

APPENDIX A

CLD-236

June 14, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-1188**

UNITED STATES OF AMERICA

VS.

LAURA SHAUGER, Appellant

(E.D. Pa. Crim. No. 12-cr-00497)
(Criminal treated as civil)

Present: CHAGARES, GREENAWAY, JR., and FUENTES, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
 - (2) Appellant's corrected motion for appointment of counsel
- in the above-captioned case.

Respectfully,

Clerk

ORDER

Shauger's application for a certificate of appealability is denied. Jurists of reason would not debate the District Court's conclusion that Shauger did not show that her Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). Jurists of reason would not debate that Shauger's attorney acted reasonably in the evidence that he presented at sentencing, nor would they debate that Shauger was not prejudiced by her attorney's conduct. In particular, jurists of reason would not debate that Shauger's attorney acted reasonably by relying on the testimony of Dr. Russell and

by failing to investigate further, given the facts known to him at the time. Shauger's motion for appointment of counsel is denied as moot.

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: July 3, 2018
tmm/cc: Michael L. Levy, Esq.
James H. Feldman, Jr., Esq.



A True Copy:

Patricia S. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

LAURA SHAUGER

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**CRIMINAL NO. 12-497
CIVIL NO. 15-3684**

Goldberg, J.

November 30, 2017

MEMORANDUM OPINION

Before me is Defendant, Laura Shauger's (hereinafter referred to as "Petitioner"), motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255. Petitioner requests that I vacate her sentence and resentence her because sentencing counsel was constitutionally ineffective. For the reasons set out below, I will deny her request.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 2012, Petitioner was indicted on eight counts of employing a child to produce images of the child engaging in sexually explicit conduct in violation of 18 U.S.C. § 2251(a). These charges involved a nine-month time span over which Petitioner took sexually explicit photographs and videos of her seven-year-old daughter and sent them to her boyfriend and co-defendant, Patrick Mergen ("Mergen"), who then distributed the photographs. Investigators seized a total of 211 photographs and 14 videos of Petitioner's daughter either nude or posing in sexually explicit ways. Two of these images depicted Mergen touching Petitioner's daughter in her genital area. These images and videos were recovered from a USB flash drive seized from Mergen, and had been taken on Petitioner's mobile phone or digital camera. (Pre-Sentencing Report at 6-7.)

On May 20, 2013, Petitioner pled guilty to one count of employing a child to produce images of the child engaging in sexually explicit conduct, and as part of her plea agreement, admitted to the conduct charged in the other seven counts. Under the sentencing guidelines, the base offense level was 32. Ten levels were added to the base offense level because: the victim's/daughter's age; the offense included distribution; Petitioner victimized her own daughter; and the fact that some of the images depicted Mergen touching the child's vagina and inner thigh. With a two-level downward adjustment for acceptance of responsibility, the total offense level was 40. Petitioner's criminal history score was I, and thus the guideline range was 292 to 360 months.

Sentencing was held on August 21, 2013. At the hearing, Dr. William Russell testified on Petitioner's behalf. Dr. Russell's practice focused on the evaluation and rehabilitation of sex offenders, and he was previously a member of the Pennsylvania Sexual Offender Assessment Board. He opined that Petitioner suffered from "an adjustment disorder with a depressed mood" and a "dependent personality disorder." Dr. Russell offered the following explanation of his diagnosis:

Well, I think the hardest thing for everybody to understand in a case like this is the question of why. How did this person, how does this mother let these types of behaviors occur and that's where the dependent personality disorder comes into play. We all have ways of dealing with stress in our life and dealing with stressful events and most of them are fairly normal. But sometimes, over the course of a lifetime, an individual develops a pattern of behavior and dealing with stressful events, its very maladaptive. And in Ms. Shauger's case, the way that we see a pattern of dealing with stressful events and relationships going back to early childhood is through a pattern of excessive neediness and desire to be taken care of. We see an individual who is somewhat docile, passive, has difficulty asserting themselves, who goes through a great deal of energy to try and please others. And when we look at a personality disorder, what we're looking at is a pervasive pattern of difficulty interacting with the environment in maladaptive ways.

Dr. Russell further opined that individuals with behavior similar to Petitioner's—that is, “where the individual engages in sexual behavior as part of a relationship with another individual”—have a recidivism rate of about two percent with treatment. (N.T. 08/21/13 at 18-20.)

Petitioner's counsel offered Dr. Russell's testimony as an explanation for her actions and as a basis for a downward variance. Contending that “there was a misfire up there that caused her to commit these criminal acts,” counsel urged me to find that 180 months would be sufficient punishment, and asserted that she “possessed tremendous potential for rehabilitation.” In requesting this variance, Petitioner's counsel acknowledged that safety of the victim was a critical concern, but noted that 180 months would mean her daughter would be in her early 20s when Petitioner was released. (Id. at 48-51.)

I denied Petitioner's request for a downward variance and sentenced her to a term of 300 months' imprisonment—a low-end guideline sentence. I found that Dr. Russell's explanation for Petitioner's actions did not support a variance because it did not sufficiently provide a connection between the disorders identified by Dr. Russell and Petitioner's actions. I also found that Petitioner had not fully accepted responsibility, observing that there had been testimony from Petitioner's family that Petitioner was the victim in this case.

In considering the Section 3553 factors, I reviewed the nature of the photographs and the disturbing circumstances of Petitioner's offense. Taking into account these details, I determined that the offense in this case “couldn't be any more serious” and that a term of 300 months promoted a respect for the law, provided a just punishment, and afforded adequate deterrence. (Id. at 58, 60-64.) On September 18, 2013, Petitioner appealed to the United States Court of Appeals for the Third Circuit, which granted the Government's motion to dismiss the appeal and issued a summary affirmance on July 1, 2014.

On June 30, 2015, Petitioner filed this § 2255 motion. The Government's response, Petitioner's reply, the Government's sur-reply, and Petitioner's sur-sur-reply followed. Petitioner raised three claims of ineffective assistance of counsel. She first alleged that sentencing counsel was ineffective for failing to argue she deserved a downward variance equivalent to a one-level reduction. As noted infra, this claim was subsequently withdrawn. Second, Petitioner contended that counsel was ineffective for using Dr. Russell as an expert at sentencing. Third, she argued that counsel was ineffective for submitting letters at the sentencing hearing that did not support the request for a downward variance.

I held an evidentiary hearing on Petitioner's claims on January 12, 2017. There, Petitioner withdrew her first claim and focused on the fact that counsel was ineffective for using Dr. Russell as an expert at sentencing. In support, she presented the testimony and report of Dr. Marti Loring, who opined that Petitioner was actually suffering from battered person syndrome and post-traumatic distress at the time she committed the charged offenses. Dr. Loring testified that the trauma suffered by Petitioner explained her actions because "it impaired her ability to think and evaluate for herself, so that she behaved in robot-like fashion, doing what was asked, commanded She'd receive commands, and she would then obey them, from [Mergen]." Dr. Loring also opined that Petitioner suffered from dissociation as a result of the trauma, such that she was detached "like she was an outsider, like outside her body, outside of her thinking, sort of observing what it was that was happening, though somewhat foggy in the observation." (N.T. 01/12/2017 at 5, 18-19.)

Dr. Loring explained that in order to arrive at her conclusions she utilized certain "trauma measures," such as the Clinician Administered PTSD Scale ("CAPS"), which she described as

the “gold standard” tool to measure trauma. She also used the trauma belief inventory, the trauma symptom checklist, the DAPS, and then MFAST to test for malingering. (*Id.* at 22-23.)

Dr. Loring also interviewed what she referred to as “collateral witnesses.” She pointed to childhood family violence and a physically and emotionally abusive relationship with Mr. Jeffrey Shauger (Petitioner’s husband) as important to her diagnosis. (*Id.* at 23.)

Regarding Dr. Russell, Dr. Loring noted that he did not evaluate Petitioner for trauma, post-traumatic stress disorder, or battered person syndrome, and that his diagnosis of Petitioner did not sufficiently explain why she committed the offenses. Dr. Loring explained that her conclusion that Dr. Russell had failed to evaluate Petitioner for abuse or trauma was evidenced by the following: he used only one evaluative tool, the MMPI-2, which does not always catch post-traumatic stress disorder; he did not diagnose Petitioner with a serious diagnosis, or an “Axis 1”; and although he mentioned abuse, he did not “tie it together to see whether there was any trauma associated with it.” (*Id.* at 16-26, 33-35.)

Petitioner filed a post-hearing brief on March 15, 2017, again raising three claims of ineffective assistance of counsel, but refining those claims. The Government filed a response to Petitioner’s post-hearing brief, to which Petitioner filed a reply.¹ This matter is ready for disposition.

II. DISCUSSION

As noted above, Petitioner raises three claims of ineffectiveness of counsel, which she argues entitle her to relief under 28 U.S.C. § 2255. First, she contends counsel failed to conduct an adequate investigation when he did not have Petitioner evaluated for trauma and abuse.

¹ I will rely on Petitioner’s post-hearing brief throughout this Memorandum as it clarifies her claims. I will rely on the Government’s response to the post-hearing brief as well as its prior filings pursuant to its statement of incorporation. (Gov. Resp. to Post-Hr’g Br., Doc. No. 143, at 1.)

Second, Petitioner argues that counsel made insufficient arguments in support of a downward variance. Finally, she asserts that counsel presented evidence and made arguments that were contrary to her best interests.

A. Legal Standard for Ineffective Assistance of Counsel

28 U.S.C. § 2255 allows “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . [to] move the court which imposed the sentence to vacate, set aside, or correct the sentence.” 28 U.S.C. § 2255(a). Petitioner claims that her sentence is unconstitutional because it was the result of the ineffective assistance of counsel.

The United States Supreme Court’s standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment is set forth in Strickland v. Washington, 466 U.S. 668 (1984), and has been reaffirmed consistently since. According to Strickland, counsel is presumed to have acted effectively unless the petitioner can demonstrate both that (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 686-88, 693-94. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 668. In assessing whether counsel performed deficiently, the court must “‘reconstruct the circumstances of counsel’s challenged conduct’ and ‘evaluate the conduct from counsel’s perspective at the time.’” Harrington v. Richter, 131 S. Ct. 770, 779 (2011) (quoting Strickland, 466 U.S. at 689).

Nonetheless, because the “ultimate focus of the inquiry [is] on the fundamental fairness of the proceeding whose result is being challenged . . . a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as

a result of the alleged deficiencies.” Strickland, 466 U.S. at 696-97. In fact, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed.” Id. at 697.

B. Petitioner’s Claims

1. Whether Sentencing Counsel Was Ineffective for Failing to Have Petitioner Evaluated for Trauma and Abuse

Petitioner first contends that counsel was constitutionally ineffective for failing to conduct an adequate investigation when he failed to have Petitioner evaluated for trauma and abuse. She explains that Dr. Russell used only one psychological tool to evaluate her, one that often fails to identify post-traumatic stress disorder or battered person syndrome, and did not interview any witnesses. Petitioner draws on information contained within seven letters submitted to the Assistant United States Attorney (“AUSA”) during the plea negotiation process, which were shared with her sentencing counsel, and contends that those letters should have alerted him that she had been abused by her husband and/or Mergen.² Petitioner urges that Dr. Russell’s failure to investigate whether Petitioner suffered from trauma or abuse, “combined with the fact that he provided no explanation for why she committed the offense,” should have led counsel to conduct further investigation. To support her argument, Petitioner relies on

² Petitioner points to the following content in the referenced letters: (1) Carol Cook, Petitioner’s aunt, wrote that Petitioner had “grown incompetent as a responsible adult through the abuse of Mr. Shauger and then Mr. Mergen”; (2) Veronica Dunn, Petitioner’s friend, wrote that Petitioner was “a mother who had been mentally abused by her husband for a number of years”; (3) Ashleigh McKenna, Petitioner’s friend, wrote that Mr. Shauger’s “abuse of Laura has played a large role in the person she is today,” and that Petitioner’s co-defendant “manipulated her with the knowledge of the abuse she endured from her estranged husband”; (4) Jillian Saner, Petitioner’s former employee, wrote that “[t]he verbal and emotional abuse she took from Jeffrey [Shauger] really took a toll on her”; (5) Michelle Shapiro, Petitioner’s sister, referred in her letter to Petitioner’s “past history of emotional abuse”; (6) Cynthia Sotak, Petitioner’s mother, wrote that Petitioner had been “emotionally abused” during her marriage; and (7) Lisa Sotak, Petitioner’s sister, wrote that Petitioner was under a lot of stress and had been “highly mistreated” by Mr. Shauger. (Post-Hr’g Br., Doc. No. 142, at 2-3 (quoting letters included in Def. Ex. 1.))

Saranchak v. Sec., Pa. Dep't of Corrs., 802 F.3d 579 (3d Cir. 2015) (finding counsel's performance was deficient, and prejudicial, where he did not investigate his client's mental health history despite being aware that he had "demonstrated psychological issues") and Marcum v. Lieberres, 509 F.3d 489 (8th Cir. 2007) (finding counsel's performance was not prejudicial where he mistakenly believed he could not present medical records related to his client's mental health and did not timely disclose witnesses who could have testified about those records). (Post-Hr'g Br., Doc. No. 142, at 1-8.)

The Government responds that Petitioner has recast the argument she made in her original petition—that counsel picked the wrong expert—as an inadequate investigation claim. It contends that the issue is really whether counsel selected the wrong expert, which is governed by Hinton v. Alabama, 134 S. Ct. 1081 (2014). Arguing that sentencing counsel provided objectively reasonable representation, the Government explains that counsel reviewed the letters submitted by Petitioner's family and friends, and based on his understanding of the situation, sought an expert who specialized in the evaluation and treatment of sex offenders. Regarding Dr. Loring's evaluation of Petitioner, the Government asserts that although she and Dr. Russell provided different psychological labels for Petitioner's behavior, both experts largely agreed on the characterization of that behavior. The Government urges that because Petitioner has "chosen the wrong standard" under which to evaluate counsel's selection of Dr. Russell, she is erroneously imposing Dr. Loring's judgment of Dr. Russell's evaluation onto the analysis of counsel's representation. (Gov. Resp. to Post-Hr'g Br., Doc. No. 143, at 1-4.)

In Strickland, the Supreme Court explained that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. "In assessing the reasonableness of an attorney's investigation . .

. a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527 (2003). However, when a reviewing court analyzes the reasonableness of counsel’s investigation or decision, it must “apply[] a heavy measure of deference to counsel’s judgments.” Id.

Applying this heavy measure of deference, I conclude that sentencing counsel was objectively reasonable in his investigation. Counsel reviewed the letters submitted by Petitioner’s family and friends, and given the content of the letters, selected an expert who specialized in the sentencing topic at issue—the evaluation and rehabilitation of sex offenders. Dr. Russell carefully evaluated Petitioner, prepared a report with his conclusions, and presented those conclusions at sentencing.

Petitioner first cites to Saranchak v. Sec., Pa. Dep’t of Corrs., 802 F.3d 579, 594-95 (3d Cir. 2015). In Saranchak, the Third Circuit addressed whether the decision of the defendant’s trial counsel not to pursue his client’s mental health and behavioral history at the penalty phase of a death penalty hearing constituted objectively unreasonable conduct under Strickland. 802 F.3d at 593. Prior to the penalty phase, counsel was aware that his client had “demonstrated psychological issues, ‘at times’ adopting a ‘character or mode’ that [he] was in the military.” In fact, counsel’s admitted theory of defense was his client’s “mental health issue.” Id. Yet, counsel did not obtain a psychiatric evaluation and never retained a defense expert on his client’s behalf. Id. at 94. Instead, he deferred to a neutral expert, appointed to evaluate the defendant’s competency to stand trial, and who did not evaluate the defendant’s background, history, or general mental health. Id. Counsel relied on the neutral expert’s “glowing” opinion of his client and did not seek further evaluation. Id. The Third Circuit found that counsel’s investigation

“fell woefully short” under Supreme Court and professional standards, concluding that counsel’s performance at the penalty phase was unreasonably deficient and prejudiced the defendant. Id. at 595-96.

The facts before me are markedly different from those in Saranchak, where counsel failed to investigate his client’s mental health and behavioral history in any way despite having knowledge of past demonstration of psychological issues. In contrast, here, counsel did investigate Petitioner’s mental health, did obtain an independent evaluation, and presented Dr. Russell as an expert on Petitioner’s behalf at sentencing.

Petitioner also relies upon Marcrum v. Lieberres, 509 F.3d 489, 511 (8th Cir. 2007), where counsel raised insanity and diminished capacity at the guilt phase of a death penalty case. 509 F.3d at 506-07. Under the mistaken belief that the trial court excluded them, counsel did not present medical records demonstrating that the defendant had failed to take his anticonvulsants leading up to the murder, which resulted in serial seizures and a state of psychosis. Id. Counsel also did not present medical records from the night of the murder diagnosing the defendant as psychotic and showing a sub-therapeutic level of anticonvulsants in his blood. Id. Finally, counsel failed to timely disclose as witnesses the doctors and other healthcare providers who treated the defendant and would have testified about his medical records, and thus those witnesses were excluded. Id. Instead, counsel called an expert who testified that the defendant suffered from a mental disease, but did not testify to the relationship that might exist between the defendant’s seizures and delusions. Id. at 494-95. In his habeas petition, the defendant produced a new expert who opined that the defendant had a seizure disorder that had developed into an organic personality disorder, such that when he was having a seizure and not being medicated, he would develop organic psychosis. Id. at 496-97.

The United States Court of Appeals for the Eighth Circuit noted that counsel erred in failing to present the medical records and was “wrong” for neglecting to disclose the doctors and healthcare providers as witnesses at trial. Id. at 506. The court, however, did not determine whether counsel’s performance was unconstitutionally deficient because it ultimately held that the defendant was not prejudiced. Id. at 507. In so holding, the Eighth Circuit noted that the real issue was whether counsel was ineffective for failing to present an expert at trial to testify about the relationship between the defendant’s seizures and psychosis. Id. at 510. The Eighth Circuit answered that question in the negative, stating that “[t]he fact that a later expert, usually presented at habeas, renders an opinion that would have been more helpful to the defendant’s case does not show that counsel was ineffective for failing to find and present that expert.” Id. at 511. Counsel in Marcum had selected an expert who was qualified and spent sufficient time evaluating the defendant. Id. at 510. Observing that it would not necessarily have been obvious to counsel that there was a link between the seizures and psychosis, the Eighth Circuit concluded that although the interpretation provided by the expert relied on in the habeas petition may have “ma[de] a more coherent story[,] . . . this does not necessarily mean that [the trial expert’s] interpretation was wrong or that [counsel] was wrong to rely on it.” Id. at 511.

The facts before me are unlike those in Marcum to the extent that sentencing counsel did not fail to promptly disclose witnesses who would testify to the content of Petitioner’s medical records, nor did Petitioner’s counsel fail to introduce the medical records. Similarly to Marcum, however, counsel here selected a qualified expert based on the information presented to him, had that expert evaluate Petitioner, and presented that expert on her behalf at the sentencing.

The letters referenced by Petitioner shed light on her counsel’s ineffectiveness. In one of the letters cited to by Petitioner, see infra n.2, Carol Cook, Petitioner’s aunt, wrote:

Both men are manipulative in their own ways for their own selfish reasons. [Petitioner] fell from one low to another while with these men trying to please them and be loved. . . . [Petitioner], like everyone else in the world, wants to be loved and cherished. . . . [Petitioner] has done unspeakable things simply to feel loved.

Ashleigh McKenna, Petitioner's friend, wrote:

Mr. Mergen manipulated [Petitioner] with the knowledge of the abuse she endured from her estranged husband, and instead preyed on her desperate need to be loved and to please and protect the one she loves. . . . As for [Petitioner]'s part in this case, it is primarily appallingly bad choices made by a desperately lonely woman who believed in order to feel complete she must have a man in her life.

Cindy Sotak, Petitioner's mother, submitted the following remarks in her letter:

During her marriage she was manipulated and emotionally abused. Jeff turned away from her, refusing to go to counseling. He didn't force her out of the house but wanted nothing to do with her and wanted to live separate lives under the same roof. This made her feel useless, unimportant, worthless, incompetent and just plain stupid. . . .

When [Mergen] first met [Petitioner] she was with her family, so he saw how [Petitioner] was being treated and that she had a beautiful young daughter with long blond hair. Now another man could step into her life to manipulate and emotionally abuse her even more. Facing a failed marriage, she really wanted this relationship to work.

Finally, Lisa Sotak, Petitioner's sister, wrote:

In [Petitioner]'s case she was in a bad relationship going into another bad relationship where she learned some not so good behaviors. She always wanted to please others and make them happy, which is what got her into this trouble. She cared more about doing things to make other people happy even when it wasn't the right thing to do, but she later realized this and stopped it.

(Post-Hr'g Br., Doc. No. 142, Ex. 1.)

Dr. Russell's report addressed the exact behaviors described by Petitioner's friends and family in the letters, observing that "[t]here is little question [Mergen] was able to see [Petitioner's] neediness and dependency as something he could manipulate and control. In turn her neediness and dependency made her an ideal candidate to engage in the types of behaviors

that bring her in front of the court.” Additionally, “[Petitioner]’s identity and self worth became tied into this relationship. Her investment in maintaining the relationship prevailed above all else.” Dr. Russell concluded that Petitioner’s behavior “is consistent with the pattern of many women who commit sexual offenses at the bequest of a romantic partner,” and opined that she suffered from a personality disorder driven by a desire to remain loved and accepted. (Def. Sent. Mem., App. A at 4-5.) In short, Dr. Russell directly addressed Petitioner’s past and how that affected her behavior.

In light of all of the above, I find that it was not objectively unreasonable for sentencing counsel to cease his investigation into Petitioner’s mental health once Dr. Russell evaluated and diagnosed her because counsel had obtained a diagnosis from a qualified expert that attempted to provide an explanation for Petitioner’s actions. The letters quoted above include observations by close friends and family members detailing Petitioner’s desire to please others and be loved. Dr. Russell explained that these behaviors were connected to a larger personality disorder. Based on the evidence known to counsel at the time, I conclude that counsel’s representation did not fall below an objective standard of reasonableness. The fact that I did not find Dr. Russell’s explanation helpful does not change this conclusion. Similarly, the fact that Dr. Loring did not think Dr. Russell’s explanation was the correct explanation does not mean that counsel was unreasonable in presenting it.

I also agree with the Government that Petitioner’s inadequate investigation argument appears to in fact be a thinly veiled “wrong expert” argument, which is governed by United States v. Hinton. 134 S. Ct. 1081 (2014). In Hinton, the prosecution’s case turned on the state expert’s conclusion that bullets had been fired from the defendant’s gun. 134 S. Ct. at 1084. To rebut that conclusion, trial counsel needed a toolmark expert. Id. Counsel knew that the expert

he had obtained was not the correct expert, but because counsel believed he could not obtain more than \$1,000 from the court to cover expert fees, did not seek a better expert. Id. at 1084-85. The Supreme Court found that counsel's failure to ask for funding to replace an expert whom he knew to be inadequate was based on a mistaken belief as to the law, amounting to deficient performance. Id. at 1088. Counsel was found to be ineffective because he failed to understand the law, not because he "hir[ed] . . . an expert who, though qualified, was not qualified enough." Id. at 1089. The Court went on to say that "[t]he selection of an expert witness is a paradigmatic example of the type of 'strategic choice' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" Id. (citing Strickland, 466 U.S. at 690) (emphasis added). The Court underscored that it was not "launch[ing] federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law." Id.

Here, in considering counsel's strategic choice to select Dr. Russell, I am guided by the Supreme Court's comments in Strickland, which instructs that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Here, Petitioner urges me to apply the hindsight Strickland prohibits. She suggests that because I found Dr. Russell's explanation of the impact of dependent personality disorder on her actions unavailing, I should find counsel ineffective for selecting Dr. Russell. But, the fact that Dr. Russell's testimony was unpersuasive because it did not sufficiently explain Petitioner's actions does not mean that counsel was unreasonable in selecting Dr. Russell. Rather, counsel chose an expert based on the facts

presented to him. In light of the great deference that Hinton instructs I give to counsel's selection of an expert, I cannot say that counsel was objectively unreasonable in his expert selection. Because I find that counsel's performance did not fall below an objective standard of reasonableness, I need not analyze the prejudice prong of Strickland.

2. Whether Counsel Was Ineffective for Making Inadequate Arguments in Support of a Request for a Downward Variance

Petitioner next argues that counsel was unconstitutionally ineffective because he made deficient arguments in support of a request for a downward variance, while failing to make two strong arguments. She asserts that counsel should have raised the following arguments in support of a downward variance: (1) Petitioner independently ceased her criminal conduct almost two years before she was arrested; and (2) Petitioner committed her offense (engaging her daughter in sexually explicit conduct) in one of the less harmful ways contemplated by 18 U.S.C. § 2251(a) because "sexual intercourse," "bestiality," and "sadistic or masochistic abuse" did not occur in this case. (Post-Hr'g Br., Doc. No. 142, at 6-7) (citing 18 U.S.C. § 2256(2)(A)(i)-(ii), (iv).)

The Government responds that this type of "it could have been even worse argument" is not consistent with how I properly evaluated the conduct in this case. The Government stresses that in imposing a sentence, I emphasized that the conduct involved a mother and her seven-year-old child. (N.T. 08/21/13 at 62) ("[T]his case boils down to a situation where a mother exploited rather than protected.") The Government urges that under Strickland's deferential standard, counsel's representation did not fail to meet the standards of the Sixth Amendment. (Gov. Resp., Doc. No. 112, at 7.)

Turning to the prejudice prong of Strickland, I must determine whether there is a reasonable probability that, but for counsel's failure to make the above arguments, the result of

the proceeding would have been different. 466 U.S. at 694. In his sentencing memorandum, counsel argued for a variance from the guideline range based on the following factors: (1) Petitioner showed remorse; (2) Dr. Russell's evaluation; and (3) Petitioner's "extraordinary" family and community support. (Def. Sent. Mem. at 9-10.) At sentencing, counsel made a formal request for a downward variance, stating the following:

I know what the Guideline range is. I know what the Co-Defendant's sentence was. And I very seldom ask for a specific sentence because I feel that it's presumptuous, but I am going to do that here. I'm going to ask for a variance. . . .

[T]he basis for the variance, I guess in the old days, it would be pre-Booker, I guess we would have called it a 5K2. It would have been that something's misfiring in her brain that Dr. Russell reports. . . .

Something is misfiring up there and she was examined—she saw Dr. Russell a number of times and his testimony today hopefully was somewhat helpful, but there was a misfire up there that caused her to commit these criminal acts and they are heinous. . . . But I think, Judge, that 180 months, which I know is the minimum, I think that it does a couple things if you look at 3553. It certainly is a punishment. It certainly would serve to deter others. But I think that this particular Defendant, as medical reports and the Pre-Sentence Report and the live testimony and the letters show, possesses a tremendous potential for rehabilitation.

(N.T. 08/21/2013 at 44-45, 47-49.) The AUSA responded in opposition of a downward variance:

What I find truly disturbing is the conduct of taking the other pictures were designed to encourage her daughter's sexualization at a very early age. She permitted Mergen to fondle her daughter and photograph that conduct which has got to teach her daughter that being subject to this kind of abuse is acceptable and proper behavior. Her lack of judgment in sending the images to Mergen in a digital format making it readily transferable to others. I think we learn in grammar school that if you share a secret with somebody, there's a risk that person will share that secret with others. . . . [S]he is a mother who risked psychological harm to her child and . . . there's still a risk that she can do it again.

(Id. at 56-57.) After hearing the above arguments, as well as the testimony of Dr. Russell and that of Petitioner's family and friends, I denied Petitioner's request for a downward variance, observing:

I think that Mr. Shauger got it right when he said this case boils down to a situation where a mother exploited rather than protected. . . . I can't ignore the overwhelming despicable violation of trust that occurred here where a mother facilitated a situation which allowed a child predator to ruin the life of a seven-year-old. . . .

(Id. at 62-63.)

In light of the record before me, I cannot say that there is a reasonable probability that, but for counsel's failure to argue that the conduct was "less harmful" than other types of child abuse, the result of the proceeding would have been different. The record is replete with testimony concerning the devastating betrayal of trust between mother and child. Even if counsel had pointed out that Petitioner stopped committing the crimes two years prior to arrest, that would not have altered the fact that Petitioner took sexually explicit photographs of her own seven-year-old daughter for ten months, and did so for the gratification of a sexual predator. It also would not have altered the fact that some of those photographs depicted Mergen fondling her daughter, or that Petitioner installed a camera in the shower to capture her daughter on video. Petitioner was not an ignorant bystander in this situation, but the conduit through which the criminal activity was made possible. I find that Petitioner has not met her burden of demonstrating prejudice, and because Petitioner has failed to show prejudice, I need not consider whether counsel's performance was objectively unreasonable.

3. Whether Counsel Was Ineffective for Presenting Evidence and Making Arguments Against the Interests of His Client

In Petitioner's final claim, she argues that counsel was unconstitutionally ineffective when he introduced letters of support and similar testimony at sentencing from her family and friends that appeared to shift blame away from Petitioner or minimize the seriousness of the offense. Petitioner cites to letters from Kathy Coe and Carol Cook that state she was "coerced" into committing the offense; letters from Michael Kistner and Ashley McKenna that portray

Petitioner as a victim; a letter from Patricia Leotta that shifts the blame from Petitioner to Mergen; the letter from Carol Cook suggesting that house arrest would be an appropriate punishment, where Petitioner could make “quilts for the needy”; and a letter from Lisa Sotak portraying Petitioner’s offense as “one mistake and a bad decision of judgment.” (Post-Hr’g Br., Doc. No. 142, at 9.)

Petitioner also argues that counsel was ineffective when he made statements that included telling me that another judge with whom he consulted thought Petitioner’s sentence should be longer than Mergen’s, and stating that a sentence not longer than 15 years would be “troubling” to him “as the father of seven children.” In support of her argument, Petitioner cites to United States v. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009) (observing that counsel’s performance was likely ineffective where he argued against his client’s interests at sentencing, such that a future habeas petition should be analyzed under a presumption of prejudice standard). (Post-Hr’g Br., Doc. No. 142, at 8-9.)

The Government does not respond directly to Petitioner’s contention regarding the letters, but asserts that counsel’s presentation of family and friend witnesses was part of his strategy to establish that while Petitioner had committed a horrible crime, she could be restored to society without presenting further danger. It further argues that family and friends who said that Petitioner was manipulated by Mergen merely came to the same conclusion as Dr. Russell. Finally, the Government argues that when counsel commented on a sentence not longer than 15 years as “troubling” to him, he was simply expressing the personal difficulty of working on the case, an obvious sentiment, also expressed by the AUSA. (Gov. Resp., Doc. No. 112, at 5-8.)

United States v. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009) does not help Petitioner’s position. There, the United States Court of Appeals for the Sixth Circuit addressed, but did rule

upon, counsel's performance. 571 F.3d at 591-92. At sentencing, counsel attached a letter he had written to the defendant to his sentencing memorandum. Id. In the memorandum, counsel wrote that he attached the letter because "[t]here is not one thing about [the defendant's] situation that lends itself to a positive thought." Id. The court observed that counsel had failed to raise any § 3553(a) factors, and instead made something similar to "a prosecutor's argument in favor of a harsher sentence" in his letter. Id. at 592. As an example, the court pointed to language from counsel's letter stating that the defendant was "at the bottom of society's hierarchy," and declaring that it was "only a matter of time" before the defendant "kill[ed], maim[ed], or injur[ed] some innocent driver or passenger in another vehicle or bystander." Id. Focusing on the following language, the court observed that counsel seemed to have "abdicated his responsibility to advocate on behalf of his client":

I am truly at a loss to figure out how to explain to [the judge] that somehow or in some manner, he should not treat you most severely. . . . I am sorry to be so blunt, but I have to honest with you, your case has left me without an expressible empathy. For this I am sorry because it leaves me almost unable to advocate on your behalf.

Id.

The Sixth Circuit noted that because counsel fundamentally argued against his client's interests, his performance may have prejudiced the defendant such that an ineffective assistance claim in a future habeas petition should be analyzed under the presumption of prejudice standard announced in United States v. Cronin, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

Here, nothing even remotely similar to the letter submitted in Hererra-Zuniga was ever offered or considered. The letters in this case were presented in conjunction with counsel's

request for a downward variance. Counsel made a strategic decision to present this evidence to show that Petitioner had a deep support network that would assist her rehabilitation. Additionally, counsel sought to humanize his client so that I could understand what he meant when he said that this was a case where “a good person . . . did a bad thing, and I don’t mean one bad thing, I mean a series of events By all accounts, she’s a good person.” (N.T. 08/21/2013 at 45.) In light of the “heavy measure of deference” that I am to give to strategic decisions of counsel, I find that counsel’s choice to present the letters and testimony was not objectively unreasonable and therefore does not amount to ineffective assistance of counsel.

As to the comments made by counsel at sentencing, Petitioner first takes issue with counsel’s remark that in trying to figure out how to resolve this case, he spoke to a former judge who said: “[Y]ou’ve got to be kidding me. The mother, if I was sentencing her, I’d give more to the mother.” (*Id.* at 47.) Petitioner also complains of the underlined statement made by counsel at the end of this paragraph:

I’m focusing on what is appropriate, 180 months. I’d ask the Court to look at it this way: Let’s say there was no mandatory and the Court felt that it really wasn’t the sentence in this particular Defendant’s case where the Guideline recommendation was—you know, was almost something that couldn’t be moved off. What does 180 months do? Well, it certainly punishes the Defendant for quite some time. I think the net would be 12.75 years of incarceration. And it also, because the victim—this is a crime where the victim’s safety I’m sure is of paramount concern to the Court, the victim would be in her early 20s on the Defendant’s release and at that point, I mean – the case has been difficult for a lot of reasons and I have to just keep my lawyer hat on. But when I think of it as a father of seven children, I don’t know what (indiscernible) to impose. I mean, it’s troubling, but that’s not my job.

(*Id.* at 49-50) (emphasis added.)

Petitioner pled guilty to employing a child to produce images of the child engaging in sexually explicit conduct—a child who was her own seven-year-old daughter. She took sexually explicit photographs and videos of her daughter and sent them to Mergen, who in turn distributed

the photographs. Although Petitioner pled guilty to only one count, she admitted to eight other instances of conduct amounting to the photographing and videotaping of her daughter over a ten-month period. Two of the images depicted Petitioner's daughter being fondled by Mergen. The two statements made by counsel appear to be reflective in nature rather than argumentative. Counsel did not argue against the interests of his client as did counsel in Hererra-Zuniga. Rather, he made two candid comments that merely reflected the challenging realities of this disturbing case. Counsel in Hererra-Zuniga did not even attempt to argue for a variance, and in fact seemed to argue against one in his letter to the defendant. Counsel here did no such thing. There is not a reasonable probability that any court would have given Petitioner a different sentence had those comments not been made by counsel. As such, I find that counsel's comments did not prejudice Petitioner and therefore did not amount to ineffective assistance of counsel.

III. CONCLUSION

For the reasons stated herein, Petitioner's § 2255 motion is denied, and a certificate of appealability shall not issue.

An appropriate Order follows.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1188

UNITED STATES OF AMERICA

v.

LAURA SHAUGER,
Appellant

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO,
BIBAS and FUENTES, * *Circuit Judges*

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: August 15, 2018
Michael L. Levy, Esq.

* Judge Fuentes's vote is limited to panel rehearing only.

James H. Feldman, Jr., Esq.