U.S. Case No. _____
Appeal No.: 17-15655
District Court No.: 6:16-cv00788-JA-GJK

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE SOZA,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

Respondent.

ON *PETITION FOR WRIT OF CERTIORARI* TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Jose Soza #X62244
Avon Park Correctional Institution
8100 Highway 64 East
Avon Park, FL 33825-6801

QUESTION PRESENTED

Q. (1): **Whether state trial counsel rendered constitutionally ineffective assistance of counsel when he failed to present evidence that the alleged crimes did not take place in the county charged in the information. The Petitioner proved, at a state evidentiary hearing, that trial counsel's performance was deficient and that the deficient performance prejudiced the defense in violation of the *Sixth* and *Fourteenth* Amendment of the United States Constitution.**

(2) **Whether counsel was constitutionally deficient for failing to ensure that proper jury instructions were given and for failing to follow up with explaining the law and instructions, in violation of due process, the *Fifth, Sixth,* and *Fourteenth* Amendments of the United States Constitution**

LIST OF PARTIES

All parties **do not** appear in the caption of this case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Antoon, John – U.S. District Judge

Apte, Alan S. – Circuit Court Judge, Ninth Judicial Circuit, Florida

Berger, Wendy W. – Fifth District Court of Appeal, Florida

Bondi, Pamela Jo. – Elected Attorney General, State of Florida

Busch, William – State Prosecutor

Castrofort, Joe L. – Trial Attorney

Davis, Jennifer M. -- Circuit Court Judge, Ninth Judicial Circuit, Florida

Evander, Kerry I. – Judge, Fifth District Court of Appeal, Florida

Koller, Pamela – Assistant State Attorney

Labar, Lydia L. – Attorney for State Postconviction

Lamar, Lawson – Elected State Attorney, Ninth Juridical Circuit, Florida

Lambert, Brian D. – Judge, Fifth District Court of Appeal, Florida

Levering, Rose M. – Assistant Public Defender, Appellate Division

McCollum, Bill – Assistant Attorney General on Direct Appeal

Palmer, William D. – Judge, Fifth District Court of Appeal, Florida

Purdy, James R. – Elected Public Defender, Seventh Judicial Circuit, Florida

Ross, Leonard – Direct Appeal Counsel for Petitioner

Torpy, Vincent G. Jr., -- Judge, Fifth District Court of Appeal, Florida

Soza, Jose – Petitioner

Wallis, F. Rand. -- Judge, Fifth District Court of Appeal, Florida

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In the
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a *Writ of Certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at **Appendix A** to the petition and is unpublished. The opinion of the United States District Court denying petitioner's 28 U.S.C. § 2254 petition appears at **Appendix B** and is unpublished. The order denying rehearing to the United States Court of Appeals appears at **Appendix C** to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).The court of appeals entered judgment on April 19, 2018. **Appendix A.** Rehearing was denied on July 11, 2018. **Appendix C.** For these reasons explained below, this Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 28 U.S.C. §§ 1254, 1257(a), 1651, 2244, 2253 and 2254 as well as the *Fifth, Sixth,* and *Fourteenth* Amendments of the United States Constitution are involved in this cause of action.

STATEMENT OF THE CASE

On February 5, 2007, the State of Florida charged Soza by information with sexual battery on a physically helpless person, in violation of Florida Statutes § 794.011(4)(a) (count one) and lewd or lascivious battery, in violation of Florida Statute § 800.04(4)(a) (count two). After a two-day trial, a jury found Soza guilty as charged on both counts. The trial court sentenced Soza as a sexual predator to 22-years in prison. Florida's Fifth District Court of Appeal affirmed Soza's conviction and sentence.

The Petitioner was convicted of sexual battery on a physically helpless person and lewd or lascivious battery on a person over 12 but under 16 years of age and is currently serving a 22-year prison sentence. The information alleged that both counts took place in Orange County, Florida.

On July 29, 2010, Soza filed a post-conviction motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. He filed an amended Rule 3.850 motion on October 29, 2010. He filed a second amended Rule 3.850 motion on November 26, 2012. The post-conviction court summarily denied grounds one, four, five, six, and seven of Soza's amended Rule 3.850 motion, and held an evidentiary hearing on grounds two and three. Following an evidentiary hearing, (Appx D) the post-conviction court denied the remaining claims. (Appx E, pg. 1-4)

Florida's Fifth District Court of Appeal *per curiam affirmed* after Soza's appointed counsel filed a brief on the merits. (Appx F)

On May 5, 2016, Soza filed a timely 28 U.S.C. 2254 petition which was denied on November 17, 2017 and judgment was entered on November 20, 2017. (Appx. B) On January 26, 2018 The Eleventh Circuit informed Soza, after they received orders from the southern district of Florida declining to issue a COA and denying leave to proceed on appeal *in forma pauperis,* via letter he had 30-days to move in the Eleventh Circuit for leave to proceed on appeal as a pauper and to file a COA or his notice of appeal would be treated as a COA. On February 14, 2018, Soza filed a timely certificate of appealability. On April 19, 2018 the Eleventh Circuit issued an order denying Soza's COA. (Appx. A) He then filed a motion reconsideration which was denied on July 11, 2018. (Appx. C) Therefore, this certiorari is due to be filed by October 9, 2018.

STATEMENT OF THE FACTS

At the evidentiary hearing on the 3.850 motion, the following facts emerged: The charged allegations arose from the events of one night in a hotel room. (Appx D, pg.222). Allegedly, the acts occurred at a Quality Inn in Orange County. (Appx D, pg.221-222) However, the Petitioner, before the trial, had informed his attorney that the hotel in question was actually a La Quinta Inn, which was in Kissimmee, in Osceola County. (Appx D, pg.222) The trial attorney acknowledged that the Petitioner gave him documentation in the form of his credit card statement showing a charge for the date in question. (Appx D, pg.233-234) The Petitioner also provided counsel with a video of the La Quinta in Kissimmee. (Appx D, pg.234-235) Counsel confirmed by locating the La Quinta Inn on a map, but did not contact management at either hotel to confirm or deny that the Petitioner was there on the night in question. (Appx D, pg.224-226) Counsel did not provide the state with those items in pretrial discovery. (Appx D, pg.223, 228) At the hearing, the Petitioner also presented evidence in the form of a receipt from the La Quinta hotel, which, presumably, could have been obtained, and used to advantage with testimony from the custodian of the hotel's records. (*Compare* Appx D, pg.233-234 and Appx G)

It was clear to trial counsel at the time that venue had been improperly charged – that it should have been Osceola. He discussed the issue with Petitioner

(and with co-counsel and the co-defendant, Petitioner's wife). (Appx D, pg.238) It was decided that an Orange County jury would be more beneficial (better judges), and also that improper venue could be challenged in a motion for judgment of acquittal at trial. The trial strategy was to not mention venue in the state's case, argue in a motion for judgment of acquittal, and, if the motion was unsuccessful, to present evidence establishing the correct venue in the defense case-in-chief through the testimony of the Petitioner and his wife, and move again for a judgment of acquittal. (Appx D, pg.239-240) Petitioner said at the motion hearing that he understood that his attorney would question witnesses about venue, and that he would raise the venue issue mid-trial. (Appx D, pg.262-263)

Counsel did argue venue at trial after the state's case-in-chief and lost on that issue. (Appx D, pg.240) However, counsel did not then proceed with the second part of the strategy. Counsel felt the state's case was not very convincing. He said as much to his client, and told him they might not need to do anything else. He did not recall if they specifically discussed venue. (Appx D, pg.241) The defendants did not testify. (Appx D, pg.240-241)

Counsel was unaware, at the time, that he could have requested a special jury instruction if venue was an issue in the case, and no such instruction was requested. (Appx D, pg.241) After the jury verdict, counsel did file a motion for new trial, and raised the venue issue. (Appx D, pg.242-246) After the trial,

Petitioner requested the return of his credit card receipt, but counsel was unable to provide it. (Appx D, pg.247-248)

There had been some testimony at the trial about the hotel where the alleged incident occurred. (Appx D, pg.253-256) Counsel recalled that there was testimony that there was a stop at one hotel where the party did not check in, after which the party checked into another hotel. (Appx D, pg.256) Counsel thought that the detective deduced it was a Quality Inn in Orange County from the description from one victim; he thought another victim testified that it was a Quality Inn in Orange County. (Appx D, pg.253) The judge made it clear that if there was a discrepancy between counsel's recollection, and the trial transcript, he would rely on the transcript. (Appx D, pg.254-255)

The state pointed out parts of the trial transcript where the state "establish[ed] venue": on pages 247, 257, 299-301, 347, and 402-404 (Appx H) of the transcript. (Appx D, pg.277) The state argued that the trial testimony showed that the party went first to one hotel, which was full so that they could not stay, and then to the hotel where the acts allegedly occurred, and that there was no evidence to dispute the testimony that they stayed at the Quality Inn. (Appx D, pg.277-278) The state argued no deficient performance and no prejudice. (Appx D, pg.278-279)

The trial transcript shows that one victim testified the hotel was a Quality Inn, but did not know whether it was in Orlando or Kissimmee. (Appx H, pg.245-

248, 301) An Orange County Sheriff's deputy testified that based some landmarks the victims had referenced (*i.e.,* proximity to International Drive and a McDonalds restaurant) he narrowed the choice of hotels down to a particular Quality Inn in Orange County. However, he did not consider hotels outside his jurisdiction. (Appx H, pg.392-393, 402-404) The alleged incident had taken place over a year before. (Appx H, pg.401) If the detectives had made any efforts to verify that the party stayed there by checking records, that witness was unaware of them. (Appx H, pg.401)

The court took the matter under advisement and on May 29, 2014, rendered a written opinion denying relief. (Appx E) The court found that counsel made a strategic decision to refrain from challenging venue because Petitioner would be better off being tried in Orange county. Also, had venue been challenged, the State could have refilled in Osceola County. In addition, that it was not possible to determine if the outcome of a trial would be more favorable in Osceola.

REASONS FOR GRANTING THE PETITION

Question One

Whether state trial counsel rendered constitutionally ineffective assistance of counsel when he failed to present evidence that the alleged crimes did not take place in the county charged in the information. The Petitioner proved, at a state evidentiary hearing, that trial counsel's performance was deficient and that the deficient performance prejudiced the defense in violation of the Sixth and Fourteenth Amendment of the United States Constitution.

Petitioner's trial counsel was ineffective because he abandoned the agreed upon trial strategy regarding venue by failing to present available evidence that the alleged crime occurred in Osceola County, not Orange County, as charged in the information. The trial took place in Orange County. In order to obtain a conviction the state must venue. Croft v. State, 139 Fla. 711, 191 So. 34 (1939); Pennick v. State, 453 So. 2d 542 (Fla. 3rd DCA 1984). If counsel had carried through with this strategy, there is more than a reasonable probability that the trial outcome would be different. That is, that either the trial court would have granted a motion for judgment of acquittal for the state's failure to prove venue, or the jury would have found that venue was not proven.

Argument

In the present case, counsel's trial strategy was that he would raise the issue in a motion for judgment of acquittal at the close of the state's case-in-chief, and if unsuccessful, present evidence in the defense case-in-chief that the acts occurred in another county. At the close of the state's case, counsel argued that the state had not proved venue. (Appx D, pg.240) Therefore, as in Monroe v State, 14 So.3d 1205 (Fla. 4th DCA 2009), the issue was not waived below. But, counsel did not then attempt to present evidence that would have shown venue was improperly charged.

Counsel was ineffective because he had the opportunity and the means to prove that the acts occurred in another county, but failed to do so. At the 3.850 hearing, counsel said that after the state's case-in-chief he did not specifically remember discussing venue because he felt the state's case was weak, he advised his client that his testimony was not necessary. He offered no explanation of why he did not present other evidence that the alleged acts had occurred in Orange County. He acknowledged that his client had given him proof, in the form of a credit card statement that the hotel used on the night in question was in Osceola County. But, he did not follow up by contacting hotel management, or obtaining records from the hotel. (Appx D, pg.222-225) At the hearing, the Petitioner also presented evidence in the form of a receipt from the La Quinta hotel, which,

presumably, could have been obtained, and used to advantage with testimony from the custodian of the hotel's records. (Appx D, pg.233-234).

That would have been sufficient to refute the state's evidence at trial as to the location of the crime. At the hearing, the state referenced pages in the trial transcript where he believed venue was established; pages 247, 257, 299-301, 347, and 402-404. (Appx H) That evidence is inconclusive. One victim, V.A., testified that it was a Quality Inn, but she did not know whether it was Orlando or Kissimmee. (Appx H, pg.245-248, 301). She only gave the police the name of the hotel. (Appx H, pg.248) She said they went first to one hotel that was booked, or not available, then went to the Quality Inn. (Appx H, pg.256-257) An Orange County Sheriff's deputy testified that based upon some landmarks the victims had referenced (*i.e.,* proximity to International Drive and a McDonalds restaurant) he narrowed the choice of hotels down to a particular Quality Inn in Orange County. However, he did not consider hotels outside his jurisdiction. (Appx H, pg.392-393, 402-404) The alleged incident had taken place over a year before. (Appx H, pg.401) If the detectives had made any efforts to verify that the party stayed there by checking records, that witness was unaware of them. (Appx H, pg.401)

The evidence available to defense counsel was more than enough to rebut the State's evidence as to where the alleged crime occurred. Advising his client not to testify might be reasonable trial strategy. **But, there was no reason to forego**

the strategy of challenging venue. Even though counsel unaware that he could have asked for a jury instruction on the issue (itself deficient performance) his original strategy to raise the issue in a motion for judgment of acquittal was sound. Evidence of the correct venue could have been presented even without the Petitioner's testimony, by producing the business records and record custodian from the correct hotel. The issue could have been raised in a second motion for judgment of acquittal, or (had counsel been aware of the option) by placing the issue by requesting an instruction on venue. Fla.Std.Jury.Instr. (Crim) 3.8(e).

In Conflict With The Decision Of Another Circuit Court Of Appeals

On one side of the spectrum caselaw establishes ineffective assistance of counsel for failing to seek a change of venue. See Harris v. Wainwright, 697 F.2d 202 (8th Cir. 1982) (A trial counsel's failure to properly handle change of venue issues amounts to ineffective assistance of counsel.)

On the other side of the spectrum caselaw also states venue can be waived as of trial counsel's strategy. See also Weeks v. Jones, 26 F.3d 1030, 1046 n.13 (11th Cir. 1994)(concluding that no ineffective assistance occurred when trial counsel made a "strategic decision not to move the trial from Macon County because, based on experience, he thought that [the petitioner] had the best chance for acquittal there.)

However, Petitioner's case falls in between that dividing line because, defense counsel was aware before trial began that venue was improperly charged in Orange County. The fact that he felt his client would fare better with a trial in that county, and so did not move to change venue, did not waive the requirement that the state must prove the venue as charged in the information.

U.S. Supreme Court Rule 10(a) indicate compelling reasons for the Court to consider before a writ of certiorari can be granted which states in pertinent part ... "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter..."

Therefore, a cert should issue on the above question.

Question Two

Whether counsel was constitutionally deficient for failing to ensure that proper jury instructions were given and for failing to follow up with explaining the law and instructions, in violation of due process, the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

This claim was raised for the first time in Petitioner's habeas corpus petition. (Appx I) (DE.1) Without the application of Martinez v. Ryan, 132 S.Ct. 1309 (2012) this claim will not survive exhaustion requirements.

Soza was convicted of sexual battery on a victim physically helpless to resist. This was only possible because of the incomplete instructions provided to the jury in regard to count one and counsel's failure to properly inform the jury.

The jury was improperly instructed in the following manner:

> "To prove the crime of sexual battery upon a person twelve years of age or older under specified circumstances, the state must prove the following four elements beyond a reasonable doubt:
>
> 1. Cynthia Aleman was twelve years of age or older.
> 2. Jose Soza committed an act upon Cynthia Aleman in which the sexual organ of Jose penetrated or had union with the vagina of Cynthia Aleman.
> 3. Cynthia Aleman was physically helpless to resist.
> 4. The act was committed without the consent of Cynthia Aleman.
>
> "Consent means intelligent, knowing or voluntary consent and does not include coerced submission."

The state introduced evidence which if believed by the jury demonstrated that the complainant was physically helpless. Even with such evidence and finding, the jury still had to find that the "act was committed without the consent of Cynthia Aleman."

The jury in finding Soza guilty necessarily had to find the consent was not present as it was an element that was instructed upon. This finding, however, was not fairly, intelligently or properly made because the jury was not fully instructed.

For a proper determination, the jury should have received the multiple definitions that collectively define and explain exactly what consent means. The jury did receive the following general consent instruction:

> "Consent means intelligent, knowing or voluntary consent and does not include coerced submission. Consent does not mean the failure of the alleged victim to offer physical resistance to the offender."

MISSING INSTRUCTIONS

The jury did not receive the other necessary instructions:

> Evidence of victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent. "Mentally Incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic or intoxicating substance administered to that person

without his or her consent or due to any other act committed upon that person[1] without his or her consent.

Under these instructions, the jury is informed that even if they find the victim was physically helpless, they must also find that consent was not present and that any mental incapacity that temporarily removed the ability to consent had to have been the result of intoxication – involuntarily consumed. They were not, however, given these complete instructions so their verdict of guilty does not reflect the effect of the complaints voluntary consumption of alcohol. A difference that would have resulted in an acquittal.

[1] The jury was properly instructed for the lesser offense but not the main offense.

CONCLUSION

This Court should grant *certiorari* to review the judgment below.

Respectfully submitted,

Jose Soza #X62244
Avon Park Correctional Institution
8100 Highway 64 East
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CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that a true and correct copy of the foregoing has been served by first-class mail on after being placed in the hands of a prison official for mailing at Avon Park Correctional Institution:

SUPREME COURT OF THE UNITED STATES
One First St. N.E.,
Washington, DC 20543

Attorney General's Office
Daytona Beach Office (Fifth DCA)
444 Seabreeze Blvd. Ste. 500,
Daytona Beach, Fl. 32118

On this 24 day of August 2018

Jose Soza #X62244
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Avon Park, FL 33826-6801

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