No. 22-953

IN THE

Supreme Court of the United States

PABLO CALDERON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 28, 2023

QUESTION PRESENTED

Does a federal district court have habeas corpus jurisdiction when a substantive element of the criminal charges was not found under the law mandated by federal statute?

PARTIES TO THE PROCEEDING

Pablo Calderon is the petitioner here and was the plaintiff-appellant below.

The United States is the respondent here and was the appellee below.

RELATED CASES

United States v. Lillemoe, et al., No. 3:15-CR-25 (JCH), U.S. District Court for the District of Connecticut. Judgment entered June 14, 2017.

United States v. Calderon et al., No. 17-1956-cr, United States Court of Appeals for the Second Circuit. Judgment entered December 3, 2019.

Pablo Calderon v. United States, No. 3:21-CV-742 (JCH), U.S. District Court for the District of Connecticut. Judgment entered June 27, 2022.

Pablo Calderon v. United States, No. 22-1427, United States Court of Appeals for the Second Circuit. Judgment entered November 30, 2022.

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INTRODUCTION

The substantive law of the habeas corpus statute is stated in very broad terms. It is no more specific than to state that habeas corpus is a remedy for an applicant who "is in custody in violation of the Constitution or laws or treaties of the United States" or a remedy when "circumstances exist that render [the judicial] process ineffective to protect the rights of the applicant." Historically, this Court's interpretations of this text and its antecedents have varied widely. The differences in views today are as marked as ever. Yet, reasonable jurists agree on one general proposition, namely, when a court acts beyond its power, a defendant who complies with the other conditions of the law may challenge the finality of the court's judgment in a habeas corpus proceeding. It is under such circumstances that the courts below passed and affirmed judgment and the Petitioner filed his habeas corpus motion.

The power of federal courts derives both from the Constitution and from Acts of Congress. As with all law, the Constitution takes precedence. In other words, an Act of Congress is void, as held by this Court, if the Constitution provides otherwise. Correspondingly, the Rules of Decision Act, 28 U.S.C. § 1652, in force since the first Congress, states that in civil matters the laws of the several states are the rules of decision when they apply and when the Constitution or Acts of Congress do not provide

otherwise.[1] In particular, when determining the rights and privileges of the parties to a letter of credit, the courts must apply the law of the state with jurisdiction over the transaction. In Petitioner's case, the courts refused to apply state statutory law to determine those rights and privileges and instead relied on witness testimony contrary to the law. In doing so, the courts exceeded the power granted by Congress.

Petitioner was convicted of wire fraud and conspiracy to commit wire fraud and bank fraud for deceiving the confirming banks to honor letters of credit. A substantive element of the charges is the materiality of an alleged false statement, meaning the statement is "capable of influencing ... the decision of the decisionmaking body to which it was addressed".[2] A person may choose when he has the right or privilege to do so, not when he has the obligation. A decision is a choice where there are at least two lawful alternatives, not where there is only one. In Petitioner's case, the substance of the criminal charges reduces to a matter of state law.

The appeals court erred in not granting Petitioner's motion for a Certificate of Appealability ("COA"). A court must grant the certificate when the movant has made a substantial showing of the denial of a constitutional right. The standard is that jurists of reason would find it debatable whether the motion states a

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[1] *See* App. 101.

2 *Neder v. United States*, 527 U.S. 1, 16, citing *United States v. Gaudin*, 515 U.S. 506, 509, citing *Kungys v. United States*, 485 U.S. 759, 770 (internal quotation marks omitted).

valid claim.[3] The movant need not convince the court that his claim will prevail. In Petitioner's case the appeals court summarily ruled that he has not made such a showing. In other words, according to the appeals court, Petitioner's constitutional due process rights do not include being judged under the law mandated by federal statute. This finding is not only beyond debate, it is wrong on its face.

This Court should grant certiorari in this case for several reasons. First, by applying state law to the facts of this case, Calderon makes a showing of actual innocence. By ignoring state law, denying his habeas motion and not issuing a COA, the courts below have endorsed a "miscarriage of justice", the precise thing habeas law is designed to avoid.

Second, this Court should stop the courts below and renowned defense counsel alike from disregarding the Rules of Decision Act. When major actors in the legal community ignore a fundamental statute defining state sovereignty respect for the law is compromised. By not granting certiorari, this Court would miss an opportunity to promote the needed respect inside and also outside of the legal community, in particular, for the jurisdiction of state laws.

Third, the decision below also contradicts the long and well-established law in the civil litigation of letter of credit disputes. All 50 states have adopted the Uniform Commercial Code ("UCC") Article 5 on letters of credit. Relevant to this case are the States of New

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3 *See Slack v. McDaniel*, 529 U.S. 473, *and Miller-El v. Cockrell*, 537 U.S. 322.

York and Colorado that have adopted the language of the model code virtually verbatim. The rejection of state laws by the Second Circuit Court sets a dangerous precedent which this Court should flag and correct.

Fourth, this Second Circuit Court decision negatively affects trade, both domestic and international. Letters of credit are the most common form of payment in international commercial sales. Most letters of credit related to U.S. exports and imports are subject to the law of New York State, home of the premier U.S. dollar financial center. By overruling blackletter and statutory law, the Second Circuit Court undermines confidence in, and the stability of, the rule of law in commercial markets.

The facts here are not in dispute. This case presents a clean question of law whether courts have the power to set aside the law mandated by statute and decide questions of law based on witness testimony. Calderon's case satisfies all the other requirements of the habeas statute, therefore the decision to be reviewed here, whether to grant the COA, hinges on Calderon's constitutional rights and whether the courts' want of power arguably satisfies the substantive requirements of the habeas statute.

Another notable feature of this case is that one of the findings by the appeals court is probative under state law that indeed the confirming banks had the obligation to honor defendants' presentations. By reversing the restitution ordered by the trial court, the appeals court implicitly found that one of the two conditions for the obligation to honor exists. The other

condition is the undisputed fact that defendants' presentations were complying on their face. Though the question presented in this petition relates to the power of the courts, not the merits of the case, the merits are relevant to the decision to be reviewed if this petition is granted, namely, the issuance of a COA.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Second Circuit denying a Certificate of Appealability is unreported. App. 1-2. The earlier opinion of the district court denying the motion pursuant to 18 U.S.C. § 2255 and declining to issue a Certificate of Appealability is unreported. App. 3-17. The earlier opinion of the U.S. Court of Appeals for the Second Circuit is reported at 944 F.3d 72. App. 18-65.

JURISDICTION

The Second Circuit issued its order on November 30, 2022. App.1-2. On February 15, 2023, Justice Sotomayor extended the time to file this petition until March 30, 2023. No. 22A748. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

- 28 U.S.C. § 2253 provides in relevant parts:

  (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. ...

(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— ...

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

(c) (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.

(c) (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

- 28 U.S.C. § 2255 provides in relevant part:

(b) 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. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such 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.

The other relevant provisions are:

- 18 U.S.C. §§ 1343, 1349, reproduced at App. 100,
- 28 U.S.C. § 1652, reproduced at App. 101,
- C.R.S. §4-1-303, relevant parts and Official Comments reproduced at App. 101-102,
- N.Y.U.C.C. § 1-205, relevant part reproduced at App. 103,
- C.R.S. §§ 4-5-103, 107, 108, 109 and 116, relevant parts and Official Comments are reproduced at App. 103-112,
- the sections of N.Y.U.C.C. article 5 corresponding to the sections of C.R.S. above which are virtually verbatim copies of the Colorado statute.

STATEMENT OF THE CASE

A. Factual Background[4]

From 2008 to 2010 Calderon and his co-defendant, Brett Lillemoe, participated in the GSM-102 Export Credit Guarantee Program ("Program") of the United

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[4] The factual background presented here is derived from the parties' submissions and the uncontroverted evidence presented at trial.

States Department of Agriculture ("USDA"). With the purpose of promoting U.S. agricultural exports to select countries lacking sufficiently strong credit ratings, the Program provides financial guarantees for loans related to the export sales. A technical requirement of the Program is that the loans finance letter of credit payments due to U.S. banks by foreign banks. Every year the USDA allocates the amount of available guarantees per country and per product. App. 27.

During the first couple of decades of its existence, participation in the Program was essentially restricted to financially sophisticated agricultural exporters. The majority of qualifying exports were sold by exporters who did not participate in the Program because they lacked the banking expertise required to do so. Sensing opportunity, exporters with the financial knowhow devised a method, called the "third party", "financial intermediation" or "structured transaction" model to allow a bigger share of exporters to benefit from the Program. App. 69-70. USDA vetted this business model and approved it, welcoming the extended reach of the Program that these transactions allowed. As relevant to this case, the courts below found nothing illegal in this transaction model. App. 28. In 1999 Lillemoe and others set up a small partnership to compete for structured transactions. Calderon joined Lillemoe's partnership in August of 2008.

To participate, the Program requires that the export sale be paid by a letter of credit and that the Program guarantee secure a loan by a U.S. bank to an approved foreign bank to finance the payment under the letter of credit. The Program participant is the

beneficiary of the letter of credit and, when he makes a complying presentation to the U.S. confirming bank, he is paid the value of the exports covered. When the U.S. confirming bank honors the presentation, it is assigned the guarantees that secure the loans to the foreign bank. The documents presented by the beneficiary to the confirming bank are essentially the documents required by the USDA to present a loss claim if and when the foreign issuing bank fails to pay the loan. Upon such failure, the U.S. confirming bank exercises the guarantees. A key document required in a loss claim is a *copy* of an original bill of lading documenting each shipment of covered goods.

As part of a structured transaction, the Program participant obtains copies of original bills of lading from the shipper of the exported goods. Lillemoe concededly altered a few of those copies of bills of lading and Calderon, knowing of the changes, presented them to the U.S. confirming banks. The changes consisted of whiting out "copy non-negotiable" stamps and replacing them with "original" stamps. The relevant characteristics of the products and the shipments were *not* misrepresented in the copies presented to the confirming banks.

In two of the several transactions underlying the conspiracy charge, Lillemoe concededly changed by one day the onboard dates of the copy bills of lading. Yet Calderon was not involved in any aspect of those transactions. He learned of them *after* they were consummated.

A critical and undisputed fact is that the defendants' presentations were *strictly complying on their face* with the conditions of the letters of credit.

B. Indictment and Trial

In February 2015, the government charged Calderon with a 23-count indictment alleging that he had defrauded the U.S. confirming banks, CoBank and Deutsche Bank. *See* App. 3-7. The indictment also alleged that Calderon's transaction model was unlawful. The trial court disagreed with the latter proposition on the structure of the transactions, but it also denied Calderon's motion to dismiss finding that the materiality of the alleged false statements made to the banks was a matter for a jury to decide. *See* also App. 70.

The jury acquitted Calderon on all counts but the conspiracy count (18 U.S.C. §1349, App. 100-101) and one wire fraud count (18 U.S.C. §1343, App. 100) related to one presentation to CoBank. After the jury's verdict Calderon moved for a judgment of acquittal, or alternatively, a new trial. The motion was denied. App. 66-99.

Calderon was sentenced to 5-months' incarceration, three years of supervised release and more than $63 thousand forfeiture. The district court also ordered defendants to pay jointly and severally more than $18 million in restitution to the USDA for reimbursing the U.S. banks following a foreign bank's default.

C. The Second Circuit's Decision on Appeal

On appeal, defense counsel failed to substantially argue the relevance of state law in this case. *See United States v. Calderon et al.*, no. 17-1956, 2d Cir., Doc. No. 228. [5] Calderon, *pro se*, in his reply brief explained in length the state law, the Uniform Commercial Code Article 5 of Colorado and New York States. He did not invoke the Rules of Decision Act, however. App. 101. *See United States v. Calderon et al.*, no. 17-1956, 2d Cir., Doc. No. 232. The opinion of the appeals court did not discuss state law at all, implicitly setting it aside. App. 18-65.

In addressing the materiality of the alleged false statements, the court relied on witness testimony that Lillemoe's changes, without more, gave the confirming banks the right to dishonor the presentations. "Co-Bank representative Holly Womack and Deutsche Bank representative Rudolph Effing testified that their respective banks would have declined to go through with the transactions at issue had they known about the specific alterations the defendants made to the bills of lading." App. 41. Yet the court

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[5] Lillemoe argued that the contractual language the Uniform Customs and Practice, n.600, the widely accepted trade code for letters of credit, "has the force of law" but did not refer to the pertinent section of UCC. *See infra* on UCC Article 1. He did not consider state law that specifies the rights and obligations of the parties. Calderon, represented by counsel, very briefly mentioned sections of UCC addressing the rights and obligations of parties. *See United States v. Calderon et al.*, no. 17-1956, 2d Cir., Doc. No. 231. He did not elaborate.

recognized the undisputed fact that the documents as presented "appeared" to comply. App. 40.

Relying on witness testimony, the court also found that the unaltered bills of lading were not complying, both in the case of altered stamps and altered onboard dates. App. 41 ("testimony of Womack that if the confirming bank 'didn't have a copy of an original on board, original bill of lading' [sic] it 'wouldn't have paid the funds.'"; "testimony of Womack that she would not have accepted the unaltered bill of lading prior to the defendants' date change").

The court also invoked evidence of Lillemoe's statements to support the theory that before altering the stamps, the bills of lading were not complying and that "the banks could have and would have rejected nonconforming documents", *i.e.* that the misrepresentations were material. App. 42.

The court also rejected the defendants' claims that they did not contemplate any harm to the U.S. banks concluding that "[t]he Government presented a great deal of evidence that the defendants' submission of falsified, non-compliant documents exposed the victim banks to the risk of 'actual harm or injury' on multiple dimensions." App. 48. This finding actually consists of two assertions. First, the unaltered documents were not complying. And second, the documents presented, though complying on their face, were not complying for purposes of honor by the confirming banks and consequently the banks had the right to dishonor.

In support of the court's theory it does not refer directly to the text of the trade code applicable here, the

Uniform Customs and Practice for Documentary Credits ("UCP") Publication no. 600 ("UCP 600") , or to the text of UCC. Rather the court relies exclusively on witness testimony and (erroneously) to the law in preceding opinions. For example, the court states that "the modifications to the bills of lading exposed the banks to risk of default or non-reimbursement from the foreign banks" and refers to CoBank's Womack testimony. App. 44. The court also states that "the modifications increased the risk that the USDA would decline to reimburse the banks". App. 45. and refers to the testimony of USDA employee Jonathan Doster and government rebuttal expert James Byrne referring to the on-board dates of the bills of lading.

The only part of the trial court's judgment that the appeals court did reverse was the restitution including the restitution to the USDA for reimbursing the U.S. banks following a foreign bank's default. App. 57-65. Regarding the risk "that the USDA would not reimburse the banks for their losses because the transactions were not compliant with the GSM-102 program requirements", the court found that it did not "arguably materialize". App. 61-62. Which is to say that all the transactions which did lead to loss claims *were* compliant with the Program, the shipments and the unaltered documents qualified, and the guarantees were valid. That includes the transaction of the wire fraud count and all the transactions underlying the conspiracy charge save one with changed dates (the Radiance). In that transaction, the court asserts, the defendants (including Calderon) changed on-board dates of the bills of lading, when in fact the only

evidence at trial was that Calderon could have learned of the changes well after the transaction was consummated. App. 29. In that instance, the court simply repeated the government's conclusory claims.

D. The Decisions on the Habeas Motion

After judgment by the appeals court, Calderon petitioned for rehearing and then petitioned this Court for a writ of certiorari. Case no. 20-176. Both petitions were denied.[6] Calderon adduced the Rules of Decision Act for the first time in his first petition to this Court.

On May 25, 2021, Calderon filed a motion pursuant to 28 U.S.C. § 2255 at the trial court for the first time. The following day, Calderon self-surrendered to federal prison. The court later ordered the respondent to show cause. Calderon's motion complied with the statutory time limit, the only additional requirement of the motion. Among other arguments, Calderon's first argument is that Rules of Decision Act mandates the application of UCC to determine the rights and privileges of the parties to a letter of credit and that on direct review the appeals court failed to do so. Further, Calderon showed that if state law is applied, he is actually innocent of both charges of conviction. He also invoked UCC § 1-303(c), which states that the interpretation of a trade code like UCP 600, is a matter of law. He showed that under UCP 600, expert witness James Byrne's key testimony is false as a matter of

[6] Lillemoe, represented by counsel, also petitioned this Court and his petition was also denied. Case no. 20-163. Lillemoe did not discuss state law in his petition.

law. He referred to uncontroverted trial evidence contrary to key testimony by the USDA witness, explicitly cited by the court on appeal. *See Calderon v. United States*, no. 3:21-cv-724-JCH, D. Conn., Doc. no. 1-1.

On June 27, 2022, the district court denied the habeas motion and declined to issue a COA. App. 3-17. In its order it explicitly rejected Calderon's arguments, with one critical exception: the court did not address the Rules of Decision Act. It ignored the issue altogether, thereby implicitly rejecting the statute's mandate to apply state law to the key civil question, the determination of rights and privileges of parties to a letter of credit.

The district court rejected Calderon's arguments reasoning that he had raised them before and that they were procedurally barred. App. 12-16. The court erred in this finding for two reasons. First, Calderon did not invoke the Rules of Decision Act on direct appeal.[7] The point of repeating the arguments in habeas proceedings was for the court to acknowledge the mandate of the Act and apply UCC as opposed to the appeals court's choice of setting UCC aside. Yet, the court ignored Calderon's now explicit claim that state law is mandated by statute.

Second, Calderon made a valid showing of actual innocence and a failure to hear his claims would a

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[7] Central to the arguments in the Petition for Certiorari on direct appeal, no. 20-176, is the Rules of Decision Act. But this Court denied the Petition without any statement of the reasons therefor. The denial has no weight in subsequent habeas proceedings. *Brown v. Allen*, 344 U.S. 443 (1953), 489-497.

constitute a "miscarriage of justice". which is sufficient to overcome the assumed procedural hurdles. *Murray v. Carrier,* 477 U.S. 478 (1986), 496, *McCleskey v. Zant,* 499 U.S. 467 (1991), 494-495, *Sawyer v. Whitley,* 505 U.S. 333 (1992), 338-339, *Schlup v. Delo,* 513 U.S. 298 (1995), 313-332. The district court rejected Calderon's actual innocence claim because he presents no new facts in his habeas motion. App. 16 . But the court erred again because the requirement of new facts is for *second or successive* proceedings, not for the first. 28 U.S.C. § 2255 (h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain (1) newly discovered evidence...")

On July 8, 2022, Calderon filed a notice of appeal for a COA. In his motion he reproduces most of the arguments he made at district court. The first constitutional claim he lists is the courts' failure to apply state law as mandated by the Rules of Decision Act and that under state law, the undisputed facts show his actual innocence. *See Calderon v. United States,* Case No. 22-1427, 2d Cir., Doc. no. 25-1. The appeals court summarily denied the motion. App. 1-2.

REASONS FOR GRANTING CERTIORARI

This Petition concerns the denial of a Certificate of Appealability. Under 28 U.S.C. § 2253 (c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Calderon's § 2255 motion is the first in this case. The motion was timely filed on May 25, 2021, and the district court ordered the respondent to show cause.

Calderon v. United States, case no. 3:21-cv-724-JCH, Doc. no. 4. With a showing described above, Calderon fulfills all the requirements of § 2253.

In denying Calderon's habeas motion and a COA, the district court's order did not acknowledge that the Rules of Decision Act requires questions of civil law be decided according to state law because, here, no superseding law provides otherwise. By refusing to apply mandated law, the court acts without legal jurisdiction, beyond the powers granted by the Constitution and the Acts of Congress. There is no dispute that every citizen has the constitutional due process right to be judged according to law mandated by federal statute, *i.e.* by a court acting within its powers.

There are two main reasons why this Court should grant the writ of certiorari here. First, Calderon reasonably interprets the UCC applied to the very facts found at trial. Under UCC, Calderon shows that he is actually innocent of all charges. By ignoring UCC, denying his habeas motion and not issuing a COA, the courts below have arguably endorsed a "miscarriage of justice", the precise thing habeas law is designed to avoid.

Second, by disregarding letter of credit law the courts below set a dangerous precedent that affects international trade. Letters of credit are the payment mechanism of the vast majority of international sales transactions. In particular, the letters of credit of many of U.S. imports and exports are subject to the jurisdiction and the law of New York State, home of the premier financial center for U.S.-dollar

denominated transactions.[8] A precedent of the Second Circuit Court which in effect overrules blackletter and statutory law based on considerations foreign to commercial practice, undermines confidence in, and the credibility of, the rule of commercial law and the jurisdiction of New York State.

The rest of this Petition reproduces Calderon's arguments which show his actual innocence under UCC and addresses some history of letter of credit law.

I. PETITIONER IS ACTUALLY INNOCENT UNDER UCC LAW AND THE FACTS OF THE CASE

All 50 States of the United States have adopted the latest revision of the model UCC Article 5 promulgated by the National Conference of Commissioners on Uniform State Law ("NCCUSL"). In particular, Colorado State enacted the code in the year 1996 and New York State in the year 2000. The letters of this case are governed by the UCC of these two states that adopted the model text virtually verbatim in the sections cited below. Wherever the Colorado Revised Statutes Title 4 Article 5 is cited, the corresponding section of the New York Uniform Commercial Code ("NYUCC") applies to the letters of credit governed by New York law.

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[8] "A vast amount of international letter of credit business is customarily handled by certain New York banks whose facilities and foreign connections are particularly adaptable to this field of operation". *J. Zeevi & Sons, Ltd. v. Grindlays Bank*, 37 N.Y.2d 220 (NY Court of Appeals, 1975)

A. The Obligation to Honor the Letters of Credit

The letters of credit of this case were confirmed by CoBank, located in Denver, Colorado, and Deutsche Bank AG, New York Branch, located in New York, New York. As there is no agreement otherwise, the banks' liabilities in these transactions are governed by UCC Article 5 of the respective states. C.R.S. § 4-5-116(b). App. 111.

As the letters of credit are explicitly subject to UCP 600, those rules take precedence over the UCC except for the "nonvariable" provisions specified in C.R.S. § 4-5-103(c). C.R.S. § 4-5-116(c) at App. 111 and C.R.S. § 4-5-103(c) at App. 103. Among the nonvariable provisions are the rights and obligations of the parties to the letters of credit specified in the code. C.R.S. § 4-5-103(a). App. 103.

Calderon was convicted of wire fraud and conspiracy to commit wire and bank fraud. 18 U.S.C. §§ 1343, 1349. App. 100. A substantive element of the charges is that the alleged misrepresentations be "material", that they be "capable of influencing a decision of the decisionmaking body to whom it is addressed". *Neder,* 527 U.S. at 16. In this case the alleged decision was whether the confirming banks would honor defendants' presentations that included the altered bills of lading. App. 40. Therefore, the question is whether the confirming banks had the privilege to dishonor the presentations, in which case the banks had a decision to make, or had the obligation to honor, meaning that there was no lawful alternative but to honor. The

materiality element of the charges are thus determined by the obligations of confirming banks under the letters of credit, or the lack thereof. As shown below, given the facts found at trial, under UCC the confirming banks had the obligation to honor all of defendants' presentations which negates the materiality element of the charges. C.R.S. §§ 4-5-107, 108, 109. App. 104–110.

1. It is undisputed that defendants' presentations were complying *on their face*. App. 28, 40, 61. Furthermore, the risk "that the USDA would not reimburse the banks for their losses because the transactions were not compliant with the GSM-102 program requirements" did not "arguably materialize", according to the appeals court. App. 61-62. Which is to say that all the transactions which led to loss claims *were* compliant with the Program, the shipments and the documents qualified, and the guarantees were valid. That includes the transaction of the wire fraud count ("Cool Express") and one transaction ("Ref Lira") of the three with changed onboard dates on bills of lading.

There are several transactions underlying the conspiracy charge that led to loss claims. The district court found that USDA suffered losses across five transactions totaling $18,501,353 that contributed to

the restitution.[9] The appeals court observed that the conviction "for conspiracy could have rested on those grounds alone." App. 53. The jury's verdict did not specify on which transactions the defendants allegedly conspired.

The appeals court's opinion addresses in length the changed dates and found that in those transactions the shipments did not qualify for the guarantees. App. 32-34, App. 45-47. Yet, the court implicitly found in reversing the restitution that the Ref Lira shipments did qualify and that the guarantee was valid. *See supra.* Further, the appeals court does not notice that, undisputedly, the only evidence at trial was that Calderon could have learned of changed dates well after the transactions were consummated, thereby precluding the agreement element of the conspiracy charge for those transactions.[10] In finding that the shipments with changed bill of lading onboard dates did not qualify for the guarantees, the appeals court relied on the testimony of two witnesses. Expert James Byrne testified that the onboard date is *the* date the goods are loaded. App. 34, 47. This testimony is false and

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[9] "So the loss amount ... is -- on the Cool Express deal, 821940, the USDA's loss is 6,177,190 [sic]; on the Ref Lira, 819323, it's 693,954; on the META deal, 821945, it's 4,595,454; on the 822691, M/V Frost, it's $7,071,925; and on the 822000, Amber deal, it's $340,407, for a total of $18,501,353." *United States v. Calderon.* Case no. 17-1956, 2d Cir., Joint Appendix at JA1635.

[10] *United States v. Calderon.* Case no. 17-1956, 2d Cir., Joint Appendix at JA2336, JA2343, JA3517, JA3521, JA3575, JA3579.

contrary to UCC law. *See infra.* USDA employee, Jonathan Doster, testified that the bill of lading onboard date is dispositive of whether the shipment qualifies for the guarantee. App. 34. Yet, the appeals court did not notice that Doster's testimony is contrary to uncontroverted evidence of another transaction, relating to vessel Akademik Zavaritskiy, where the bill of lading onboard date did not qualify the shipment for the guarantee but a *different* document showed that the shipment did qualify. *See United States v. Lillemoe*, Case no. 3:15-cr-25, D. Conn., Defense Trial Exhibits 1251, 1252, 1253.

2. A letter of credit issuing bank must examine a presentation and if it is "complying", the bank must honor. C.R.S. § 4-5-108(a), App. 105, UCP 600 article 7(a). As to the standard of examination, the bank must determine "whether or not the documents *appear on their face* to constitute a complying presentation." (Emphasis added). UCP 600 article 14(a), App. 114. UCC echoes this standard:

> An issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, *appears on its face* strictly to comply with the terms and conditions of the letter of credit.

(Emphasis added) C.R.S. § 4-5-108(a), App. 105. In this case, the "standard practice" are the rules of UCP 600.

There is only one exception to this obligation, it is provided by C.R.S. 4-5-109:

> (a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:
>
> (1) The issuer shall honor the presentation, if honor is demanded by ... (ii) a confirmer who has honored its confirmation in good faith, ...
>
> (2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

App. 107-108.

A confirming bank has the same obligation with respect to the beneficiary making a presentation, as the issuing bank has. C.R.S. § 4-5-107(a), App. 104.

The meaning "materially fraudulent" in § 5-109 is explained in the Official Comment 1 of the section. App. 108-110. The Comment uses a simple hypothetical example. Suppose a letter of credit calls for an invoice of 1,000 barrels of salad oil, the beneficiary delivers 988 barrels and knowingly summits an invoice showing 1,000 barrels.

> [If two barrels] would be an insubstantial and immaterial breach of the underlying contract, the beneficiary's act, though possibly fraudulent, is not materially so ... Conversely, the knowing submission of those invoices upon delivery of only five barrels would be materially fraudulent. The

> courts must examine the underlying transaction when there is an allegation of material fraud, for only by examining that transaction can one determine whether a document is fraudulent or the beneficiary has committed fraud and, if so, whether the fraud was material.

App 108-109.

This "fraud exception" in the latest revision of UCC Article 5 is meant to coincide with the exception of the preceding version (previously codified at § 5-114 as "fraud in the transaction"). The Comment finds support in the caselaw under the previous version of UCC citing *Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank*, 356 F. Supp. 991 (N.D. Ga. 1973), *Intraworld Indus. v. Girard Trust Bank*, 336 A.2d 316 (Pa. 1975), *Roman Ceramics Corp. v. People's Nat. Bank*, 714 F.2d 1207 (3d Cir. 1983), *Itek Corp. v. First Nat. Bank of Boston*, 730 F.2d 19 (1st Cir. 1984), *Cromwell v. Commerce & Energy Bank*, 464 So.2d 721 (La. 1985) and *Ground Air Transfer v. Westates Airlines*, 899 F.2d 1269 (1st Cir. 1990). App. 108-110.

3. As explained above, the purpose of the letters of credit in this case is to create an obligation which is financed by a loan extended by a U.S. bank to a foreign bank. The loan is insured by a USDA guarantee. The guarantee is issued to the Program participant and when the letter of credit is honored, the guarantee is assigned to the U.S. bank. The copy bills of lading at issue in this case, are part of the presentation to the U.S. bank. If and when the guarantee is exercised, the U.S. bank includes the copies in the loss claim. The underlying transaction of the letters of credit here is

the assignment of the USDA guarantee. Therefore, if the assigned guarantee is valid and in force, and if the U.S. bank possesses the documents required to exercise the guarantee, there is no breach of the contract underlying the letters of credit.

The Second Circuit Court determined that in the transactions that led to loss claims, the guarantees and the loss claims were valid. *See supra.* Those transactions include the one related to the wire fraud conviction and several other transactions also related to the conspiracy conviction. Therefore, in those transactions there was no breach of contract, much less fraud.

Because there was no fraud in the underlying transactions and the presentations were complying *on their face*, by UCC law the confirming banks had the obligation to honor the presentations. The banks had no choice but to honor. At trial, the bank witnesses falsely asserted that the banks would have dishonored had they known of alterations to copy bills of lading. Expert witness Byrne's testimony that the copy bills of lading presented were not "copies of originals" is not only false (as shown below) but also irrelevant because the copies "appeared" to comply. App. 40. The copy bills of lading that the defendants presented in those letters of credit served their contractual purpose in valid loss claims despite the changes that Lillemoe made. The fact that the banks had the obligation, the only legal choice, to honor the presentations defeats the materiality element of the alleged misrepresentations in the wire fraud conviction and some, if not all, of the letters of credit underlying the conspiracy

conviction. Calderon is actually innocent of fraud in those letters of credit.

To establish actual innocence in the transactions underlying the conspiracy conviction that did not lead to loss claims it suffices to show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006) citing *Schlup*, 513 U.S. at 327. *Schlup* and *House* involved either a successive habeas proceeding or forfeited claims and consequently the introduction of new facts was key to establish habeas jurisdiction in those cases. In the circumstances of the instant habeas motion, a first time proceeding without forfeited claims, there is no need to introduce new facts and the existence of a reasonable doubt suffices to establish actual innocence.

The following facts create a reasonable doubt that Calderon is innocent of the conspiracy charge. First, the changes in the bills of lading of the loss claims, cover the main types of alleged misrepresentations: changed stamps (Cool Express, Meta, Frost and Amber) and changed dates (Ref Lira). *See* footnote 9 above and App. 29. There is nothing that distinguishes the changes of these bills of lading from the changes of the other transactions underlying the conspiracy charge. Second, the appeals court relied on false testimony by expert witness Byrne on the nature of a "copy" bill of lading (and thus so did the jury). *See infra.* Third, the appeals court relied on false testimony by expert witness Byrne on the meaning of the "on board" date of a bill of lading. *See infra.*

By setting aside state law, the courts below denied Calderon the constitutional due process right of being judged according to the law mandated by statute. If state law is applied to the facts of his case, he has shown that he is actually innocent of the charges of conviction.

B. The Interpretation of the UCP 600 is a Matter of Law

The International Chamber of Commerce ("ICC") was established in 1919 with the purpose of facilitating international trade and promoting the world trading system. The UCP is a set of rules introduced by the ICC "to alleviate the confusion caused by individual countries' promoting their own national rules on letter of credit practice." The objective of the rules was to establish uniformity of practice in global trade. UCP 600 is the latest revision of the rules adopted in 2006. UCP 600 Forward. The UCP is the most successful set of private rules for trade ever developed. *Id.*

The ICC also publishes the International Standard Banking Practice for the Examination of Documents under Documentary Credits ("ISBP") to provide guidance to the practitioner on how to apply UCP 600, filling in the gap between the general principles of UCP 600 and the concrete task of document checkers. The ISBP "does not amend UCP 600. It explains how the practices articulated in UCP 600 are applied by documentary practitioners." ISBP 681 Introduction. ISBP no.681 was published in 2007.

Under UCC, when a letter of credit incorporates UCP and there is a conflict between UCC and UCP, UCP governs except for the "nonvariable" provisions of C.R.S. 4-5-103(c) including the rights and obligations of a confirming bank under C.R.S. 4-5-107, 108 and 109. C.R.S. 4-5-116(c).[11] Under C.R.S. 5-4-108(e), "the standard practice is a matter of interpretation for the court." App. 103-112.

UCC also refers to standard practice in a general context applicable to all the Articles. The current version C.R.S. 4-1-303(c) states: "If it is established that such a usage [of trade] is embodied in a trade code or similar record, the interpretation of the record is a question of law." [12] App. 101.

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[11] Understanding the history of UCC Article 5 is helpful. New York State, the most important U.S. jurisdiction for international trade and home to most of the largest banks of the country, resisted the original version of Article 5 because of UCP's subordinate role. In 1964, it became the first of 4 states to "adopt" UCC Article 5 with one nonconforming clause, § 5-102(4) stating that UCC does not apply when the letter of credit is subject to UCP, which is almost always. This presented a major uniformity of law problem, so NCCUSL proposed the current revision as a compromise with New York State. This history puts in stark relief the importance of UCP under UCC law. *See* James G. Barnes & James E. Byrne, *Revision of U.C.C. Article 5*, 50 Bus. Law. 1449 (1995).

[12] New York State adopted § 1-303 in 2015, after the period covered by Calderon's indictment. Before 2015, New York State codified the same principle in a different section, N.Y.U.C.C. §1 205(2): "If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court." App. 103.

The appeals court opinion on direct appeal relied on two assertions of expert witness Byrne's testimony which are false as a matter of law in general and, in particular, applied to this case.

1. First, he stated in a wholly conclusory manner that the unaltered copies of bills of lading of the Cool Express transaction, the one underlying the conviction of wire fraud, were not copies of original bills of lading: "A copy of a copy non-negotiable is not a copy of an original." *United States v. Calderon*. Case no. 17-1956, 2d Cir., Joint Appendix at JA1248. App. 122. The appeals court relied in part on this statement to conclude that the unaltered copy bills of lading did not comply with the letter of credit. "[The materiality of the changes was buttressed by] the Government's expert, who testified as to the functional significance of the Defendants' changes. J.A. 1248–49." App. 42.

UCP 600 article 14(f) states:

> If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).

App. 115. Further, ISBP 681 ¶20 Documents for which the UCP 600 Transport Articles Do Not Apply, states:

> Copies of transport documents are not transport documents for the purpose of UCP 600 articles 19–25 and sub-article 14(c). The UCP 600

> transport articles apply where there are original transport documents presented. Where a credit allows for the presentation of a copy transport document rather than an original, the credit must explicitly state the details to be shown.

App. 116-117.

So to determine whether a copy complies with the letter of credit, its *content* must appear to fulfill the function of the required document. It is undisputed that the function of the copy bills of lading is to be presented in a potential loss claim. Byrne was admitted as an expert on letter of credit law and practice, not on the Program, to which he conceded at trial. *United States v. Lillemoe,* Case no. 3:15-cr-25, D. Conn., Trial Transcript at 4596:16-4597:2. Therefore, he was unable to determine whether they actually were copies of the originals or whether the copies complied. It is further undisputed that the copies presented for the loss claim did fulfill their purpose and that there is no explicit requirement in the Program regulations or in the letters of credit of any type of stamp. Thus, Byrne's testimony on copy bills of lading is false according to UCP 600 rules and consequently as a matter of UCC law. The testimony is false in general and, in particular, applied to this case.

2. Second, Byrne stated that the onboard date of a bill of lading is *the* date the goods are loaded, thereby implying there is only one possible date. App.33-34. Yet, ISBP 681 ¶ 96 On Board Notations, states:

> If a pre-printed "Shipped on board" bill of lading is presented, its issuance date will be deemed to

> be the date of shipment unless it bears a separate dated on board notation, in which event the date of the on board notation will be deemed to be the date of shipment *whether or not the on board date is before or after the issuance date of the bill of lading.*

(Emphasis added.) App. 117. Further, it is undisputed that shipped-on-board bills of lading can be issued *after* the date the vessel sailed. Therefore, the UCP 600 allows that the on board notation be a date strictly after the goods are loaded. Byrne's testimony is false according to UCP 600 and consequently as a matter of UCC law.

The appeals court opinion on direct appeal relied on this false testimony to conclude that in a particular transaction, the Radiance, the shipment did not qualify for the guarantee because the on board date of the unredacted bill of lading, October 5, was not in the range allowed by the guarantee. App. 33, 42, 46. According to Byrne's definition, no other bill of lading issued for the same shipment could have shown as on board date October 6, for example, which would qualify for the guarantee. Or for that matter, no other document, for example the port log, could have qualified the shipment for the guarantee. Yet, the Akademik Zavaritskiy, transaction mentioned above and which the government does not dispute, is an example where the bill of lading's on board date did not qualify the shipment but the port log did. The port log of Radiance does qualify the shipments for the guarantee. *See United States v. Lillemoe*, Case no. 3:15-cr-25, D. Conn., Defense Trial Exhibit 1512.

Byrne's on board date testimony is false according to UCP 600 rules and consequently as a matter of UCC law. The appeals court relied on false testimony to find, erroneously, that the Radiance shipments do not qualify for the guarantee.

II. THE SECOND CIRCUIT COURT DECISION IN A HISTORICAL CONTEXT

> The law merchant is a body of rules, first of custom, then of law, that has been built up over the course of occidental civilization under the pressure of the needs of commerce and without constructive contribution by lawyers. ... Among the great contributions made by the law merchant have been the bill of exchange, the promissory note, and the letter of credit.

Trimble, Rufus, *The Law Merchant and the Letter of Credit*, 61 Harv. L. Rev. 981, 981-982 (1948). "The merchant-bankers of Venice, Genoa, Florence and other commercial cities of Europe freely used letters of credit in the fourteenth century." *Id.* at 985. *See* this article generally. Initially, the common law courts of England were reluctant to follow the law merchant because of its disregard for the rules of contract and consideration but in the seventeenth century, common law courts started accepting the mercantile principles governing letters of credit. This country inherited the common law of England, including the law merchant. Eventually, in the nineteenth century, courts on both sides of the Atlantic returned to the habit of trying to apply the principles of common law contracts to negotiable instruments creating confusion and

uncertainty. So much so that it became necessary to codify the law of negotiable instruments. *Id.*

The law of letters of credit was less problematic and remained uncodified in the United States until the adoption of UCC Article 5 starting in the 1950's. Yet as noted above, footnote 11, Article 5 created tensions between the legal principles of UCC and the practice embodied by UCP. As put by James Barnes before the latest revision of UCC Article 5 promulgated in 1995,

> [i]n comparing the merits of the U.C.P. and U.C.C. approaches, it should be noted that the U.C.P. is superior to the U.C.C. in providing quick and certain answers to the parties' questions when a facial nonconformity issue arises. It also limits and better frames the precise issues to be decided in wrongful dishonor litigation. What the U.C.P. approach lacks is equity. ... On the other hand, the U.C.C. ... generally provide[s] too much equity and too little certainty, clarity and finality for use in day-to-day transactions or for purposes of facilitating summary judgment in the litigation context.

Barnes, James G., *Nonconforming presentations under letters of credit: Preclusion and final payment*, 56 Brook. L. Rev. 103, 108-109 (1990)

The latest revision of Article 5 struck a balance between the exigencies of the market and equity. Regarding the fraud exception,

> the NCCUSL Drafting Committee decided to keep extraordinary defenses against honor narrow, whether raised by way of applicant

> injunction action or issuer defense. Accordingly, Draft Revised UCC section 5-109 keeps the words "fraud" and "forgery," found in current UCC section 5-114(2), for purposes of defining the scope of extraordinary defenses against honor of *facially conforming* documents.

(Emphasis added.) Barnes, James G., *Defining Good Faith Letter of Credit Practices*, 28 Loy. L. A. L. Rev. 101, 106 (1994).

In the instant case, the Second Circuit Court has changed the statutory definition of complying presentation which is consistent with UCP and replaced it with something radically different. Gone is the notion of a facially complying presentation, and with its replacement the existing statutory law of the fraud exception is no longer operative. There is no precedent of a variation in interpretation so radical, either before or after codification. The decision is based on an absolute aberration well beyond the power of the court to maintain. The Second Circuit Court did not add a grain of sand to the gears of a finely tuned machine, it threw in the whole wrench.

CONCLUSION

This Court should grant the Petition. Alternatively, it should issue an order to grant, vacate, and remand, allowing the parties to address state law and the courts below to apply any adequate standard of statutory interpretation to the text of UCC and UCP.

Respectfully submitted,

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