No: 20-6140

ORIGINAL

In the
Supreme Court of the United States

ROGER JOSE ALMANZAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the First Circuit err in not granting a certificate of appealability on the merits of the claims of ineffective assistance of counsel when it addressed the acceptance of a plea offer.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case is the United States Court of Appeal for the First Circuit and the United States District Court of Massachusetts.

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

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PETITION FOR WRIT OF CERTIORARI

Roger Jose Almanzar, the Petitioner herein, respectfully prays that a Writ of Certiorari is issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished opinion *Almanzar v. United States*, 19-1218 (1st Cir. 2020) entered on July 17, 2020 and is reprinted as Appendix A to this Petition.

The opinion of the United States District Court denying his Title 28 U.S.C. § 2255 whose judgment is herein sought to be reviewed, is an unpublished opinion *United States v. Almanzar,* 2019 U.S. Dist. LEXIS 14485 (D. Mass. Jan. 29, 2019) is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The First Circuit Court of Appeals opinion was entered on July 17, 2020. The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Id. Fifth Amendment U.S. Constitution

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

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

Id. Sixth Amendment U.S. Constitution

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

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

Title 28 U.S.C. § 2253 provides in pertinent part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or

trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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

(B) the final order in a proceeding under section 2255.

(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 (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Id. Title 28 U.S.C. § 2253.

STATEMENT OF THE CASE

On his Title 28 U.S.C. § 2255 challenge, Almanzar argued that his counsel was ineffective during his bench trial and subsequent appeal.

STATEMENT OF THE FACTS

Beginning in approximately 2011, federal agents began investigating the drug-trafficking and money-laundering activities of Rahdames Pena and his associates in and around Lynn, Massachusetts. During the course of the investigation, agents identified New York-based Almanzar as one of Pena's suppliers of kilogram quantities of cocaine. Notably, agents used a cooperating witness, Hector Diaz, who was a member of Pena's organization, to make a controlled purchase of two

kilograms of cocaine from Almanzar on Pena's behalf in November of 2012; agents intercepted phone calls and text messages between Pena and Almanzar, and between Pena and his associates, in early June of 2012 discussing Pena's purchase of seven kilograms of cocaine from Almanzar and a seized drug ledger belonging to Pena contained notations indicating that Pena had purchased over 30 kilograms of cocaine from Almanzar during 2011. Based on this and other evidence obtained during the investigation, a federal grand jury in the District of Massachusetts returned an indictment on November 29, 2012, charging Almanzar, Pena, and nine others with conspiring to possess with intent to distribute and to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846 and §841(a)(1) and (b)(1)(A)(ii) (Count One); Pena and others were separately charged with additional drug-trafficking offenses. That same day, a magistrate judge (Dein, M.J.) issued arrest warrants for Almanzar and his ten codefendants. On April 17, 2014, the grand jury returned a superseding indictment. Like the original indictment, the superseding indictment charged Almanzar in Count One with conspiring "to possess with intent to distribute, and to distribute, cocaine," in violation of 21 U.S.C. §846 and §841(a)(1); and alleged that "the offense charged in Count One involved five kilograms or more of . . . cocaine," thereby triggering the enhanced penalties set forth in §841(b)(1)(A)(ii). The superseding indictment further alleged that, "with respect to Count One, five kilograms or more of . . . cocaine . . . are

attributable to, or were reasonably foreseeable by" Almanzar, thereby making the enhanced penalties set forth in §841(b)(1)(A)(ii) - - specifically, a 10-year mandatory minimum sentence—applicable to Almanzar individually.

Almanzar and Pena were tried together in a six-day bench trial that began on June 9, 2014. At the start of trial, Almanzar conceded that he was guilty of the conspiracy charged in Count One because he did not dispute that he sold two kilograms of cocaine to Diaz in Novem-ber 2012. However, Almanzar disclaimed responsibility for any additional quantities of cocaine and stated that "the whole focus of this trial is whether or not [the government] proved the five kilos" of cocaine charged in the indictment that would require the court to impose a 10-year mandatory minimum sentence. Almanzar recognized that, if the court were to conclude beyond a reasonable doubt that he sold seven kilograms of cocaine to Pena in June 2012, that would, "in effect, end [the] inquiry." *Id.*

During trial, the government introduced evidence - testimony from agents and cooperating witnesses, intercepted phone calls and text messages, and drug ledgers, among other things - to prove that Almanzar sold two kilograms of cocaine to Diaz in November 2012; that Pena's drug ledger reflected multi-kilogram cocaine transactions with Almanzar during 2011; and that Almanzar sold seven kilograms of cocaine to Pena in June 2012. The government argued that the evidence proved beyond a reasonable doubt that Almanzar had conspired to distribute and possess

with intent to distribute five or more kilograms of cocaine. In his defense, Almanzar argued that the June 2012 transaction with Pena did not involve the sale of seven kilograms of cocaine, but was instead a money-laundering transaction. The court ultimately concluded beyond a reasonable doubt that Almanzar sold Pena seven kilograms of cocaine in June 2012, finding Almanzar's money laundering defense not credible. The court also concluded that Almanzar was guilty of the drug-trafficking conspiracy charged in Count One, that the conspiracy involved five or more kilograms of cocaine, and that such quantity was attributable to Almanzar individually. On October 9, 2014, the court sentenced Almanzar to 140 months in prison. Subsequent appeals and post conviction pleadings were denied on the merits.

REASONS FOR GRANTING THE WRIT

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

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW
ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

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

QUESTIONS PRESENTED

1. Did the First Circuit err in not granting a certificate of appealability on t he merits of the claims of ineffective assistance of counsel when it addressed the acceptance of a plea offer.

The instant application seeks a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b)(1), because the correctness of the District Courts' disposition on the merits of the ineffectiveness claim is at least "debatable" among jurists of reason. *See, Buck v. Davis*, 580 U.S. —, 137 S.Ct. 759, 773–75 (2017) (reiterating governing standard for issuance of COA); *Tennard v. Dretke,* 542 U.S. 274, 282–83 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 335–38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)); see also *Sorto v. Davis,* 672 F. App'x 342, 346 (5th Cir. 2016) (defendant must demonstrate 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.'"); see also *Rosales v. Dretke*, 133 F. App'x 135, 137 (5th Cir. 2005) (any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination); *Fuller v. Johnson,* 114 F.3d 491, 495 (5th Cir. 1997).

To obtain a COA, the showing of possible error need not be conclusive. Far from it. As explained in *Miller-El*, 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 petitioner will not prevail" 537 U.S. at 338. In short, § 2253(c) establishes a low threshold for granting a COA. *Buck v. Davis,* 137 S.Ct. at 773–75. "We reiterate what we have said before: A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id.* at 774 (bracketed insertions original), quoting *Miller-El*, 537 U.S. at 327, 348. In this case, In the court's Order of denial, the court concluded that "all indications were that Almanzar would not accept a 120-month sentence, not just by the account of his counsel, (Doc. 891-3 at 2),[1] but by the scope of the bench trial in which he did not dispute his guilt of the conspiracy charge, but contested

[1] "Doc." refers to the Docket Entry in the District Court.

the government's contention that the quantity of cocaine attributable to him was high enough to trigger the minimum mandatory sentence of ten years. (Doc. 895, p 4). This position is open to interpretation. Almanzar, contrary to his attorney's response, would have accepted a plea, even if at a mandatory minimum sentence. (Doc. 876-1, p 3). In fact, during the sentencing hearing, Almanzar's counsel noted the following:

> MR. SHEKETOFF: ... ***The way the negotiations went in this case is we said from the beginning we're willing to plead to the indictment, because the indictment did not have a quantity in it.*** The government superseded before trial to put the quantity in, which meant that we couldn't plead to it anymore. ***So it was always clear that we were willing to plead to the indictment as it initially drafted, but that would not have had a minimum mandatory associated with it.*** I mean, given your sentencing decisions, the guideline calculation, it wouldn't have mattered. I think I said this to you at the very beginning of our trial, that in many ways, this trial might just be a total waste of time, because, you know, whether you were required to give 10 years or not required to give 10 years, you had the discretion, given the government's position at sentencing, it was likely that you were going to be -- that this might be an irrelevancy.

Id. (Doc. 717. p. 23).

The sentencing transcripts establish that Almanzar was "willing to plead to the indictment" which could have occurred prior to the superseding indictment being issued. (Doc. 717. p. 23). Counsel's affidavit that he was "informed that [Almanzar] would not accept any bargains unless the quantity involved would not expose him to the minimum mandatory sentence" is contradicted by the statement made at sentencing. (Doc. 891-3, p. 32). Whether Almanzar was willing to "plead

to the indictment" or "would not accept any bargains unless the quantity involved would not expose him to the minimum mandatory sentence" are opposite of each other. This is a classic case where a jurist of reason would agree that the matter could have been resolved in a different manner. *Widener v. Cowen*, 2019 U.S. Dist. LEXIS 12360, at *16 (D. Mass. Jan. 25, 2019) (A certificate of appealability is appropriate when "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Miller-El v. Cockrell,* 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Here, a jurist of reason could have debated whether counsel remembered what he stated at the sentencing hearing versus what he alleged in his affidavit. As stated in *Slack v. McDaniel*, 529 U.S. 473, 481, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* 529 U.S., at 484. Almanzar does not require a showing that the appeal will succeed. *Miller-El v. Cockrell,* 537 U.S. 322, 337, 123 S. Ct. 1029, 1039 (2003). All Almanzar requires a showing of victory on appeal. The fact that he is requesting permission to appeal is enough to show he has already lost. *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983).

The appellate court should not have declined the application for a COA merely because it believed Almanzar will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if the appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. *Id. Estelle* at 893. All that Almanzar had to establish was that there was "probable cause requires something more than the absence of frivolity" or the existence of mere "good faith" on his. *Barefoot*, at 893. The court does not require Almanzar to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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 Almanzar will not prevail. As the court stated in *Slack*, "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 529 U.S., at 484. In this case, counsel's statements during the change of plea hearing are contradicted by his statements in the sworn affidavit. A jurist of reason may find it debatable whether counsel advised Almanzar of the possibility to plead guilty, prior to the indictment being superseded, thus avoiding

a mandatory minimum sentence. The statements are inconclusive, debatable and warrant encouragement to proceed further. As such, the lower court's decision was in error, requiring this court's intervention.

CONCLUSION

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

Done this 13, day of October 2020.

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