

No: **21 - 5910**

**In the
Supreme Court of the United States**

CARLOS SAUZO,

Petitioner,

vs.

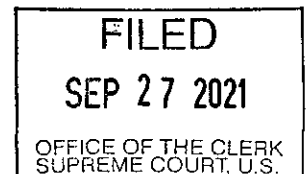
ORIGINAL

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI



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QUESTIONS PRESENTED FOR REVIEW

Does the Fifth and Sixth Amendment require the lower court to address an evidentiary hearing when the record before the court is inconclusive as to which party must be believed.

**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 in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the District Court Western District of Texas.

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

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PETITION FOR WRIT OF CERTIORARI

Carlos Sauzo, 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The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is unpublished *United States v. Sauzo*, 846 F. App'x 306 (5th Cir. 2021) was entered on February 6, 2021 and is reprinted in the separate Appendix A to this petition. The denial of Sauzo's 28 U.S.C. § 2255 was entered on April 25, 2019. See, *United States v. Sauzo*, 768 F. App'x 284 (5th Cir. 2019) and in and is reprinted in the separate Appendix B to this petition

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on February 6, 2021. The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 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

STATEMENT OF THE CASE

Sauzo's conviction in this case arises from his involvement in a large-scale narcotics organization responsible for smuggling narcotics and illegal drug proceeds from Mexico through the Laredo, Texas, Port of Entry and transporting the narcotics to northern parts of the United States, including New York and

Boston. An investigation by Homeland Security Investigations (HSI) revealed the narcotics originated from the Sinaloa Cartel in Mexico. The narcotics organization's leader, Jorge Alberto Mojica, utilized tractor trailers, eighteen-wheelers, and passenger vehicles with hidden compartments to transport the narcotics. Mr. Mojica also recruited individuals to serve in various capacities to assist the operation by packing the drugs in vehicles, smuggling the drugs into the United States through the Laredo Port of Entry, and delivering the products to employees of movant Sauzo, a resident of Connecticut. Movant Sauzo, who was identified as a manager/supervisor of the organization, employed various individuals to travel south to receive the shipments from Jorge Mojica's employees and to transport the narcotics to New York and Boston for distribution. An approximate total of 19.3 kilograms of heroin, 11.43 kilograms of cocaine, and between \$200,000 and \$400,000 in United States currency were transported during the time frame of the conspiracy charged in this case.

On July 23, 2013, Carlos Sauzo pleaded guilty to trafficking heroin in state court in Boston, Massachusetts, based on his involvement in the criminal enterprise described above, and was sentenced to three years and six months of imprisonment in the Massachusetts Department of Corrections. (ECF No. 458 at 13). On February 5, 2014, a federal grand jury returned a four-count indictment naming Carlos Sauzo and ten co-defendants. (ECF No. 3). Count One of the indictment

charged Sauzo with conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. (*Id.* at 1-2).

On July 21, 2016, Sauzo was charged by superseding information with conspiracy to distribute and possess with intent to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. (ECF No. 447). Sauzo waived indictment and pleaded guilty to Count One of the superseding information pursuant to a written Plea Agreement. (ECF Nos. 442, 448, & 449). In exchange for Sauzo's agreement to plead guilty, the Government agreed to dismiss any remaining counts against him and recommend a three-level downward adjustment for acceptance of responsibility at sentencing, and that his sentence run concurrently with his sentence in the Massachusetts state case. (ECF No. 442 at 11). The PSR reflected a base offense level of 34, pursuant to U.S.S.G. § 2D1.1(c)(3), because Sauzo was responsible for the possession of 11,935 grams of heroin and 2,982 grams of cocaine, for a total of 12,531.9 kilograms when converted to their marijuana equivalency. (ECF No. 458 at 9). Three levels were added pursuant to U.S.S.G. § 3B1.1(b) based on Mr. Sauzo's role as a manager or supervisor and because the criminal activity involved five or more participants or was otherwise extensive. (*Id.*). Two levels were deducted for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), and one additional

level was deducted for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b), resulting in a total offense level of 34. (*Id.*). Sauzo was subject to a statutory mandatory minimum term of imprisonment of 5 years and a maximum term of 40 years, pursuant to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). (*Id.* at 16). Based on a total offense level of 34 and a criminal history category of II, movant Sauzo's advisory Guidelines sentencing range was calculated as 168 months to 210 months. (*Id.*). On July 21, 2016, this Court sentenced Sauzo to a below-Guidelines sentence of 120 months of imprisonment with credit for time served while in custody for the federal offense, five years of supervised release, and a \$100 special monetary assessment. (ECF Nos. 460 & 464).

The § 2255 motion is before the Court following remand from the United States Court of Appeals for the Fifth Circuit. Sauzo filed the § 2255 motion and affidavit in support on October 10, 2017. (ECF Nos. 485 & 486). Having found that movant Sauzo waived his preconviction claims and his right to appeal his sentence or contest it in a § 2255 collateral proceeding by pleading guilty, this Court denied movant Sauzo's § 2255 motion prior to service. (ECF No. 498). Sauzo appealed, and the Fifth Circuit vacated the judgment denying the § 2255 motion and remanded the matter back to the District Court for further proceedings. (ECF No. 527).

Post remand, the district court denied the claims without the benefit of an

evidentiary hearing, although, the affidavits provided by Sauzo and counsel conflicted with each other. Post remand, the Fifth Circuit denied the request for a certificate of appealability. *United States v. Sauzo*, 846 F. App'x 306 (5th Cir. 2021).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION 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

DOES THE FIFTH AND SIXTH AMENDMENT REQUIRE THE LOWER COURTS TO ADDRESS AN EVIDENTIARY HEARING WHEN THE RECORD BEFORE THE COURT IS INCONCLUSIVE AS TO WHICH PARTY MUST BE BELIEVED.

The instant petition seeks a writ of certiorari because the correctness of the Circuit Courts' disposition on the merits of the ineffectiveness claim were at least "debatable" among jurists of reason. The conflictive nature of the affidavits between Sauzo and counsel required a hearing. 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); *MillerEl 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 differently 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).

A COA was required in this case and it was error to not have one granted. To obtain a COA, the showing of possible error need not be conclusive. Far from it. As explained by this court 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.” *Id.* 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, the District Court addressed the merits of the § 2255 but did not hold a hearing on the conflictive nature of the parties affidavits. Since the conflictive nature of the affidavits was not resolved, nor addressed by the District Court, the request for a certificate of appealability should have been granted since the District Court’s decision “was debatable.” *Buck v. Davis*, 137 S.Ct. at 774. There are two versions of the facts, counsel’s version, and Sauzo’s version. Both versions contradict each other. The only way to decide which party is to be believed was via an evidentiary hearing. To merit an evidentiary hearing, all

Sauzo needed to allege was that trial counsel's representation fell below an objective standard of reasonableness." *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 367. (1985). The district court cannot discredit Sauzo's affidavit merely because he is incarcerated. See, *Taylor v. United States*, 287 F.3d 658 (7th Cir. 2002) determined that if the record contains an evidentiary conflict on a material issue of fact a judge must hold an evidentiary hearing to decide who is telling the truth. "It is not sound to say that in every conflict between a prisoner and a lawyer, the lawyer must be believed." *Id.*; *Freedman v. United States*, 588 F.2d 1010 (5th Cir. 1979) (stating that contested fact issues in a § 2255 case cannot be resolved on the basis of affidavits); *Montgomery v. United States*, 469 F.2d 1485 (5th Cir. 1972); *Brown v. United States*, 462 F.2d 681 (5th Cir. 1972). The issues of the conflictive affidavits addressed conversations that occurred between counsel and Sauzo and were therefore not part of the record. What is part of the record is Sauzo's plea. A plea that was provided based on misinformation received by counsel before entering court.

For example, trial counsel's affidavit stated:

I never told him that he was likely to receive a term of imprisonment in the 40-60 month range or that 60 months was the most he was looking at. I knew the count to which he was pleading guilty carried a mandatory minimum of 60 months, so I never would have told him a sentence of 40-60 months was likely.

Id. (Dkt. 530 at 2-4).

Sauzo's affidavit stated in substance the opposite:

Within 13-days of discussing the discovery, a plea agreement was executed. This rush scenario supports the allegation, that Sauzo was under the impression of a 60-month maximum sentence, and based on his jail credit, he would be “going home in 2 to 6 months after signing the plea agreement.” (Dkt. 486 at 2).

Martinez “just told [him] that he faced a sentence of no more than 60 months and would receive a 4-year credit on that 60 months,” for time served on related state charges, meaning he would serve “a little under one year in Texas” and would be held accountable for at most 100 grams of heroin.³ (Id. at 5, 21-23).

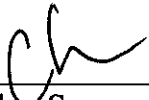
Id. (Dkt. 486 at 2).

The question arises, thus the encouragement to proceed further was required, as to whether the district court was required to hold an evidentiary hearing to determine which party must be believed in light of the conflictive nature of the affidavits. The District Court and Circuit Court’s actions requires the granting of a writ of certiorari.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Fifth Circuit and the District Court to address the matters of the issues filed herein.

Done this 22, day of September 2021.



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