

Supreme Court, U.S.
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No. _____

22-6592

IN THE

SUPREME COURT OF THE UNITED STATES

James Stacey Harber

— PETITIONER

(Your Name)

vs.

United States Court Of Appeals For The Fifth Circuit — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court Of The United States Of America

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

PETITION FOR WRIT OF CERTIORARI

James Stacey Harber 19626-035

(Your Name)

Coleman II USP P. O. Box 1034

(Address)

Coleman, Florida 33521

(City, State, Zip Code)

352-689-7000

(Phone Number)

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SUPREME COURT, U.S.

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I.

QUESTIONS PRESENTED

1. Was Mr. Harber denied the effective assistance of counsel at the plea and sentencing phase of trial?
2. Did the district court err by denying Mr. Harber's 28 U.S.C. § 2255 petition?
3. Did the Fifth Circuit Court of Appeals err by denying Mr. Harber's right to certificate of appealability?

II. PARTIES TO THE PROCEEDING

Petitioner James Stacey Harber was the defendant in the district court proceedings and appellant in the court of appeals proceedings. Respondents United States of America District Court, Western District of Louisiana, Lafayette Division and United States Court of Appeals for The Fifth Circuit.

III. RELATED CASES

- State of Louisiana v James S Harber, Docket No. 60450-R. Judgement entered June 21, 2016
- State of Louisiana v James S Harber, 15th Judicial District Court, Docket No. 60450-R. Dismissal entered on January 24, 2022
- USA District Court, Western District of Louisiana, Lafayette Division v James Stacey Harber (1) Angela Head (2) #16-00129
Dated: May 25, 2016.
- USA District Court, Western District of Louisiana, Lafayette Division. USA v James Stacey Harber #16-00129-01. Dated: August 18, 2017.
- USA District Court, Western District of Louisiana, Lafayette Division. USA v James Stacey Harber # 16-00129-01. Judgement entered of January 19, 2018.
- USA Court of Appeals for The Fifth Circuit
USA v James Stacey Harber #18-30146.
Judgement Entered on October 17, 2018.
- USA District Court, Western District of Louisiana, Lafayette Division. USA v James Stacey Harber #6:16-CR-00129-01. Response entered October 28, 2020.
- USA Court of Appeals for The Fifth Circuit.
USA v James Stacey Harber #21-30529.
Dated: December 1, 2021.
- USA Court of Appeals for The Fifth Circuit
USA v James Stacey Harber #21-30529.
Response entered April 6, 2022.

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VI. Petition for Writ of Certiorari

James Stacey Harber, filing *pro se*, currently incarcerated at Coleman II in the state of Florida, respectfully petitions this court for a writ of certiorari to review the judgement of the Fifth Circuit Court of Appeals.

VII. Opinions Below

The Fifth Circuit Court of Appeals opinion is reported at:

U.S.A. v Harber No. 21-30529, U.S.D.C. No. 6:20-CV-55. The Fifth Circuit’s denial of application for a Certificate of Appealability is reproduced at App. A

The District Court opinion is reported at:

U.S.A. v Harber 6:16-cr-129-01-01. The Western District of Louisiana’s denial of motion to vacate sentence pursuant to 28 U.S.C. § 2255 is reproduced at APP. E

VIII. Jurisdiction

The court of appeals entered judgement on April 6, 2022 denying the request for an application for a Certificate of Appealability for the United States District for the Western District of Louisiana. It is reproduced at App. A

Justice Alito granted an extension in July for filing this petition on September 3, 2022. This court has jurisdiction under 28 U.S.G. § 1254 (1).

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X. Constitutional Provision Involved

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

XI. STATEMENT OF THE CASE

On May 25, 2016, a federal grand jury returned a ten-count indictment against the appellant James Stacey Harber and co-defendant Angela Head. On August 18, 2017, pursuant to a written plea agreement, Mr. Harber plead guilty to Counts 7, 8, 9 and 10. Counts 7, 8 and 9 charged him with production of child pornography, respectively, on June 13, 2013, on September 28, 2013 and on December 8, 2013, in violation of 18 U.S.C. §§ 2251 (a) and 2. Count 10 charged him with possession of child pornography on April 26, 2016, in violation of 18 U.S.C. §§ 2252A (a) (5) (B).

Both parties submitted sentencing memoranda. Mr. Harber filed objections to the presentence investigation report.

On January 19, 2018, the district court sentenced Mr. Harber, a first-time offender, to thirty years imprisonment as to Counts 7 and 8 to run concurrently with one another. The court sentenced Mr. Harber to thirty years imprisonment as to Count 9 and to ten years imprisonment for Count 10, and ordered that Counts 9 and 10 shall be run consecutively with sentencing for Counts 7 and 8. Thus the total term of imprisonment is for seventy years, effectively a life sentence.

Mr. Fiser, the attorney for Mr. Harber, immediately appealed. He then relieved himself of the appeal process and a new attorney, Clare Roubion, was assigned through

the Federal Public Defender's Office. Since Mr. Fiser neglected to raise any arguments, she had little to object to and the 5th Circuit affirmed the judge's decision on October 17, 2018.

On January 13, 2020, Mr. Harber filed, *pro se*, in the district court a "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody" alleging four grounds for relief, all of which were based upon his position that his conviction and sentence were invalid as having been obtained in violation of his constitution right to effective assistance of counsel in the district court at both the plea and the sentencing phases of the proceedings that led to his conviction and sentence.

On August 5, 2021, Judge Dee D. Drell issued a "Ruling and Order" denying Mr. Harber's "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a person in Federal Custody". With respect to the plea phase, Judge Drell felt Mr. Harber was not denied the effective assistance of counsel. Specifically, Judge Drell felt that Mr. Harber failed to provide a reasonable probability that but for his counsel's inadequate review of the plea materials and gross underestimation of sentencing exposure, he would not have plead guilty and would have instead insisted upon going to trial. In support of the conclusion, Judge Drell felt that: (1) appellant Mr. Harber failed to assert or otherwise document any desire to withdraw his guilty plea and proceed to trial. Mr. Harber was never informed by his counsel that he could withdraw his plea but with a

limited timeframe to do so; (2) the factual challenges that Mr. Harber presented were immaterial to the offenses.

With respect to the sentencing phase, Judge Drell felt that Mr. Harber was not denied the effective assistance of counsel. Specifically, Judge Drell felt that: (1) the fact Mr. Harber's counsel failed to submit character witnesses' letters to be immaterial both because Mr. Harber had the opportunity at the sentencing hearing to present evidence of his character through these letters *which Mr. Harber was never made aware of this fact, since Mr. Fiser had been presented with them and it was believed he had submitted them.* Also, the judge felt there was no acknowledgement of the damaging effects of his actions. Mr. Harber made an apology and asked for forgiveness during his allocution. (2) any error in calculating the victim's ages was immaterial because, at the least, V3 was under the age of twelve; (3) Mr. Harber's attorney was not deficient for failing to object to the Sentencing Guideline's calculations, *although counsel had objected at one point then withdrew the objection,* and (4) the sentencing court acted within the bounds of its discretion in ordering that the sentences be served consecutively.

On August 18, 2021, appellant Mr. Harber filed a notice of appeal and a request for a Certificate of Appealability. On August 23, 2021, the district court issued an order denying Mr. Harber a Certificate of Appealability on grounds that the "applicant had

failed to demonstrate a substantial showing of denial of a constitutional right”. On August 25, 2021, the district court denied the motion to appoint counsel.

Mr. Harber then applied to the Court of Appeals for the issuance of a Certificate of Appealability on the issue of whether the district court erred in denying his “Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody”, and particularly, whether it erred by doing so without at least affording him the opportunity to develop his claims at an evidentiary hearing.

SUMMARY OF THE ARGUMENT

Mr. Harber's plea of guilt was induced by his attorney's incorrect advice regarding the sentence he would, likely, receive if he plead guilty as opposed to exercising his right to trial. Mr. Fiser, his attorney, failed to conduct proper research and investigations into potential mitigation evidence that may have affected the advice with regard to the plea and sentence. He also failed to have a psychological evaluation done on Mr. Harber and failed to properly oppose sentencing enhancements such that the court arrived at an improper calculation.

Pursuant to *Miller-El v Cockrell*, 537 U. S. 322, 336 (2003), the threshold inquiry for purposes of the issuance of a certificate of appealability (COA) is whether it is "debatable amongst jurists of reason" that the petition for a writ of habeas corpus should have been resolved in a different manner from that of the district court or that the issues presented are "adequate to deserve encouragement to proceed further".

In the instant case, Mr. Harber has shown that reasonable jurists could find that the district court erred in resolving the issues of ineffective assistance of counsel as raised in his 28 U.S.C. § 2255 petition such that this court should issue a certificate of appealability and allow the case to proceed.

Reasons For Granting Petition

To avoid deprivation of right to “effective counsel” according to the Sixth Amendment. As stated in the American Bar General Standards (https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/) website part 1 Standard: 4-1.1 (a): As used in these Standards, “defense counsel” means any attorney – including privately retained, assigned by the court, acting *pro bono* or serving indigent defendants in a legal aid or public defender’s office – who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct, or a client seeking legal advice regarding a potential, ongoing or past criminal matter or subpoena, including as a witness. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The Standards are intended to serve the best interests of clients, and should not be relied upon to justify any decision that is counter to the client’s best interests. The burden to justify any exception should rest with the lawyer seeking it.

These are the guidelines under the American Bar Association that all defense attorneys are to abide by when representing a client. Each point was made in the original 28 U.S.C. § 2255, Docket No. 18-30146 and the Appeal for the Fifth Circuit, Docket No. 21-30529. The following previously reported as merit showing the ineffectiveness of counsel in the original criminal action No. 16-00129-01.

2255: “On June 6, 2016 an arraignment hearing was held at the Federal Courthouse in Lafayette, Louisiana. Defense attorney, Michael Fiser, was not present and the hearing was re-set for June 24, 2016.”

Reference: Standard 4-4.6 Preparation for Court Proceedings, and Recording and Transmitting Information

(b) Defense counsel should appear at all hearings in cases assigned to them, unless with good cause a substitute counsel is arranged.

Reference: Standard 4-2.3 Right to Counsel at First and Subsequent Judicial Appearances

A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.

2255: "He stopped in for a few more brief visits when I was in St. Martinville and, on one occasion, he confused my case with someone else's case, going so far as to speak about details of that client's case."

Reference: Standard 4-1.2 Functions and Duties of Defense Counsel

(f) Defense counsel should be knowledgeable about...

2255: "...Mr. Catalon doing a presentation from his laptop and Luke Walker making derogatory comments. It was difficult to focus on one or the other as both were happening simultaneously. Mr. Fiser was rather aloof during most of this visit. After the presentation was wrapped up and Mr. Walker and Mr. Catalon left, Mr. Fiser stayed for several minutes for a brief discussion about the presentation. When I asked questions, he waved a hand gesture and said, "Don't worry about it right now". I understood that to mean that we would discuss it at a later date, and then he left. He rarely addressed any of my questions, After receiving what he thought was all of the discovery information, there was a meeting with Mr. Fiser around December 1, 2016 and at that time he told me there was no DNA or any other physical evidence presented, and since my face did not appear in any of the images shown, he felt it was a very weak rape case. He also said some of the images shown in the presentation had been floating around on the internet since the 1980's and nothing was found on my PC."

Reference: Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government's physical evidence is preserved at least until the defense can examine or evaluate it.

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.

2255: "Whenever calls were made to his office, it would take close to a month before he would return these calls."

Reference: Standard 4-3.9 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

2255: "On Wednesday, August 16, 2017 which was only days before the trial date of August 21, 2017, there was another meeting with Mr. Fiser, Luke Walker, Erol Catalon and another person that was not introduced. This was held in a downstairs conference room at St. Martinville. Luke Walker presented the images he planned to use at trial. These were not the same that had been shown previously. Luke said they talked and "We promise to give you 280 years when you take this to trial on Monday." With that Luke closed the laptop and stepped out of the room. Mr. Fiser said he'd go talk to him and left the room also. After a while, Mr. Fiser came back into the room and said he thought he had a plea which was supposedly the first and only one ever offered but the paperwork had to be submitted on Friday. Mr. Fiser's demeanor showed that he was visibly shaken. The others left and Mr. Fiser said I *had* to plea guilty to four of the charges but he felt that the most time I would get sentenced to would be 15 years or less."

Reference: Standard 4-8.3 Sentencing

(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might

affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

(b) Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

Reference: Standard 4-6.1 Duty to Explore Disposition Without Trial

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

Reference: Standard 4-6.2 Negotiated Disposition Discussions

(e) Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.

2255: "Mr. Fiser came to Natchitoches on Friday, August 18, 2017 in the morning to have me sign the paperwork but he was very rushed and there was no discussion. He handed me the paperwork and a pen and told me to just sign, and said I needed to be brief with my answers to the judge and be agreeable with what was being said."

Reference: Standard 4-1.2 Functions and Duties of Defense Counsel

(b) Defense counsel is the client's professional representative, not the client's alter-ego.

Reference: Standard 4-3.9 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client's access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, there is good reason not to do so.

2255: "At some point, after August 2017, he met with me to discuss the Presentence Investigation Report and I pointed out discrepancies and was told "That's not important," or don't know."

Reference: Standard 4-8.3 Sentencing

(e) If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not

allowed) discuss counsel's knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

2255: "My parents also provided him with medical information that should have been included on the PIR but it was not taken into account on the report. Mr. Fiser expressed he felt the PIR writer may have done a cut and paste from the reports she was given by Luke Walker."

Reference: Standard 4-4.1 Duty to Investigate and Engage Investigators

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

Reference: Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy....

2255: "Mr. Fiser told my parents he had expected much less time on the sentence."

Reference: Standard 4-8.3 Sentencing

(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and

other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

2255: "Mr. Fiser told my parents he wanted to get a psychological evaluation done on me but never discussed this with me. It was never done. He said he contacted the Food Stamp Department at DCFS and no one would talk with him for fear of retaliation. He said he contacted the local schools also, and was rebuffed by them. No subpoenas were ever ordered."

Reference: Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment

of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

2255: “He was also provided character witness letters which had names and contact information included but he did not contact any of these people either.”

Reference: Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.

Reference: Standard 4-1.5 Preserving the Record

At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

2255: “It was quite unprofessional for him to show up for meetings at the last minute and late for court (on a few occasions) or not at all. He also requested too many date changes with the court. The original sentencing date was set for November 27, 2017 which was postponed to December 22, 2017 and then re-scheduled again for January 19, 2018.”

Reference: Standard 4-1.9 Diligence, Promptness and Punctuality

(a) Defense counsel should act with diligence and promptness in representing a client, and should avoid unnecessary delay in the disposition of cases....

(e) Defense counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. Defense counsel should emphasize to the client, assistants, and defense witnesses the importance of punctuality in court attendance.

2255: "Most of the time, he made decisions without consulting me and he didn't take time to go over these issues or any legal strategies with me."

Reference: Standard 4-3.9 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client's access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, there is good reason not to do so.

Reference: Standard 4-5.2 Control and Direction of the Case

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(iii) whether to accept a plea offer;

(v) whether to waive jury trial;

(ix) any other decision that has been determined in the jurisdiction to belong to the client.

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2255: "At other times, his responses seemed very indifferent, delayed or not at all especially when I asked questions that he, apparently, didn't want to or couldn't answer."

Reference: Standard 4-3.9 Duty to Keep Client Informed and Advised About the Representation

(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

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2255: "It was quite unprofessional for him to show up for meetings at the last minute and late for court (on a few occasions) or not at all. He also requested too many date changes with the court. The original sentencing date was set for November 27, 2017 which was postponed to December 22, 2017 and then re-scheduled again for January 19, 2018."

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2255: "Mr. Fiser and Luke Walker met outside of the room to talk and when Mr. Fiser returned, he seemed flustered, He stated that he thought he had a plea agreement (the first ever and only one offered) and the paperwork had to be submitted on Friday. After the others had left, he expressed his disappointment in that Luke waited to the last minute to spring things on us. He said I *had* to plead guilty to four of the charges and the judge would be more lenient if it didn't have to go to a jury trial but he felt confident the most time I would be sentenced to would be 15 years or possibly less. He reminded me again that I was to answer the judge with brief statements and that he would do the talking. He assumed I would be at St, Martinville the next day and he planned to meet with me alone to discuss the paperwork but I was moved to Natchitoches before he could get there. Mr. Fiser came to Natchitoches early Friday, August 18, 2017 and 'said he was short on time, had me sign the paperwork and left. I was scheduled to be at court in Alexandria at 10:45. We never had the chance to go over the paperwork in detail."

Reference: Standard 4-5.2 Control and Direction of the Case

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(iii) whether to accept a plea offer;

(v) whether to waive jury trial;

(vii) whether to speak at sentencing;

(ix) any other decision that has been determined in the jurisdiction to belong to the client.

Conclusion

For the foregoing reasons, Mr. Harber respectfully requests that this court issues a Writ of Certiorari for review of the judgement of the United States Court Of Appeals for the Fifth Circuit.

Dated this 3rd day of September, 2022.

Respectfully submitted,

James Stacey Harber

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