IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO.: 17-7359

UNITED STATES OF AMERICA,

Appellee

versus

CORVAIN T. COOPER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION

INFORMAL OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure, Appellant submits that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Hon. Robert J. Conrad, District Court Judge
2. AUSA Elizabeth Margaret Greenough, Esq., counsel for Appellee
3. Patrick Michael Megaro, Esq., counsel for Appellant
4. Halscott Megaro, P.A., counsel for Appellant
5. AUSA Steven R. Kaufman, Esq., former counsel for Appellee
6. AUSA Dianne Jones McVay, Esq., former counsel for Appellant

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument on this matter, as the claims raised in this appeal concern the breadth and scope of Due Process under the Fifth Amendment, and the Sixth Amendment's right to effective assistance of counsel. Accordingly, counsel believes that oral discussion of the facts and applicable precedent would assist the Court in determining a just resolution.

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STATEMENT OF JURISDICTION

This Jurisdictional Statement is submitted pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A). Pursuant to Rule 22 of the Federal Rules of Appellate Procedure, Cooper cannot take an appeal of the denial of his Petition for Habeas Corpus relief brought under 28 U.S.C. § 2254 "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22.

The District Court, which declined to issue Cooper a certificate of appealability, had jurisdiction under 28 U.S.C. § 2255. (Doc. 65 at p. 12). Pursuant to 28 U.S.C. § 1291, this Court would have jurisdiction over this appeal if it were to grant the instant application.

STATEMENT OF THE ISSUES

Cooper seeks a certificate of appealability regarding the following issues:

1. Whether the Appellant's Sentence of Life Imprisonment Without the Possibility of Parole as a Result of Two Prior Drug Convictions Is Lawful Where Both Predicate Convictions Were Vacated Under California State Law; and

2. Whether Appellant Received Effective Assistance of Counsel Where His Trial Attorney Failed to Object to Opinion Evidence By Unqualified Witnesses, Permitted Damaging Hearsay to Be Admitted, and Failed to Object to a Calculation of Drug Amounts by a Witness Which Was Based on Pure Speculation.

STATEMENT OF THE CASE

On August 20, 2013 Cooper was charged in a Third Superseding Indictment with the following allegations: Count # 1, conspiracy to distribute and possession with intent to distribute 1000 kilograms or more of marijuana (21 U.S.C. § 841(b)(1)(A)), Count # 2, conspiracy to commit money laundering (18 U.S.C. § 1956(h)), and Count # 4, structuring transactions (31 U.S.C. § 5313(a)). (Docket Entry # 1). A special information pursuant to 21 U.S.C. § 851 was also filed against Cooper, alleging two prior felony convictions for possession of drugs in the California state courts. (Docket Entry # 190).

From October 15-18, 2013 Cooper was tried alongside two co-defendants, at the conclusion of the trial, Cooper, alongside both codefendants were found guilty of all charges. Cooper was sentenced on count #1 to life imprisonment without the possibility of parole. The Judge stated that it was "troubling for the court by the lack of discretion". (Docket Entry # 488, p. 14).

> [T]he Court is not comfortable with imposing a mandatory life sentence on a 34 year old individual without some discretion to consider the 3553(a) factors that a court normally is entitled to consider…The Court has no discretion. I'm not sure what I would do if I had discretion, but the absence of discretion is a difficult thing for the Court.

Id.

Cooper perfect an appeal to the United States Court of Appeals for the Fourth Circuit, which affirmed his conviction and sentence in an unpublished decision on October 2, 2015 in Docket # 14-4586.

On March 28, 2016, the United States Supreme Court denied certiorari, rendering his conviction final.

Subsequently, Cooper filed a petition pursuant to the California Penal Code 1170.18 (proposition 47) seeking vacatur of the felony conviction entered in Case # INGYA08050901, California Superior Court (Inglewood), Los Angeles County. (Docket Entry # 1-1).

The petition was granted on July 22, 2016, the felony vacated, and a misdemeanor conviction was substituted.

On November 10, 2016, Cooper filed a petition pursuant to 28 U.S.C. § 2255, seeking to vacate the sentence and conviction on the grounds that one of the predicate convictions had been vacated, and grounds that he received ineffective assistance of counsel in Criminal Case No. 3:11-cr-337-12. (Docket Entry # 1). The motion was amended the following day to correct an error in formatting. (Docket Entry # 2).

While the petition was pending, Cooper applied for relief under California's Proposition 64 law, seeking to vacate the predicate conviction in Case # BH SA 07215401, Beverly Hills, California, as alleged in the § 851 enhancement.

On February 16, 2017, the Government filed a motion to dismiss the Petitioner's motion to vacate, set aside or correct the sentence by the USA. (Docket Entry #6).

On February 22, 2017, Petitioner filed a response to the motion to dismiss by the Government, to dismiss the Government's motion to dismiss Petitioner's motion to vacate, set aside or correct sentencing. (Docket Entry # 7).

On May 24, 2017, the California court vacated that felony conviction and replaced it with a misdemeanor conviction. (Docket Entry # 9-1).

On June 8, 2017 Cooper moved to supplement his § 2255 petition, arguing that the second predicate felony conviction's vacatur further required resentencing. (Docket Entry # 9).

On October 2, 2017, the District Court granted the Government's motion to dismiss the § 2255 petition, denying Cooper relief, and declined to issue a Certificate of Appealability. (Docket Entry # 11, 12).

On October 10, 2017 Cooper timely filed a notice of appeal as to the judgement granting the Government's motion to dismiss, and declining to issue a Certificate of Appealability. (Docket Entry #15).

On November 1, 2017 Cooper timely filed a motion for extension of time, requesting 30 days, from November 6, 2017 to and including December 6, 2017. (Docket Entry #17).

STATEMENT OF THE FACTS

On August 20, 2013, Cooper was charged in a Third Superseding Indictment with Count # 1, conspiracy to distribute and possession with intent to distribute 1000 kilograms or more of marijuana (21 U.S.C. § 841(b)(1)(A)), Count # 2, conspiracy to commit money laundering (18 U.S.C. § 1956(h)), and Count # 4, structuring transactions (31 U.S.C. § 5313(a)). (Docket Entry # 1). A special information pursuant to 21 U.S.C. § 851 was also filed against Cooper, alleging two prior felony convictions for possession of marijuana in the California state courts. (Docket Entry # 190). One of the two predicate convictions was Possession of a Controlled Substance (Codeine), Case # INGYA08050901, California Superior Court (Inglewood), Los Angeles County, convicted on August 5, 2011, with a sentence of 2 years imprisonment.[1]

Cooper and two co-defendants were tried before the District Court and a jury from October 15, 2013 through October 18, 2013.

At trial, Detective James Beaver, an employee of the Charlotte-Mecklenburg Police Department assigned to a joint Federal task force, was the second witness to testify for the Government. Without objection, Detective Beaver was permitted to testify as to his familiarity with different grade of marijuana and street level pricing of marijuana according to different grades, testified "[law enforcement] was hearing

[1] That conviction is referenced in Paragraph # 52 of the Pre-Sentence Report (Docket # 362).

that the marijuana was being purchased on the West Coast for approximately 3- to 350 a pound." He further testified, without objection, as to various methods of shipping marijuana in bulk from past investigations, which involved using wooden crates sent through Federal Express, UPS, and the U.S. Postal Service, sending multiple shipments, the use of masking agents to cover the smell of marijuana and transporting marihuana via vehicles.

Beaver testified that on January 6, 2009 he received a phone call from a deputy sheriff in Los Angeles, California that a shipment of marijuana was headed through a freight carrier to Charlotte on January 9, 2009 with an intended recipient named James Roberts. He contacted the carrier and learned that the same recipient had previously received five other shipments. No objection was made to this testimony. He intercepted the crate and found two 55-gallon drums inside containing a total of 338 pounds of marijuana. Law enforcement then waited for someone to pick up the crate, who turned out to be Gerren Ezekeil Darty. Darty placed the crate in a rented truck and drove to a parking lot, where he left the truck and never returned. Beaver and other law enforcement agents took the marijuana from the truck and left the 55-gallon drums inside.

Without objection, Beaver testified that another law enforcement officer, not he, observed Darty driving in a car, and arrested him for driving with a suspended license. Without objection, Beaver testified that Darty called Cooper on January 6,

2009, but conceded that the telephone number Darty called was linked to an account owned by an individual named Michael Jackson. Through phone records, Beaver further testified that the same number communicated with co-defendant LaChappelle on 305 occasions. LaChappelle communicated with co-defendant Wade on a number of occasions as well.

Without objection, through Beaver, business records of the cargo carrier concerning the January 9, 2009 shipment as well as the prior shipments were introduced into evidence. Beaver testified that he subpoenaed records from the freight carrier and received records of additional past shipments that he believed contained marijuana. No objection was made by the defense.

Approximately 1 month later in February, 2009, Beaver received a call from a business owner who had found two discarded shipping crates on his property which contained a shipping label. Beaver inspected the crates and found 55-gallon drums in them as well. Even though they contained no marijuana, Beaver opined that they too had previously contained marijuana. Again, no objection was made by the defense.

Using these records of past shipments, Beaver added up the weights of each past shipment that he had determined had contained marijuana, added the 338 pounds of marijuana that had actually been recovered, and opined that approximately

5,000 pounds of marijuana had been shipped from California to Charlotte during the charged conspiracy. Defense counsel made no objection to this calculation.

Beaver testified that on January 28, 2013, he arrested Cooper. He testified that when he arrested him, "I seized the phone when he was arrested and I have been through his phone." As a result of inspecting Cooper's phone, he recovered various images and photographs which were introduced as evidence against Cooper. He also recovered numerous text messages, which were also introduced as evidence. Without objection, Beaver further testified that the text messages were coded language for drug transactions. No search warrant had been obtained for the cell phone, and trial counsel did not move to suppress the results of the search of Cooper's cell phone.

Finally, Beaver testified in his opinion, the recorded calls from the Mecklenburg County Jail were made by Cooper's voice. Again, no objection was made by trial counsel.

Agent Glen McDonald of the Department of Homeland Security testified that a Cash Transaction Report is a form that a bank or other financial institution is required to fill out for any cash transaction over $10,000.00. He testified that by using information he gained through interviews with bank employees about their practices and debriefings of money launderers, he learned that people laundering

money will make multiple transactions under $10,000.00 to get around the reporting requirement. No objection was voiced by trial counsel.

McDonald testified that money was deposited into accounts owned by co-defendants LaChappelle and Wade, and withdrawn or placed into "accounts applying to Corvain Cooper or associated with Corvain Cooper," which McDonald claimed were three accounts, one owned by an individual named Courtney Bradshaw, one owned by a corporation, and one owned by Cooper. McDonald admitted that he did not believe that Cooper was using his own accounts for money laundering purposes. McDonald testified that he obtained certified tax return records for Cooper, which showed no tax returns being filed in 2010, 2011, or 2012. On cross-examination, trial counsel brought out the fact that Cooper did not file tax returns for those years because he was incarcerated.

Police Officer David Rudy of the Beverly Hills Police Department in California testified that on June 19, 2009, he stopped a vehicle driven by Cooper, who gave him a driver's license bearing the name Leamon Mosely. Three other people were in the car with Cooper. He smelled burnt marijuana in the car, ordered the occupants out, and searched the vehicle, finding a shoe box with a quantity of marijuana in the trunk. He further testified that he found a piece of paper inside the car in the rear seat with the words "payes and owes" written on it, and immediately

recognized that to be a "drug dealer's checkbook." Trial counsel voiced no objection to this testimony.

On cross examination, trial counsel elicited testimony that none of the other three occupants in the car were arrested; that Cooper took full responsibility for the marijuana in the trunk; and that Cooper pled guilty to possessing the marijuana and was sentenced to two years in California state prison.

At the conclusion of trial, Cooper and both co-defendants were found guilty of all counts.

Represented now by undersigned counsel, prior to sentencing Cooper filed objections to the Pre-Sentence Report and a sentencing memorandum with the Court. (Docket Entry # 372, 430). In those documents, Cooper presented extensive mitigation evidence, objected to an enhancement for firearms possession, drug amount, and leadership role, and objected to a mandatory life sentence without parole on Eighth Amendment grounds, pointing out the disparity in sentences meted out to the co-defendants and others similarly-situated.

On June 18, 2014, Cooper appeared for sentencing. This Court recognized the severity of the mandatory life sentence, noting that it "would want to have discretion before imposing a life sentence. The absence of discretion is a troubling thing for the Court." (Docket Entry # 488, p. 5). Later during the sentencing, this Court stated that

> [T]he Court is not comfortable with imposing a mandatory life sentence on a 34 year old individual without some discretion to consider the 3553(a) factors that a court normally is entitled to consider…The Court has no discretion. I'm not sure what I would do if I had discretion, but the absence of discretion is a difficult thing for the Court.

(Docket Entry # 488, p. 14).

As a consequence, Cooper was sentenced to life imprisonment without the possibility of parole on Count # 1, and otherwise as indicated above. He unsuccessfully appealed to the Fourth Circuit from the conviction and sentence, raising four issues related to the conviction itself, and one issue related to sentencing: whether the Eighth Amendment prohibits the cruel and unusual punishment of mandatory life imprisonment without parole for a 34-year old man with two prior convictions for possession of marijuana and no history of violence. The United States Supreme Court denied certiorari, rendering his conviction final on March 28, 2016.

On or about June 8, 2016, Cooper filed a petition pursuant to California Penal Code 1170.18 (Proposition 47), seeking vacatur of the felony conviction entered in Case # INGYA08050901, California Superior Court (Inglewood), Los Angeles County. (Docket Entry # 1-1). The petition was granted on July 22, 2016, the felony vacated, and a misdemeanor conviction was substituted.

On November 10, 2016, Cooper filed a petition pursuant to 28 U.S.C. § 2255, seeking to vacate the sentence and vacate the conviction on the grounds that because one of the predicate convictions had been vacated, and on the grounds that he received ineffective assistance of counsel. (Docket Entry # 1). The motion was amended the following day to correct an error in formatting. (Docket Entry # 2).

Subsequently, Cooper applied for relief under California's Proposition 64 law, seeking to vacate the predicate conviction in Case # BH SA 07215401, Beverly Hills, California, as alleged in the § 851 enhancement. On May 24, 2017, the California court vacated that felony conviction and replaced it with a misdemeanor conviction. (Docket Entry # 9-1).

As a result, Cooper moved to supplement his § 2255 petition on June 8, 2017, arguing that the second predicate felony conviction's vacatur further required resentencing. (Docket Entry # 9).

On October 2, 2017, the District Court granted the Government's motion to dismiss the § 2255 petition, denying Cooper relief, and declined to issue a Certificate of Appealability. (Docket Entry # 11, 12). Cooper timely filed a notice of appeal on October 10, 2017. (Docket Entry # 13). This informal opening brief follows.[2]

[2] In the interest of full disclosure, Corvain Cooper has unsuccessfully applied to President Barack Obama for executive clemency, seeking commutation of the sentences imposed.

SUMMARY OF THE ARGUMENT

The District Court made several erroneous factual and legal determinations in denying Cooper's claims. The petitioner is entitled to a certificate of appealability because it is debatable whether he is entitled to resentencing because both of the predicate state convictions and sentences have been vacated subsequent to the conclusion of his direct appeal. Petitioners, both prior felony convictions have been vacated and reclassified as a misdemeanor, the defendant asks to be resentenced with the enhancement from the prior to felonies now vacated, no longer applying. Furthermore, the petitioner also states as his second point, that a certificate of appealability should issue because, its debatable whether Cooper's trial counsel provided inefficient assistance of counsel by failing to object to opinion testimony by witness who were not qualified as experts, failed to object to damaging Hearsay, and failed to object to a calculation of drug amounts by a witness which was based on rank speculation. For these reasons Cooper should be issued a certificate of appealability.

POINT I – PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY BECAUSE IT IS DEBATABLE WHETHER HE IS ENTITLED TO RESENTENCING BECAUSE BOTH OF THE PREDICATE STATE CONVICTIONS AND SENTENCES HAVE BEEN VACATED SUBSEQUENT TO THE CONCLUSION OF HIS DIRECT APPEAL

A. Standard of Review

To show that a Certificate of Appealability should issue under 28 U.S.C. § 2253(c), Cooper need only make a substantial showing that jurists of reason could disagree with the district court's resolving his constitutional claims. See Miller-El v. Cockrell, 537 U.S. 322 (2003). Courts of Appeal ask only if the district court's decision was debatable. Id.; see also Bradshaw v. Estelle, 463 U.S. 880, 893 n.4 (1983). A determination related to a certificate of appealability is a separate proceeding, one distinct from the underlying merits. See Miller-El, 537 U.S. at 342 (citing Slack v. McDaniel, 529 U.S. 473, 481 (2000)).

To cross this low threshold, Cooper need not show that his "appeal will succeed," and the Court here should not deny him a Certificate of Appealability just because this Court might believe he will not show he is entitled to relief under § 2254. See Miller-El, 537 U.S. at 337. Cooper only needs to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

B. Argument on the Merits

California Penal Code § 1170.18 (enacted by Proposition 47) permits people who have been convicted of certain enumerated felonies to apply for vacatur of the conviction and sentence, and to be resentenced for a misdemeanor. Subdivision (k) of the statute states "[a]ny felony conviction that is recalled and resentenced ... or designated as a misdemeanor ... shall be considered a misdemeanor for all purposes." In Custis v. United States, 511 U.S. 485 (1994), the United States Supreme Court held that if a defendant "is successful in attaching [his] state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." Id. at 497.

Seven years later, the Supreme Court decided Daniels v. United States, 532 U.S. 374 (2001), where the Court held that "after an enhanced federal sentence has been imposed…the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction." Id. at 382. The Court further held that "[i]f any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." Id.

The Fourth Circuit has applied both Custis and Daniels in several cases, granting Certificates of Appealability from the denial of 28 U.S.C. § 2255 petitions seeking resentencing after vacatur of a state sentence. See United States v. Dorsey, 611 Fed.Appx 767 (4th Cir. 2015); United States v. Mobley, 96 Fed.Appx. 127 (4th

Cir. 2004); United States v. Gadsden, 332 F.3d 224 (4th Cir. 2003); United States v. Bacon, 94 F.3d 158 (4th Cir. 1996).[3]

Here, Petitioner's sentence in this case was enhanced by virtue of his California conviction in the Los Angeles County Superior Court. Both predicate felony convictions has been vacated and reclassified as a misdemeanor, and along with it, the felony sentence. Pursuant to Custis, Daniels, and current Fourth Circuit precedent, Petitioner is entitled to be resentenced, as the enhancement no longer applies.

[3] But see United States v. Diaz, 821 F.3d 1051 (9th Cir. 2016), denying resentencing for a defendant who was sentenced under 21 U.S.C. § 841(b)(1)(A) and subsequently successfully moved for relief under Proposition 47. Petitioner respectfully submits that the holding in Diaz is directly contrary to clearly-established Supreme Court law, as well as the law in the Fourth Circuit, and therefore should be disregarded.

POINT II - A CERTIFICATE OF APPEALABILITY SHOULD ISSUE BECAUSE IT IS DEBATABLE WHETHER COOPER'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO OPINION TESTIMONY BY WITNESSES WHO WERE NOT QUALIFIED AS EXPERTS, FAILED TO OBJECT TO DAMAGING HEARSAY, AND FAILED TO OBJECT TO A CALCULATION OF DRUG AMOUNTS BY A WITNESS WHICH WAS BASED ON RANK SPECULATION[4]

The United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

A. **Standard of Review**

The Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under Strickland, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so

[4] Although ineffective assistance of counsel was raised on direct appeal, the Fourth Circuit dismissed those arguments, ruling that Petitioner's ineffectiveness claims needed to be raised in a § 2255 petition to fully develop the record. Thus, they were not adjudicated on the merits, and are properly before this Court.

egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690.

B. Argument on the Merits

A. Failure to Object to Detective Beaver's Opinion Testimony Regarding Drug Trafficking and Expert Voice Analysis, Failure to Object to Police Officer Rudy's Expertise in Recognizing Drug Ledgers, and Failure to Object to McDonald's Expertise Without Qualification

The United States Court of Appeals for the Second Circuit recently held that expert testimony that relies upon hearsay and custodial interrogations violates the Confrontation Clause of the Sixth Amendment. United States v. Mejia, 545 F.3d 179, 198 (2d Cir. 2008) (expert testimony violates Crawford if [the expert]

communicate[s] out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion).

In Mejia, a law enforcement officer with extensive gang training was allowed to testify as an expert at trial regarding his experiences dealing with the MS-13 gang. The Second Circuit reversed, holding that his testimony "went far beyond interpreting jargon or code messages" and "addressed matters the average juror could have understood." Id. at 195. Further, by reciting what he had read in books, websites, and his experience on the Task Force, the officer's testimony became merely factual by nature and had lost its expert character; that is, "those parts of his testimony that involved purely factual matters…fell far beyond the proper bounds of expert testimony." Id. at 196. Finally, since the expert in Mejia simply repeated information he had read, heard, or seen, and gathered from debriefings of inmates, gang members, and received from secondary hearsay sources, the court held that he should not have testified since he merely relied on hearsay without applying any degree of expertise, in violation of the Confrontation Clause pursuant to Crawford.

Here, the testimony of Detective Beaver, Agent McDonald, and Officer Rudy regarding the drug business and money laundering was based on the same type of hearsay condemned in Mejia. Both Beaver and McDonald testified that their information about their respective topics came from debriefing cooperators, suspects, and from other law enforcement sources. Officer Rudy did not specifically

testify to that, but it was implied in his testimony. Thus, counsel could have, and should have objected.

Further, counsel failed to properly object to Detective Beaver's opinion testimony that the voice on the recorded jail calls was Cooper's voice. Beaver testified to no special training, experience, or prior qualifications in the field of voice recognition. Accordingly, counsel should have objected to this improper opinion testimony as well.

Her failure to do so was not a strategy or tactic, but objectively unreasonable, as this evidence greatly prejudiced Cooper. As a result of this testimony, the jury was permitted to draw conclusions that Petitioner's voice was on the recorded telephone call, and that the incriminating statements were made by him. Creating prejudice, that if it was timely objected by Petitioner's counsel, it would have jurors fairly debating what should be the outcome of the trial. The jury was permitted to conclude that because others had told Agent McDonald that these were methods to launder money and avoid the $10,000 reporting requirement, Petitioner had employed these same illegal methods, and was guilty of those counts.

B. Failure to Object to Detective Beaver's Calculation of Drug Amounts and Hearsay Business Records

Additionally, trial counsel failed to object to Detective Beaver's calculations of phantom drug amounts which were based on rank speculation, as argued above.

In addition, Detective Beaver's testimony was based almost entirely on hearsay from documents that he subpoenaed from the shipping company. Although not an employee of the company, or the custodian of their records, his testimony was used as the foundation for their introduction, which led directly to this calculation of drug weight. This failure unquestionably prejudiced Cooper, as this was the testimony that established a critical element of Count # 1. Furthermore, without this testimony, it is fairly debatable, that two different triers of facts would have reached the same conclusion.

C. Prejudice

But for counsel's errors, there is a significant probability that the verdict would have been different. Beaver's testimony filled in the gaps of several cooperating witnesses, who had credibility issues. Additionally, there was a lack of physical evidence that Petitioner conspired to distribute marijuana for the period of time ascribed to him; while there were some marijuana seizures close in time to the original indictment, there was a lack of physical evidence connecting Petitioner to the historical sales of marijuana. Additionally, there was a lack of evidence that he had entered the Western District of North Carolina. Accordingly, because counsel's errors affected the outcome of the case, a new trial is required.

CONCLUSION

The District Court erred in denying Cooper a Certificate of Appealability on any of his claims presented in his Petition. As held in Slack, an applicant for a certificate of appealability need not show the appeal will succeed on the merits and the District Court should not have denied the issuance of a COA "merely because it believes the applicant will not demonstrate an entitlement to relief." See Miller-El, 537 U.S. at 337. However, as argued above, the issues contained herein are fairly debateable. Based upon the record, and upon consideration of the foregoing, a Certificate of Appealability should issue to consider the merits of Cooper's claims.

Dated: Orlando, Florida
November 22, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman Font.

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties via CM/ECF on November 22, 2017

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