No. _____

In The
Supreme Court of the United States

COREY T. MCCAULEY,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an inter-circuit split on a critical controlling point of law creates a mandatory finding that reasonable jurists may disagree so as to require issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253.

PARTIES TO THE PROCEEDING

The parties are Petitioner, Corey T. McCauley and Respondents Secretary, Department of Corrections of the State of Florida and Florida Attorney General.

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Petitioner, Corey T. McCauley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit denying Petitioner's Request for a Certificate of Appealability appears at page 1 of the Appendix to the Petition. The

decision of the Eleventh Circuit denying Petitioner's Motion for Reconsideration appears at page 14 of the Appendix to the Petition. The District Court's Order Denying the Petition for Writ of Habeas Corpus appears at pages 2 to 13 of the Appendix to the Petition.

JURISDICTION

On July 22, 2014, the Eleventh Circuit entered its Order denying Petitioner's Request for a Certificate of Appealability. On September 3, 2014, the Eleventh Circuit entered its Order denying Petitioner's Motion for Reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2253 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 28 U.S.C. § 2253 provides in relevant part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

* * *

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (10) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

2. 28 U.S.C. § 2254 provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

3. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

4. The Sixth Amendment to the United States Constitution 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Course of Proceedings

The procedural history of this case, as accurately found by the district court, is as follows:

The record reflects that Petitioner was charged by Information with trafficking in cocaine while armed with a firearm. Defense counsel filed two motions to suppress the physical evidence and any statements or admissions made by Petitioner. The trial court held hearings on those motions, and then denied them. Petitioner subsequently entered a no contest plea. The trial court accepted the plea and sentenced Petitioner to a twenty-year term of imprisonment

with a ten-year minimum mandatory sentence. [App. 2].

On March 23, 2010, Petitioner filed a Motion for Post-Conviction Relief in the trial court and thereafter filed an Amended Motion for Post-Conviction Relief on June 2, 2010, raising four claims of ineffective assistance of counsel. [App. 3, 19]. The trial court denied Petitioner's Amended Motion for Post-Conviction Relief. [App. 4, 19]. Petitioner appealed the denial of his motion to the Florida First District Court of Appeal and the court issued a per curiam affirmed opinion without a written decision on April 12, 2011. [App. 4, 19].

Petitioner filed his Petition for Writ of Habeas Corpus in the Middle District of Florida on June 11, 2011. [App. 2]. Respondents filed their Answer to Petition for Writ of Habeas Corpus on February 28, 2012. [App. 2]. Petitioner filed a Reply to Respondent's Answer to Petition for Writ of Habeas Corpus on July 25, 2012. [App. 3]. The district court issued its Order denying McCauley's petition, denying a certificate of appealability, and dismissing the case with prejudice on April 23, 2014. [App. 2-13].

On June 16, 2014, Petitioner filed his petition for Certificate of Appealability with the Eleventh Circuit Court of Appeals. [App. 15-37]. On July 22, 2014, the Eleventh Circuit entered its Order denying Petitioner's Request for a Certificate of Appealability. [App. 1]. On August 14, 2014, Petitioner filed a Motion for Reconsideration. [App. 38-47]. On September 3, 2014,

the Eleventh Circuit entered its Order denying Petitioners' Motion for Reconsideration. [App. 14].

B. Factual Background

On April 5, 2007, Detective Vincent Hall (Detective Hall) of the Clay County Sheriff's Office executed a search warrant at McCauley's home, believing that the home was used to possess and conceal marijuana. [App. 19]. In his affidavit for the search warrant, Detective Hall swore that he received information from a "previously reliable confidential informant" that McCauley was to receive a shipment of marijuana from a man named Jimmy Wayne Hodges (Hodges) at McCauley's home on April 5, 2007. [App. 19]. During the execution of the search warrant, law enforcement officers recovered the charged cocaine and a firearm. [App. 19].

After McCauley was charged with one count of armed trafficking in cocaine (based on the evidence seized in the search), his trial counsel took the deposition of Detective Hall. [App. 19]. When counsel asked Detective Hall questions pertaining to the "previously reliable confidential informant," the detective refused to answer unless he was ordered to answer by the court. [App. 20]. However, Detective Hall did testify that, "none of the information in the affidavit came directly from Jimmy Wayne Hodges." [App. 20]. Later in the deposition, Detective Hall admitted to trial counsel that wiretaps were applicable to getting the search warrant. [App. 20]. However,

counsel failed to inquire how and to what extent such wiretaps were used in obtaining the search warrant.

In reality, there was never any "previously reliable confidential informant," and all information in the affidavit ascribed to him/her came from a wiretap targeting Hodges. [App. 20]. Moreover, the judge issuing the warrant was aware that all of this information had come from a wiretap. [App. 20]. The same judge had been the supervising judge with regard to the wiretap all along and knew that the information from the wiretap was the basis for Detective Hall's probable cause. [App. 20].

McCauley's trial counsel initially moved to suppress the fruits of the search warrant by arguing that the affidavit lacked probable cause. [App. 20]. At the hearing on the motion to suppress, which took place on October 4, 2007, Detective Hall continued to testify as though the information in the affidavit had come from a confidential informant and not a wiretap. [App. 20]. The judge presiding over the criminal case of McCauley was not the judge who issued the warrant, and thus had no knowledge that the "confidential informant" was actually a wiretap. [App. 20]. To compound the deception, the assistant state attorney who elicited Detective Hall's testimony at the hearing was also aware that there was no "confidential informant" and failed to disclose the same to the court. [App. 21]. Summarily, the State and Detective Hall not only provided false information in the search warrant affidavit to the judge issuing the warrant, but knowingly provided false information to

a different judge presiding over the hearing on the motion to suppress, who had no idea of the wiretap's existence. Trial counsel failed to cross-examine Detective Hall to glean further information regarding the fictitious informant.

McCauley subsequently filed a motion to reconsider the trial court's denial of his motion to suppress, as well as a second motion to suppress on the grounds that the warrant was not issued by a neutral and detached magistrate. [App. 21]. A second hearing was conducted on January 18, 2008. [App. 21]. Trial counsel failed to subpoena any witnesses to the hearing because, again, he was laboring under the assumption that the source of the information in the affidavit was indeed a "confidential informant." [App. 21]. Only at the end of the hearing was it implied that the "confidential informant" was actually a wiretap. [App. 21].[1] However, trial counsel failed to take notice of this disclosure. The trial court denied both McCauley's Motion for Reconsideration and his Second Motion to Suppress. [App. 22].

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[1] In its denial of McCauley's habeas petition, the district court did not read the record as concretely establishing the search warrant affidavit contained a lie. [App. 21]. Respectfully, the totality of the transcripts as well as Detective Hall's deposition testimony establish Hall's false testimony. [App. 21]. As discussed, infra, a § 2253(c) review to grant a certificate of appealability does not require a thorough dissection of the record. It is sufficient to find that reasonable jurists may disagree.

Because trial counsel failed to discover that the confidential informant was the wiretap, he did not pursue a motion to suppress pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). Instead, McCauley eventually entered a plea of no contest, reserving his right to appeal the denial of his dispositive motions to suppress. [App. 22]. On April 17, 2007, the trial court sentenced McCauley to twenty years in prison with a ten-year minimum mandatory. [App. 22]. Petitioner appealed his conviction and sentence to the Florida First District Court of Appeal, which affirmed the judgment and sentence with a per curiam affirmed opinion without a written decision on June 29, 2009. [App. 22].

REASONS FOR GRANTING THE PETITION

McCauley argued below that his trial counsel rendered ineffective assistance of counsel by failing to file a motion to suppress pursuant to *Franks v. Delaware* because the affidavit in support of the search warrant falsely asserted that its content was based on information from a confidential reliable informant when, in reality, that assertion was false. The Ninth Circuit and other district courts hold that under these facts, pursuant to *Franks*, the Fourth Amendment is violated. The Eleventh Circuit decision of *United States v. Glinton*, upon which McCauley was denied relief below, by contrast, holds it does not. As a result, there is a circuit split on this controlling point of law in McCauley's case. As a petitioner

seeking a certificate of appealability need only show that it is reasonable for a jurist to disagree with the district court's ruling, McCauley submits that the aforementioned circuit split on this issue creates a mandatory finding of such reasonable disagreement so as to warrant the issuance of a certificate of appealability.

A. Certificate of Appealability Standard

A certificate of appealability (COA) may be issued upon denial of a habeas petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The present § 2253(c) is a "codification of the standard announced in *Barefoot v. Estelle*." *Slack v. McDaniel*, 529 U.S. 473, 475, 120 S.Ct. 1595, 1599 (2000) (internal citations omitted). All that is necessary for a petitioner to receive a COA is to show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotations omitted). To review reasonable debatability, this Court must broadly review the claims in the habeas petition and make a general assessment of their merits. *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003). The Court's general assessment "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* However, this does not mean that a prisoner can get away with showing a

mere "absence of frivolity." *Id.* (quoting *Barefoot v. Estelle,* 463 U.S. 880, 881, 103 S.Ct. 3383, 3389 (1983)). Nonetheless, this Court acknowledges that this standard of review is significantly more lenient than a full review on the merits. *See Miller-El*, 537 U.S. at 336, 123 S.Ct at 1039. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor." *Id.* (internal quotation marks omitted). This Court has held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petition will not prevail." *Id.* at 338. A movant does not have to demonstrate that the appeal would succeed to obtain a certificate of appealability. *Id.* at 337 ("Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief."). The determination whether to issue a certificate of appealability should be a threshold inquiry into whether the district court's decision was debatable and does not require a decision on the merits. *Id.* at 342. Put simply, McCauley only has to show that it is reasonable for a jurist to disagree with the district court's ruling.

B. McCauley's Claim of Ineffective Assistance of Counsel

McCauley's Petition to the district court under 28 U.S.C. § 2254(d) asserted that trial counsel was ineffective for failing to pursue a motion to suppress under *Franks*. Therefore, the reasonableness inquiry of § 2253 must be applied to the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). "An ineffective assistance claim has two components: a Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2534 (2003).

To establish deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). This Court instructs that this standard for appropriate attorney conduct is one of "reasonableness under prevailing professional norms." *Id.* "[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. A failure to file a motion to suppress that is based on a lack of knowledge of the state of the evidence due to counsel's misunderstanding or ignorance of the law or failure to conduct adequate investigations can satisfy *Strickland*'s deficiency prong. *See Kimmelman v. Morrison*, 477 U.S. 365, 383-87, 106 S.Ct. 2574, 2586-90 (1986).

To establish prejudice, a defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct at 20. "To establish prejudice in the context of ineffective assistance of counsel for failure to raise a Fourth Amendment claim, a defendant must show that (1) the underlying Fourth Amendment issue has merit and (2) there is a 'reasonable probability that the verdict would have been different absent the excludable evidence. . . .'" *Green v. Nelson*, 595 F.3d 1245, 1251-52 (11th Cir. 2010) (quoting *Kimmelman*, 477 U.S. at 375, 106 S.Ct. at 2582).

"When challenging the integrity of a warrant under the Fourth Amendment, a defendant must make a substantial showing of a 'deliberate falsehood or reckless disregard for the truth' in the affidavit supporting the issuance of the warrant." *Green*, 595 F.3d at 1252 (quoting *Franks,* 438 U.S. at 171, 98 S.Ct. at 2684). "If that standard is met, the affidavit should be examined with the incorrect assertion set aside to determine if the remaining information is sufficient to establish probable cause." *Id.*

Trial counsel was ineffective for failing to pursue a motion to suppress based on *Franks* because the affidavit in support of the search warrant falsely asserted that its content was based on information from a confidential reliable informant when, in reality, that assertion was false. Detective Hall testified that wiretaps and electronic surveillance contributed to obtaining the search warrant. Additionally, as

discussed above, the record heavily implies on multiple occasions that the "confidential informant" was actually a wiretap. [App. 20]. Trial counsel was ineffective for failing to discover or even take notice of the prosecutor's disclosure that the affidavit was knowingly false. Thus, the failure to pursue a *Franks* motion cannot be deemed a "strategic" decision. *See Kimmelman*, 477 U.S. at 385, 106 S.Ct. at 2588 (finding counsel's failure to file a suppression motion constituted deficient performance as the failure was due to counsel's failure to conduct discovery and a lack of knowledge as to the state of evidence and not a strategic decision). Because a *Franks* violation occurred, trial counsel's failure to take notice that the affidavit was knowingly false and seek to suppress on such basis is constitutionally deficient performance and prejudice clearly resulted therefrom.

A *Franks* motion to suppress would have been granted and the State would not have been able to proceed against McCauley. The deceit perpetrated by the law enforcement officer and prosecutor in this case went beyond the intentionally false information in the affidavit and extended to live testimony where the presiding judge was unaware that the "confidential informant" was a wiretap. Moreover, trial counsel's failure to properly question Detective Hall as to the extent wiretaps were applicable to the search warrant, as well as the subject of Detective Hall's meetings with the judge supervising the wiretap, directly led to trial counsel being unable to call either the judge or Detective Hall as witnesses during

McCauley's postconviction relief hearing. As a result, McCauley was prejudiced by trial counsel's failure to file a motion to suppress.

Additionally, redacting the false information from the affidavit renders it devoid of probable cause. Each paragraph in the affidavit describing the investigation begins with information from the "previously reliable confidential informant." [App. 28]. The only pertinent piece of information that would remain in the affidavit would be Detective Hall's personal surveillance of Petitioner's home, during which Detective Hall observed an "unidentified male" removing a large "unidentifiable package" from the rear of his vehicle and taking the package inside of Petitioner's premises. [App. 28]. However, the timing and location of his observations resulted from the wiretap, and it was only after the "confidential informant" communicated to Hall that he could say the unidentifiable package contained illegal drugs. The motion to suppress would have been granted, the prosecution would have had no basis to go forward, and the case against McCauley would have been dismissed. Accordingly, McCauley was clearly prejudiced by trial counsel's failures.

C. The *Franks* Standard and Decisions Applying *Franks* to Facts Similar to those of McCauley's Case

This Court has stated: "As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935),

this Court made clear that deliberate deception of a court and juries by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765 (1972); *see also United States v. Daugerdas,* 867 F.Supp.2d 445, 448 (S.D.N.Y. 2012) ("The sanctity of an oath is central to the sound administration of justice . . . [a]nd attorneys, as officers of the court, owe an unflagging duty of candor toward the tribunal. When these foundational duties are breached, the integrity of the judicial process is undermined and a free society imperiled."). With these precepts in mind, this Court sought to provide a remedy to the accused when law enforcement officers' use of intentionally false information or information set forth with a reckless disregard for the truth in affidavits for search warrants in *Franks*.

Where an affidavit in support of a warrant contains material allegations that the affiant knew or should have known to be false, the court redacts the false information from the affidavit and determines whether the redacted affidavit still sets forth probable cause. *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85. If the affidavit then lacks probable cause, the remedy is suppression of the fruits of the warrant. *Franks*, 438 U.S. at 170-71, 98 S.Ct. at 2684. *Franks*, however, does not contain an exception to the requirement for truthful warrant affidavits in order to avoid disclosure of the existence of a wiretap. Indeed, the Court in *Franks* succinctly summarized

the purpose of the Fourth Amendment's requirement that probable cause be based on a "truthful" showing:

> [A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of the information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" Because it is the magistrate who must determine independently whether there is a probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberate or reckless false statement, were to stand beyond impeachment.

Id. at 165, 98 S.Ct. at 2681 (internal citations omitted).

The law does not provide for an exception allowing an affiant to put forth information he knows to be false as a means to avoid disclosure of a wiretap. Courts have expressly condemned "the insertion of false material in affidavits because '[s]uch an egregious practice defeats the whole point of the procedure, having judicial officer make an independent

assessment of whether probable cause exists.'" *United States v. Broward*, 594 F.2d 345, 351 (2d Cir. 1979) (citing *Franks*, 438 U.S. at 162-64). "Obviously, other methods for protecting informants can be devised." *Broward*, 594 F.2d at 351.

The Ninth Circuit holds that *Franks* is violated where the source of information used to supply probable cause in an affidavit is misrepresented even where the affiant believed the inaccuracy unimportant because the judge to whom the offending affidavit was presented had issued a related warrant based on a truthful affidavit. *United States v. Davis*, 714 F.2d 896, 900 (9th Cir. 1983). In *Davis*, an officer's statements regarding informants in a warrant affidavit had been copied from a previously approved affidavit and indicated that the officer had personal knowledge; however, the officer actually relied on the fellow officers "who had previously interviewed the informants." *Id.* at 899. Although the officer "thought the inaccuracy unimportant because the affidavit would be examined by the same magistrate who issued the previous and related warrant," a "false oath cannot be justified on the grounds that the person to whom it is made knows or should know the truth despite the falsehood." *Id*. (quoting *Keeble v. Sulmeyer*, 290 F.2d 127, 131 (9th Cir. 1961)). *Davis* is also instructive on the proper application of *Franks:*

> By failing properly to identify their sources of information the affiants in each case made it impossible for the magistrate to evaluate the existence of probable cause. *Franks*

> teaches that when, as in this case, that failure is intentional, the warrant must be invalidated. The fact that probable cause did exist and could have been established by truthful affidavit did not cure the error.

Id. at 899. Thus, the court in *Davis* found that the warrant was invalid and the evidence seized under it should have been suppressed.

Likewise, in *United States v. McCain*, 271 F.Supp.2d 1187 (N.D. Cal. 2003), the court granted a motion to suppress the fruits of a search warrant where the basis for probable cause in the supporting affidavit was stated to be a confidential reliable source, but in truth was a telephone wiretap. The Government defended the practice on the basis of protecting the wiretap's secrecy so as not to compromise an investigation. *Id*. at 1189. The court in *McCain*, however, found that under *Franks* the false statements constituted reckless disregard for the truth that were not excused by the affiant's belief that probable cause existed. *Id.* at 1193. Under *Franks*, "when an intentional or reckless misrepresentation in an affidavit is necessary to a magistrate's finding that that affidavit supports probable cause, the warrant must be invalidated." *Id*.; *see also United States v. Johnson*, 696 F.2d 115, 118, n. 21 (D.C. Cir. 1982) ("An affiant's failure to inform the magistrate that some of his evidence was obtained through electronic surveillance could, under some circumstances, affect the finding of probable cause.").

Similarly, in *State v. Beney*, 523 So.2d 744 (Fla. 5th DCA 1998), the court granted a motion to suppress the fruits of a search warrant where the basis for probable cause in the supporting affidavit was stated to be a confidential reliable source, but in fact was from a New Jersey police officer who had compiled information from other officers in New Jersey based on a court ordered wiretap. The court found that under *Franks,* the false statements constituted reckless disregard for the truth, so as to render evidence obtained by the search warrant inadmissible. *Id.*

D. The Eleventh Circuit's Decision in *United States v. Glinton* and the Split With the Ninth Circuit's Decision in *United States v. Davis*

Despite the precedent set forth above, the state court and district court relied upon *United States v. Glinton*, 154 F.3d 1245 (11th Cir. 1998) to deny McCauley's claim of ineffective assistance of counsel. Also implicit in the Eleventh Circuit's denial of McCauley's request for a COA is reliance upon *Glinton*.

In *Glinton*, the Eleventh Circuit concluded that the affidavit's reference to a wiretap as a "confidential informant" did not affect probable cause. *Id*. at 1255. Explaining why such a misrepresentation was not intentionally false, the Eleventh Circuit stated: "[i]n a broad generic sense, the wiretap served as a reliable

provider, or 'informant' of information." *Id*. Further, while the court claimed that "[w]e certainly do not condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge," it inconsistently concluded that "we do not feel that the warrant should be suppressed because the magistrate judge was not 'misled by information' in the affidavit." *Id*. (quoting *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3408 (1984)).

However, prior precedent of the Eleventh Circuit is contrary to the holding in *Glinton*. In *United States v. Kirk*, 781 F.2d 1498, 1505 (11th Cir. 1986), the Eleventh Circuit held that although officers are entitled to rely on information obtained from fellow law enforcement officers, in an affidavit submitted in support of issuing a search warrant, the affiant must so advise the issuing magistrate. "Unlike an officer in the field, a magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable." *Id*. at 1504-05. The holding in *Glinton* authorizing law enforcement officers to misrepresent the source of information in affidavits for search warrants upon which the denial of the COA was based, is contrary to the Eleventh Circuit's prior holding in *Kirk*.

Also, and more importantly, *Glinton* is an anomaly that represents a significant departure from clearly established federal law. Accordingly, it should be overruled. In *Glinton*, the court purports "not to

condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge[,]" but its holding actually condones perjury by law enforcement. Twenty years after *Franks* established a framework to prevent perjury in affidavits, *Glinton* effectively authorized law enforcement to include perjurious statements in affidavits for search warrants. Instead of submitting a warrant affidavit under seal (or submitting a redacted affidavit along with an unredacted one to be sealed), law enforcement officers may now include perjured or false material facts in their affidavits to protect confidentiality so long as they orally advise the issuing magistrate of their deception. Accordingly, the state court and district court's reliance on *Glinton* in denying McCauley relief below constitutes an unreasonable application of federal law.

Additionally, the Order denying McCauley a COA, with its implicit reliance on *Glinton*, also conflicts with the Ninth Circuit's decision in *Davis*. Similar to *Kirk*, *Davis* addressed a situation in which a law enforcement officer failed to set forth that information contained in the affidavit came from fellow officers. 714 F.2d at 897-98. The Ninth Circuit held "the magistrate's neutral and detached judgment in this case lacked a substantial basis because it necessarily relied on an affidavit known to be false." *Id*. at 900. The court observed a difference between conveying information between officers in the field and to an issuing magistrate:

> Officers operating in the field are entitled to rely on the information and judgment of fellow officers with whom they are working in close contact. The situation is very different when an application is made for a warrant. Unlike officers in the field, a magistrate is not entitled to rely on the judgment of law enforcement officials. He or she is expected to review the material submitted and make a detached, independent judgment as to the existence of probable cause.

Id. See also McCain, 271 F.Supp.2d 1187 (suppressing evidence where officers misrepresented in affidavit for search warrant that information was obtained from a "confidential reliable source" when in fact information was derived from a wiretap). Indeed, the Eleventh Circuit's *Kirk* decision cited with approval the Ninth Circuit's *Davis* decision regarding the identification of the source of information in the affidavit. *See Kirk*, 781 F.2d at 1505.

Moreover, in its Order rejecting McCauley's petition for a certificate of appealability, the district court claimed that, because *Davis* was a case outside of the Eleventh Circuit, it did not constitute binding precedent. [App. 34]. The district court failed to note that the Eleventh Circuit had independently adopted the *Davis* standard in *Kirk*, 781 F.2d at 1505. In *Kirk*, the Eleventh Circuit undertook an analysis virtually identical to that in *Davis*, when it examined whether an affidavit properly identified sources other than the affiant in providing information critical to the warrant's probable cause determination. *Id*. (citing *Davis*,

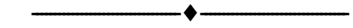
714 F.2d at 899) ("To comply with the requirement of particularity and to enable the magistrate to make an independent probable cause evaluation, however, the agent must state in the affidavit that he is relying upon other officers."). Because the Eleventh Circuit had adopted the *Davis* standard in *Kirk*, prior to the *Glinton* decision, the Eleventh Circuit has an intra-circuit split on the question of whether an affiant may mislead a judge about the source of information in his or her affidavit. In such a situation, the earlier decision should have controlled. *See Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998).

Accordingly, Petitioner has made a substantial showing that he has been denied his Sixth Amendment right to effective assistance of counsel by counsel's failure to identify the intentional misrepresentation by the affiant in his application for the search warrant and his failure to file a *Franks* motion to suppress on that basis.

To reiterate, *Franks* does not have an exception for the protection of wiretaps. Likewise, *Giglio* does not authorize prosecutors to knowingly present false testimony at hearings to protect the confidentiality of wiretaps. Accordingly, the lower courts' reliance on *Glinton* in finding that a *Franks* motion to suppress would not be meritorious constitutes an unreasonable application of clearly established federal law.

Finally, because all that is required in order to obtain a COA is a showing that a reasonable jurist could disagree with the district court's ruling, the

circuit split here meets, and indeed, should compel that finding and the issuance of a COA. Indeed, here, even jurists within the Eleventh Circuit would appear to disagree with the conclusion reached in *Glinton* as evidenced by the Eleventh Circuit's own prior decision in *Kirk*. Put simply, at a minimum, at least three jurists, the Ninth Circuit panel in *Davis*, would disagree with the result reached by the district court in this case. While the district court and Eleventh Circuit may disagree with those jurists, that is not the standard for issuing a COA and it is not the prerogative of the district court or the circuit in which McCauley's case was heard to deem those other jurists unreasonable, which is all the more apparent from the decisions of other courts nationwide that have reached similar results on similar facts as those addressed by the Ninth Circuit in *Davis* and at issue here. Accordingly, the circuit split compels a finding that reasonable jurists could disagree so as to warrant the issuance of a certificate of appealability here.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-12330-B

COREY T. MCCAULEY,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 22, 2014)

ORDER:

Corey T. McCauley moves for a certificate of appealability in order to appeal the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Charles Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

COREY T. MCCAULEY,

Petitioner,

v.

Case No.: 3:11-cv-704-J-39MCR

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Status

Petitioner Corey T. McCauley, through counsel, filed a Petition for Writ of Habeas Corpus (Petition) pursuant to 28 U.S.C. §2254 (Doc. No. 1). Petitioner challenges his 2008 state court (Duval County) conviction for trafficking in cocaine while armed with a firearm. Petitioner raises one ground for relief: trial counsel was ineffective for failing to file and litigate a motion to suppress based on *Franks v. Delaware,* 438 U.S. 154 (1978). Upon review, no evidentiary proceedings are required in this Court.

This cause is before the Court on Respondents' Answer to Petition for Writ of Habeas Corpus

(Response) (Doc. No. 13)[1] and the Exhibits to Answer to Petition for Writ of Habeas Corpus (Appendix) (Doc. No. 15).[2] Petitioner filed a Reply to Respondents' Answer to Petition for Writ of Habeas Corpus (Reply) (Doc. No. 20).

II. Procedural History

The record reflects that Petitioner was charged by information with trafficking in cocaine while armed with a firearm. Ex. 1. Defense counsel filed two motions to suppress the physical evidence and any statements or admissions made by Petitioner. Exs. 2 & 8. The trial court held hearings on those motions, Exs. 4 & 9, and then denied them. Exs. 15 & 10. Petitioner subsequently entered a no contest plea. Ex. 11. The trial court accepted the plea and sentenced Petitioner to a twenty-year term of imprisonment with a ten-year minimum mandatory sentence, Exs. 12 & 13. Petitioner appealed the denial of his motions to suppress, and the First District Court of Appeal affirmed *per curiam*. Exs. 15 & 18.

Petitioner then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of

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[1] Respondents calculate that the Petition is timely, Response at 6-7, and the Court accepts this calculation.

[2] The Court hereinafter refers to the Exhibits contained in the Appendix as "Ex." Where provided, the page numbers referenced in this opinion are the Bats stamp numbers at the bottom of each page of the Appendix. Otherwise, the page number on the particular document will be referenced.

Criminal Procedure (Rule 3.850 motion). Ex. 19. After filing an amended motion, the trial court summarily denied relief. Exs. 20 & 22. The First District Court of Appeal affirmed *per curiam.* Ex. 25.

III. Standard of Review

This Court will analyze Petitioner's claim under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to th[re]e exceptions." *Harrington v. Richter,* 131 S. Ct. 770, 784 (2011). The exceptions are: (1) the state court's decision was contrary to clearly established federal law; or (2) there was an unreasonable application of clearly established federal law; or (3) the decision was based on a reasonable determination of the facts. *Id.* at 785.

There is a presumption of correctness of state courts' factual findings unless rebutted with clear and convincing evidence. 28 U.S.C. §2254(3)(1). This presumption applies to the factual determinations of both trial and appellate courts. *See Bul v. Haley,* 321 F.3d 1304, 1312 (11th Cir. 2003).

IV. Ineffective Assistance of Counsel

In the Petition, Petitioner claims he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

In order to prevail on this Sixth Amendment claim, he must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984), requiring that he show both deficient performance (counsel's representation fell below an objective standard of reasonableness) and prejudice (there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). In *Hill v. Lockhart,* 474 U.S. 52, 58 (1985), the Supreme Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." Since both prongs of the two-part *Strickland* test must be satisfied to show a Sixth Amendment violation, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." *Ward v. Hall,* 592 F.3d 1144, 1163 (11th Cir. 2010) (citation omitted).

V. Finding of Fact and Conclusions of Law

Petitioner alleges that trial counsel was ineffective for failing to file and litigate a motion to suppress based on *Franks,* 438 U.S. at 154 (holding a search warrant can be invalidated when a false statement is knowingly and intentionally, or with reckless disregard for the truth, included in a warrant affidavit and the allegedly false statement is necessary to find probable cause). Petition at 16. In support of this claim, Petitioner alleges that the affidavit in support of the search warrant of his home falsely asserted that its content was based upon information received

from a reliable confidential informant when instead the information set forth in the affidavit was derived from the content of wire intercept conversations. *Id.*

Petitioner raised this claim in his amended Rule 3.850 motion. Ex. 20. The trial court summarily denied relief, concluding that had counsel filed a motion to suppress based on *Franks,* such a motion would not have been granted. Ex. 22 at 195-98 (citing *United States v. Glinton,* 154 F.3d 1245, 1255 (11th Cir. 1998) (holding "the fact that the 'confidential informant' referred to in [an] . . . affidavit was actually a wiretap" does not affect the validity of the search warrant because the magistrate was advised that the "confidential informant" was in reality a wiretap). The trial court stated that although the information in the affidavit in support of the search warrant was not entirely accurate, the magistrate judge issuing the search warrant was not misled because he was aware of the facts and circumstances surrounding the investigation. *Id.* Therefore, the trial court concluded the magistrate judge could make an informed evaluation as to whether there was probable cause to support the search warrant. *Id.*

A review of the record reflects that Detective Vincent Hall (Detective Hall) of the Clay County Sheriff's Department applied for a search warrant of Petitioner's home, attesting that it was believed the home was used to possess and conceal controlled substances, namely, marijuana. Ex. 14. Detective Hall attested that he received information from a previously reliable confidential informant that Petitioner

was awaiting a delivery of marijuana at his residence on April 5, 2007. *Id.*

Defense counsel moved to suppress the search, the evidence seized, and Petitioner's statements, arguing that the affidavit lacked probable cause. Ex. 3. At the October 4, 2007, hearing on the motion to suppress, Detective Hall testified he had been investigating an individual named Jimmy Wayne Hodges (Hodges) via a court-authorized wire intercept. Ex. 4 at 146. Circuit Court Judge David M. Gooding (Judge Gooding) was the supervising judge on the wire intercept. *Id.* at 147.. Detective Hall testified that on April 5, 2007, he brought his affidavit to Judge Gooding to obtain a search warrant for Petitioner's home. *Id.* at 147-48. Detective Hall stated he had received information from a confidential informant that narcotics were being transferred between Hodges and Petitioner. *Id.* at 147-48. Judge Gooding was aware of this information prior to the approval of the search warrant due to his role as supervising judge with regard to the wire intercept. *Id.* at 148-49. According to Hall, after conferring with Judge Gooding about the confidential informant and what his surveillance had relayed, Judge Gooding signed the search warrant. *Id.* at 149. The trial court denied the motion to suppress, finding it was supported by probable cause. Ex. 5.

Petitioner then filed a second motion to suppress in which he alleged that the warrant was not issued by a neutral and detached magistrate judge. Exs. 6 & 8. On January 18, 2008, the trial court held a hearing

on the second motion to suppress. Ex. 9. In arguing that the warrant was issued by a detached and neutral judge, the State distinguished the instant case from numerous federal and state cases. *Id.* at 194-205. During the prosecutor's arguments, she discussed the *Glinton* case, wherein the magistrate judge authorized the police to refer to a wiretap as a "past reliable confidential informant" in order to protect the secrecy of the wiretap. *Id.* at 202-05; *see also* 154 F.3d at 1255-56. The state prosecutor analogized the instant case to the *Glinton* case and stated that because Judge Gooding was supervising the wire intercept and was aware of the basis for probable cause for the search warrant, he did not lose his neutrality. *Id.* at 205. The trial court concluded that Judge Gooding had acted as a neutral and detached magistrate and denied the second motion to suppress. Ex. 10.

Assuming that the affidavit in support of the search warrant in this case inaccurately stated that Detective Hall was relying on a past reliable confidential informant instead of information gleaned from a wire intercept,[3] the Court concludes that

[3] The Court notes that contrary to Petitioner's assertions, the record does not concretely establish that Detective Hall lied in his affidavit when he stated he received information that Petitioner was possessing illegal drugs in his home from a past reliable confidential informant. *See* Ex. 4 at 145-151. Detective Hall testified at the first evidentiary hearing that the reliable confidential informant relayed information regarding petitioner's narcotics activities. *Id.* at 148-49. Furthermore, Detective

(Continued on following page)

Petitioner has not demonstrated that counsel's failure to file a motion to suppress on this basis resulted in prejudice. To establish prejudice in the context of ineffective assistance of counsel for failure to raise a Fourth Amendment claim, a petitioner must show that "(1) the underlying Fourth Amendment issue has merit and (2) there is a 'reasonable probability that the verdict would have been different absent the excludable evidence.'" *Green v. Nelson,* 595 F.3d 1245, 1251 (11th Cir. 2010) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986)).

As noted above, in *Glinton* the Eleventh Circuit held that no *Franks* violation occurred where an affidavit in support of a search warrant attested that the facts establishing of [sic] probable cause were obtained from a confidential informant when the information actually was obtained through a wire intercept. 154 F.3d at 1255. The *Glinton* court reasoned that because the magistrate judge had been informed that the information in the affidavit was obtained through a wire intercept, the magistrate had not been "misled

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Hall stated that he conferred with Judge Gooding regarding the information he had obtained from the confidential informant, after which the Judge authorized the search warrant. *Id.* at 149-50. The State argued that Judge Gooding was aware of the existence of the confidential informant by virtue of having supervised the case since its inception. *Id.* at 158. Although at the second motion to suppress hearing the State made argument in relation to *Glinton,* the Court does not read the prosecutor's statements as admitting that the reference to a confidential informant was actually a wire intercept that Detective Hall was attempting to keep secret. *See* Ex. 9 at 203.

by information." *Id.* at 1255-56. The court also noted "[t]he fact that a wiretap was the basis for gaining confidential information does not detract from the reliability or veracity of the source. In fact, upon learning of the means by which this information was obtained, the magistrate judge could gain reassurance as to the veracity of the information." *Id.* at 1255. Consequently, the court concluded the warrant was not subject to suppression. *Id.* at 1256.

Similar to *Glinton,* in the instant case Judge Gooding was the supervising judge regarding the wire intercept. Thus, the judge was aware of the facts surrounding Detective Hall's investigation, including where Detective Hall obtained the information regarding Petitioner's drug trafficking. There is no evidence Detective Hall was attempting to mislead Judge Gooding by using falsehoods or deceptions in order to obtain a search warrant. *See State v. Petroni,* 123 So. 3d 62, 64-65 (Fla. 1st DCA 2013) (noting that "to meet the *Franks* test, police conduct must rise to the level of hoodwinking or bilking, duping the issuing judge or magistrate into signing the warrant. . . ." and stating "[o]nly when a defendant shows that the officer was attempting to deceive the judge with false information and the remaining allegations are insufficient to support a probable cause finding, is a full *[Franks]* hearing even necessary.") (citations omitted). The mere fact that a wire intercept, and not a confidential informant, provided the information which led to the application of the search warrant does not detract from the reliability of the

affidavit or a finding of probable cause. *See Glinton,* 154 F.2d at 1256; *Petroni,* 123 So. 3d at 64-65. Petitioner cannot demonstrate that a motion to suppress on this basis would have been successful.

Petitioner urges the Court to follow cases such as *United States v. Davis,* 714 F.3d 896, 899-900 (9th Cir. 1983) (inserting a false oath in an affidavit in support of a search warrant cannot be justified); *United States v. Broward,* 594 F.2d 345, 351 (2d Cir. 1979) (same); and *United States v. McCain,* 271 F. Supp. 2d 1187 (N.D. Cal. 2003) (granting a motion to suppress and distinguishing *Glinton*). These cases, however, are not binding on this Court because they were not issued by the Eleventh Circuit nor are they Supreme Court precedent. *See Velasquez* Gamas *v. United States Atty Gen.,* 229 F. App'x 892, (11th Cir. 2007) (citing *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1982)) (holding cases from other circuits are merely persuasive). Petitioner has not demonstrated that the state court's denial of his claim was contrary to, or an unreasonable application of, clearly established federal law as determine [sic] by the Supreme Court of the United States. Thus, Petitioner is not entitled to relief on his claim.

Therefore, it is now

ORDERED AND ADJUDGED

1. The Petition (Doc. No. 1) is **DENIED**, and this action is **DISMISSED WITH PREJUDICE**.

2. The **Clerk of the Court** shall enter judgment denying the Petition and dismissing the case with prejudice and close this case.

3. If Petitioner appeals this Order, the Court denies a certificate of appealability.[4] Because this Court has determined that a certificate of appealability is not warranted, the **Clerk of the Court** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

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[4] This Court should issue a certificate of appealability only if the Petition makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke,* 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell,* 437 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack,* 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid clam of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Here, after consideration of the record as a whole, a certificate of appealability is not warranted.

DONE AND ORDERED, at Jacksonville, Florida this 23rd day of April, 2014.

Brian J. Davis
BRIAN J. DAVIS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12330-B

COREY T. MCCAULEY,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(Filed Sep. 3, 2014)

Before: PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Corey T. McCauley has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 22, 2014, order denying a certificate of appealability in his appeal of the dismissal of his underlying petition for habeas corpus, 28 U.S.C. § 2254. Upon review, McCauley's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY T. McCAULEY,

Petitioner,

vs. Appeal Docket No.: 14-12330

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

PETITION FOR CERTIFICATE OF APPEALABILITY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY T. McCAULEY,

Petitioner,

vs. Appeal Docket No.: 14-12330

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Honorable Brian J. Davis, United States District Judge

2. Honorable Monte C. Richardson, United States Magistrate Judge

3. Wm. J. Sheppard, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant

4. Elizabeth L. White, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant

5. Matthew R. Kachergus, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant

6. Bryan E. DeMaggio, Sheppard, White, Kachergus, & DeMaggio, P.A., Counsel for Appellant

7. Pamela Jo Bondi, Attorney General

8. Anne C. Conley, Assistant Attorney General, Counsel for Appellee

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY T. McCAULEY,

Petitioner,

vs. Appeal Docket No.: 14-12330

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

PETITION FOR CERTIFICATE OF APPEALABILITY

Corey T. McCauley, the above-named Petitioner-Appellant, pursuant to Fed.R.App.P. 22(b) and 11th Cir. R. 22-1, respectfully shows the Court:

1. On July 18, 2011, McCauley filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 ("Petition") with the United States District Court for the Middle District of Florida. [R.E. 228-243][5].

2. On February 8, 2012, Respondents filed their Answer to Petition for Writ of Habeas Corpus. [R.E. 228-243].

3. On April 23, 2014, the district court entered its Order denying the Petition, denying a Certificate of Appealability, and dismissing Petitioner's case with prejudice. [R.E. 296-305].

4. On May 23, 2014, Petitioner filed his notice of appeal to the Eleventh Circuit with the district court. [R.E. 308-309].

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[5] All citations to [R.E. ___] refer to Petitioner's Record Excerpts in the Appendix. All record excerpts have been re-paginated by way of Bates stamp. Accordingly, all page numbers in the Appendix refer only to the Bates stamp pagination. The district court's Order uses a slightly different system of citation, referring to an Appendix cited in Doc. 15, which was itself an Appendix from the trial court. This Appendix was voluminous and therefore not filed on PACER. The record excerpts are, in pertinent part, a reconstruction of that Appendix.

5. Petitioner is entitled to redress on appeal and an appealability clause should be issued in this case on the following grounds:

A.

THE DISTRICT COURT ERRED IN SUMMARILY DENYING RELIEF ON PETITIONER'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON THE FAILURE OF HIS PRIOR COUNSEL TO FILE AND LITIGATE A MOTION TO SUPPRESS, WHERE. THE SEARCH WARRANT AFFIDAVIT FALSELY ASSERTED THAT ITS CONTENT WAS BASED ON INFORMATION FROM A CONFIDENTIAL INFORMANT WHEN IN FACT THE INFORMATION WAS DERIVED FROM A WIRE INTERCEPT.

I. Procedural History

The procedural history of this case, leading up to the filing of the Petition for Writ of Habeas Corpus, as accurately found by the district court, is as follows:

> The record reflects that Petitioner was charged by information with trafficking in cocaine while armed with a firearm. Defense counsel filed two motions to suppress the physical evidence and any statements or admissions made by Petitioner. The trial court held hearings on those motions, and then denied them. Petitioner subsequently entered a no contest plea. The trial court accepted the plea and sentenced Petitioner to a twenty-year term of imprisonment with a ten-year minimum mandatory sentence.

> Petitioner then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Rule 3.850 motion). After filing an amended motion, the trial court summarily denied relief. The First District Court of Appeal affirmed per curiam.

[R.E. 297] (citations omitted).

II. Background and Relevant Facts

On April 5, 2007, Detective Vincent Hall (Detective Hall) of the Clay County Sheriffs Office executed search warrant at McCauley's home, believing that the home was used to possess and conceal marijuana. [R.E. 138-41]. In his affidavit for the search warrant, Detective Hall swore that he received information from a "previously reliable confidential informant" that McCauley was to receive a shipment of marijuana from a man named Jimmy Wayne Hodges (Hodges) at McCauley's home on April 5, 2007. [R.E. 13 8-3 9]. During the execution of the search warrant, law enforcement officers recovered the charged cocaine and a firearm. [R.E. 141].

After McCauley was charged with one count of armed trafficking in cocaine (based on the evidence seized in the search), his trial counsel took the deposition of Detective Hall. [R.E. 159-211]. When counsel asked Detective Hall questions pertaining to the "previously reliable confidential informant," the detective refused to answer unless he was ordered to

answer by the court. [R.E. 164]. However, Detective Hall did testify that "none of the information in the affidavit came directly from Jimmy Wayne Hodges." [R.E. 165] Later in the deposition, Detective Hall admitted to trial counsel that wiretaps were applicable to getting the search warrant. [RE. 166]. However, counsel failed to inquire how and to what extent such wiretaps were used in obtaining the search warrant.

In reality, there was never any "previously reliable confidential informant," and all information in the affidavit ascribed to him/her came from a wiretap targeting Hodges. [R.E. 5 9, 114, 117, 166]. Moreover, the judge issuing the warrant was aware that all of this information had come from a wiretap. [R.E. 5 9, 114]. The same judge had been the supervising judge with regard to the wiretap all along and knew that the information from the wiretap was the basis for Detective Hall's probable cause. [R.E. 59, 114].

McCauley's trial counsel initially moved to suppress the fruits of the search warrant by arguing that the affidavit lacked probable cause. [R.E. 15, 18-20]. At the hearing on the motion to suppress, which took place on October 4, 2007, Detective Hall continued to testify as though the information in the affidavit had come from a confidential informant and not a wiretap. [R.E. 50-51]. The judge presiding over the criminal case of McCauley was not the judge who issued the warrant, and thus had no knowledge that the "confidential informant" was actually a wiretap. [R.E. 21, 50-51]. To compound the deception, the assistant state attorney who elicited Detective Hall's testimony

at the hearing was also aware that there was no "confidential informant" and failed to disclose the same to the court. [R.E. 105]. Summarily, the State and Detective Hall not only provided false information in the search warrant affidavit to the judge issuing the warrant, but knowingly provided false information to a different judge presiding over the hearing on the motion to suppress, who had no idea of the wiretap's existence. Trial counsel failed to cross-examine Detective Hall to glean further information regarding the fictitious informant.

McCauley subsequently filed a motion to reconsider the trial court's denial of his motion to suppress, as well as a second motion to suppress on the grounds that the warrant was not issued by a neutral and detached magistrate. [R.E. 80-81, 83-86]. A second hearing was conducted on January 18, 2008. [R.E. 87-124]. Trial counsel failed to subpoena any witnesses to the hearing because, again, he was laboring under the assumption that the source of the information in the affidavit was indeed a "confidential informant." [R.E. 92-95]. Only at the end of the hearing was it implied that the "confidential informant" was actually a wiretap.[6] [R.E. 114-17] However, trial counsel

[6] In its denial of McCauley's habeas petition, the district court did not read the record as concretely establishing the search warrant affidavit contained a lie. [R.E. 301 n.3] Respectfully, the totality of the transcripts as well as Detective Hall's deposition testimony establish Hall's false testimony. [R.E. 59, 114, 117,166]. As discussed infra, a § 2253(c) review to grant a certificate of appealability does not require a thorough dissection

(Continued on following page)

failed to take notice of this disclosure. The trial court denied both Petitioner's Motion for Reconsideration and his Second Motion to Suppress. [R.E. 225].

Because trial counsel failed to discover that the confidential informant was the wiretap, he did not pursue a motion to suppress pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) . Instead, McCauley eventually entered a plea of no contest, reserving his right to appeal the denial of his dispositive motions to suppress. [R.E. 128-29]. On April 17, 2007, the trial court sentenced McCauley to 20 years in prison with a 10-year minimum mandatory [R.E. 130-37]. Petitioner appealed his conviction and sentence to the Florida First District Court of Appeal, which affirmed the judgment and sentence with a *per curiam* affirmed opinion without a written decision on June 29, 2009. [R.E. 142-43].

On March 23, 2010, Petitioner filed a Motion for Post-Conviction Relief in the trial court and thereafter filed an Amended Motion for Post-Conviction Relief on June 2, 2010, raising four claims of ineffective assistance of counsel. [R.E. 144-50, 151-58]. The trial court denied Petitioner's Amended Motion for Post-Conviction Relief. [R.E. 212-221]. Petitioner appealed the denial of his motion to the Florida First District Court of Appeal and the court issued a per

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of the record. It is sufficient to find that reasonable jurists may disagree.

curiam affirmed without written opinion on April 12, 2011. [R.E. 222].

McCauley filed his Petition for Writ of Habeas Corpus in the Middle District of Florida on June 11, 2011. [R.E. 228-43]. Respondents filed their Answer to Petition for Writ of Habeas Corpus on February 28, 2012. [R.E. 224-79]. McCauley filed a Reply to Respondent's Answer to Petition for Writ of Habeas Corpus on July 25, 2012. [R.E. 280-95] The district court issued its Order denying McCauley's petition, denying a certificate of appealability, and dismissing the case with prejudice on April 23, 2014. [R.E. 296-305, 306-07]. The instant appeal followed. [R.E. 308-09].

III. Standard of Review Under 28 U.S.C. § 2253(c)

A certificate of appealability (COA) may be issued upon denial of a habeas petition "only if the applicant has made a substantial showing of the denial of a constitutional right." § 28 U.S.C. 2253(c)(2). The present§ 2253(c) is a "codification of the standard announced in *Barefoot v. Estelle*." *Slack v. McDaniel*, 529 U.S. 473, 475, 120 S.Ct. 1595, 1599 (2000) (internal citations omitted). All that is necessary for a petitioner to receive a COA is to show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotations omitted). To review

reasonable debatability, this Court must broadly review the claims in the habeas petition and make a general assessment of their merits. *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003) The Court's general assessment "does not require. full consideration of the factual or legal bases adduced in support of the claims." *Id*. However, this does not mean that a prisoner can get away with showing a mere "absence of frivolity." *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 881, 103 S.Ct. 3383, 3389 (1983)). Nonetheless, the Supreme Court acknowledges that this standard of review is significantly more lenient than a full review on the merits. *See Miller-El*, 537 U.S. at 336, 123 S.Ct at 1039. "It is consistent with§ 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor." *Id.* (internal quotation marks omitted). Put simply, McCauley only has to show that it is reasonable for a jurist to disagree with the district court's ruling.

IV. Standards of Review Under *Strickland v. Washington* and *Franks v. Delaware*

McCauley's Petition to the district court under 28 U.S.C. §2254(d) asserted that trial counsel was ineffective for failing to pursue a motion to suppress under *Franks*. Therefore, the reasonableness inquiry of § 2253 must be applied to the standard set forth in *Strickland v. Washington* 466 U.S. 668, 104 S.Ct.

2052 (1984). "An ineffective assistance claim has two components: a Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2534 (2003). To establish deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness.'" *Id*. (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). The Supreme Court instructs that this standard for appropriate attorney conduct is one of "reasonableness under prevailing professional norms." *Id.* "[S]trategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066. A failure to file a motion to suppress that is based on a lack of knowledge of the state of the evidence due to counsel's misunderstanding or ignorance of the law or failure to conduct adequate investigations can satisfy *Strickland*'s deficiency prong. *See Kimmelman v. Morrison*, 477 U.S. 365, 383-87, 106 S.Ct. 2574, 2586-90 (1986). To establish prejudice, a defendant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct at 20. "To establish prejudice in the context of ineffective assistance of counsel for failure to raise a Fourth Amendment claim, a defendant must show that (1) the underlying Fourth Amendment issue has merit and (2) there is a 'reasonable probability that the verdict would have been different

absent the excludable evidence. . . .'" *Green v. Nelson*, 595 F.3d 1245,1251-52 (11th Cir. 2010) (quoting *Kimmelman*, 477 U.S. at 375, 106 S.Ct. at 2582).

"When challenging the integrity of a warrant under the Fourth Amendment, a defendant must make a substantial showing of a 'deliberate falsehood or reckless disregard for the truth' in the affidavit supporting the issuance of the warrant." *Green*, 595 F.3d at 1252 (*quoting Franks* 438, U.S. at 171, 98 S.Ct. at 2684). "If that standard is met, the affidavit should be examined with the incorrect assertion set aside to determine if the remaining information is sufficient to establish probable cause." *Id.*

V. Reasonable Jurists May Disagree as to Whether Trial Counsel Rendered Ineffective Assistance by Failing to Discover that Detective Hall's "Confidential Informant" was a Wiretap and Failing to Pursue a *Franks* Motion to Suppress the Evidence Seized Pursuant to the Search Warrant Because the Warrant Affidavit Falsely Stated Information Obtained from a Confidential Informant.

Trial counsel was ineffective for failing to pursue a motion to suppress based on *Franks* because the affidavit in support of the search warrant falsely asserted that its content was based on information from a confidential reliable informant when, in reality, that assertion was false. Detective Hall testified that wiretaps and electronic surveillance contributed to

obtaining the search warrant. Additionally, as discussed above, the record heavily implies on multiple occasions that the "confidential informant" was actually a wiretap. [R.E. 5 9, 114, 117, 166]. Trial counsel was ineffective for failing to discover or even take notice of the prosecutor's disclosure that the affidavit was knowingly false. Thus, the failure to pursue a *Franks* motion cannot be deemed a "strategic" decision. *See Kimmelman*, 477 U.S. at 385, 106 S.Ct. at 2588 (finding counsel's failure to file a suppression motion constituted deficient performance as the failure was due to counsel's failure to conduct discovery and a lack of knowledge as to the state of evidence and not a strategic decision). Because a *Franks* violation occurred, trial counsel's failure to take notice that the affidavit was knowingly false and seek to suppress on such basis is constitutionally deficient performance and prejudice clearly resulted therefrom.

A *Franks* motion to suppress would have been granted and the State would not have been able to proceed against Petitioner. The deceit perpetrated by the law enforcement officer and prosecutor in this case went beyond the intentionally false information in the affidavit and extended to live testimony where the presiding judge was unaware that the "confidential informant" was a wiretap. Moreover, trial counsel's failure to properly question Detective Hall as to the extent wiretaps were applicable to the search warrant, as well as the subject of Detective Hall's meetings with the judge supervising the wiretap, directly led to trial counsel being unable to call either

the judge or Detective Hall as witnesses during McCauley's postconviction relief hearing. As a result, McCauley was prejudiced by trial counsel's failure to file a motion to suppress.

Additionally, redacting the false information from the affidavit renders it devoid of probable cause. Each paragraph in the affidavit describing the investigation begins with information from the "previously reliable confidential informant." [R.E. 138-39]. The only pertinent piece of information that would remain in the affidavit would be Detective Hall's personal surveillance of Petitioner's home, during which Detective Hall observed an "unidentified male" removing a large "unidentifiable package" from the rear of his vehicle and taking the package inside of Petitioner's premises. [R.E. 138-39]. However, the timing and location of his observations resulted from the wiretap, and it was only after the "confidential informant" communicated to Hall that he could say the unidentifiable package contained illegal drugs. The motion to suppress would have been granted, the prosecution would have had no basis to go forward, and the case against McCauley would have been dismissed. Accordingly, McCauley was clearly prejudiced by trial counsel's failures.

VI. Reasonable Jurists May Disagree as to Whether the Trial and District Courts' Reliance on Glinton Constitutes an Unreasonable Application of Clearly Established Federal Law and Fails to Recognize an Intra-Circuit Split Within the Eleventh Circuit.

The trial court's adjudication was contrary to a reasonable application of clearly established federal law. The Supreme Court of the United States has stated: "As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), this Court made clear that deliberate deception of a court and juries by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765 (1972); *see also, United States v. Daugerdas*, 2012 WL 2149238 at*1 (S.D.N.Y. June 4, 2012) ("The sanctity of an oath is central to the sound administration of justice . . . [a]nd attorneys, as officers of the court, owe an unflagging duty of candor toward the tribunal. When these foundational duties are breached, the integrity of the judicial process is undermined and a free society imperiled."). With these precepts in mind, the Supreme Court sought to provide a remedy to the accused when law enforcement officers' use of intentionally false information or information set forth with a reckless disregard for the truth in affidavits for search warrants in *Franks*.

Where an affidavit in support of a warrant contains material allegations that the affiant knew or

should have known to be false, the court redacts the false information from the affidavit and determines whether the redacted affidavit still sets forth probable cause. *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85. If the affidavit then lacks probable cause, the remedy is suppression of the fruits of the warrant. *Franks*, 438 U.S. at 170-71, 98 S.Ct. at 2684. Franks, however, does not contain an exception to the requirement for truthful warrant affidavits in order to avoid disclosure of the existence of a wiretap. Indeed, the Court in Franks succinctly summarized the purpose of the Fourth Amendment's requirement that probable cause be based on a "truthful" showing:

> [A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of the information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" Because it is the magistrate who must determine independently whether there is a probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberate or reckless

> false statement, were to stand beyond impeachment.

Id. at 165, 98 S.Ct. at 2681 (internal citations omitted) (emphasis added).

The law does not provide for an, exception allowing an affiant to put forth information he knows to be false as a means to avoid disclosure of a wiretap. Courts have expressly condemned "the insertion of false material in affidavits because '[s]uch an egregious practice defeats the whole point of the procedure, having judicial officer make an independent assessment of whether probable cause exists.'" *United States v. Broward*, 594 F.2d 345, 351 (2d. Cir. 1979) (citing *Franks*, 438 U.S. at 162-64). "Obviously, other methods for protecting informants can be devised." *Broward*, 594 F.2d at 351.

Other circuits have held that Franks is violated where the source of information used to supply probable cause in an affidavit is misrepresented even where the affiant believed the inaccuracy unimportant because the judge to whom the offending affidavit was presented had issued a related warrant based on a truthful affidavit. *United States v. Davis*, 714 F.2d 896, 900 (9th Cir. 1983). In Davis, an officer's statements regarding informants in a warrant affidavit had been copied from a previously approved affidavit and indicated that the officer had personal knowledge; however, the officer actually relied on the fellow officers "who had previously interviewed the informants." *Id.* at 899. Although the officer "thought

the inaccuracy unimportant because the affidavit would be examined by the same magistrate who issued the previous and related warrant," a "false oath cannot be justified on the grounds that the person to whom it is made knows or should know the truth despite the falsehood.'" *Id.* (citing *Keeble v. Sulmeyer*, 290 F.2d 127, 131 (9th Cir. 1961)). Davis is also instructive on the proper application of *Franks*:

> By failing properly to identify their sources of information the affiants in each case made it impossible for the magistrate to evaluate the existence of probable cause. *Franks* teaches that when, as in this case, that failure is intentional, the warrant must be invalidated. The fact that probable cause did exist and could have been established by truthful affidavit did not cure the error.

Id. at 899. Thus, the court in Davis found that the warrant was invalid and the evidence seized under it should have been suppressed.

Likewise, in *United States v. McCain*, 271 F. Supp. 2d 1187 (N.D. Cal. 2003), the court granted a motion to suppress the fruits of a search warrant where the basis for probable cause in the supporting affidavit was stated to be a confidential reliable source, but in truth was a telephone wiretap. The Government defended the practice on the basis of protecting the wiretap's secrecy so as not to compromise an investigation. *Id.* at 1189. The court in McCain, however, found that under *Franks* the false

statements constituted reckless disregard for the truth that was not excused by the affiant's belief that probable cause existed. *Id.* at 1193. Under *Franks*, "when an intentional or reckless misrepresentation in an affidavit is necessary to a magistrate's finding that that affidavit supports probable cause, the warrant must be invalidated." *Id.* (emphasis in original).

The trial and district courts' reliance on *United States v. Glinton*, 154 F.3d 1245 (11th Cir. 1998), constitutes an application of federal law with which reasonable jurists may disagree. In *Glinton*, this Court concluded that the affidavit's reference to a wiretap as a "confidential informant" did not affect probable cause. *Id.* at 1255. Explaining why such a misrepresentation was not intentionally false, this Court stated: "[i]n a broad generic sense, the wiretap served as a reliable provider, or 'informant' of 'information." *Id.* Further, while the Court claimed that "[w]e certainly do not condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge," it inconsistently concluded that "we do not feel that the warrant should be suppressed because the magistrate judge was not 'misled by information.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3408 (1984)). The *Glinton* decision additionally overlooks certain factual grounds to evaluate the previous reliability of an informant that must be asserted in an affidavit in order to provide the issuing judge a basis to conclude that the informant actually bore indicia of reliability.

Further, Glinton is an anomaly that represents a significant departure from clearly established federal law. Accordingly, it should be overruled. In Glinton, the Court purports "not to condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge[,]" but its holding actually condones perjury by law enforcement. Twenty years after *Franks* established a framework to prevent perjury in affidavits, *Glinton* effectively authorized law enforcement to include perjurious statements in affidavits for search warrants. Instead of submitting a warrant affidavit under seal (or submitting a redacted affidavit along with an unredacted one to be sealed), law enforcement officers may now include perjured or false material facts in their affidavits to protect confidentiality so long as they orally advise the issuing magistrate of their deception. Accordingly, the trial and district courts' reliance on *Glinton* in denying Petitioner relief below constitutes an unreasonable application of federal law.

Moreover, in its Order rejecting McCauley's petition for a certificate of appealability, the district court claimed that, because Davis was a case outside of the Eleventh Circuit, it did not constitute binding precedent. [R.E. 301-02]. The district court failed to note that the Eleventh Circuit had independently adopted the *Davis* standard in a previous case, *United States v. Kirk,* 781 F.2d 1498, 1505 (11th Cir.1986). In *Kirk*, this Court undertook an analysis virtually identical to that in Davis, when it examined whether

an affidavit properly identified sources other than the affiant in providing information critical to the warrant's probable cause determination. *Id.* (citing *Davis*, 714 F .2d at 899) ("To comply with the requirement of particularity and to enable the magistrate to make an independent probable cause evaluation, however, the agent must state in the affidavit that he is relying upon other officers."). Because this Court had adopted the Davis standard in *Kirk*, prior to the *Glinton* decision, the Eleventh Circuit has an intra-circuit split on the question of whether an affiant may mislead a judge about the source of information in his or her affidavit. In such a situation, the earlier decision controls. *See Walker v. Mortham*,158 F.3d 1177, 1188 (11th Cir. 1998).

To reiterate, *Franks* does not have an exception for the protection of wiretaps. Likewise, *Giglio* does not authorize prosecutors to knowingly present false testimony at hearings to protect the confidentiality of wiretaps. Accordingly, the lower courts' reliance on *Glinton* in finding that a *Franks* motion to suppress would not be meritorious constitutes an unreasonable application of clearly established federal law. For the aforementioned reasons, this Court should reconsider the question of whether Glinton remains good law in the Eleventh Circuit.

VI. Conclusion

In summation, Petitioner contends he was deprived of constitutionally effective counsel by his trial

counsel's failure to file a motion to suppress pursuant to *Franks*. Petitioner was prejudiced by trial counsel's failure as such a motion would have been meritorious and the outcome of the proceedings would certainly have been different if the evidence derived from the execution of the search warrant was suppressed. Furthermore, *Glinton* represents a departure from clearly established federal law. The state court's reliance upon it involves an unreasonable application of clearly established federal law and the district court's order fails to acknowledge an intra-circuit split. For all of the foregoing reasons, this Court should grant Petitioner a Certificate of Appealability.

WHEREFORE, Petitioner respectfully moves that the United States Court of Appeals for the Eleventh Circuit issue a Certificate of Appealability so that Petitioner may appeal the order of the district court denying Petitioner's Petition for Writ of Habeas Corpus entered on April 23, 2014.

Respectfully submitted,

/s/ Bryan E. DeMaggio

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2014, I electronically filed the foregoing with the Clerk of the Court by using PACER/ECF System which will send a notice of electronic filing to the following:

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/s/ Bryan E. DeMaggio
ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY T. McCAULEY,

Petitioner,

vs. Appeal Docket No.: 14-12330

SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

MOTION FOR RECONSIDERATION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Honorable Brian J. Davis, United States District Judge
2. Honorable Monte C. Richardson, United States Magistrate Judge
3. Wm. J. Sheppard, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant
4. Elizabeth L. White, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant
5. Matthew R. Kachergus, Sheppard, White, Kachergus, & DeMaggio, Counsel for Appellant
6. Bryan E. DeMaggio, Sheppard, White, Kachergus, & DeMaggio, P.A., Counsel for Appellant
7. Pamela Jo Bondi, Attorney General
8. Anne C. Conley, Assistant Attorney General, Counsel for Appellee

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY T. McCAULEY,

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SECRETARY, DEPARTMENT
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Respondents.

MOTION FOR RECONSIDERATION

Petitioner, Corey T. McCauley, by and through undersigned counsel and pursuant to FRAP 27 and 11th Cir. Rules 22-1 and 27-2 hereby moves for reconsideration of this Court's Order denying Petitioner a Certificate of Appealability. In support thereof, Petitioner states:

1. On May 27, 2014, Petitioner filed his Notice of Appeal seeking to appeal the denial of his Petition for Writ Of Habeas Corpus under 28 U.S.C. §2254. In its denial, the District Court denied Petitioner a Certificate of Appealability ("COA").

2. On June 16, 2014, McCauley filed his Petition for Certificate of Appealability with this Court.

3. On July 22, 2014, this Court entered its Order denying McCauley a COA finding that he failed to make a substantial showing of the denial of the constitutional right.

4. Petitioner requests the Court reconsider its denial as Petitioner contends he made a substantial showing that his Sixth Amendment right to effective assistance of counsel was denied in the state court proceedings below.

5. The facts giving rise to the petition are as follows: Detective Hall with the Clay County Sheriff's Office obtained a search warrant for Petitioner's home by representing in his supporting affidavit to the issuing magistrate that information he received from a "previously reliable confidential informant" revealed that a future shipment of marijuana was to be delivered to the residence to be searched. [R.E. 138-41]. In truth and fact, the "previously reliable confidential informant" was a wiretap. [R.E. 59, 114, 117, 166]. During the execution of the search warrant, law enforcement officers recovered cocaine and a firearm. [R.E. 141]. Petitioner was charged with trafficking in cocaine while armed with a firearm. [R.E. 297].

6. During the state court proceedings, trial counsel failed to discover that the "previously reliable confidential informant" was in reality a wiretap. As a result, he failed to file a motion to suppress the fruits of the search based on *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). Petitioner entered a plea of no contest to the charge and the trial court sentenced Petitioner to twenty (20) years in prison with a ten (10) year minimum mandatory. [R.E. 128-37].

7. Petitioner's trial counsel failed to discover that the Affiant falsely represented to the issuing magistrate that information was received from a "previously reliable confidential informant" when in truth and fact the information was obtained from a wiretap and failed to file a motion to suppress on that basis.

8. McCauley's Petition to the district court under 28 U.S.C. §2254(d) asserted that trial counsel was ineffective for failing to pursue a motion to suppress under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). "When challenging the integrity of a warrant under the Fourth Amendment, a defendant must make a substantial showing of a 'deliberate falsehood or reckless disregard for the truth' in the affidavit supporting the issuance of the warrant." *Green v. Nelson*, 595 F.3d 1245, 1252 (11th Cir. 2010) (*quoting Franks* 438, U.S. at 171, 98 S.Ct. at 2684). "If that standard is met, the affidavit should be examined with the incorrect assertion set aside to determine if the remaining information is sufficient to establish probable cause." *Id*. The Supreme Court of the United States has stated: "As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), this Court made clear that deliberate deception of a court and juries by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765 (1972); *see also*, *United States v. Daugerdas*, 2012 WL 2149238 at *1 (S.D.N.Y. 2012) ("The sanctity of an oath is central to

the sound administration of justice . . . [a]nd attorneys, as officers of the court, owe an unflagging duty of candor toward the tribunal. When these foundational duties are breached, the integrity of the judicial process is undermined and a free society imperiled.").

9. The Order denying McCauley a COA stated that he failed to make a substantial showing of the denial of a constitutional right. Implicit in that finding is reliance on this Court's prior holding in *United States v. Glinton*, 154 F.3d 1245 (11th Cir. 1998). In *Glinton*, this Court concluded that the affidavit's reference to a wiretap as a "confidential informant" did not affect probable cause. *Id.* at 1255. Explaining why such a misrepresentation was not intentionally false, this Court stated: "[i]n a broad generic sense, the wiretap served as a reliable provider, or 'informant' of 'information." *Id.* Further, while the Court claimed that "[w]e certainly do not condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge," it inconsistently concluded that "we do not feel that the warrant should be suppressed because the magistrate judge was not 'misled by information.'" *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 3408 (1984)).

10. However, prior precedent of this Court is contrary to the holding of *Glinton.* In *United States v. Kirk*, 781 F. 2d 1498, 1505 (11th Cir. 1986), this Court held that although officers are entitled to rely on information obtained from fellow law enforcement

officers, in an affidavit submitted in support of issuing a search warrant, the affiant must so advise the issuing magistrate. "Unlike an officer in the field, a magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable." *Id.* at 1504-1505. The holding in *Glinton* authorizing law enforcement officers to misrepresent the source of information in affidavits for search warrants upon which the denial of the COA was based, is contrary to this Court's prior holding in *Kirk*.

11. Further, *Glinton* is an anomaly that represents a significant departure from clearly established federal law. Accordingly, it should be overruled. In *Glinton*, the Court purports "not to condone a position that it is proper to lie under oath in a search warrant affidavit as long as the affiant orally tells the truth to the issuing magistrate judge" but its holding actually condones perjury by law enforcement. Twenty years after *Franks* established a framework to prevent perjury in affidavits, *Glinton* effectively authorized law enforcement to include perjurious statements in affidavits for search warrants. Instead of submitting a warrant affidavit under seal (or submitting a redacted affidavit along with an unredacted one to be sealed), law enforcement officers in this Circuit may include perjured or false material facts in their affidavits to protect confidentiality so long as they orally advise the issuing magistrate of their deception.

12. Accordingly, Petitioner has made a substantial showing that he has been denied his Sixth Amendment right to effective assistance of counsel by counsel's failure to identify the intentional misrepresentation by the affiant in his application for the search warrant and his failure to file a *Franks* motion to suppress on that basis.

13. Additionally, the Order denying McCauley a COA, with its implicit reliance on *Glinton*, also conflicts with the Ninth Circuit's decision in *United States v. Davis*, 714 F.2d 869 (9th Circuit 1983). Similar to *Kirk, Davis* addressed a situation in which a law enforcement officer failed to set forth that information contained in the affidavit came from fellow officers. *Id.* at 897-98. The Ninth Circuit held "the magistrate's neutral and detached judgment in this case lacked a substantial basis because it necessarily relied on an affidavit know [sic] to be false." *Id.* at 900. The court observed a difference between conveying information between officers in the field and to an issuing magistrate:

> Officers operating in the field are entitled to rely on the information and judgment of fellow officers with whom they are working in close contact. The situation in [sic] very different when an application is made for a warrant. Unlike officers in the field, a magistrate is not entitled to rely on the judgment of law enforcement officials. He or she is expected to review the material submitted and make a detached, independent judgment as to the existence of probable cause.

Id. See also United States v. McCain, 271 F. Supp. 2d 1187 (N.D. CA 2003) (suppressing evidence where officers misrepresented in affidavit for search warrant that information was obtained from a "confidential reliable source" when in fact information was derived from a wiretap). Indeed, this Court's *Kirk* decision cited with approval the Ninth Circuit's *Davis* decision regarding the identification of the source of information in the affidavit. *See Kirk*, 781 F.2d at 1505.

14. Accordingly, this case involves a question of exceptional importance as this Court's adherence to *Glinton*, conflicts with the Ninth Circuit's decision in *Davis*. This Court should grant Petitioner a COA to allow consideration to recede from Glinton.

WHEREFORE, Petitioner respectfully requests that this Court reconsider it [sic] Order, entered July 22, 2014, and issue Petitioner a Certificate of Appealability.

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