No:

In the
Supreme Court of the United States

DERRICK SAMUELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Samuels was forced to proceed to trial with no black jurors, spectators nor other black persons in the court room. The situation was so uncomfortable that the trial judge noted the lack of black individuals. After a trial with all white jurors, Samuel was convicted. Based on these facts, Samuel presents as follows:

Should a writ of certiorari been granted to determine if Samuel's Fifth Amendment rights were violated when he was forced to proceed to trial as the only black person in the courtroom, including jurors?

Was Samuel's Fifth Amendment right against self-incrimination violated when the prosecutor advised the jury during opening arguments that Samuel would testify during the trial?

Should a writ of certiorari be granted to review if Samuels' due process Sixth Amendment confrontation rights were violated when a witness at trial was permitted to testify as an expert without being qualified as such in violation of the Federal Rules of Evidence Rule 702?

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 Sixth Circuit and the United States District Court for the Southern District Court of Western District of Michigan.

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

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OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, whose judgment is herein sought to be reviewed, is unpublished *Samuels v. United States*, 2021 U.S. App. LEXIS 26073 (6th Cir. Aug. 27, 2021) is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Western District of Michigan, whose judgment was appealed to be reviewed, is an unpublished opinion in *Samuels v. United States,* 2:20-CV-209, (W.D.M.I. March 4, 2021) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on August 27, 2021.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).[1]

[1] Based upon restrictions caused by COVID-19, the United States Supreme Court extended its 90-day filing deadline of all Writ of Certiorari to 150 days. See, Order, No. 589, 2020 U.S. LEXIS 1643 at * 1 (Mar. 19, 2020) (IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.)

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.

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.

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.

STATEMENT OF THE CASE

1. Indictment and Jury Trial.

A grand jury charged Samuels in a Superseding Indictment with a count of conspiracy to distribute and possess with intent to distribute heroin; three counts of distribution of heroin; and a count of attempted distribution of heroin. (Crim. ECF No. 36).[2] The matter proceeded to a jury trial, and Samuels was found guilty on all five counts. The Sixth Circuit Court of Appeals summarized the government's proofs and Samuel's subsequent sentencing as follows:

> Samuels spent years dealing heroin in the Upper Peninsula of Michigan. Some of his purchasers re-sold the heroin they bought from him, drove him to Chicago to pick up more heroin, and cleaned his house after it was searched by the police. These co-conspirators testified against Samuels at his trial. All indicated they would assert their Fifth Amendment rights if asked questions about drugs, and so all were given use immunity. The jury found Samuels guilty on all five counts. At sentencing, Samuels argued to the district court that, despite the fact that the career offender Guidelines applied to him, he should be sentenced as though they did not because his predicate offenses and offense of conviction were all free of weapons or overt violence and involved relatively small amounts of drugs. The district court sentenced Samuels to 240 months incarceration, a below-Guidelines sentence.

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[2] "Crim. ECF" refers to the docket entry in the United States District Court for the Western District of Michigan, Northern Division.

Id. United States v. Samuels, 781 F. App'x 454, 455 (6th Cir. 2019) (internal citations omitted).

2. Appellate Claims - Issues.

On appeal, Samuels raised five arguments before the Court of Appeals: (1) the procedural and substantive reasonableness of his sentence; (2) the sufficiency of the evidence with respect to the conspiracy charge; (3) prosecutorial misconduct through the manner in which witnesses were immunized; (4) prosecutorial misconduct through witness bolstering; and (5) an Enright violation. The Court of Appeals determined all arguments failed on the merits and affirmed his convictions and sentence. *Id.* No writ of certiorari was filed.

3. Post-Conviction Proceedings.

Samuels then filed a motion to vacate, set aside, or correct his sentence on October 13, 2020. (ECF No. 1). The motion and the supporting brief, contained three grounds for relief consisting of two claims of ineffective assistance of trial counsel, and one claim of ineffective assistance of appellate counsel:

1. Counsel failed to object to the government's comment, made during opening statements, that Samuels would testify; and

2. The failure to object to the opinion testimony of Detective Hanes under Rule 702.

3. That appellate counsel was ineffective for failing to appeal the Magistrate Judge's denial of his motion to change venue.

Id.

The District Court denied the motion without the benefit on an evidentiary hearing. The Sixth Circuit Court of Appeals denied the request for Certificate of Appealability. *Id. Samuels v. United States*, 2021 U.S. App. LEXIS 26073 (6th Cir. Aug. 27, 2021). Samuels presents that at least one of his claims, the error on the failure to grant a change of venue appeal, warrants relief.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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

I. SHOULD A WRIT OF CERTIORARI BEEN GRANTED TO DETERMINE IF SAMUEL'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS FORCED TO PROCEED TO TRIAL AS THE ONLY BLACK PERSON IN THE COURTROOM, INCLUDING JURORS

Prior to trial, defense counsel filed a motion to have the venue of this case changed to another district due to the lack of black jurors. In fact, Samuel's was the only black person in the courtroom. The request was appropriate at the time, although discretionary. The court noted during jury selection that no black persons, except for Samuels were present during the trial:

> Let me look to a different issue. And this one is hard again, so I'm going to be direct about it. You know, when I look around the jury box, I see no black faces. My face isn't black. I don't see any black faces anywhere in the courtroom except one place and that's Mr. Samuels. And he's the person who is on trial here. If I were Mr. Samuels, I would be pretty intimidated about that. I'd be scared about that. Race is a big issue in this country, and this is not a part of the country where we have a lot of African-Americans living in the first place.

Id. (ECF 120, PageID 564).[3]

[3] The comment was made in jury selection as to the court's inquiry whether Samuel's could obtain a fair trial.

Expecting this would occur, before trial defense counsel filed a motion for change of venue addressing that same concern. In his change of venue motion, Samuels noted that he felt "he cannot obtain a fair and impartial trial in the Upper Peninsula of Michigan because of what he perceives as the inherent potential racial prejudice against a black man from what will likely be an all-white jury." *Id.* (ECF 50 PageID 89). The court abused its discretion when it denied the motion for a change of venue. (ECF 61, PageID. 123). Irrespective of the court's order to the contrary, the matter was preserved for appellate review. The issue was not frivolous, warranted consideration to proceed further, and could have rendered a different result. Although this court formulated the *Strickland v. Washington,* 466 U.S. 668 (1984) test in the context of trial counsel's stewardship, applying it with equal force to the analysis of the defendants' challenge to the performance of appellate counsel. *See Diggs v. Owens*, 833 F.2d 439, 444-45 (3d Cir. 1987); see also *McKee v. United States*, 167 F.3d 103, 106 (2d Cir. 1999); *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995); *United States v. Merida*, 985 F.2d 198, 202 (5th Cir. 1993). A defendant whose lawyer does not provide him with effective assistance on direct appeal and who is prejudiced by the deprivation is entitled to a new appeal. *Ramirez v. Tegels*, 963 F.3d 604, 606 (7th Cir. 2020).

Here Samuels was concerned over the lack of a black jurors at his trial, so he filed a change of venue motion. The denial was within the court's discretion, but a

viable issue to present on appeal. A court determines whether counsel exercised reasonable professional judgment by evaluating counsel's performance from the perspective of a reasonable attorney *at the time* of petitioner's appeal, taking care to avoid the distorting effects of hindsight. *Id. Tegels,* at 606. When viewing counsel's actions from his perspective at the time a decision was made on the issues to raise on appeal, the court must agree that counsel rendered ineffective assistance when he failed to raise such a critical issue on appeal. As such the court should grant Samuels's request for a writ of certiorari.

II. WAS SAMUEL'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION VIOLATED WHEN THE PROSECUTOR ADVISED THE JURY DURING OPENING ARGUMENTS THAT SAMUEL WOULD TESTIFY DURING THE TRIAL

The violation here was clear and on point. During opening arguments, the government told the jury that Samuels would testify. The prosecutor mentioned this during the list of witnesses the government would call to present testimony:

> "MR. VERMAAT: Thank you, Your Honor. Good morning, ladies and gentlemen. As you're going to hear in this case, this is a case about bonds between people but not bonds of friendship or bonds of love or of family but an entirely different kind of bond: Bonds of heroin. That's what this case is about. You're going to hear an awful lot about all of these people: ***Mr. Samuels,*** **Ms. Amanda Rush, Julaine Mankowski, Sara Turner, Katie Seymour, Russell Gustafson. You're going to hear more about them. *They are all going to testify*.** And what you're going to hear is there's a difference between them and Mr. Samuels.

Id. (ECF 121, PageID 657).

The government listed their witnesses, provide what the evidence showed and what the witnesses were going to testify, however, they cannot advise the jury that Samuels will or will not testify on his defense. This court addressed that in *Arizona v. Washington*, 434 U.S. 497 (1978) (An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment.) There was no objection from trial counsel. Not even at the end of the government's opening statement, so as to not interrupt the opening statements. Neither was there a correction by the court to the jury. By mentioning to the jury, at the opening of the case that "Samuels" and the government witnesses are "all going to testify" the government shifted the burden to Samuel. After the improper statement, the jury was waiting for Samuels to testify, defend, and present his facts to the jury. The statement only highlighted Samuels's silence during the trial. This was the equivalent of commenting on Samuels's failure to defend his case.

Neither the court nor prosecutor may invite the jury to infer guilt from Samuels's decision not to testify. They may not "solemnize[] the silence of the accused into evidence against him" *Griffin v. California*, 380 U.S. 609 (1965) or "suggest[] to the jury that it may treat the defendant's silence as substantive

evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976). *Griffin* has been taken to forbid comment on the defendant's failure to call witnesses when the only potential witness was the defendant himself. *Williams v. Lane*, 826 F.2d 654, 1987 U.S. App. LEXIS 10973 (7th Cir. 1987), slip op. 17-20; *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1300-02 (7th Cir. 1985). But unless the prosecutor's comment uses the defendant's privilege as evidence against him, it is not objectionable. Here it was. A court may call the jury's attention to the defendant's failure to testify, so long as it does not invite an inference based on the privilege. *Lakeside v. Oregon*, 435 U.S. 333, 55 L. Ed. 2d 319, 98 S. Ct. 1091 (1978). *Cf. Greer v. Miller,* 483 U.S. 756, 107 S. Ct. 3102, 3108-09, 97 L. Ed. 2d 618 (1987). Here, however, the prosecutor placed Samuels in the predicament that he *must testify,* since the government told the jury he would testify. The jury was led to believe that the Prosecutor was aware of some facts involving Samuels's defense and its strategy.

Courts "have long recognized that a prosecutor is obliged 'to avoid making statements of fact to the jury not supported by proper evidence introduced during trial.'" *United States v. Williams-Davis*, 90 F.3d 490, 507 (D.C. Cir. 1996) (quoting *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969)). Here there is no evidence that Samuels alluded that he would testify during the trial. On the contrary, that decision would never be disclosed to the government before the

closing of the government's case. There was no reason to mention to the jury that Samuel would testify during opening arguments. That error warranted a mistrial and a new jury panel. The District Court by not granting a hearing erred and the Sixth Circuits erred in not allowing the matter to proceed further.

III. SHOULD A WRIT OF CERTIORARI BE GRANTED TO REVIEW IF SAMUELS' DUE PROCESS SIXTH AMENDMENT CONFRONTATION RIGHTS WERE VIOLATED WHEN A WITNESS AT TRIAL WAS PERMITTED TO TESTIFY AS AN EXPERT WITHOUT BEING QUALIFIED AS SUCH IN VIOLATION OF THE FEDERAL RULES OF EVIDENCE RULE 702.

Federal Rule of Evidence 702 is clear - before a witness can testify as an expert, the party presenting his testimony must, among other things, show that the witness "is qualified to testify competently regarding the matters he intends to address." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). At Samuel's trial. Officer Mark Hanes ("Hanes") testified as to his basic law enforcement training and his involvement with government witness CI Michael Contrares ("Contrares"). (ECF 121, PageID 855). Hanes was not presented as an expert, nor did his direct testimony lead the defense or the jury to assume he was an expert. The government failed to establish by a preponderance of the evidence that he was qualified as an expert. *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1107 (11th Cir. 2005). (The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the

evidence.) The proponent of the expert testimony carries a substantial burden under Rule 702. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579). Thus, the proponent must demonstrate that the witness is qualified to testify competently, that his opinions are based on sound methodology, and that his testimony will be helpful to the trier of fact. *United States v. Frazier,* 387 F.3d 1244 (11th Cir. 2004) ("The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion . . . ."); *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2001); *Maiz v. Virani,* 253 F.3d 641 (11th Cir. 2001).

During the trial, Hanes testified as follow on recross-examination:

BY MR. NUMINEN:

Q. Well, this, what we're looking at, doesn't say anything about heroin, does it?

A. Yes, it does. To me it does, Mr. Numinen. "I am still at work. Kelly is at work. Front me one until tomorrow." That is Ms. Mankowski asking Mr. Samuels right there "Give me a bag, give me a $100 bag until tomorrow. Kelly gets paid."
That's exactly what that is.

Q. That's what you assume it is.

A. Through my training and experience that's what that is.

Q. It could be front me one of a bag of marijuana.

A. No.

Q. It could be front me one of, you know, almost any controlled substance.

A. No. If you're fronting marijuana, you're going to front an eighth, you're going to front an ounce, give me an oz, stuff like that.

Q. What if that means one ounce?

A. No. Because it's a one, $100 bag. In my experience that's what that is.

Q. ***In your mind*** that word "one" can only mean heroin?

A. "Front me one until tomorrow," yes.

Q. It can only mean heroin?

A. Maybe heroin. Maybe a hundred bag of coke or crack.

Q. So it could be coke. It could be crack.

A. Yes, yes.

Q. Not necessarily heroin then?

A. Heroin, coke, crack. I'll give you that, yeah.

Q. And we depend on the people that are exchanging these texts what they meant by it, right?
A. That's correct.

Q. Okay. And you don't know what they meant by it, right?

A. Ms. Julaine meant give me one bag of heroin, front it to me, and I'll give you tomorrow. That's what she meant.

Q. That's what you assume she meant.

A. Yep, through my training and experience I believe that's what she meant, yes.

Id. (ECF 121, PageID 913-914)

Allowing Hanes to provide expert testimony during re-cross testimony as to the meaning of the text messages involving a heroin transaction, absent being classified as an expert was an error. Hanes's testimony was that of an expert not of a layman. See *Martinez Perez v. Hyundai Motor Co.*, 440 F. Supp. 2d 57, 68-69 (D.P.R. 2006) (Lay testimony results from a process of reasoning familiar with everyday life while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.) Hanes's testimony was that of an expert not of a layman. *See, United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.") Absent an expert qualification, Hanes could not have provided his testimony on the meaning of the text messages that were devastating to Samuel's defense. See, *United States v. Garcia*, 447 F.3d 1327 (11th Cir. 2006) ("[a] witness *[may be] qualified* as an expert by knowledge, skill, experience, training, or education.") *Id.* at 1334. The keywords are *"[may be] qualified." Id.* Just as in *United States v. Williams*, 827 F.3d 1134 (D.C. Cir. 2016), allowing Haines' testimony to proceed to jury verdict was an error. For example, in *Williams'* the case was for participation in a cocaine distribution scheme. The court determined it was reversible error to admit lay opinion testimony from the officer

interpreting recorded conversations and other interactions between alleged coconspirators because testimony failed to establish bases for opinion and thus blurred the distinction between lay and expert opinion testimony and risked providing expert opinion on mental state or condition constituting element of the crime charged. The same error occurred here. Haines was permitted to interpret the text messages between Samuels and Mankowski *a cooperating co-conspirator*. See, *United States v. Samuels*, 781 F. App'x 454, 455 (6th Cir. 2019) (co-conspirators testified against Samuels at his trial). Not every person who testifies meets the expert hurdle. It is unknown if Haines can overcome the expert hurdle since on direct, he was only questioned as to his responsibilities to "investigate the sales, distribution, manufacture of drugs" and his education. (ECF 121, PageID 855). Haines was never tendered as an expert at any stage and most interestingly were not listed as an expert on the government's Notice of Experts under Fed. R. Evid. 702 as required. (ECF 76).[4] The error was evident requiring a new trial. The jury relied on that erroneous testimony for their verdict. Both the District Court and the Court of Appeals did not address the matter, requiring this court's intervention.

[4] ECF 76, Notice of Experts as required by Fed. R. Crim. P. 16(1)(1)(G), filed by the prosecutor only noted: 1) MSP Forensic Chemist Zachary Blacksmith, 2) UPSET D/Sgt. Ron Koski, Special Agent Aaron Voogd, of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and 3) MSP Trooper Patrick McNeely. Mark Hanes was not noted as an expert.

CONCLUSION

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

Done this 23, day of November 2021.

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