold drugs from a location on Oak Avenue in Coconut Grove. During the investigation into the narcotics trafficking of Witherspoon and his associates, law enforcement officers conducted a judicially authorized Title III wire interception of Witherspoon's cellular telephone from June 23, 2007, to July 22, 2007. Conversations recorded during that interception evidenced multiple sales of narcotics from Frederick to Witherspoon and his associates.

Witherspoon estimated that, during 2009, he purchased two to three ounces of cocaine from Frederick three times a month. In 2009, Frederick and a partner, Ronald Burke operated out of a duplex located on Carter Street in Coconut Grove. Burke sold small amounts of cocaine and crack to retail purchasers, and Frederick sold quantities consistent with wholesale distribution.

Burke and Frederick sold approximately $1,500–7,000 of cocaine and crack cocaine from the Carter Street location each day. Evidence collected from wiretaps of Burke's and Frederick's cellular telephone calls from January to March 2009, was intercepted pursuant to wiretaps and the calls included discussions between Frederick and Burke about police presence, whether to shut down operations and what to do with the drugs. They also included a number of conversations about specific drug transactions, with many requests by Burke for more drugs to supply their retail purchasers. A search of the Carter street property produced powder and crack cocaine as well as police scanners that had been used to monitor City of Miami police channels. During a search of Frederick's condominium in Sunny Isles, Florida, agents seized an AK–47. In addition, the search produced two kilograms of cocaine, empty baggies with cocaine residue, $47,000 cash, and documents bearing Frederick's name.

The investigation resulted in a series of indictments charging as many as thirty defendants with various drug conspiracy and substantive offenses. Of those originally indicted, many pleaded guilty and agreed to cooperate by testifying for the government. Frederick, along with several co-defendants, was charged in a 43-count second superseding indictment returned on March 31, 2010, with the offenses of conspiring from April 2007, through August 2009, to possess with intent to distribute five or more kilograms of cocaine and fifty or more grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1)-(b)(1)(A)(iii), 846 and 18 U.S.C. § 2 (Count 1) and possession with intent to distribute five or more grams of a substance containing a detectable amount of cocaine base, also known as "crack," in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2.

Frederick was also charged with possessing a firearm in furtherance of the drug trafficking crime set forth in Count 41, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 42), and with being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 43). Id. Frederick entered pleas of not guilty to the crimes charged and the case proceeded to jury trial along with codefendants Bishop Capers and Larry Little.

Following the ten-day trial, the jury deliberated for two days. The jury returned its verdicts, convicting Frederick of the conspiracy charged in Count 1, all but one of the nineteen distribution counts as charged in Counts 10–13, 16–24, 28, 30–31, 33, 39 and 41, and the firearms violations alleged in Counts 42 and 43. (Cr-DE# 1177). As to Count 39, the jury convicted Frederick of possession and distribution of only five grams of crack, as opposed to the fifty grams charged.

Relevant to this writ of certiorari, Frederick argued in his Title 28 U.S.C. § 2255 the following:

- He received ineffective assistance of trial counsel because counsel misrepresented to the Court that the government had provided him and counsel with the 2007, wiretap application, affidavit and order, authorizing the interception of wire communications of co-defendant Laman Witherspoon.

- He received ineffective assistance of trial counsel because counsel failed to investigate, interview and subpoena agents involving 2007, Witherspoon investigation.

- He received ineffective assistance of trial counsel because his lawyer failed to obtain and challenge the Warrant Application, Affidavit and Judicial Order pertaining to Laman Witherspoon.

- His convictions are violative of his constitutional rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), because the government failed to provide the Witherspoon Warrant Application and related documents ten days before the suppression hearing and trial counsel rendered ineffective assistance for failing to raise the prosecutorial misconduct claim.

- His convictions are violative of his constitutional rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), because the government improperly withheld information regarding the Witherspoon wiretap (i.e., a denied extension of the wiretap authorization) and trial counsel rendered ineffective assistance for failing to raise the prosecutorial misconduct claim.

- He received ineffective assistance of trial counsel because his lawyer failed to challenge the unlawful use of a GPS Mobile Tracking Device.

- His convictions are violative of his constitutional rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), because the government failed to provide the Witherspoon Warrant Application, Affidavit and Judicial Order authorizing the interception of wire communications of co-defendant Laman Witherspoon 10-days before trial and trial counsel rendered ineffective assistance for failing to raise the prosecutorial misconduct claim.

- He received ineffective assistance of trial counsel at sentencing because counsel failed to seek a sentence in accordance with the Fair Sentencing Act of 2010 ("FSA").

- He received ineffective assistance of appellate counsel because his lawyer failed to raise on direct appeal the issue that he had not been provided with the 2007, wiretap application, affidavit, and order, authorizing the interception of wire communications of co-defendant Laman Witherspoon.

- He received ineffective assistance of trial counsel because his lawyer failed to challenge law enforcement's authority to review materials related to the Witherspoon wiretap.

The District Court and the Eleventh Circuit Court of Appeals refused to grant relief, this writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

WHETHER THE ELEVENTH CIRCUIT'S RULING THAT FREDERICK HAD WAIVED AN ISSUE NOT RAISED IN THE DISTRICT COURT, BUT BASED INSTEAD UPON A PERCEIVED CONCESSION IN HIS APPLICATION FOR A CERTIFICATE OF APPEALABILITY ("COA"), CONSTITUTES A MERITS DETERMINATION AT THE COA STAGE IN VIOLATION OF THIS COURT'S DECISION IN *BUCK v. DAVIS*, 137 S.CT. 759 (2017), WHICH HELD THAT WHEN A COURT OF APPEALS CONSIDERS A COA IT LACKS JURISDICTION TO FIRST DECIDE THE MERIT OF AN APPEAL?

A Writ should be granted is because the Eleventh Circuit has departed from the accepted and usual course of judicial proceedings in such a way as to call for an exercise of this Court's supervisory powers. Furthermore, the Eleventh Circuit has implicitly decided on the important factual question in a way that conflicts with relevant decisions of this Court.

As this Court has stressed, a COA is required so long as a habeas petitioner makes a "threshold" showing that the District Court's decision was "debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Thus, "[a] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Instead, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Id.* at 327 (quoting *Slack v. McDaniel*, 529 U.S. 473, 474, 484 (2000) and 28 U.S.C. § 2253(c)(2)). That standard is satisfied when reasonable jurists could either disagree with the district court's denial of relief or determine that "the issues presented ... deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327, 336.

In this case, the District Court adopted the Magistrate's Report and Recommendation, combining Grounds I, II, III, IV, V and VII into one substantive responsive ground regarding whether counsel possessed Witherspoon's documentation relating to the wiretap information. The Court in adopting the Report and Recommendation, which are the grounds for the granting the writ of certiorari, determined that counsel was provided the 2007 wiretap information from the Witherspoon investigation during discovery. However, although it appears that may be the case, this did not address the issues raised in the Title 28 U.S.C. § 2255.

The grounds raised were as they relate those failures, as to whether "counsel failed to *investigate, interview and subpoena agents involved in the 2007 Witherspoon investigation*." As to Ground 2 whether counsel "failed to obtain *and challenge the Witherspoon wiretap application, affidavit, and order authorizing the Witherspoon wiretap.*" Grounds 1 and 2 feed into Grounds 3, 4, 5 and 7 as they relate to the *failure to object to these documents* specifically, not whether counsel had the documents or not. Whether the documents were provided to his attorney or not is an issue. The issue is whether ineffective assistance of counsel claim should have been allowed to proceed further based on counsel's failure to ***interview, subpoena or challenge the Witherspoon affidavit application in its entirety***, not whether he had the documents. Attacking the Witherspoon affidavit or its authors has been addressed by the District Court. It matters not that counsel *might have* possessed the documents when the motions to suppress were filed, what matters before the Court was whether counsel rendered assistance ***when he failed to "investigate, interview, and subpoena the agents"*** relating to the Witherspoon investigation. Those issues strike at the heart of the arguments raised in the Title 28 U.S.C. § 2255. It is counsel's lack of performance relating to the Witherspoon investigation that triggered the granting of the Certificate of Appealability and now a writ of certiorari.

The District Court never reached the conclusion that Frederick's counsel was not ineffective in failing to challenge the Witherspoon affidavits, but only relied on the fact that counsel might possess the documents. Possession with failure to act reaches a level of ineffectiveness. See, *Kimmelman v. Morrison,* 477 U.S. 365, 385-387, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986) ("a single, serious error may support a claim of ineffective assistance of counsel.") Ironically, the Magistrate's Report established that trial counsel was in receipt of the copies of the application for the wiretaps, however did not explain how counsel does render ineffective assistance when he failed to follow through and pursue a defense of the case with this information in mind. Furthermore, the Report clarified that the Witherspoon wiretaps were provided to trial counsel until _sometime after the suppression proceedings_ and _possibly not until the time of the trial_.

At that stage, the Magistrate Judge was taking Fredericks' position that counsel was not in possession of all the wiretap information from the Witherspoon investigation in order to provide an adequate defense of the case. Late possession is tantamount to no possession at all.

The record was inconclusive to support the Magistrate's position that counsel "reviewed the various discovery material provided by the Government, as well as the wiretap application and supporting affidavits." The government cannot interject their versions of events and their strategy as to why counsel chose one avenue of defense or appeal over another. Just as the court cannot construe strategic defenses that counsel does not offer, *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990) neither should the government be permitted to do so. The government should not and cannot present tactical decisions for trial counsel's actions. All the record establishes is that according to the Government's theory, that counsel was provided the Witherspoon wiretap information at some stage. The record is inconclusive that counsel took the matter a step further by relying on those documents in the proper preparation of a defense.

Ironically, the Magistrate in the "catch-all provision" took the position that *even* if somehow counsel can be deemed to have rendered deficient performance regarding the Witherspoon wiretap material, that Frederick could still not establish an ineffectiveness claim because he cannot satisfy the prejudice prong of *Strickland*. This is where the request a writ of certiorari comes in its most important aspect. Without the granting of an evidentiary hearing, the District Court could not reach a conclusion that Frederick was not in fact prejudiced in light of the counsel's lack of performance. Counsel was only granted a *limited* evidentiary hearing in order to properly obtain exculpatory information regarding the Witherspoon wiretap affidavits. Knowing that the hearing was limited in its source, counsel had a reasonable expectation to fully prepare for the hearing and to use the time to Frederick's best advantage in order to be able to ascertain all the defense information required based on the limitations placed by the District Court.

As such, Frederick cannot overcome the prejudice hurdle ***unless*** he is able to place counsel on the stand and extrapolate from counsel's testimony as to what exact procedures counsel took in preparing or utilizing the Witherspoon documents. Without inquiring from counsel during an evidentiary hearing the extent of use of the Witherspoon documents, Frederick, nor any Petitioner can ever overcome *Strickland's* prejudice hurdle. This hurdle cannot be overcome based on the limited resources placed upon Frederick by the District Court.

The allegations of ineffectiveness are directed *specifically* to counsel's actions and/or inactions based on the possession of the documents which he had in his possession. By failing to advise Frederick of the existence or the possession of the documents, also causes an ineffective assistance claim because Frederick was not in a defensive position where he could assist his counsel in clarifying what the statements made during the recorded conversations actually meant.

Ironically in footnote 14 of the Report, where it requested that the Title 28 U.S.C. § 2255 be denied, the Magistrate Judge notes that Frederick alleged that trial counsel failed "*to raise the argument that the Witherspoon wiretap had not been renewed after the 30 day trial during the suppression hearing*." This is an allegation of ineffective assistance of counsel that required an evidentiary hearing since it strikes at counsel's strategy if any. Frederick's allegation that his attorney was ineffective by failing to follow a proper procedure in the defense of the case was clear. The Government by responding that trial counsel possessed all the documents did not address this allegation of ineffectiveness as raised by Frederick.

Furthermore, all the allegations as to the substantial presentation of the motion to suppress under direct appeal and the District Court's refusal to permit an additional evidentiary hearing on the matter were raised under the substance that the District Court did not err as a matter of law. None of the allegations of ineffective assistance of counsel as relating to the Witherspoon affidavit were ever raised on direct appeal. Therefore, the Magistrate's position that these issues were addressed by the Eleventh Circuit Court of Appeals and rejected as meritless, does not address the ineffective assistance of counsel allegations raised in the pleadings. They merely address the *legal substance* of the motion to suppress documents filed in the District Court. None of the ineffective assistance of counsel allegations has ever been addressed before the Appellate Court and was only raised for the first time in the Title 28 U.S.C. § 2255.

As such, since none of the Magistrate's positions were justified in the denial of the Title 28 U.S.C. § 2255, this Court's intervention by granting a writ of certiorari will be required.

THE GRANTING OF A WRIT OF CERTIORARI SHOULD BE PERMITTED TO DETERMINE WHETHER THE MANIFEST INJUSTICE REQUIRED VACATING OF THE CONVICTION IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES v. JONES*, 132 S. CT. 945 (2012).

Frederick alleged in ground VI of Title 28 U.S.C. § 2255 that he received an ineffective assistance when his counsel failed to challenge the use of the global-positioning-system ("GPS") mobile tracking device placed on his vehicle as a violation of the Fourth Amendment that has now been recognized as a Constitutional violation in light of this Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012). Although the Magistrate Judge was correct that counsel's performance at the time cannot be viewed in light of a yet to be decided Supreme

Court decision, the Court was required to grant a Certificate of Appealability to avoid a manifest injustice error to proceed.

This Court's decision in *Jones* was issued on January 23, 2012, after Frederick had proceeded to trial and had been convicted. Prior to *Jones*, the Eleventh Circuit held that a warrant was not required to install an electronic tracking device on the exterior of a vehicle parked in a public place. See *United States v. Smith*, 741 F.3d 1211, 1224 (11th Cir. 2013). Although, counsel could not have foreseen or anticipate the change in the law, and as such, cannot be held ineffective for the lack of foresight, (see *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001)) the manifest injustice clause permits this Court to grant relief, since it is evident that had the decision been rendered while Frederick was on trial or on appeal, all the illegally obtained GPS tracking data from the vehicle would have been suppressed.

Under the manifest injustice theory, Frederick provided sufficient facts which supported a finding that the exceptions of the procedural default in not being able to raise the issue should have been overcome. The manifest injustice applies in a situation where "(1) new or substantially different evidence emerges at trial; (3) the earlier ruling was clearly erroneous and will work as a manifest injustice if implemented today." See *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984). See *Hill v. Jones*, 81 F.3d 1015, 1017 (11th Cir. 1996)(A petitioner is not entitled to a hearing on the threshold issues of cause or prejudice or manifest injustice without first proffering specific facts to support a finding that one of these exceptions to the procedural default will exist.) A manifest injustice applies when a prior decision was clearly erroneous and to continue with that decision would cause a manifest injustice of the current opinion.

Allowing illegally obtained the GPS tracking information, which this in *Jones* determined to be unconstitutional, triggers the manifest authority that the Court had to remand the case to the District Court for an evidentiary hearing to determine what relief Frederick is entitled to once the illegally obtained tracking from the GPS vehicle was suppressed. Although the Eleventh Circuit precedent at the time prohibited counsel from raising the issue, allowing Frederick's conviction to stand on what this has now determined to be a Fourth Amendment violation, flies on the face of the United States Constitution.

As such, this Court must agree that granting a writ of certiorari to address this specific issue is appropriate at this time to determine when an intervening Supreme Court precedent Constitutional decision is rendered, which is directly applicable to a case before it, should the Court disregard prior precedence that prohibited the raising of the issue at the time.

A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN HIS FAILURE TO OBJECT TO AGENT VATTIATO'S USE OF THE WITHERSPOON MATERIAL.

In the Title 28 U.S.C. § 2255, Frederick alleged that Special Agent Vattiato was not part of the original Witherspoon investigation which commenced in 2007, therefore, should not have been allowed access to the material that came out of the earlier Witherspoon investigation. The Magistrate Judge merely adopted the Government's position and denied the petition under the assumption that Frederick cannot demonstrate that Agent Vattiato was not operating in the performance of his official law enforcement duties when he made the use of the earlier wiretap information. However, the Magistrate Judge could not reach a conclusion that Agent Vattiato *did, in fact, have access to the information* under the authority of his law enforcement position. The issue is just inconclusive as per the record before the Court. As the case law in this Circuit currently stands, an evidentiary hearing was required in order to have counsel explain why he did not inquire whether Agent Vattiato had access to the documents or not at the time that he relied upon the Witherspoon documents in order to secure the current wiretap.

Although Frederick cannot challenge the suppression of the evidence under Title 18 U.S.C. § 2520 and can only file for a civil action, had counsel inquired into Agent Vattiato's wrongdoings, it could have shed light into the wrongdoings of the other agents that were relying on the Witherspoon affidavits as well. Just because Agent Vattiato's actions do not warrant relief in the criminal proceeding, an investigation into Agent Vattiato's wrongdoings, would have warranted additional evidence that could have been extrapolated to use during the motion to suppress hearing. The relief at this stage is not the issue, it's the relief and possible different outcome in the motion to suppress hearing that matters in the proceedings. While Frederick is not entitled to relief from the criminal aspect of the case, the Magistrate Judge could not have reached a conclusion that Agent Vattiato's information would not have led to additional defense suppression of evidence that would have resulted in a favorable outcome to Frederick's cause.

Without an evidentiary hearing, the District Court could not have reached a conclusion that counsel's failure to investigate Agent Vattiato's improper access to the Witherspoon wiretap information, would not have resulted in additional exculpatory information being released or located which could have been used to secure a favorable result during the motion to suppress hearing. See, *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994)(evidentiary hearing required unless § 2255 motion, files, and trial record "conclusively show" petitioner entitled to no relief); *Virgin Islands v. Weatherwax*, 20 F.3d 572, 573 (3rd Cir. 1994)(petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to petitioner would entitle him to relief*); Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994) (same); *Shaw v. United States*, 24

F.3d 1040, 1043 (8th Cir 1994) (same); *Nichols v. United States*, 75 F.3d 1137, 1145-46 (7th Cir. 1996) (petitioner entitled to evidentiary hearing on claim of ineffective assistance of counsel when record inconclusive on issue); *United States v. Witherspoon,* 231 F.3d 923 (7th Cir. 2000).

As such, the granting of a writ of certiorari on whether Agent Vattiato's involvement with the Witherspoon wire communications, which were ultimately used to secure a wire against Frederick, should have been addressed via an evidentiary hearing to determine the extent of prejudice that Frederick will suffer as a result of the improper disclosure of the information.

A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THIS COURT'S DISCRETION SHOULD BE EXERCISED IN LIGHT OF THE COURT'S DECISION IN *DORSEY v. UNITED STATES*, 132 S. CT. 2321 (2012).

Although Frederick raised under his Title 28 U.S.C. § 2255 that counsel rendered ineffective assistance by failing to advise the Court that he should receive benefit of the Fair Sentencing Act in order to receive a lower sentence, the Magistrate Judge alternative relied on the fact that Frederick was sentenced as a career offender and therefore could not reap the benefits of the Supreme Court's *Dorsey* decision.

The court reasoned that in light of the Eleventh Circuit's decision in *United States v. Tellis*, 748 F.3d 1305 (11th Cir. 2014), that Frederick was not entitled to relief. Under the *Tellis* decision, the court held that the Fair Sentencing Act does not apply to the career offender guideline calculations. Frederick's reasoning is that this court has yet to address whether the Fair Sentencing Act guideline applications should apply to guideline imposed sentences such as the career criminal guideline enhancement as in Frederick's case. Allowing a writ of certiorari to be granted would allow Frederick the opportunity reap the benefit of the Fair Sentencing Act.

As such, Frederick respectfully prays that this Honorable Court will grant a writ of certiorari to determine whether the Eleventh Circuit's decision in *Tellis*, can still be considered good law in light of this Court's decision in *Dorsey* and whether the Fair Sentencing Act provisions should apply to career criminal cases just as any other criminal case.

A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN NOT PERMITTING FREDERICK TO EXPAND THE RECORD AS TO GROUNDS 4, 5 AND 7 BASED ON PROSECUTORIAL MISCONDUCT.

The Magistrate Judge briefly addressed that Frederick attempts to supplement the record based on prosecutorial misconduct and related ineffective assistance of trial counsel claims as Docket Entry 22, 23 with the attached exhibits on his Title 28 U.S.C. § 2255. Those issues remain unaddressed. Without requiring a response from the Prosecutor, the Magistrate Judge takes the position that the issues should be denied and then addresses the substantive points of law why the issues should not be granted relief.

Under Title 28 U.S.C. § 2255, the actions that the Court must take when a Title 28 U.S.C. § 2255 petition and supplemental pleadings are filed, are straightforward:

> (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.*

To somehow have the Magistrate Judge follow the Government's theory that they did not "knowingly use perjured testimony or that the falsehood was not material" without requiring that the Government provide a response to the allegations raised therein, does not follow the direct wording of Title 28 U.S.C. § 2255. Without addressing whether the Government was involved in inappropriate actions, which might result in the prosecutor becoming a witness, the Court cannot reach a conclusion that none of the improprieties occurred. Once an allegation of impropriety is raised in a Title 28 U.S.C. § 2255, a response to the same should be requested and a prompt hearing thereon should be granted, if it is plausible, that Frederick has raised a possibility of impropriety. Docket entry 22, in this case, raises allegations of improprieties and prosecutorial misconduct issues that have been discovered in the Southern District of Florida. The record established the threshold requirements which should have triggered a response from the

Government on the allegations raised. Without a response, the Court cannot reach a one-sided conclusion that Frederick is not entitled to relief.

The Magistrate Judge merely took the position that Frederick cannot support the allegations of prosecutorial misconduct with nothing more. Although Frederick he is relying on evidence that is extrinsic to the case file before this Court. As the file before the Court currently stood at the time, the Magistrate Judge could not have reached a conclusion on the prosecutorial misconduct allegations, without requiring a response from the Government or the Prosecutor's office.

As such, this Court must agree that the granting of a writ of certiorari on this claim, should be granted in order to allow the record to be further developed based on the allegations of prosecutorial misconduct raised by Frederick in his original pleadings and specifically in Docket entry 22 and 23 of the Title 28 U.S.C. § 2255.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the Eleventh Circuit.

Done this 21, day of November 2017

I hereby do certify that pursuant to Penalty of Perjury Title 28 U.S.C. § 1746 that on this 21 day of November 2017 I signed and mailed this document via the Federal Bureau of Prisons' Legal Mail System.

Respectfully submitted,

L. Frederick

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