

IN THE SUPREME COURT OF THE UNITED STATES

JOSE AMAYA-VASQUEZ,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari from the United States
Court of Appeals for the Third Circuit at Appeal Number 18-1851

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court erred by considering the prior bad acts in the determination of the appropriate sentence?
2. Whether the sentence imposed by the Court was reasonable?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF AUTHORITIES CITED

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IN THE SUPREME COURT OF THE UNITED STATES

JOSE VASQUEZ-AMAYA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeal for the Third Circuit. This Court's Non-Precedential Opinions are attached hereto to as part of Appendix A-.¹

JURISDICTION

This litigation began as a criminal prosecution against Jose Vasquez-Amaya, Petitioner, for violations of laws of the United States. The United States District Courts have jurisdiction over such prosecutions. 18 U. S. C. § 3231. This is an appeal from the Order of the Third Circuit, entered on January 11, 2019. (A-) The Petitioner filed the Notice of Appeal on April 16, 2018. (A-) The Third Circuit Affirmed the Lower Court on January 11, 2019. This Court has Jurisdiction under

¹References to "A" and a number refer to the Appendix and page number within Appendix created for this Petition.

28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

On January 13, 2016, the Government charged the Petitioner with Kidnapping in violation of 18 U.S.C. § 1201(a)(1), Interstate Domestic Violence in violation of 18 U.S.C. § 2261(a)(2)(b)(3), Transportation into Interstate Commerce of a Stolen Vehicle in violation of 18 U.S.C. § 2312, and Illegal Re-Entry in violation of 8 U.S.C. § 1326(a) and (b)(1). On April 17, 2017, the Petitioner pleaded guilty to Illegal Re-Entry, and on April 27, 2017, the Petitioner pleaded guilty to Kidnapping and Interstate Domestic Violence. On April 13, 2018, the Court sentenced the Petitioner to a sentence of 288 months of incarceration in a Federal Correctional Facility, a five-year period of Supervised Release, \$6,100.00 in Restitution, and a \$300.00 Special Assessment.² The Government dismissed Count III charging Transportation into Interstate Commerce of a Stolen Vehicle at sentencing. The Petitioner submits that the sentence was unreasonable and that the Court erred when it considered in determining the appropriate sentence several prior bad acts.

2 Count I, Kidnapping, 288 months, five years of Supervised Release. Count II, Interstate Domestic Violence, 120 months concurrent to Count I, three years of Supervised Release concurrent to Count I's Supervised Release. Count IV, Illegal Re-entry, 120 months concurrent to Counts I and II, and three years of Supervised Release concurrent to Count I's Supervised Release.

Relevant Facts

The Petitioner is 33 years old. He was 30 years old when he committed these offenses. He was born in Marcala, Honduras on January 1, 1985. The Petitioner is an illegal alien. As such, the Government will deport the Petitioner once he completes serving his sentence. On March 14, 2017, an Immigration Judge Ordered the Petitioner removed from the United States. After that, the Bureau of Immigration and Customs Enforcement filed a Detainer. PSR ¶ 133.

In Honduras, the Petitioner was raised by his parents José Cristino Amaya Benitez and Marta Alicia Vasquez. He grew up with his siblings José Heraldo Vasquez, Alicia Marleni Amaya Vasquez, Milton Misael Amaya Vasquez, Lenin Isaid Amaya Vasquez, and Yasmin Noemi Amaya Vasquez. The Petitioner also had a brother, Vicente Antonio Amaya Vasquez, who died at the age of two. The Petitioner 's mother blamed the Petitioner for his death because when he was born, she had to stop breastfeeding his brother to feed the Petitioner.

The Petitioner grew up in a poor environment. He lived in a one-room wooden home, without a floor, and without utilities. The entire family lived in this small home. The home did not have water, and as a result, the family had to get their water from the local water well. His family made a living working on the farm. While the Petitioner 's family appears to have owned the land, the earnings from this endeavor were very small causing the family to live in poverty. The Petitioner's family also

raised pigs and chickens for the family's consumption. While the Petitioner was not involved in gang activities, his town had a lot of MS-13 gang activity. As a result, the Petitioner frequently saw beheadings (heads and bodies separated) and body parts around his neighborhood.

The Petitioner stopped going to school at the age of 12. At that age, he began to work in the farm with his father. The Petitioner does not have any other education. The Petitioner's father frequently hit the Petitioner with branches of coffee trees, and he frequently called the Petitioner "whore," "lazy," "dummy," and "stupid." Albeit less, the mother also abused the Petitioner verbally. This physical and verbal abuse went on from the age of six to the age of 15 when the Petitioner left home after being hit by his father. The Petitioner returned home after some time, and his father did not hit him again. However, his father continued to abuse him verbally.

The Petitioner has two children. A girl with his former girlfriend, the victim, who is six years old. Also, the Petitioner has a son named Thomas that is nine years old with another woman. Both children live with their mothers.

The Petitioner has a consistent history of employment since he was a young child into adulthood. The Petitioner continued to work upon his arrival in the United States. The PSR showed consistent employment from his arrival in 2005 to his arrest in 2015. PSR ¶¶ 147 to 152.

On October 22, 2015, the Government removed the Petitioner from the United States. The Petitioner re-entered the United States in November 2014, without permission from the United States Government. Several months after re-entering the United States, on May 23, 2015, the Petitioner forced his former girlfriend and their daughter to leave Kansas City, Missouri towards New York. The Petitioner wanted to reconcile with his former girlfriend and forced her to leave Kansas City with him. During the trip, the Petitioner forced his former girlfriend to have sex with him against her will on multiple occasions, and he also made threats of violence towards her and her family. He used a knife to threat and forced the victim to have sex with him.

On or about May 25, 2015, the Petitioner was arrested by the local police and eventually charged in this case on January 13, 2016, with Kidnapping in violation of 18 U.S.C. § 1201(a)(1), Interstate Domestic Violence in violation of 18 U.S.C. § 2261(a)(2)(b)(3), Transportation into Interstate Commerce of a Stolen Vehicle in violation of 18 U.S.C. § 2312, and Illegal Re-Entry in violation of 8 U.S.C. § 1326(a) and (b)(1). On April 17, 2017, the Petitioner pleaded guilty to Illegal Re-Entry, and on April 27, 2017, the Petitioner pleaded guilty to Kidnapping and Interstate Domestic Violence.

As part of the Petitioner's preparation for sentencing, at Counsel's request, Dr. Steven E. Samuel, Ph.D. ("Dr. Samuel") examined the Petitioner. Dr. Samuel

found the Petitioner suffered five conditions:

- 1) Post Traumatic Stress Disorder (PTSD),
- 2) Child Physical Abuse,
- 3) Child Psychological Abuse,
- 4) Dependent Personality Disorder, and
- 5) Persistent Depressive Disorder.

Dr. Samuel's Report is on pages 29 to 33 of the Appendix. Dr. Samuel concluded that the Petitioner was remorseful and amenable to treatment. He further found that treatment can reduce the risk of future unlawful conduct.

On April 13, 2018, during the Sentencing Hearing, as to the purpose of the examination, Dr. Samuel testified:

You asked me to evaluate him with a focus on did he have a psychological disorder of any type, and as a result of that evaluation, were there any factors that supported the existence of mitigating circumstances in his personality and his background.

(App. 76).

As to the method and manner of examination, Dr. Samuel testified:

...

I interviewed your client in your presence, again. I went through a list of symptoms. There is an instrument, it's called the semi-structured clinical interview, and that interview is designed to elicit or not symptoms of psychological disorders. It's a guide, a map, if you will, for a clinician to follow. And so I administered sections of that. It's called the SCID, S-C-I-D, dash 5 clinical version or CV.

(App. 78).

I reviewed sections of the memorandum that had been forwarded to you and then you sent to me by the government. I gave some questions from the MMPI-2, that's the Minnesota Multiphasic Personality Inventory. And so that was the congress, if you will, of things that I did.

I talked with him at length about how he was doing, what his record was like in the prison, how he was feeling. I went through a series of symptoms that he may or may not have had. And then recorded his responses to the clinical interview as well as the testing items.

(App. 79).

As to his findings, Dr. Samuel testified:

. . . I had a number of diagnoses that came up. Some are historical in nature, meaning that they were apparent in him when he was growing up. There's an issue, post-traumatic stress disorder by history. That is a result of his being exposed as a kid to violence, gang violence. He reported to me, I believe it was also in the sentencing memorandum, that he had seen people killed, people had been beheaded as a kid. This is fairly traumatic. I treat children, adolescents who have seen things like this, although not exactly to that extent. So, when I

(App. 79).

went through the symptoms of the disorder, it was apparent to me that he had the disorder as a kid at some point along the way because of his exposure to that violence.

The second diagnosis by history was child abuse. He was physically and psychologically abused. So, you get child physical abuse and child psychological abuse by history, meaning that as a kid he was psychologically and physically abused.

His father, as I understand it, both in the presentence memorandum and from his report directly to me, was physically abusing and verbally, where his mom was more phys -- verbally, excuse me, verbally abusing.

And I think that the effect of that upon him was at some point to leave home. He left briefly when he was 15, then came back I think about a month later. He had a very torturous, argumentative existence with his dad, who had taken him out of school. I think he went as far as the sixth grade and began working at that point at his father's behest, and I think the issue here is that the easier diagnoses by history, what's important to understand in a person's development, their personality is how does it develop, what direction does it go in, and these are antecedents, if you will, that point to a certain kind of suffering or not that a child and then an adolescent and adult can experience. So, they are formative in the sense that they were existing in the past and helped

(App. 80).

form a pattern, a behavior, and then ultimately form who he is today.

He has a dependent personality disorder. That is a kind of disorder that's listed in the DSM-5 and that is a disorder which, as I wrote about in the report, essentially means that you have what's called an insecure attachment, a bond attachment, and what that means is that you don't perceive yourself essentially to be separate of someone of significance to you. Typically it's a parent or a caretaker. Dependent personality disorder doesn't forecast criminal involvement any more than it forecasts political affiliation, but it is a way of relating to people, and I think that's relevant in this particular matter because he in my view has blurred and did blur the distinction between himself and the baby's mother. There wasn't a distinction in his mind. He thought her needs were mine, and that's obviously not correct.

So, I think he has a dependent personality disorder, and he has what's called depression or dysthymia, and formally it's called persistent depressive disorder. This in my opinion is something that's been in and out of his personality and life most of his life, I would think, certainly starting as a youngster, and at varying levels of severity, and he certainly was depressed when I saw him. He was on the mental health unit of the facility during the times that I met with

(App. 81).

him.

So, you've got some diagnoses by history, there's a trio of them, and he has some diagnoses that are presently in place, dependent personality disorder and depression.

(App. 82).

As to factors that support the mitigation of the Petitioner's sentence, Dr. Samuel testified:

I think that it's -- the circumstances that I discussed in the report are not excuses. There really is no excuse for this sort of behavior. It's extremely harmful to children, their mothers, to families, to society. So, my focus is instead not on excusing him, but trying to understand what's a derivative, where did it come from? Well, it comes from a number of things.

You can't say logically that all kids who are abused end up acting in this way. You can't say logically that all children who are depressed physically, psychologically abused act this way. That's not true either. You can't say that children who have seen some horrible things, and lots of kids have, that they act in this way. But I think it's important, though, that we see that there's an accumulation problem. It's not just one.

And so if you look at his background, you can see that

(App. 82).

there's very little possibility that he's going to grow up having a normal self and a normal life. That's pretty slim given the circumstances under which he grew up. The fact that he hadn't had any treatment during any of this is not surprising, but also helps understand the durability and the persistence of his symptoms.

So, having said that, I thought that there, as I said a minute ago, there's some childhood antecedents that the Court could consider, and that had to do with his growing up experiences, what I described as abuse,

seeing physical violence. There's arguing, some at home. He's the focus of some physical and also psychological abuse, if you will.

What happens with kids and adults and youngsters is that they don't learn how to cope. They also become very dependent or they become very exclusive of their parents, meaning it's a binary function. They either become so dependent on their parents for love, or it's like a light goes on and they hate their parents. In this case there's a dependency that forms, and again it starts early in life. So, I think that his childhood experiences was a Petri dish, if you will, for what was to come later.

The issue is whether he was amenable to supervision. No one can say with 100 percent certainty whether a person will or will not be. There's not an amenability test. So, you look at the behavior of an individual when they're in

(App. 83).

custody or, for that matter, when they're in society. It's not been written up as far as I know at the time I saw him.

So, it says that for the given period of time we have while he's in custody, he does not pose himself to be a disciplinary problem to anybody, and you could forecast that in that situation, it does not forecast itself to society in that situation, a secure setting, he seems amenable. He is responding positively, although I would say he's quite depressed and I have some concerns about the level of his depression.

There's no history of mental health treatment, as I said, and again, you're thinking about these factors cumulatively. It's not just one. And the issue is remorse. There's not a test, there's not a remorse meter. I have written about, thought about, talked about, interviewed people for many years now, thinking about is remorse real or not? Does it exist?

At the time this is occurring I would say there was scant evidence, but more of a desperate dependent clinging behavior on his part, an urgency to be with her. As I said, again, I think he was unaware of the fact that they were separate. His wishes were hers, her wishes were his, the two were the same, and he was calling the shots.

I do think that remorse is on a continuum. At one end there is a person who is not remorseful at all, on the other

(App. 84).

a person who is despondent and feels incredible regret. I thought in the end after talking to him for the hours that I did that there was remorse there. I think he feels disappointed himself. He recognizes in custody that he hurt his child and the baby's mother. He recognizes that his life and the others and his family, extended family, and hers as well, is forever changed. That's a factor of remorse or remorsefulness.

He wants forgiveness. He asked me for forgiveness. I'm not there as that entity to do so, but that's an expression that he had, unsolicited from me, I didn't ask him about that. And I think in the end what comes across is an intermittently tearful person who is depressed. He's been depressed well before this. He can't have access to her. He's cut off. It's like an addiction. Descriptively, he's cut off from seeing her, he's depressed, and he says nothing can forgive me for what I did.

So, he's got the reality testing within the confines of the structure of the prison, and then again there's the issue of his dependent personality, and people with dependent personalities don't necessarily get arrested more often, but in this particular case, I think his dependent personality characteristics made him more vulnerable.

And again, you see that in the condition he is in prior to his arrest, he literally can't see the distinction between

(App. 85).

himself and her. What he wants is what she wants, and he has a fantasy solution, like a child. A child says, well, if it snows today, my mother will love me. He has a fantasy solution that if he takes her, you can see how dependency, his depression distorts thinking, if I take her to New York, we'll all get back together again. That's how out of balance it is, and I think how significant was his troubling, troubles at the time. So, I thought those were circumstances.

And finally is the issue of mental health. Does the prison system offer mental health treatment? Yes, it does. He could benefit from that. And I think that if he gets in treatment and he participates in treatment, then his level of risk at this point is high, if his participation in treatment is evident, genuine, consistent, it reduces his level of risk while he's in custody.

So, I think that that's something else to consider, too, because he is saying to me, I need help, I did very, very, very bad things. I can't believe what I did. I've got to fix this. I want to fix this. And so to me there is some sense, as opposed to someone who says, well, I'm fine, it's all her fault, that's the last thing he said. So, I think there is a sense of forgiveness and also I need treatment.

And so that's a good prognosticator, if you will, for someone benefiting from treatment.

(App. 86).

Evidence of Bad Acts

During the cross-examination of Dr. Samuel, the Government asked the following questions about bad acts attributed to the Petitioner.

Q. And so it started back shortly after they got together, the defendant and the victim, when the defendant held a knife to the victim?

A. Yes.

Q. They move from New York. They go to Kansas City. He pulls a machete on her?

A. That's right, that's what I read, yes.

Q. And it's all of -- all of that is behavior, it's going to his dependent personality, it's going to him wanting to control the victim?

A. Those characterizations help explain, they don't excuse, they help explain why would somebody do this, that's right.

Q. And so then the victim finally has enough. He throws a

(App. 94).

hairbrush at her.

A. Yes.

Q. Did you read that?

A. I did.

Q. At that point the defendant is arrested and deported. Several months later he comes back.

A. I read this, yes.

Q. And when he comes back, he's still fixated on her, correct?

A. That's the pathological part of dependency, if you will.

Even in the most salient of anger, argumentativeness, if you've got this kind of fixation, without help it does not go away.

Q. Right. And so when he came back, when he snuck back into the country, his goal was to find her?

A. That's right, that's right.

Q. When she rebuffed him again, he resorted to physical violence to rape her?

A. These are all again characterizations of someone with a pathological dependency, that's right.

Q. But it's violent behavior towards her when she rebuffed him, that he is going to take whatever he wants, and this first part was at point of knife?

A. That's right.

Q. Are you aware, Doctor, that when, after that first

(App. 95).

that he would come to her house at night and look for her?

A. Yes, I was aware of that.

Q. Are you aware that he damaged her property?

A. Yes, I was aware of that. You must be mine, you must be mine, nothing is going to get in the way, nothing solves my upset except when you're with me. That's what we're talking about.

Q. And would it surprise you, Doctor, or did you have an opportunity to review the amount of times that the defendant contacted the victim over the period of February '15 to May of '15?

A. That is descriptively the, quote, addictive aspect of this, that's right, unrequited, I can't stop, that's right.

Q. And it's escalating. It was 126 contacts in March, 101 in April, and May, there were 378 contacts telephonically, either text or phone call.

A. Yeah. What we're getting at here also is something called intermittent reinforcement, which means that every once in a while

when I get together with someone that doesn't want to be with me, they might feel helpless, which I think is true in this matter, and I am by no means disparaging her, and every once in a while we get together, it's, quote, okay. And so that reinforces this fellow into thinking, well, I guess if it's okay, I can try again. So, that's a part of the picture,

(App. 96).

also. No blame whatsoever.

Q. But you point out in your report that he couldn't understand, he couldn't separate it.

A. Yeah.

Q. But she was telling him no.

A. That's right. That's the, quote, reality distorting element of this, is that it is so strong of a need that nothing gets in the way.

Q. Doctor, are you aware that Mr. Amaya approached the victim on the streets in Kansas City and attempted to take her and her daughter from the street?

A. I was aware of that.

Q. Are you aware that he punched her in the face, causing a black eye?

A. I was aware of that.

Q. Are you aware that after each and every incident, she went to the police seeking help?

A. I read that, yeah. Yes, I did.

Q. And he wouldn't -- so, it's your testimony that he didn't understand that you don't show love by punching somebody in the face?

A. I think he didn't understand, using your language, because of how his personality is made. I think he understands it logically, but I don't think his emotions helped him correct that.

(App. 97).

The Government included a similar recount of the bad acts attributed to the Petitioner in its Sentencing Memorandum. (App. 47 to 51). These bad acts were also the subject of a Motion in Limine filed by the Government under Fed. R. Evid. 412. The Court granted this motion. (Docket Entry 45). These bad acts included

allegations of threats, assaults, rapes, harassment, stalking, damage to property, and the use of weapons. The Petitioner had not been convicted of these bad acts. In fact, Petitioner had not been charged with many of these bad acts. The PSR in ¶ 108 shows that after the events that gave rise to this case, the Petitioner was charged in Jackson County, Missouri with Rape and Domestic Assault. Also, the Petitioner was charged with Assault on June 7, 2014. However, these charges, as of the date of the Sentencing Hearing remained open. The PSR also included a detail discussion of these bad acts beginning in ¶ 24 and ending in ¶ 39. The Government again argued, during the Sentencing Hearing, in its last argument to the Court before the imposition of the sentence, the same bad acts all over again. (App. 118 to 120). The Court also during the explanation for the sentence explicitly considered the bad acts in determining the appropriate sentence. (App. 129 to 133).

The Court sentenced Petitioner to 288 months of incarceration. The PSR found the Base Offense Level to be 38, the Criminal History Category I, and the recommended incarceration Range 235 to 293. As such, the 288-month sentence was toward the upper end of the recommended incarceration range, but five months below the upper end of the range.

REASONS FOR GRANTING PETITION

I

A SENTENCE OF 288 MONTHS WAS
UNREASONABLE UNDER THE CIRCUMSTANCES

It is within the discretion of the District Court to determine the appropriate sentence of a Defendant. This discretion, however, is not unfettered. Section 3553(a) of the United States Code, states that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.” 18 U.S.C. § 3553(a)(2). Further, the Supreme Court has held that sentences must be reasonable. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court set the review of sentences under a reasonable standard. *Id.* at 224.3 Subsequently, the Court reaffirmed this standard of review. Specifically, in *Gall v. U.S.*, 552 U.S. 38 (2007), the Supreme Court stated:

As a result of our decision, the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are “reasonable.” Our explanation of “reasonableness” review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

Id. at 46.

Here, the facts are tragic. A young woman was kidnapped and raped. However, under the circumstances of the case, a lower sentence was appropriate. The following will address the historical and medical conditions as discussed and diagnosed by Dr. Samuel that supported a lower sentence.

3 “Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for “unreasonable[ness].” *Booker*, 543 U.S. at 224.

Historical Conditions

The Petitioner grew up in a difficult environment. He was subject to physical and verbal abuse by both parents. Specifically, the physical abuse was predominantly at the hands of the father. The mother, however, is not free from blame because she would tell the Petitioner, as a child, that it was Petitioner's fault that his brother had died because she could no longer breastfeed the brother after Petitioner's birth. Further, both parents frequently called Petitioner "whore," "lazy," "dummy," and "stupid." This treatment also supports Dr. Samuel's conclusion that Petitioner had PTSD. However, Dr. Samuel also found that having seen the body parts and the decapitated bodies, that were the product MS-13 gang violence, also contributed to the Petitioner's PTSD. Further, these life experiences also contributed to the Petitioner's conditions of Dependent Personality Disorder and Persistent Depressive Disorder.⁴

The testimony and questioning by and of Dr. Samuel about Dependent Personality Disorder was much more extensive than for Persistent Depressive

4 THE COURT: And to some extent, consistent with that, to some extent the diagnoses of dependent personality disorder [App. 40] and persistent depressive disorder are based on your assessment of him suffering from the first three diagnoses?

THE WITNESS: He did suffer from them. That's why it says by history. So, I think there is, the triotus of those experiences in him now are the predicates for dependent personality and dysthymia, that's right.
(App. 41).

Disorder. The following discussion separates these subjects.

Dependent Personality Disorder

Dr. Samuel described Dependent Personality Disorder as follows:

[Petitioner] has a dependent personality disorder. That is a kind of disorder that's listed in the DSM-5 and that is a disorder which, as I wrote about in the report, essentially means that you have what's called an insecure attachment, a bond attachment, and what that means is that you don't perceive yourself essentially to be separate of someone of significance to you. Typically it's a parent or a caretaker. Dependent personality disorder doesn't forecast criminal involvement any more than it forecasts political affiliation, but it is a way of relating to people, and I think that's relevant in this particular matter because he in my view has blurred and did blur the distinction between himself and the baby's mother. There wasn't a distinction in his mind. He thought her needs were mine, and that's obviously not correct.

(App. 81). Similarly, in the Report Dr. Samuel described Dependent Personality Disorder as follows:

The DSM-5 diagnostic criteria for Dependent Personality Disorder includes "a pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation, beginning in early adulthood and present in a variety of contexts." Symptoms pertinent to Mr. Amaya-Vasquez include the DSM-5 criteria "goes to excessive lengths to obtain nurturance and support from others, to the point of volunteering to do things that are unpleasant; is unrealistically preoccupied with fears of being left to take care of him or herself; feels uncomfortable or helpless when alone because of exaggerated fears of being alone; has difficulty expressing disagreement with others because of fear of loss of support or approval; urgently seeks another relationship as a source of care and support when a close relationship ends."

(App. 30). On cross-examination, Dr. Samuel addressed the condition of Dependent Personality Disorder as follows:

Q. I'd like to turn to the dependent personality disorder, if I can, for a minute, and I want to talk about your report that with this dependency order -- or, excuse me, with this diagnosis, the person really fixates on their object. Is that fair to say?

A. It's fair to say. Like an example would be a child who wakes up at night and fixates on a night light or a blanket. It's that kind of an image, just like that. That's right, it's a fixation, it's a scrutinizing, an exquisite sensitivity to the presence or the loss of the person.

Q. And with that, when you talk about the childhood antecedents, you talked about idealization and devaluation and

(App. 90).

self-destructive behavior. Do you recall that in your report?

A. Yes, I do.

Q. And idealization means what, Doctor?

A. Idealization is a, first of all, it's a distortion of reality, those we idealize, put on a pedestal, are no longer real objects. Idealization means that, it's a black and white chiaroscuro, it's a term for describing Rembrandt's paintings, black and white. Chiaroscuro is a term which contrasts black and white. Idealization is the complete utter belief that something or someone is perfect, and its opposite is devaluation.

And so when he is growing up, there's an alteration between you're a good guy, you got out of school, you're doing the farm tours, and you're stupid, you're unintelligent, you don't look good, you're a bad boy, and I'm going to hit you. So, there is this alternating back and forth between the two. It confuses the kid's personality, their growth, and so as an adult, this is how they treat others.

Q. And that obviously is my next question, this passes into adulthood, correct?

A. It can, and in this case it did. The early attachments, the early relationships we have typically inform what our relationships are like later, right.

Q. So, it's learned behavior that is continued and it's imprinted. By the time he is an adult, the behavior is not

(App. 91).

going to change?

A. I disagree with that. It's imprinted, that's true, but not changing is not accurate, but it certainly has not changed so far in his case. It can change with help.

Q. So, in this case, if he idealized the victim, she was perfect for him, but then in the same vein he devalued her by causing her -- calling her names and abusing her?

A. That's right. The devaluing was a way of saying -- way of controlling and a way of saying I must maintain an idealized image of you, and devaluing her, he hurt her, and he alternates back and forth between good and bad, all good, all bad.

Q. So, you talk about in your report the pathological dependence that the defendant had on the victim, and am I right that in layman's terms that means he had to be with her no matter what?

A. That's right. It wasn't enough to think of her. He had to -- the word you used before is a good one, he had to control and be with her literally, like I have to see you in my eyes.

Q. And so you talked about at the end of your direct examination that in the defendant's mind he was going to take her and the child to New York and they were going to be a family, correct?

A. That was the fantasy that he had.

(App. 92).

Q. And if she didn't want to go, was the natural conclusion to that fantasy that if he couldn't possess her, nobody else could?

A. Yes.

Q. So, he would have killed her?

A. I have no idea whether he would have killed her. I would say that the natural trajectory of that is you are mine and mine only and we're going to go to New York and this is what we're going to do. Whether he would have killed her is nothing I can comment upon.

Q. And if I can't have you, then nobody else can either?

A. So I will control you. And you can think of it in another way descriptively, people will say you must remain at home or you must do this and nothing else in your life. That's really where he was heading with this.

Q. So, along those veins, you're talking about learned behavior and imprinting earlier, that you talked about the defendant's father would be physically abusive and also berate him, call him a whore, lazy, dummy,

and stupid. Is that behavior that he picked up and then would continue on with the victim at times?

A. I believe that's true.

(App. 93).

Q. At that point the defendant is arrested and deported.

Several months later he comes back.

A. I read this, yes.

Q. And when he comes back, he's still fixated on her, correct?

A. That's the pathological part of dependency, if you will.

Even in the most salient of anger, argumentativeness, if you've got this kind of fixation, without help it does not go away.

Q. Right. And so when he came back, when he snuck back into the country, his goal was to find her?

A. That's right, that's right.

Q. When she rebuffed him again, he resorted to physical violence to rape her?

A. These are all again characterizations of someone with a pathological dependency, that's right.

Q. But it's violent behavior towards her when she rebuffed him, that he is going to take whatever he wants, and this first part was at point of knife?

A. That's right.

(App. 95).

Q. Are you aware that he damaged her property?

A. Yes, I was aware of that. You must be mine, you must be mine, nothing is going to get in the way, nothing solves my upset except when you're with me. That's what we're talking about.

Q. And would it surprise you, Doctor, or did you have an opportunity to review the amount of times that the defendant contacted the victim over the period of February '15 to May of '15?

A. That is descriptively the, quote, addictive aspect of this, that's right, unrequited, I can't stop, that's right.

Q. And it's escalating. It was 126 contacts in March, 101 in April, and May, there were 378 contacts telephonically, either text or phone call.

A. Yeah. What we're getting at here also is something called intermittent reinforcement, which means that every once in a while when I get together with someone that doesn't want to be with me, they

might feel helpless, which I think is true in this matter, and I am by no means disparaging her, and every once in a while we get together, it's, quote, okay. And so that reinforces this fellow into thinking, well, I guess if it's okay, I can try again. So, that's a part of the picture,

(App. 96).

also. No blame whatsoever.

Q. But you point out in your report that he couldn't understand, he couldn't separate it.

A. Yeah.

Q. But she was telling him no.

A. That's right. That's the, quote, reality distorting element of this, is that it is so strong of a need that nothing gets in the way.

(App. 97).

Q. And isn't that an escalation of behavior, that he is going to keep the object of his affection close or nobody else is going to have her?

(App. 98).

A. That's why you call it a disorder, psychological disorder. That's why you give it that label.

Q. And he still suffers from that psychological disorder now?

A. Yes, he does.

Q. Does everybody who suffers from this diagnosis rape, beat and abuse the person who is the fixation of their obsession?

A. No. That's what I was saying in the beginning, I've spent many years studying predatorial, stalking behavior, and what I said at the beginning I think is accurate in that it is not one factor, it's a cumulation of factors. The answer is no, not every person who goes through these things behaves this way. It's an inordinate congress of behaviors, a perfect storm, descriptively, they get together and they cause these sorts of problems, but not all kids who were treated this way do this sort of thing, no.

Q. So, he is an outlier at the far end of the continuum that you talked about earlier?

A. Correct.

Q. And that makes him more violent and dangerous to the victim?

A. It made him more violent and dangerous to her, that's right.
(App. 99).

Persistent Depressive Disorder

As stated above, there was very limited testimony about this condition. Dr. Samuel described Persistent Depressive Disorder as follows:

and he has what's called depression or dysthymia, and formally it's called persistent depressive disorder. This in my opinion is something that's been in and out of his personality and life most of his life, I would think, certainly starting as a youngster, and at varying levels of severity, and he certainly was depressed when I saw him. He was on the mental health unit of the facility during the times that I met with

(App. 81). In the Report Dr. Samuel described Persistent Depressive Disorder as follows:

The DSM-5 diagnostic criteria for Persistent Depressive Disorder (Dysthymia) includes the presence in Mr. Amaya-Vasquez of a "depressed mood for most of the day, for more days than not, as indicated by either subjective account or observation by others, for at least two years." The DSM-5 symptoms of the Disorder in him include "low-self-esteem, feelings of hopelessness, low energy and fatigue." Exclusionary criteria present in Mr. Amaya-Vasquez include the following: symptoms of Mr. Amaya-Vasquez's Depressive Disorder are not attributable to illegal substances nor a medical condition nor his having a history of experiencing a manic or hypomanic episode.

(App. 31).

Dr. Samuel evaluation, Report, and testimony, as discussed and cited above, established that the Petitioner was the victim of child physical and psychological abuse. It also concluded that the Petitioner was suffering from three mental illness: PTSD, Dependent Personality Disorder, and Persistent Depressive Disorder. From the above

recount of the Dr. Samuel's Report and testimony, it is clear that Dependent Personality Disorder had a larger role in his criminal conduct. While Dr. Samuel did not ever state that Petitioner was not legally responsible for his crimes, he did give a professional opinion to a reasonable degree of psychological certainty, that Petitioner's conditions, at the very least, contributed to the commission of these crimes. (App. 36). While the Government did cross-examine Dr. Samuel, as shown above, Dr. Samuel properly responded and credibly addressed the Government questions. Similarly, Dr. Samuel also credibly addressed the Court's questions. In fact, during an important point in the questioning by the Court concerning certain possible contradictions, i.e., the Petitioner's current good relationship with his parents and the letters of reference that described Petitioner as a good person, that may question the validity of Dr. Samuel's findings and diagnosis, Dr. Samuel persuasively explained his position and conclusions as follows:

There's a problem here that you have, it seems to me, if you will, please, and that is, you've got some contradictions. From me as a psychologist, how can you have these severe -- these are not just everyday run of the mill problems. These are extremely significant. Where does such extreme pathology come from? It does not come from mom and dad sitting around the campfire or being in a house loving one another. Violence begets violence. Hatred of children brings out hatred in adults. It had to come from somewhere. And that's what I'm left with. I'm left with a conundrum, if you will, but there's no question the kind of behavior you are seeing here is extreme. This is the kind of behavior I've been studying in predatory sexual offenders, predatory violence. I study the patterns. And to say that there's a gr[eat] environment, everything is fine, and then to have this, there's a disconnect in my mind.

(App. 52).

Therefore, if one accepts Dr. Samuel's diagnosis and testimony the sentence violated

the primary mandate of § 3553 because it is longer than necessary. However, there is more. Dr. Samuel also explained that the Petitioner recognized the gravity of his actions, was despondent, regretful, and remorseful. He explained that the Petitioner had not received prior mental health treatment but that the Petitioner concluded that he needed professional help and that would welcome help. the fear for future criminal conduct by the Petitioner could be reduced. As such, he concluded that risk of future criminal activity by the Petitioner could be reduced if the Petitioner was properly treated. Last, but not least, as argued in the Petitioner's Sentencing Memorandum, how much punishment is necessary after certain period of time. How is a sentence of 24 years, more appropriate than a sentence of 15 or 17 years when the convicted person will be deported from the United States at the conclusion of his sentence? How does an additional nine or a seven-year period of incarceration promotes, other than retribution the other goals of sentencing or of the factors mandated by 18 U.S.C. § 3553?

It is respectfully submitted that at some point, incarceration is only punishment. Thus, notwithstanding the tragic nature of this case, under the circumstances of this case, a 24-year sentence was longer than necessary, and therefore unreasonable. The Petitioner respectfully submits that a sentence of 17 years as requested in the Petitioner's Sentencing Memorandum addressed the 3553 factors. Thus, anything above 17 years is longer than necessary.

THE CONSIDERATION OF THE BAD ACTS DURING SENTENCING
VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS

The Due Process Clause of the Fifth Amendment guarantees that no person shall "... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. In *Steele v. Williams*, 425 U.S. 501 (1976), the Supreme Court stated:

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Droe v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895).

Id. at 503. In *Nelson v. Colorado*, 581 U.S. ___, 137 S.Ct. 1249 (2017), the Court held that a Colorado law that prohibited the reimbursement of fines, costs, and restitution after a conviction was reversed violated the presumption of innocence as incorporated in the due process clause. The Court held that once the convictions were reversed, the Defendant was protected by the presumption of innocence. As such, only convicted conduct can be subject to sanctions. The presumption of innocence applies to the sentencing context where the PSR, the Government, and the Court considered bad acts, not convictions, as factors in the determination of the

applicable sentence. Here, as shown above, the PSR, in ¶¶ 24 – 39, discussed egregious actions attributed to the Appellant that included physical assaults, assaults with weapons, rapes, stalking, damage to property, and many types of threats. The Appellant had not been convicted of the bad acts. In fact, the Appellant had not been charged with the majority of the alleged bad acts. Also, the Government, again, in its Sentencing Memorandum and also during the Sentencing Hearing, repeated the long list of bad acts alleged to have been committed by the Appellant. Last, but not least, the Court considered these bad acts in determining its sentence. Specifically, the Court stated:

One is the recitation of the abuse suffered by the adult victim and the child victim in this matter, which is, any particular incident would be in and of itself horrendous, even more pronounced here because of its occurring over a substantial period of time and involving a wide range

(App. 130).

of physical and emotional abuse and violence, at times escalating and ultimately escalating into the crimes which brings the defendant before me. And let me try to articulate that in different terms.

This is a -- let me focus first on the physical and mental abuse. It really ranges across the whole gamut and range of despicable violent conduct. We have choking of the victim. We have the use of, as was mentioned, fists, hair pulling, the use of weapons of various kinds. There is at times a gun that was displayed, a knife, knives, multiple knives. There was the one seized at the arrest, the others involving other uses of a knife to threaten both during the kidnapping and in earlier domestic violence events. You have the use of restraints. You have not only the threat of the use of a knife but the actual use of a knife during the three-day horrific trip across the United States, a stabbing of the victim's, adult victim's thigh.

And then you have the sexual abuse, which not only occurred over a period of years, over time, but involved physical pain and, as was mentioned on at least two occasions that I can think of, multiple rapes within a short period of time, that is, on the same morning or evening. And the description of these events are painful to hear and not to describe how painful they must have been to endure. As was mentioned, this involved attempts at resisting, physical, by

(App. 131).

word and deed, and that resistance overcome.

So, we have here physical violence of the worst kind, and physical violence that the existence of which I think made much more credible another aspect of this, and this was the verbal abuse, the threatening, the acts of threats which occurred over the course of time. And these are threats not only to the victim, adult victim, but verbal and threatened abuse to the adult victim's other children in another country sufficient enough or concerning enough, in light of the defendant's ties back to Honduras, to cause the adult victim to cancel a party that was scheduled for those children.

There was a threat to harm the child they share together, most particularly in the three-day events arising out of the kidnapping. These threats to children, whatever obsession the defendant may have had with the adult victim, it's hard to understand and reconcile his use of threats to children to coerce conduct or loyalty that he apparently craved.

(App. 132). There is no question that the Court considered the bad acts in determining the appropriate sentence. Considering conduct for which the Appellant had not been found guilty violated the presumption of innocence. It is true that the Government did not request an upward departure or an upward variance. It is also true that the PSR did not award or recommend an upward departure or an upward variance. Finally, it is also true that the Court did not grant on its own an upward

departure or variance. However, the Court did not impose a sentence in the lower end of the recommended range, it imposed a sentence in the upper end of the range and explicitly outlined the bad acts as factors considered in determining the appropriate sentence. As such, the sentence was at least partially based on the bad acts. It is also true that the Court had granted the Government's Motion in Limine under Federal Rules of Evidence 404(b) and 413⁵ and that the bad acts were going to be introduced at trial. However, once the Appellant pleaded guilty, the reason for the Court's ruling disappeared. There were no longer issues of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" or the need to prove "the previous commission of a sexual assault." As such, there was no reason to consider the bad acts at sentencing. Last, while 18 U.S.C. § 3661⁶ does permit the Court to consider "everything" at sentencing, said section does not eliminate a person's Constitutional protections. That includes the presumption of innocence.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted and the United States Supreme Court reviews the judgment of the United States

5 Fed. R. Evid. 404(b) and 413.

6 "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Court of Appeals for the Third Circuit.

Respectfully,

/s/ José Luis Ongay

José Luis Ongay, Esquire
600 West Germantown Pike
Suite 400
Plymouth Meeting, PA 19462

Date: April 4, 2019

PROOF OF SERVICE

I, José Luis Ongay, Esquire, do swear or declare that on this date, April 15, 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's Counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid: The names of those served are as follows:

Mark E. Coyne, AUSA, 970 Broad Street, Suite 700, Newark, N.J. 07101

Noel Francisco, Solicitor General, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

Jose Amaya-Vasquez, 42949-380, FCI Estill, 100 Prison Road, Estill, SC 29918

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

/s/ José Luis Ongay

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Executed on April 4, 2019