IN THE SUPREME COURT OF THE UNITED STATES

No.

PABLO CALDERON, APPLICANT

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Pursuant to Rules 13.5, and 30.2 of this Court, Pablo Calderon respectfully applies for a 30-day extension of time, to and including March 30, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The order of the court of appeals was entered on November 30, 2022. App., infra, 1a. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 28, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents the question whether jurisdiction to file a motion under 28 U.S.C. § 2255 exists when a federal court of appeals has exceeded the powers granted by statute in ruling on a case before it. The Rules of Decision Act, 28 U.S.C. § 1652 states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

When determining the rights and obligations of the parties under a financial instrument, federal courts shall apply state law unless federal statutory law provides otherwise. The rights of parties to a letter of credit are governed by the Uniform Commercial Code Article 5 ("UCC") of the state which has jurisdiction for the letter of credit. A federal court does not have the power to create rights or obligations not granted by federal statutory law and specifically disallowed by state law .

The model UCC §5-108 states:

> (a) Except as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit.

Model UCC §5-109 states:

> (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 a 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 ... ; and
> (2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

Model UCC §5-107 states:

> (a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

The letters of credit in this case fall under the jurisdictions of the States of New York and Colorado. The model UCC text quoted above coincides virtually verbatim with the versions of those two states. Under the law of those states, the confirmer shall honor a presentation that appears on its face to comply with the terms and conditions of a letter of credit and where there is no "material" fraud. The Official Comment 1 of model UCC 5-109 defines in further detail material fraud. Id. at 17a. The Comment is reproduced verbatim in the New York and Colorado States versions.

If a federal court finds that a confirmer has the right to dishonor a presentation that appears on its face to comply with the terms and conditions of a letter of credit under the law of either state, and the presentation is not materially fraudulent according to UCC, the court has exceeded its power.

2. The government prosecuted applicant Pablo Calderon and his two codefendants for, among other allegations, concededly changing

the stamps on copies of bills of lading of presentations to letters of credit which included the assignment of financial guarantees. The guarantees were issued by Commodities Credit Corporation, wholly owned by the United States Department of Agriculture ("USDA"), under the USDA GSM-102 Export Credit Guarantee Program. Id. at 2a-3a.

3. The government tried applicant, together with two other codefendants, in a trial that lasted five weeks. After deliberating for a week, the jury found applicant guilty of one count of wire fraud and one count of conspiracy to commit wire or bank fraud. U.S.C. §§ 1343, 1349. The jury found applicant not guilty of 21 other charges, including wire fraud, bank fraud, money laundering and false statement. 18 U.S.C. §§ 1343, 1344, 1957, 1001. Codefendant Brett Lillemoe was found guilty of five counts of wire fraud and one count of conspiracy to commit wire or bank fraud. Another codefendant was found not guilty on all charges. Defendants moved for a judgment of acquittal or for a new trial. The district court denied the motion. United States v. Calderon, 944 F.3d 72, 84. Calderon was sentenced to 5 months of incarceration followed by 3 years of supervised release. App., infra at 5a. Calderon and Lillemoe were ordered to pay $18,501,353 in restitution to the USDA under 18 U.S.C. §§ 3663A, 3664 for the loss claims paid on guarantees issued to the defendants. Calderon, 944 F.3d at 94.

4. The court of appeals affirmed applicant's convictions but reversed in its entirety the restitution to the USDA. Id. at 97.

As relevant here, the court found that the confirmer has the right to dishonor a presentation where documents are changed by the presenter so that they appear to comply, without a finding of material fraud as defined in UCC § 5-109. Id. at 87.

As to the restitution, the court found that the changes to the documents were not the proximate cause the issuer's default which triggered the USDA's payments under the GSM-102 guarantees, thereby invalidating the restitution. Id. at 95-96. Implicit in this finding is that the USDA had the obligation to pay loss claims and that the changed copies of bills of lading did not affect the obligation, thereby negating material fraud as defined in UCC.

5. Applicant petitioned for a rehearing that was summarily denied. App., infra at 6a. Applicant also petitioned for certiorari and was denied. Case no. 20-176. In May of 2021, applicant filed a motion under 28 U.S.C. § 2255. Id. at 2a. The district court denied the motion and decided not to issue a certificate of appealability. Id. at 14a. In its ruling on the 2255 motion, the district court acknowledged applicant's UCC arguments multiple times on appeal, on petition for rehearing, on petition for certiorari and on the 2255 motion. Id. at 6a, 7a, 8a, 10a. At each turn, either the courts did not reach the Rules of Decision Act, 28 U.S.C. § 1652, or ignored the statute, the requirement of applying UCC and instead rejected UCC. Id. at 6a, 7a, 9a. On November 30,2022, the court of appeals denied applicant's motion for a certificate of appealability. Id. at 1a.

6. Applicant respectfully requests a 30-day extension of time, to and including March 30, 2023, within which to file a petition for a writ of certiorari. The applicant is not an attorney, represents himself, works alone and studies the law as he goes. When applicant filed his 2255 motion he had studied Supreme Court caselaw up to and including Schlup v. Delo, 513 U.S. 298 (1995)and Bousley v. United States, 523 U.S. 614 (1998). In both cases, the habeas writ was granted on successive petitions. In Bousley, the writ was granted even when the conditions for a successive petition in 28 U.S.C. § 2244(b)(2) are not strictly met. Based on that understanding, applicant decided not to petition for certiorari and instead take his time to study more law and move under § 2255 a second time. But as he studied more recent 2255 cases he concluded that Bousley, decided a quarter of a century ago, does not reflect the current approach of courts that now apply § 2244 (b)(2) more strictly. Applicant concluded that a second 2255 motion will fail and that this petition for certiorari is his last chance to obtain habeas relief. On February 10, 2023, he decided to file the petition. Applicant contracted COVID 19 in late November 2022 and was unable to work until the third week of December. Applicant underwent scheduled knee replacement surgery on January 3, 2023 and was unable to work for a week. Applicant needs additional time to study more law and print the petition.

Respectfully submitted,

PABLO CALDERON,
Pro Se.

7 Old Parish Rd
Darien, CT 06820
(203) 613-6748
sxallc@gmail.com

February 13, 2023

Appendix

D. Conn.
15-cr-25
21-cv-724
Hall, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of November, two thousand twenty-two.

Present:

Debra Ann Livingston,
Chief Judge,
Guido Calabresi,
Gerard E. Lynch,
Circuit Judges.

Pablo Calderon,

Petitioner-Appellant,

v. 22-1427

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PABLO CALDERON, Petitioner,	:	CIVIL CASE NO. 3:21cv724 (JCH)
v.	:	
UNITED STATES OF AMERICA, Respondent.	:	JUNE 27, 2022

RULING RE: PETITIONER'S PRO SE MOTION TO VACATE SENTENCE (DOC. NO. 1)

I. INTRODUCTION

In this case seeking habeas corpus relief, pro se petitioner Pablo Calderon ("Calderon") moves to vacate his sentence pursuant to section 2255 of title 28 of the United States Code. For the reasons set forth below, Calderon's Motion (Doc. No. 1) is denied.

II. BACKGROUND

On February 20, 2015, a federal grand jury indicted Calderon on charges of conspiracy, wire fraud, bank fraud, and making a false statement. See USA v. Lillemoe et al., 15-cr-25, Indictment (Doc. No. 1).[1]

Almost all of the counts against Calderon in the Indictment revolved around his involvement with the United States Department of Agriculture's ("USDA") Export Credit Guarantee program ("GSM-102"), a program in which U.S. banks agree to repay U.S. exporters if foreign banks default on letters of credit promising to reimburse U.S.

[1] Calderon's codefendants, Brett Lillemoe and Sarah Zirbes, faced overlapping charges in the same Indictment. See 15-cr-25, Indictment (Doc. No. 1)

exporters on behalf of foreign importers. See 7 C.F.R. § 1493 (2014). The only exception was a single count alleging that Calderon made a false statement in connection with the Federal Bureau of Investigation's investigation into the scheme. Id. at ¶¶ 55-56. More specifically, the Indictment alleged that Calderon and his coconspirator created multiple entities to win a disproportionate number of GSM-102 guarantees, which are typically split pro rata among applicants, id. at ¶ 29-33; USA v. Lillemoe et al., 15-cr-25, Trial Tr. at 799:17-800:21, and further altered bills of lading marked "copy non negotiable" by whiting out that marking and stamping the word "original" in its place. USA v. Lillemoe et al., 15-cr-25, Indictment at ¶ 40. The Indictment also alleged that Calderon and a coconspirator altered documents by adding shading to portions of documents to make the alterations less apparent. Id. at ¶ 41. Calderon's wire fraud convictions involved transactions with CoBank, while the letter of credit in the transaction was issued by a Russian bank called IIB and the goods were shipped on a vessel called Cool Express. Id. at ¶ 23.

To prove the wire fraud and bank fraud charges against Calderon, the government needed to prove beyond a reasonable doubt the following elements:

> [Wire fraud requires] "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme." Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004) (internal quotation marks and brackets omitted). Similarly, the federal bank fraud statute criminalizes the "'knowing execution' of a scheme to 'defraud a financial institution.'" United States v. Bouchard, 828 F.3d 116, 124 (2d Cir. 2016) (quoting 18 U.S.C. § 1344) (brackets omitted). Thus, both wire fraud and bank fraud require the Government to prove that the defendant had an intent to deprive the victim of money or property. Moreover, to establish the existence of a scheme to defraud, the Government must prove the materiality of a defendant's false statements or misrepresentations.

USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593) (emphasis in original). Since his indictment, Calderon has repeatedly challenged the sufficiency of the evidence as to the materiality of any misrepresentations, the existence of a scheme to defraud, and his intent to harm the financial institutions at issue.

On May 11, 2016, Calderon moved to dismiss the Indictment, arguing that the alleged changes to the bills of lading were not material and, thus, any such alterations could not support criminal charges for fraud. See USA v. Lillemoe et al., 15-cr-25, Mot. to Dismiss Indictment at 1 (Doc. No. 110). The court denied Calderon's Motion to Dismiss, ruling that the issue of materiality should be left to the jury. See USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. to Dismiss Indictment at 13, 15 (Doc. No. 181).

The case proceeded to trial, where the jury found Calderon's alterations or changes to be material and fraudulent. See USA v. Lillemoe et al., 15-cr-25, Jury Charge at 56 (Doc. No. 323). On November 9, 2016, the jury convicted Calderon on the conspiracy and wire fraud counts. See USA v. Lillemoe et al., 15-cr-25, Jury Verdict (Doc. No. 324).

One month later, on December 9, 2016, Calderon filed a Motion for Acquittal or for a New Trial, which the court denied. See USA v. Lillemoe et al., 15-cr-25, Mot. for Acquittal (Doc. No. 337); USA v. Lillemoe et al., 15-cr-25, Mem. in Support of Mot. for Acquittal (Doc. No. 338); USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal (Doc. No. 420). In his Motion for Acquittal, Calderon argued that insufficient evidence existed of a scheme to defraud the banks, and that any misrepresentations or alterations were immaterial. See USA v. Lillemoe et al., 15-cr-25, Mem. in Support of

Mot. for Acquittal at 11-29. He further contended that there was insufficient evidence of unlawful agreement or intent in the record to support his conspiracy charge. The court determined, however, that there was sufficient evidence to prove that the defendants deprived the banks of information needed to make an economic decision, the misrepresentations were material, and the banks were harmed by the defendants' deception. Id. at 9-22. The court further held that there was sufficient evidence to support the conspiracy conviction. Id. at 22-26. On June 13, 2017, the court sentenced Calderon to a below-guidelines sentence of five months of imprisonment, three years of supervised release, a $200 special assessment, and restitution of $63,509.97.[2] See Judgment, Doc. No. 488.

Calderon obtained appellate counsel and timely filed an appeal to the United States Court of Appeals for the Second Circuit. See USA v. Lillemoe (Calderon), 17-1956, Notice of Appeal (Doc. No. 1); USA v. Lillemoe (Calderon), 17-1956, Notice of Appearance (Doc. No. 115).[3] On appeal, Calderon argued, again, that the evidence was insufficient to establish a scheme to defraud, as Calderon could not be shown to have made material misrepresentations. See USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 26-41 (Doc. No. 125). He added claims that this court had improperly instructed the jury as to the Allen charge, the requisite contemplated harm, and the bank fraud charge. Id. at 43-59. In his Reply, which he filed pro se after

[2] The guidelines range was 108-135 months. See 15-cr-25, Statement of Reasons (Doc. No. 505).

[3] Mr. Calderon's attorney submitted a brief on his behalf, see 17-1956, Brief (Doc. No. 125), but subsequently filed a Motion to be Relieved, which the Court granted. See 17-1956, Motion to be Relieved (Doc. No. 159); Order Granting Motion to be Relieved (Doc. No. 162); 17-196, Notice of Termination (Doc. No. 163). Mr. Calderon has proceeded pro se since June 15, 2018.

his attorney withdrew, Calderon continued to argue that the trial evidence could not have established the materiality of his alterations or misrepresentations nor that he had contemplated harm to the banks as required to establish fraud. USA v. Lillemoe (Calderon), 17-1967, Calderon Reply Brief (Doc. No. 185). The Circuit rejected Calderon's arguments and affirmed his conviction, his term of imprisonment, and his forfeiture order, reversing only the court's order that he pay restitution. See USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593). In so doing, the Circuit held that that:

> [T]here was sufficient evidence presented at trial to support the jury's conclusion that the Defendants violated the wire fraud and conspiracy statutes. . . . [T[he district court did not err in giving the jury a "no ultimate harm" instruction, did not plainly err in charging the jury on the elements of bank fraud, and did not abuse its discretion in giving a modified Allen charge to the jury.

Id. at 4.

Calderon, acting pro se, filed a Petition for Rehearing, which was denied. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc (Doc. No. 301); USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing (Doc. No. 311). In that Petition, Calderon again contended that the misrepresentations underlying the wire fraud charges were not material. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 6 (Doc. No. 301). Specifically, Calderon challenged what he argued was the Panel's failure to properly apply the Uniform Commercial Code ("UCC") in considering his appeal. Id. at 6-10. Thus, he asserted, the substantive wire fraud count should fail, as should the conspiracy charge. Id. at 11-12. He also again argued that the theories of contemplated harm were legally insufficient, id. at 12-16, and that several evidentiary errors required vacatur. Id. at 17. These errors included, he suggested, the improper

testimony of bank representatives Womack and Effing as well as USDA official Doster, whom Calderon contended inappropriately offered expert testimony while testifying as lay witnesses. See id. at 16-17. The Second Circuit rejected these arguments, summarily denying Calderon a rehearing or rehearing en banc. See USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing.

The Second Circuit issued its Mandate on March 17, 2020. See USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593). On the same day, Calderon filed a defective Motion to Stay the Mandate, see USA v. Lillemoe (Calderon), 17-1956, Mot. to Stay (Doc. Nos. 313 & 314), then filed a Motion to Recall the Mandate two days later on March 19, 2020. See USA v. Lillemoe (Calderon), 17-1956, Mot. to Recall (Doc. No. 314). Calderon's Motion to Recall echoed many of the same arguments he had advanced in earlier filings: the Court had ignored defenses available under the UCC and, thus, the wire fraud conviction was legally insufficient because any misrepresentations were immaterial; the theory of contemplated harm was legally insufficient; and inadmissible lay witness testimony was not sufficient to support a determination regarding materiality or harm. Id. at 1-7. The Second Circuit denied Calderon's Motion to Recall the Mandate. See USA v. Lillemoe (Calderon), 17-1956, Order Denying Mot. to Recall (Doc. No. 320).

This court issued an Amended Judgment removing the restitution order pursuant to the Second Circuit's Mandate on March 27, 2020. See USA v. Lillemoe et al., 15-cr-25, Am. J. (Doc. No. 612). On August 17, 2020, Calderon filed a Writ of Certiorari with the United States Supreme Court. See Calderon v. USA, 20-176, Petition for Writ of Certiorari (Doc. No. 1). In his Petition, Calderon argued once more that the Second

Circuit had failed to properly apply the UCC, and that, had the Panel done so, it would have determined no underlying fraud had occurred because neither the materiality of the misrepresentation nor the contemplated harm element had been proven. See id. at 2-4; 14-15. The Supreme Court denied his Petition on December 15, 2020. See USA v. Lillemoe (Calderon), 17-1956, Notice of Denial (Doc. Nos. 329 & 330).

The court now considers Calderon's Motion to Vacate his Sentence. See Mot. to Vacate Sentence (Doc. No. 1). In the instant Motion, Calderon repeats several arguments raised on direct appeal. He argues that the "Appeals Court opinion in this case suffers from multiple legal flaws", contending that the Panel failed to properly apply the UCC. See Mot. to Vacate at 14-16. He also reasserts his argument that any misrepresentations were not sufficient to sustain the materiality element of the fraud charges. Id. Lastly, he contends that the record contains insufficient evidence to support the "contemplated harm" element of the fraud charges. Id. at 16.

III. LEGAL STANDARD

Section 2255 of title 28 of the United States Code permits a federal prisoner to move to vacate, set aside, or correct his sentence "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." 28 U.S.C. § 2255(a). Therefore, relief is available "under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)).

The petitioner bears the burden of proving that he is entitled to relief by a preponderance of the evidence. See Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011). However, because Calderon is proceeding pro se, the court must read his "submissions broadly so as to determine whether they raise any colorable legal claims." Parisi v. United States, 529 F.3d 134, 139 (2d Cir.2008) (citing Weixel v. Bd. of Educ., 287 F.3d 138, 145–46 (2d Cir.2002)).

IV. DISCUSSION

Calderon raises several claims for relief, each of which has been considered and rejected by the Second Circuit on direct appeal. He now asks this court to revisit and reconsider the Second Circuit's decision. See Mot. to Vacate at 13. However, the fact that Calderon has received appellate review of his claims[4] means that he may not raise them again in this proceeding, as "[i]t is well established that a [section] 2255 petition cannot be used to relitigate questions which were raised and considered on direct appeal." United States v. Sanin, 252 F.3d 79, 83 (2d Cir. 2001) (internal quotations and citation omitted). In other words, a defendant is procedurally barred from raising in a collateral attack an issue that was adjudicated on direct appeal. See id. Moreover, the Second Circuit has made clear that "the mandate rule prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010). In deciding whether an issue was resolved by the appellate court, "a district court should look to both the specific dictates

[4] Not only has Calderon received appellate review of his claims, but he has also petitioned for and been denied a rehearing en banc before the Second Circuit as well as a Writ of Certiorari before the United States Supreme Court.

of the remand order as well as the broader spirit of the mandate." Id. (internal quotation marks and citations omitted).

The first issue which Calderon has previously raised is whether any misrepresentations in one transaction, the "Cool Express" Transaction, were material. See Mot. to Vacate at 16-20. Calderon argues again that the UCC establishes his "actual innocence"[5] with respect to the fraud charge, as he contends the misrepresentations were not "materially fraudulent" under the UCC. Id. However, the question of the materiality of these misrepresentations has been addressed multiple times over the course of this litigation: by this court in denying a pretrial motion preserving the question of materiality for the jury, see USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. to Dismiss Indictment at 13, 15; by the jury at trial which found the statements material, see USA v. Lillemoe et al., 15-cr-25, Jury Charge at 56, USA v. Lillemoe et al., 15-cr-25, Jury Verdict; and again by this court in denying Calderon's Motion for Acquittal or for a New Trial. USA v. Lillemoe et al., 15-cr-25, Mot. for Acquittal; USA v. Lillemoe et al., 15-cr-25, Mem. in Support of Mot for Acquittal; USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal. Calderon also raised the same argument before the Second Circuit on direct appeal and in his Petition for a Rehearing, as well as in his Petition for Certiorari to the Supreme Court, all of which were denied. See USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 5, 27-43 (Doc. No. 125); USA v. Lillemoe (Calderon), 17-1956, Calderon Reply Brief at 1-9 (Doc. No. 185); USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or

[5] The court discusses Calderon's contention that he is actually innocent below. See pp. 11-12, infra.

Rehearing en Banc at 6-10; USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing (Doc. No. 311); Calderon v. USA, 20-176, Petition for Writ of Certiorari at 2-4, 14-15. This court will not reconsider the materiality of Calderon's statements, which has been resolved by this court, the jury, and the Second Circuit's mandate.

Second, Calderon contends once again that the bills of lading he presented to Co-Bank are actually authentic, truthful, and strictly complying. See Mot. to Vacate at 20. Calderon raised this argument at trial, contending that a copy altered with whiteout and a new original stamp was effectively a true original. See Ruling at 20-22. The jury found against Calderon, and this court upheld the jury's finding in its Ruling Denying Calderon's Motion for Aquittal. See USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal. Calderon raised the same argument in his Reply to the Government's Opposition on direct appeal, USA v. Lillemoe (Calderon), 17-1956, Calderon Reply Brief at 1, 4, 11-15, 28-29, and in his Petition for a Rehearing en Banc before the Second Circuit. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 8; USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing. He raised the same argument once more in his Petition for Certiorari before the Supreme Court, see Calderon v. USA, 20-176, Petition for Writ of Certiorari at 22. The court cannot now relitigate these issues.

Third, Calderon disputes the sufficiency of evidence that he contemplated harm to the banks, as he argues that the threat of "protracted and costly litigation" does not constitute harm. See Mot. to Vacate at 29. However, the Second Circuit addressed this argument head-on in its Decision disposing of Calderon's appeal, rejecting the

argument and reaffirming the findings of the jury and the judgment of this court. See USA v. Lillemoe et al., 15-cr-25, Mandate at 34. Thus, the court cannot revisit the question as to whether Calderon contemplated harm to the banks.

Fourth, Calderon argues that his conspiracy conviction should be vacated because, were the court to accept the arguments he raised regarding the underlying substantive fraud charges, the conspiracy charge would not lie. See Mot. to Vacate at 35. Like his other claims, this argument is procedurally barred because Calderon has raised it previously on direct appeal, see USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 25, 59, and in his rejected Petition for a Rehearing en Banc. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 11-12. Further, because both this court and the Second Circuit have determined that Calderon's underlying substantive fraud charges are not "legally insufficient", see, pp. 7-11, supra, they do not provide a ground upon which to vacate his conspiracy conviction.

Fifth, he questions the propriety of the government's witnesses, arguing that there is insufficient evidence to support two factual findings: (1) that Calderon and his coconspirator entered into an agreement to change dates on documents used in several transactions, see Mot. to Vacate at 37-38, and, again, (2) that there is insufficient evidence of the materiality of the altered dates. See id. at 37-44. However, as Calderon himself acknowledges, see id. at 43-44, the Second Circuit rejected Calderon's arguments regarding the insufficiency of the evidence of materiality and affirmed this court's conviction and the jury's finding that a conspiracy existed. See

USA v. Lillemoe et al., 15-cr-25, Mandate. This argument is therefore foreclosed to Calderon.

Lastly, he argues that the forfeiture and sentence should be vacated along with the bank and wire fraud convictions. See Mot. to Vacate at 44. However, the Second Circuit affirmed both the forfeiture and sentence in its Decision affirming the convictions and reversing the restitution order. See USA v. Lillemoe et al., 15-cr-25, Mandate. Further, the bank and wire fraud convictions have not been vacated. Thus, the court cannot vacate the sentence or the order of forfeiture.

In his Motion, Calderon couches his recycled arguments in the language of "actual innocence", asserting that he is innocent as a matter of law given his perception that this court and the Second Circuit erred in reasoning or judgment regarding his claims. See, e.g., Mot. to Vacate at 13, 20. However, while "actual innocence, if proved, serves as a gateway through which a petitioner may pass [when] the impediment is a procedural bar", a petitioner must meet a stringent standard and "persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. (citation and internal quotation marks omitted). Calderon has identified no new facts or evidence pointing to his innocence, and his rephrased legal arguments do not meet this high bar, as "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623-24 (1998) (citation omitted). Therefore, Calderon's mischaracterized assertion of "actual innocence" cannot eliminate the procedural bar to his claims.

V. CONCLUSION

For the foregoing reasons, Calderon's Motion to Vacate the Sentence (Doc. No. 1) is denied. Because Calderon has not made a "substantial showing" of denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253(c)(2). The Clerk is hereby directed to close this case.

SO ORDERED.

Dated at New Haven, Connecticut this 27th day of June 2022.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

Uniform Commercial Code

U.C.C. § 5-107 (a). Confirmer, Nominated Person, and Adviser.

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

Official Comment

1. A confirmer has the rights and obligations identified in Section 5- 108. Accordingly, unless the context otherwise requires, the terms "confirmer" and "confirmation" should be read into this article wherever the terms "issuer" and "letter of credit" appear.

A confirmer that has paid in accordance with the terms and conditions of the letter of credit is entitled to reimbursement by the issuer even if the beneficiary committed fraud (see Section 5- 109(a)(1)(ii)) and, in that sense, has greater rights against the issuer than the beneficiary has. To be entitled to reimbursement from the issuer under the typical confirmed letter of credit, the confirmer must submit conforming documents, but the confirmer's presentation to the issuer need not be made before the expiration date of the letter of credit.

U.C.C. § 5-108 (a), (e), (f). Issuer's Rights and Obligations.

(a) Except as otherwise provided in Section 5- 109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5- 113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) the performance or nonperformance of the underlying contract, arrangement, or transaction,

(2) an act or omission of others, or

(3) observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).

Official Comment

1. This section combines some of the duties previously included in Sections 5-114 and 5- 109. Because a confirmer has the rights and duties of an issuer, this section applies equally to a confirmer and an issuer. See Section 5- 107(a).

The standard of strict compliance governs the issuer's obligation to the beneficiary and to the applicant. By requiring that a "presentation" appear strictly to comply, the section requires not only that the documents themselves appear on their face strictly to comply, but also that the other terms of the letter of credit such as those dealing with the time and place of presentation are strictly complied with. Typically, a letter of credit will provide that presentation is timely if made to the issuer, confirmer, or any other nominated person prior to expiration of the letter of credit. Accordingly, a nominated person that has honored a demand or otherwise given value before expiration will have a right to reimbursement from the issuer even though presentation to the issuer is made after the expiration of the letter of credit. Conversely, where the beneficiary negotiates documents to one who is not a nominated person, the beneficiary or that person acting on behalf of the beneficiary must make presentation to a nominated person, confirmer, or issuer prior to the expiration date. ...

U.C.C. § 5-109 (a). Fraud and Forgery.

(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 a 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 (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person...

(2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

Official Comment

1. This recodification makes clear that fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. See *Cromwell v. Commerce & Energy Bank*, 464 So.2d 721 (La.1985).

Secondly, it makes clear that fraud must be "material." Necessarily courts must decide the breadth and width of "materiality." The use of the word requires that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in the underlying transaction. Assume, for example, that the beneficiary has a contract to deliver 1,000 barrels of salad oil. Knowing that it has delivered only 998, the beneficiary nevertheless submits an invoice showing 1,000 barrels. If two barrels in a 1,000 barrel shipment would be an insubstantial and immaterial breach of the underlying contract, the beneficiary's act, though possibly fraudulent, is not materially so and would not justify an injunction. 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.

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in *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), and similar decisions and embraces certain decisions under Section 5- 114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in *Ground Air Transfer v. Westate's Airlines*, 899 F.2d 1269, 1272–73 (1st Cir.1990):

> We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in *Itek*, 730 F.2d at 24–25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, *Itek*, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, id., at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see *Dynamics Corp. of America*, 356 F.Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction

that the legitimate purposes of the independence of the issuer's obligation would no longer be served," *Itek*, 730 F.2d at 25 (quoting *Roman Ceramics Corp. v. Peoples National Bank*, 714 F.2d 1207, 1212 n.12, 1215 (3d Cir.1983) (quoting *Intraworld Indus.*, 336 A.2d at 324–25)); then a court may enjoin payment.

IN THE SUPREME COURT OF THE UNITED STATES

No.

PABLO CALDERON, APPLICANT

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I hereby certify that three copies of the Application For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari in Pablo Calderon v. United States, were served via overnight mail on all parties required:

ELIZABETH B. PRELOGAR
Solicitor General
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 514-2217

I declare under penalty of perjury that the foregoing is true and correct.

Pablo Calderon

Pablo Calderon

Date: February 13, 2023