

(i)

No. _____

19-7624

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

JEROME SHAW

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA

FILED

JAN 24 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JEROME SHAW

(Your Name) Reg. No. 77940-054

United States Penitentiary Canaan

(Address)

P.O. Box 300 Waymart, PA 18472.

(City, State, Zip Code)

None

(Phone Number)

QUESTION(S) PRESENTED

- I. Whether the District Court violated Petitioner's Due Process Rights when it erroneously found that the Government had sustained its burden of proof as to disputed allegations adduced at a Fatico hearing?
- II. Whether the District Court violated Petitioner's Due Process Rights when, after Petitioner's unsuccessful, good-faith challenge to facts adduced at a Fatico hearing, it withdrew previously-credited points for acceptance of responsibility?
- III. Whether the forfeiture order imposed on Petitioner violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution?

(iii)

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 31, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE

STATUTES:

18 U.S.C. § 371.....
18 U.S.C. § 2312 and 2.....
18 U.S.C. § 2314 and 2.....
18 U.S.C. § 3231.....
18 U.S.C. § 12315 and 2.....
28 U.S.C. § 2391.....
USSG § 3E1.1.....
USSG § 3E1.1(b).....

Other Authorities:

8th Amendment of U.S Constitution.....
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Excessive Fines Clause

STATEMENT OF CASE

Jerome Shaw was indicted in the Southern District of New York on September 21, 2016 for transportation of stolen property and of a stolen vehicle, receipt and sale of stolen goods and conspiracy to transport stolen property. He was not charged with burglary or theft. Shaw pled guilty to the four-count indictment with a Pimental letter that calculated a Guidelines range of 100 to 125 months.

The Pre-sentence Report ("PSR") calculated the Guidelines range after taking into account burglaries and burglary attempts at approximately 16 households. It provided detailed accounts of those incidents, including one in which the residents were restrained by the unidentified burglars. Both the Government and the PSR granted Shaw a 3-level credit for acceptance of responsibility. The Probation Department recommended a sentence of 120 months.

Over defense objection, the trial judge ordered a Fatico hearing to determine whether Shaw had been present and actively involved in the burglaries, rather than merely "fencing" the stolen property. Shaw admitted to having been present at two of them. As to the others, although the evidence purporting to connect Shaw to the incidents was extremely insubstantial, the trial court found that Shaw was a perpetrator in the "home invasion" and was directly involved in the other burglaries. As a result, the court withdrew Shaw's previously-credited points for acceptance of responsibility, and sentenced him to 180 months' imprisonment, and forfeiture.

On October 10, 2018 after being sentenced, Shaw filed his timely notice of appeal to the 2nd Circuit Court of Appeals raising issues:

1. Whether the District Court violated Shaw's Due Process

rights when it erroneously found that the Government had sustained its burden of proof as to disputed allegations adduced at a Fatico hearing?

2. Whether the District Court violated Shaw's Due Process Rights when, after his unsuccessful, good-faith challenge to facts adduced at a Fatico hearing, it withdrew previously-credited points for acceptance of responsibility?

3. Whether the forfeiture order imposed on Shaw violated the Excessive Fines Clause of the Eighth Amendment of U.S Constitution? See Appendix-B attached herewith.

On October 31, 2019 the Second Circuit Court of Appeal found the above mentioned arguments without merit and affirmed the U.S District Court's Judgment.

Herein, Petitioner Shaw files his Writ of Certiorari in this U.S Supreme Court timely within 90 days from the date the 2nd Circuit Court denied his direct appeal.

REASON FOR GRANTING THE WRIT

REASON ONE: The 2nd Circuit Court's decision has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

FACT-1: The trial court withdrew Shaw's 3 Guideline points for acceptance of responsibility, because "we ended up having a full day hearing with live testimony in which Shaw disputed most of the burglaries."

FACT-2: Defense counsel objected, reminding the court that Shaw had not asked for a Fatico hearing and that he admitted committing all the crimes with which he was charged.

FACT-3: The trial court relied on the fact that Shaw's guilty plea "did not get into" any of the burglaries or the "home invasion," and that he disputed at the Fatico hearing the number of burglaries, the amount of money taken, "virtually everything that was being alleged by the government [at the Fatico hearing]."

FACT-4: The court said, "He may have technically said what he needed to say to meet the elements of the crimes charged in the indictment, but you have to do more than that to get acceptance responsibility."

FACT-5: Subsequently, the trial court raised Shaw's offense level to 30 which it recalculated the sentencing range was 151 to 188 months.

FACT-6: Based on the above mentioned facts, the 2nd Circuit Court

affirmed the U.S District Court's decision contradicting with its own precedents that it reviews a sentence for both procedural and substantive reasonableness. United States v. Friedberg, 558 F.3d 131,133 (2d Cir. 2009) ("As to the procedural component, the court determines whether the district Court relied on clearly erroneous factual findings.") United States v. Cavera, 550 F.3d 180,190 (2d Cir. 2008)(en banc). "Clear error exists when "we [are] 'left with the definite and firm conviction that a mistake has been committed.' Cavera, 550 F.3d at 204 (quoting Anderson v. City of Bessemer City, 470 U.S.564, 574 (1958)). Such a mistake was made here and should not stand, but the 2nd Circuit Court overlooked it anyway.

FACT-7: At the Fatico hearing, the government had the burden of proving the disputed facts by a preponderance of the evidence. The 2d Circuit Court's decision to deny Shaw's direct appeal contradicted to its precedent in United States v. Archer, 671 F.3d 149,161 (2d Cir. 2011) (Even under this relaxed standard the government failed to sustain its burden.)

As to the disputed burglaries, Shaw was never identified by any victim, law enforcement agent, witness, or co-conspirator as having been present at the scene of the burglaries or inside any of the premises.

With no proof that Shaw perpetrated the burglaries, the trial court relied extensively on the videotaped statement of Scott Ettinger, a cooperator who had lied to the FBI and the police and had fabricated false receipts for stolen property in Shaw's name. The court's step by step analysis of each dis-

puted burglary referred repeatedly to Ettinger's videotape. Ettinger said that Shaw burglarized homes in a manner was truly chilling and which, if reliable, would constitute a modus operandi: he said that Shaw would cut a hole in the back of the houses when no one was home, and would lie in wait for the homeowners to return. This statement, which was not supported by the results of the police investigations nor by Faraci's testimony, in combination with the government's claim that Shaw participated in a "series of home invasions" and that he "terrified" two Connecticut towns, inflamed the entire sentencing proceeding.

FACT-8: Ettinger's statement was inconsistent with virtually all the other evidence concerning the burglaries. Except for the Bridge Street incident, the burglars never came face to face with the homeowners. In a large number of them, homeowners were away for protracted periods of time and not likely to return during the time the burglaries were committed. In all of the burglaries with the exception of Bridge Street and the attempted burglary at Indian Chase Drive, the homes were vacant at the time of the burglaries; at the latter, the would-be burglars ran away as soon as they heard someone call out, "Who's there?"

FACT-8: The trial court committed further error when it gave no consideration whatsoever to the substantial countervailing evidence that tended to show Shaw did not commit these burglaries. Nevertheless, even under the lenient standard of preponderance of the evidence, the trial court's finding that Shaw was a perpetrator of the "home invasion" was clear error.

FACT-9: The trial court did not assess Ettinger's credibility but instead accepted and extensively relied on his statements even when they did not conform to the evidence or were contradictory. In a case in which an essential witness's Fatico testimony was, at various times, vague, equivocal, or inconsistent, this Court pointed out the need for the District Court to "carefully explain its credibility findings." United States v. Delacruz, 862 F.3d 163,176 (2d Cir. 2017). In this case, rather than systematically analyzing Ettinger's credibility, the court simply ignored the testimony when it was inconsistent with Shaw's culpability.

FACT-10: The trial court erroneously allowed itself to be persuaded by the large quantity of burglary allegations rather than by the quality of evidence. It found that "the sheer number of burglaries," occurring in the same geographical area during a 4-year period, some insignificant similarities between the burglaries, such as small access holes cut in doors and tire tracks found on the premises, combined with Shaw's prior convictions, proved Shaw's active participation. Even where no property from the burglary was recovered from Shaw, for example at the Milbrook Avenue burglary in which over \$87,000 in jewelry and handbags were stolen and never recovered, the court found Shaw was involved even though "there was no specific allegation as to what he did." Similarly, the court ultimately found that Shaw participated in the attempted burglary at Indian Chase Road, in which nothing was stolen and there was no evidence whatsoever of Shaw's involvement, stating "I think that one I probably could find by preponderance as well." While the preponderance of the

evidence standard does not require proof that is free from uncertainty, and a fact may be proven by /the preponderance if "the scales tip, however slightly, in favor of the party with the burden of proof," Ostrowski v. Atlantic Mut. Ins. Companies, 968 F.2d 171, 187 (2d Cir. 1992), the standard requires more than the mere speculation and conjecture that the court engaged in here.

FACT-11: Furthermore, Shaw's 15-year sentence was not substantively reasonable. In analyzing the reasonableness of a sentence, the 2d Circuit Court focuses on whether, under the totality of the circumstance, the sentence is within the range of permissible decisions. United States v. Friedberg, 558 F.3d at 133. Thus, its decision to affirm the District Court's ruling and decision contradicting to its precedent has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Supreme Court's Supervisory Power.

REASON TWO: Shaw's sentence increased dramatically after the "Fatico" Hearing, indicating that he was punished disproportionately for the uncharged and unconvicted conduct. Thus, the 2nd Circuit Decision to affirm the District Court's decision contradicted to its own precedents as well as going too far from accepted and usual course of judicial proceeding.

FACT-12: Shaw's sentence was well above the Guidelines range of 120 to 150 months that was calculated before the trial court improperly withdrew the 3 points for acceptance of responsibility. In assessing the substantive reasonableness of a sentence, the Second Circuit should examine both whether the variance from the appropriate Guidelines range was reasonable

and its magnitude. As to the magnitude of an above-Guidelines sentence, it evaluate "whether the departure is reasonable in light of the justification given." United States v. Campbell, 967 F.2d 20,27 (2d Cir. 1992).

FACT-13: Here, the Probation Department calculated the Guidelines and recommended a sentence of 10 years based on facts that included Shaw's participation in the burglaries, as explicated in the PSR. While the Fatico hearing may have provided additional details, it did not break new ground; the hearing did not reveal any new crimes or behavior that had not already been related in the PSR. Shaw's sentence was fifty percent higher than the Probation Department's recommendation and far greater than the parties had anticipated at the time Shaw pled guilty. Clearly, an increase of this magnitude is not substantively reasonable and should not stand.

REASON THREE: The 2nd Circuit Court's decision to affirm the District Court's judgment contradicted to other circuit courts decisions.

FACT#14: In the alternative, even if the disputed facts had been proved by a preponderance of the evidence, the use of such a relaxed evidentiary standard had so great a detrimental effect on Shaw's sentence as to constitute a "Due Process" violation. In United States v. Staten, 466 F.3d 708,720 (9th Cir.2006), held that: "When a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence." (quoting United States v. Lynch, 437 F.3d 902,916 (9th Cir.2006)). The 9th Circuit Court held that Due Process concerns required a higher evidentiary standard when, as in this case, facts found

by the District Court at sentencing greatly influenced the sentence that was imposed. Shaw argues that 2nd Circuit Court's decision to affirm the district court's judgment contradicted to above mentioned 9th Circuit Court's decisions since the disputed facts were not established by a preponderance of the evidence, the 15-year sentence that was based upon them should be vacated and the case should be remanded to the district Court for re-sentencing.

REASON FOUR: SHAW'S DUE PROCESS RIGHTS WAS DEPRIVED AFTER HIS UNSUCCESSFUL, GOOD-FAITH CHALLENGE TO FACTS ADDUCED AT A FATICO HEARING, IT WITHDREW PREVIOUSLY-CREDITED POINTS FOR ACCEPTANCE OF RESPONSIBILITY.

FACT-15: Both the Pimental letter and the Probation Department specified that Shaw would receive a 3-point credit for accepting responsibility by promptly pleading guilty. Shaw fully and truthfully allocuted to all of the facts alleged in the indictment, and presented a good-faith challenge to the grave allegations presented in the Fatico hearing.

FACT-16: Nevertheless, after the hearing the trial court withdrew the 3-point acceptance of responsibility, which resulted in a greatly increased Guidelines range and led to a sentence that was far higher than the parties had originally contemplated. Thus, Shaw's Due Process Rights to a fair sentencing were violated.

FACT-17: The 2nd Circuit Court's decision to affirm the District Court's judgment so far fell away from its precedents because the district court's factual findings should be reviewed by it under a clearly erroneous standard. United States v. Tapia-Ortiz,

23 F.3d 738,742; United States v. Burnett, 968 F.2d 278,280 (2d Cir.1992). Furthermore, as the sentencing judge "is in a unique position to evaluate a defendant's acceptance of responsibility," his determination whether or not to grant the reduction is "entitled to great deference on review."

Guidelines § 3E1.1 Application No. 5.

FACT-18: In this case, the trial court's determination that Shaw had not accepted full responsibility for the crimes with which he was charged was clearly erroneous, and its subsequent withdrawal of 3 points credits for acceptance of responsibility lacked any coherent foundation. In its recent decision, United States v. Delacruz, 862 F.3d 163 (2d Cir. 2017) held that "the paramount factor in determining eligibility for §3E1.1 credit is whether the defendant truthfully admits the conduct comprising the offense or offenses of conviction," United States v. Kumar, 617 F.3d 612,637 (2d Cir. 2010)(quoting United States v. Teyer, 322 F.Supp.2d 359,376 (S.D.N.Y.2004)). A denial of acceptance-of-responsibility credit "for behavior which [the defendant] has continued to deny and has not been proved against him beyond a reasonable doubt" violates the Fifth Amendment. This U.S Supreme Court should therefore vacate Shaw's sentence and remand the matter for a new sentencing in which the 3-point credit for accepting responsibility would be restored.

CONCLUSION

WHEREFORE, based on the mentioned reasons supported by the facts alleged herein, Jerome Shaw, pro se petitioner prays that this U.S Supreme Court will grant his petition for a Writ of Certiorari in the interest of justice where the foundation of this country is the rule of laws.

Respectfully executed and submitted at USP Canaan on January 24th, 2020.



JEROME SHAW, pro se petitioner
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VERIFICATION

I am Jerome Shaw hereby certifying under the penalty of perjury in accordance with 28 U.S.C. §1746 that the foregoing facts, statement of case, reasons supported by facts made and stated by me in this Petition for a Writ of Certiorari is true and correct.

Respectfully executed at USP Canaan on January 24th, 2020.



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