No. 23-22-7713

ORIGINAL

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAVIER GIOVANNI ARAUJO,

Petitioner-Appellant.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAVIER GIOVANNI ARAUJO
REG. NO. 55034-177
USP COLEMAN II
U.S. PENITENTIARY
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APPEARING *PRO SE*

QUESTIONS PRESENTED

I. Whether the Fifth Circuit Erred in Denying Araujo's Motion for Certificate of Appealability ("COA") Because He Did Reprise His Grounds from His Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255") and He Has Made a Substantial Showing of the Denial of a Constitutional Right Because Jurists of Reason Could Disagree with the District Court's and Appellate Court's Resolution of His Constitutional Claims or Jurists Could Conclude the Issues Presented Are Adequate to Deserve Encouragement to Proceed Further.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, JAVIER GIOVANNI ARAUJO ("Araujo"), was a criminal defendant in the United States District Court for the Northern District of Texas, Dallas Division, in USDC Criminal No. 3:16-cr-00478-M-2; as Movant in the United States District Court for the Northern District of Texas, Dallas Division, in USDC Civil No. 3:19-cv-02498-M-BT; and as Appellant in the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in USCA No. 22-10927. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. Javier Giovanni Araujo*, No. 22-10927 (5th Cir. 2023), is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 26, 2023. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution

> The Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; 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; nor shall private property be taken for public use, without just compensation."

Sixth Amendment of the United States Constitution

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Proceedings Below

On May 2, 2017, a grand jury sitting in the United States District Court for the Northern District of Texas, Dallas Division, returned a four (4) count Superseding Indictment charging Araujo. See Doc. 39.[1] Count 1s charged Araujo with Conspiracy to Produce Child Pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). *Id.* Count 2s charged Araujo with Conspiracy to Receive Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1). *Id.* Counts 3s and 4s charged Araujo with Transportation of Child Pornography, 18 U.S.C. § 2252A(a)(1). *Id.* The Indictment also contained a Notice Forfeiture, pursuant to 18 U.S.C. §§ 2253(a)(1) and (3). *Id.*

On December 16, 2016, a Rearraignment hearing was held and Araujo entered a plea of guilty as to Counts 1s and 4s of the Superseding Information pursuant to a written Plea Agreement. See Docs. 54, 58.

On February 7, 2018, Araujo was sentenced to a total term of 480 months' imprisonment, Supervised Release for

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[1] "Doc." refers to the Docket Report in the United States District Court for the Northern District of Texas, Dallas Division in Criminal No. 3:16-cr-00478-M-2, which is immediately followed by the Docket Entry Number.

a term of Life, no Fine or Restitution, and a Mandatory Special Assessment Fee of $200. See Docs. 95, 116.

On February 20, 2018, Araujo timely filed a Notice of Appeal. See Doc. 97.

On December 18, 2018, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued an Order dismissing Araujo's appeal as frivolous. See Docs. 137, 138.

On October 21, 2019, Araujo filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), which was denied on August 3, 2022. See CvDocs. 1, 22.[2]

On September 27, 2022, Araujo filed a Notice of Appeal Re: denial of his § 2255 Motion. See CvDoc. 23.

On January 3, 2023, Araujo filed a Motion for Certificate of Appealability in the Fifth Circuit, which was denied on January 26, 2023. See ROA. 13, 14, 28.

B. Statement of the Facts

1. Offense Conduct

Araujo, through his counsel's advise agreed to the following stipulated facts:

> Javier Giovanni Araujo admits and agrees that starting on a date unknown, but at least by on

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[2]"CvDoc." refers to the Docket Report in the United States District Court for the Northern District of Texas, Dallas Division in Civil No. 3:19-cv-02498-M-BT, which is immediately followed by the Docket Entry Number. "ROA." refers to the record on appeal in No. 22-10927, which is immediately followed by the page number.

or about September 26, 2016, through on or about October 7, 2016, in the Dallas Division of the Northern District of Texas, and elsewhere, Araujo did knowingly conspire and agree with coconspirator Garrett Alexander Mack ("Mack") to employ, use, persuade, induce, entice, and coerce John Doe 1, a three-year-old boy, to engage in sexually explicit conduct, as defined in 18 U.S.C. § 2256, for the purpose of producing a visual depiction of such conduct, which visual depiction was transported and transmitted using any means and facility of interstate and foreign commerce and, in and affecting interstate and foreign commerce, and which visual depiction was produced using materials that had been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, in violation of 18 U.S.C. § 2251(a) and (e).

During the aforementioned time period, Araujo agrees that as part of the same scheme as the above-described conspiracy, Mack and Araujo discussed sexually abusing children and exchanged photos and videos that they possessed depicting child pornography.

Specifically, Araujo agrees that on or about October 4, 2016, using the "Kik" application on his phone, he messaged with Mack about John Doe 1. Specifically, Mack sent a message to Araujo stating: "Would be hot to play with [Redacted] kid." Araujo responded: "I know sir."

On or about October 6, 2016, Araujo sent Mack a message: "[Redacted] son still Asleep." Mack responded: "Yeah is he alone?," to which Araujo responded: "No dad sleeping to." Later in the conversation, Mack messaged: "Cool. Maybe some time me and you could play with [John Doe 1]. I bet he would like playing with two dicks." Araujo responded: "Mmm."

Later in the conversation, Araujo sent Mack a photograph depicting John Doe 1 sitting on a bed on top of a white comforter wearing only a pair of dark colored shorts with his penis protruding from the slit in the shorts, with the message "Grr." At the time, John Doe 1 was three years old. Mack sent a message responding: "Cute boy is that his dick out," to which Araujo responded with a second photo.

Mack responded "Nice is he awake and with you," to which Araujo responded with a third photo.

The third photo depicted what appeared to be the nude buttocks of John Doe 1 on his knees with his shorts pulled down to mid-thigh. The photo also contains what appeared to be the same white comforter as the comforter described above and dark colored sheets.

In response to the third photo of John Doc 1, Mack responded "Yum can you do a video." Araujo sent to Mack a video file of John Doe 1 on his stomach wearing only green shorts with a design while lying on a bed with the white comforter and dark colored sheets visible under the child. Araujo's hand can be

> seen in the video pulling down John Doe 1's shorts to expose his buttocks. Araujo then spread John Doe 1's buttocks with his fingers to expose the child's anus. Mack responded: "Yum."
>
> Araujo messaged to Mack: "Ugh," "I get so nervous that dad's here." Mack responded: "Just play with his dick" and asked Araujo what his skype name is. Araujo responded by sending a video file that depicted the genitals of John Doe 1 wearing the same green shorts with a design that are pulled down exposing his genitals in a lewd and lascivious manner. Araujo's hand can be observed in the video using his thumb to pull the shorts down while using his index finger to manipulate the genitals of the child. Araujo also sent the message: "Dad calling," "Lol."
>
> Araujo admits that he agreed with Mack to produce child pornography involving John Doe 1. He admits further that Araujo knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.

See Doc. 55 at 3-5.

2. Plea Proceeding

On December 16, 2016, a Rearraignment hearing was held before Magistrate Judge Paul D. Stickney. See Doc. 58. Araujo pled guilty to Counts 1s and 4s of the Superseding Indictment pursuant to a written Plea Agreement. See Doc. 54. In exchange for Araujo's guilty plea, the government agreed to: (1) not bring any additional charges against Araujo based upon the conduct underlying

and related to his plea of guilty; and (2) dismiss, after sentencing, any remaining charges in the Superseding Indictment. *Id.* at 6. The case was referred to the Probation Office for the preparation of the PSR.[3]

3. Presentence Report Calculations and Recommendations

The United States Probation Office prepared Araujo's PSR. See Doc. 68. On Count 1s: Conspiracy to Produce Child Pornography, Araujo's Base Offense Level is 32, pursuant to USSG § 2G2.1(a), as it relates to John Doe 1, who was 3 years old at the time of the instant offense. See PSR ¶ 37. Four (4) levels were added because the offense involved a minor who had not attained the age of 12 years old, pursuant to USSG § 2G2.1(b)(1)(A). See PSR ¶ 38. Two (2) levels were added because the offense involved the commission of a sexual act or sexual contact, pursuant to USSG § 2G2.1(b)(2)(A). See PSR ¶ 39. Another two (2) levels were added because Araujo intentionally distributed the images and videos of John Doe 1 to Mack, pursuant to USSG § 2G2.1(b)(3). See PSR ¶ 40. Four (4) levels were added because the offense involved material that portrays an infant or toddler, pursuant to USSG § 2G2.1(b)(4)(B). See PSR ¶ 41. Two (2) levels were also added because the minor was in the custody, care, or supervisory control of Araujo, pursuant to USSG § 2G2.1(b)(5). See PSR ¶ 42. The PSR calculated Araujo's Adjusted Offense Level on Count 1s to be level 46. See PSR ¶ 46.

On Count 4s: Transportation of Child Pornography, calls for a Base Offense Level of 22 as it relates to John

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[3] "PSR" refers to the Presentence Report in this case, which is immediately followed by the paragraph ("¶") number.

Doe 2, who was 12 years at the age of the instant offense, pursuant to USSG § 2G2.2(a)(2). See PSR ¶ 47. Two (2) levels were added because the offense involved a prepubescent minor who had not attained the age of 12 years, pursuant to USSG § 2G2.2(b)(2). See PSR ¶ 48. Two (2) levels were added because the offense involved the distribution other than as described in subdivisions (A) through (E), pursuant to USSG § 2G2.2(b)(3)(F). See PSR ¶ 49. Four (4) levels were added because the offense involved material that portrayed sadistic or masochistic conduct or other depictions of violence, pursuant to USSG § 2G2.2(b)(4)(A). See PSR ¶ 50. Five (5) levels were added because Araujo engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, pursuant to USSG § 2G2.2(b)(5). See PSR ¶ 51. Two (2) levels were added because the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, pursuant to USSG § 2G2.2(b)(6). See PSR ¶ 52. Five (5) levels were added as the offense involved 600 or more images (32,218 images of child pornography), pursuant to USSG § 2G2.2(b)(7)(D). See PSR ¶ 53. Two (2) levels were added because the victims depicted in the video files "2016-02-07 10.51.40.mp4" and "2015-12-31 05.4813.mp4" were vulnerable, pursuant to USSG § 3A1.1(b)(1). See PSR ¶ 54. The PSR calculated Araujo's Adjusted Offense Level on Count 4s to be level 44. See PSR ¶ 57.

The greater of the Adjusted Offense Level above is 46. See PSR ¶ 59. Two (2) units were added pursuant to USSG § 3D1.4. See PSR ¶ 60. Araujo's Combined Adjusted Offense Level is 48. See PSR ¶ 61. However, Araujo was deemed to be a repeat and dangerous sex offender against minors, therefore, five (5) levels were added, pursuant to USSG § 4B1.5(b)(1). See PSR ¶ 62. Araujo received a three (3) level reduction for acceptance of responsibility, pursuant to USSG §§ 3E1.1(a) and (b).

See PSR ¶¶ 63-64. The Total Offense Level is 50, but pursuant to Ch. 5, Part. A (comment n.2), in those rare instances where the total offense level is calculated in excess of 43, the offense level will be treated as offense level 43. See PSR ¶ 65.

Note: Araujo denies "pattern of activity" involving the sexual abuse or exploitation of a minor and admits to no history of doing such (PSR proves that Araujo never had prior offenses prior to the instant case and the Psychology Report proves it as well). In fact, Araujo requested Saputo to look at computers and its history but Saputo defused his request and told him that "U.S. Attorney Hoxie would not accept that."

Fact: Mack sent a zip file that allegedly had one picture. Unbeknownst to Araujo, Mack placed a number of pictures in the zip file, which Araujo only found out after opening the said zip file.

The absence of Araujo's criminal convictions resulted in a criminal history score of zero (0), establishing a Criminal History Category of I. Based upon a Total Offense Level of 43 and a Criminal History Category of I, the imprisonment guideline range is Life. The maximum sentence on Count 1s is 30 years and on Count 4s is 20 years.

4. Sentencing Proceeding

On February 7, 2018, a Sentencing Hearing was held before Chief Judge Barbara M.G. Lynn. See Doc. 95. Araujo was sentenced to a total term of 480 months' imprisonment. This consists of 360 months on Count 1s and 120 months on Count 4s, to run consecutively with each other. Followed by Supervised Release for a term of Life on Counts 1s and 4s. The Court also ordered payment of a Mandatory Special Assessment Fee of $200. See Docs.

116. A timely Notice of Appeal was filed on February 20, 2018. See Doc. 97.

5. Appellate Proceeding

On Appeal, the attorney appointed to represent Araujo has moved for leave to withdraw and has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). Araujo has filed a response. The record was not sufficiently developed to allow the Fifth Circuit to make a fair evaluation of Araujo's claims of ineffective assistance of counsel, therefore, the circuit court declined to consider the claims without prejudice to collateral review. See *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014). The Fifth Circuit have reviewed counsel's *Anders* brief and the relevant portions of the record reflected therein, as well as Araujo's response, and concurred with counsel's assessment that the appeal presents no nonfrivolous issue for appellate review. Accordingly, counsel's motion for leave to withdraw was granted, counsel was excused from further responsibilities herein, and the appeal was dismissed. See 5TH CIR. R. 42.2.

6. Post-conviction Proceeding

Araujo filed this § 2255 Motion and a memorandum in support. See Doc. 144; CvDocs.1, 2. In this motion he argued:

> (1) His retained trial attorney, Paul Saputo ("Saputo"), provided ineffective assistance of counsel prior to his plea when he: (a) failed to communicate with Araujo and did not inform him of the relevant and likely consequences of pleading guilty; (b) failed to file any substantive pretrial motions; (c) failed to conduct an adequate and independent pretrial

> investigation; and d. failed to attempt to negotiate a favorable plea agreement.
>
> (2) Saputo provided ineffective assistance of counsel at sentencing when he: (a) failed to review, discuss, and explain the PSR; (b) failed to file substantive objections to the PSR; and (c) failed to argue for mitigation of punishment and object to his sentence as being substantively unreasonable.
>
> (3) His appellate attorney, Cory Lee Carlyle, provided ineffective assistance of counsel when he: (a) failed to communicate with Araujo about his appeal; (b) failed to allow him to participate in his appeal; and (c) filed an *Anders* brief and failed to raise stronger issues that were available.

The Government argues Araujo's claims that his attorney rendered ineffective assistance of counsel are meritless, and the Court should deny his motion with prejudice. Araujo filed a reply, and the Court has entered an Order in this case, accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. See CvDoc. 22. Therefore, Araujo's § 2255 Motion was denied on on August 3, 2022. *Id.*

REASONS FOR GRANTING THE WRIT

As a preliminary matter, Araujo respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The Fifth Circuit Erred in Denying Araujo's Motion for COA Because He Did

Reprise His Grounds from His § 2255 and He Has Made a Substantial Showing of the Denial of a Constitutional Right Because Jurists of Reason Could Disagree with the District Court's and Appellate Court's Resolution of His Constitutional Claims or Jurists Could Conclude the Issues Presented Are Adequate to Deserve Encouragement to Proceed Further.

Araujo contends that the Fifth Circuit abused its discretion in denying his Motion for COA without conducting a hearing for its decision. By Order dated January 26, 2023, the Fifth Circuit denied Araujo's COA, reads as follows:

> Javier Giovanni Araujo, federal prisoner # 55034-177, was convicted of conspiracy to produce child pornography and transportation of child pornography and was sentenced to a total of 480 months of imprisonment. He filed a 28 U.S.C. § 2255 motion challenging his conviction and sentence, which the district court denied. He now moves this court for a certificate of appealability (COA). Araujo contends that he received ineffective assistance when his trial counsel failed to, with respect to his pre-plea proceedings, communicate with and advise him regarding his guilty plea, file discovery motions, and retain a computer expert; and with respect to his sentencing, present his mother's testimony, present character witness letters in a timely manner, correct allegedly false statements made by the Government, and argue that his risk of recidivism was low. He also argues that appellate counsel was ineffective for failing to raise arguments on appeal that his plea was not knowing and

voluntary; the trial court failed to comply with Federal Rule of Criminal Procedure 11 in his guilty plea proceeding; and the trial court failed to comply with Federal Rule of Criminal Procedure 32 at sentencing.

As a preliminary matter, Araujo does not reprise in his COA motion, and therefore abandons, his claims that his counsel failed to file pretrial motions seeking the production of material under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1973), and to exclude prior bad acts under Federal Rule of Evidence 404(b); failed to conduct an adequate pretrial investigation; failed to negotiate a favorable plea agreement and caused Araujo to unknowingly and involuntarily plead guilty based on deficient advice; failed to properly review, discuss and explain the PSR adequately with Araujo prior to sentencing; failed to file a motion for a downward variance; failed to object to Araujo's sentence as being substantively unreasonable; and failed to communicate with Araujo and allow him to participate in his appeal. See *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

A prisoner will receive a COA only if he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). One "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

> *Miller-El*, 537 U.S. at 327. Araujo has not met this standard. See *id.* His COA motion is DENIED. His motion to proceed in *forma pauperis* on appeal is likewise DENIED.

See Appendix 1A.

In his Motion for a COA, Araujo raises the issue: Whether, pursuant to 28 U.S.C. § 2253(c)(3), the District Court's resolution of the grounds raised by Araujo in his § 2255 Motion were debatable among jurists of reason, or, for that matter, wrong.

COA: Standard of Review

A COA will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *Hohn v. United States*, 524 U.S. 236, 248 (1998). This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Under the controlling standard, the Court must make a gateway examination of the district court's application of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Araujo's constitutional claims, and, ask whether that resolution was debatable among jurists of reason or, for that matter, wrong. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. In other words, Araujo must "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.'" *Slack*, 529 U.S. at 484 (quoting

Barefoot v. Estelle, 463 U.S. 880, 893, n. 4 (1983)).

Further, the decision whether to issue a COA calls for "an overview of the claims in the habeas petition and a general assessment of their merits". Araujo need not prove that some jurists would ultimately grant the petition. Only that the question is debatable on his underlying claim(s) not the resolution of the debate. *Id.* When a district court has dismissed a petition on procedural grounds, the reviewing court should apply a two-step analysis, and a COA should issue Araujo can show both: (1) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling[1" and (2) "That jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right[.]" *Slack*, 529 U.S. at 478.

28 U.S.C. § 2255 "provides the federal prisoner with a post-conviction remedy to test the legality of his detention may do so] by filing a motion to vacate judgment and sentence in his trial court." *Kuhn v. United Stares*, 432 F.2d 82, 83 (5th Cir. 1970). The statute establishes that a prisoner in custody under a sentence of a court established by Congress "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Where there has been a "denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* (emphasis added).

The Sixth Amendment guarantees that "(i)n all criminal prosecutions, the accused shall enjoy the right ... to have the [effective] assistance of counsel for his defense." See U. S. Const. Amend. VI. See *Yarborough v. Gentry*, 540 U. S. 1, 5 (2003) (per curium); see also,

McMann v. Richardson, 397 U. S. 759, 771 n. 14 (1970). It is well-established that the accused is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his prosecution. See *United States v. Wade*, 388 U. S. 218 (1967) and *Gilbert v. California*, 388 U. S. 263 (1967).

To prevail on an ineffective assistance of trial counsel claim and obtain reversal of a conviction, Araujo must prove that: (1) counsel's performance "fell below an objective standard of reasonableness" [*Strickland v. Washington*, 466 U. S. 668, 687-88 (1984)); and (2) counsel's deficient performance prejudiced the defendant, "resulting in an unreliable or fundamentally unfair outcome of the proceeding." *Id.* Araujo must show that counsel's errors were prejudicial and deprived him of a "fair trial, a trial whose result is reliable." *Id.* This burden generally is met by showing a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. *Id.* at 694; *Williams v. Taylor*, 529 U. S. 362, 391 (2000). Unlike the performance prong of the *Strickland* test, which is analyzed at the time of trial, the prejudice prong is examined under the law at the time the ineffective assistance claim is evaluated. See *Lockhart v. Fretwell*, 506 U. S. 364, 367-72 (1993). With regard to ineffective assistance of sentencing counsel, "We have described that standard as requiring that counsel 'research relevant facts and law, or make an informed decision that certain avenues will not be fruitful.'" *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003). "... any amount of actual jail time has Sixth Amendment significance," which constitutes prejudice for purposes of the Strickland test. *Conley*, 349 F.3d at 842 (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001). To show prejudice, Araujo must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the [sentencing] proceeding would have been different." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

In this case, Araujo's motion for COA was denied because he failed to reprise the requisite showing for issuance of a COA as to his ineffective assistance of counsel claims. Contrary to the Fifth Circuit's decision, Araujo did reprise his grounds from his 2255 Motion and he "has made a substantial showing of the denial of a constitutional right" (28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) because jurists of reason could disagree with the District Court's and Appellate Court's resolution of his constitutional claims or jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983)).

a. Claim 1

As contained in Araujo' § 2255 Motion, Saputo persuaded Araujo to plead guilty or he would lose and receive a life sentence should he opt to proceed to trial. U.S. Attorney Hoxie added the conspiracy charge right before sentencing because Araujo took too long to take the plea offer. Saputo never spoke to Javier about the timeliness of the plea offer, Araujo only knew about it at sentencing.

In this case, Saputo failed to advise Araujo of the sentence guidelines should he opt to proceed to trial or plead guilty. He directly jumped into advising Araujo of getting a life sentence without even explaining if he had chosen to go to trial, he would have faced all four counts charged in the superseding indictment, and there was overwhelming evidence against him. Otherwise, by pleading guilty, Araujo limited his sentencing exposure to counts one and four of the superseding indictment, which the Government agreed to dismiss counts two and three.

See PSR ¶ 105 (noting that "Counts 2 and 3 both had statutory maximum terms of imprisonment of 20 years and would have increased the defendant's maximum exposure of imprisonment by 20 years on each count. As Saputo, as the expert at law did not set Araujo's proper expectation in a detailed manner. He surely knows how plea offer works however, he promptly told Araujo that he would get a life sentence instead of explaining everything. Being in Araujo's situation could be devastating especially when you hear such bad news which made it even more stressful for him. In this case, how Saputo communicates and conveys all the necessary information matters to Araujo to make a decision. However, Saputo failed to do so.

Furthermore, Araujo was obviously a layman to the law and has limited access to law books, that is why he needed a proper guidance to know which motions he needed to file or not. And because Saputo did not file any Motion for Discovery, Araujo had no enough information because he was not so much involved in this case preparation– which should be done hand-in-hand if indeed, Saputo wanted to help Araujo or because he was stuck with the life sentence idea, Saputo has put a stop of going beyond his service. In addition, Araujo has failed to identify a particular computer expert that should have been called to testify because Saputo did not thought of at least attempting to be an aid to his defense by bringing in a computer expert on behalf of Araujo.

Lastly, since it was not properly discussed to Araujo about the correct sentencing guidelines should he proceed to trial or plead guilty, he wished to proceed to trial yet, he was just told about the life sentence– plain and simple. It was not elaborated how the plea offer was more beneficial than proceeding to trial. Had he properly laid all of these, Araujo could have really voluntarily accepted the agreement. However, Saputo lack in communicating these things which made Araujo thought that he was not helping

at all.

b. Claim 2

In this case, filing objections to the PSR was not enough especially when Dr. Flynn testified and commented from a professional's point of view that Araujo represented a low risk of re-offending. The District Court disagreed with this opinion yet, this could possibly help Araujo had Saputo properly argued and presented clinical evidences to support Dr. Flynn's statement. However, Saputo failed to do so.

Here, were the instances wherein Saputo failed to act like how a retained attorney should be:

(1) On the night before the sentencing, Saputo spoke to Araujo's mother about being unprepared for his case. She was told that he would call her to serve as a character witness for Araujo, based on her work as an advocate for Human Trafficking, Domestic Violence, and Sexual Abuse. She was informed that it was his strategy, yet, there was no any sort of character witness presentation made by Saputo.

(2) Araujo's family, friends, and mother wrote character witness letters in preparation for the day of sentencing, and the judge's statement confirmed that she had not received the letter from the character witnesses, it obviously showed that Saputo did not intend to raise those letters during sentencing. It was only on the day of the sentencing during the 10-minute recess held when Saputo sent the letters to the judge via email. The

co-defendant's attorney presented and even stated that the co-defendant had presented his character witness letters with ample time which Araujo did not have the same due to Saputo's negligence, Araujo failed to possibly have his letters be reconsidered for a possible lower sentence or relief since he believed in the leniency of the judge. Because Saputo failed to do so, Araujo was placed in a more difficult situation.

(3) During the sentencing, Araujo asked Saputo to defend him as the US Attorney stated things that were not true and relevant to his case including people he did not know and actions he did not do. He repeatedly told Araujo's mother that the US Attorney would come down on him if he did not take the plea. So, he pleaded with the judge to give Araujo 50 years when the judge said 40 years. Had Saputo properly prepared and defended Araujo, he could have had at least a good fight in his case.

(4) His failure to firmly stand his ground in raising that Dr. Flynn's observation of Araujo being a non-re-offender was based on his years of experience, and worked to determine his expert opinion. Saputo failed to justify it with the court that an expert's observation could not be mistaken most of the time and so, it he could have at least attempted to argue that Araujo had the greater chance of changing and not re-offending. However, Saputo failed to do so.

In this case, it clear that Saputo failed to be Araujo's defensive counsel because he did not perform as how a

reliable lawyer was expected to be.

c. Claim 3

On Appeal, Araujo argues that his appellate attorney, Carlyle, failed to properly consult with him in a manner allowing him to participate in the appeal, and there was a "plethora" of issues that could have been raised. In support, Araujo cites the following issues he believes should have been raised: (1) his plea was not knowing and voluntary; (2) there was an error in his Rule 11 proceeding; and (3) there was purportedly a failure to comply with Rule 32 at sentencing.

Again, Araujo is a layman to the law and he needed proper guidance on which motions to file or not and because, he was sentenced to 480 months' imprisonment, he was more than eager to depend on possible help he could have to gain a downward variance. Yet, Carlyle, being the another person Araujo expected to be a help to this case failed to properly guide and provide the best appeal he file to gain some relief from a draconian sentence. However, with lack of expert advise, Araujo ended up getting denied with this § 2255 Motion.

d. *Brady* Violations

Brady v. Maryland (U.S. 1963) held that a prosecutor under the Fifth and Fourteenth amendments has a duty to disclose favorable evidence to defendants upon request, if the evidence is "material" to either guilt or punishment.

In this case, Saputo failed to go over the evidence with Araujo, the confession tape was corrupted and unable to playback in certain places, and whatever objections Araujo mentioned, Saputo would shut him down saying

"the U.S. Attorney will not accept that," without even asking, hence, insisting that he had a good relationship with the U.S. Attorney.

The record in this instance speaks for itself. The U. S. District Court Docket Report reflects that there were **no substantive pretrial motions** filed by Saputo prior to Araujo's plea hearing. Saputo missed out on a golden opportunity to assess and evaluate the strength of the government's case and the evidence that they had against Araujo. This includes the presentation of witness like Araujo's mother and hiring a computer expert to further prove his innocence, as well as, Dr. Flynn's expert remarks that Araujo has a low probability or re-offending– Saputo failed to raise. As such, it clearly implies ineffectivity of his counsel.

Such fundamental pretrial motions are essential in the development and evaluation in assessing the strengths and weaknesses of the government's case and would have aided the defense in the decisional process of whether to negotiate a Plea Agreement or to proceed to trial. Because of the lack of compliance and assistance from Saputo, Araujo was unable to obtain the Discovery that he needed to be fully informed so that he could make an informed decision on whether to plead guilty or proceed to trial. Without this information, he was unable to make an informed decision. As such, he relied on Saputo's erroneous advice to his detriment. Had he been given the Discovery in order to assess and evaluate the government's case-in-chief, there is a reasonable probability that he would have opted to proceed to trial. Saputo's representation was deficient because Araujo was not properly informed of the relevant circumstances and likely consequences of pleading guilty as opposed to standing trial in order to make an informed decision about which course to take.

As noted above, the Court must assume at this point that Araujo can prove his allegations. The hearing will enable the District Judge to consider them along with trial counsel's testimony and any additional evidence the parties wish to present.

Hence, Araujo has shown violations of his constitutional rights where jurists of reason could conclude that the grounds presented in his § 2255 Motion are debatable, or wrong, and that they are adequate to deserve encouragement to proceed further. As such, the Fifth Circuit erred when it denied to issue Araujo a COA.

CONCLUSION

For the above and foregoing reasons, Araujo's petition for a writ of certiorari should be granted.

Respectfully submitted,

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