

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

TRENT SCENTAIL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

IS PETITIONER ENTITLED TO BE RE-SENTENCED BECAUSE THE GOVERNMENT, BY MEANS OF SENTENCING ENTRAPMENT AND SENTENCING MANIPULATION, UNFAIRLY INCREASED HIS PRISON SENTENCE FROM 10 YEARS TO ALMOST 18 YEARS?

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The Petitioner, Mr. Trent Scentail Smith, (referred to herein as Petitioner), respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The memorandum decision of the Court of Appeals (App. A) is unpublished, *United States of America v. Trent Scentail Smith*, No. 16-30277 (9th Cir. December 08, 2017).

JURISDICTION

The judgment of the Ninth Circuit was entered on December 08, 2017. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's argument necessarily implicates his constitutional rights under the Fifth Amendment (Due Process). Therefore, the relevant provisions of the Fifth Amendment to the United States Constitution are reproduced at App. B.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

This is an appeal from a criminal conviction entered in United States District Court for the District of Montana. Petitioner was convicted of, and was sentenced for, eight methamphetamine trafficking offenses including conspiracy, distribution and possession with intent to distribute in violation of Title 21 United States Code §§ 846 and 841(a)(1). Petitioner was denied his constitutional right to due process of law.

The District Court increased both Petitioner's Guidelines range and sentence by failing to understand that the quantity of methamphetamine used to calculate the Guidelines range was unfairly inflated by the Government's sentencing entrapment and sentencing manipulation.

2. Course of the Proceedings

On February 4, 2016, Petitioner was charged by Indictment filed in the United States District Court for the District of Montana, Helena Division, in Cause No. CR 16-02-H-SEH,

with eight methamphetamine trafficking offenses including conspiracy, distribution and possession with intent to distribute in violation of Title 21 United States Code §§ 846 and 841(a)(1). (ER 28-31).

On February 9, 2016, Petitioner appeared in Court and pleaded “Not Guilty” to the alleged offenses. (Clerk of Court Docket Sheet; ER 35). He was detained pending trial. (*Id.*). With the exception of motions to continue, no Pretrial motions were filed on behalf of Petitioner although, on two occasions prior to his change of plea, the District Court replaced Petitioner’s court-appointed counsel. (Clerk of Court Docket Sheet; ER 40 & 42).

On July 26, 2016, Petitioner entered guilty pleas to all eight counts in the Indictment. (Clerk of Court Docket Sheet; ER 44). These guilty pleas were entered without a plea agreement. (*Id.*). The District Court accepted the guilty pleas and deemed Petitioner guilty of Counts 1 through 8 of the Indictment. (*Id.*). Prior to sentencing, a Presentence Investigation Report (PSR) was submitted to the District Court.

The District Court held the Sentencing Hearing on November 15, 2016. (Transcript of Sentencing Hearing (STR) ER 9-27). The District Court sentenced Petitioner to 210 months in prison on each count to run concurrently. (ER 4, 25). A Notice of Appeal was filed on November 16, 2016. (ER 4, 25).

3. Ninth Circuit Panel’s Memorandum Decision

On December 08, 2017, a panel of the Ninth Circuit (Judges Hawkins, McKeown, and Christen) affirmed the judgment of the District Court. The memorandum decision of the Court of Appeals, *United States of America v. Trent Scentail Smith*, No. 16-30277 (9th Cir. December 08, 2017) is unpublished and is replicated in Appendix A.

Petitioner contended that the amount of methamphetamine used to calculate his sentence should have been reduced because the Government engaged in sentencing entrapment and sentencing manipulation. Affirming Petitioner's sentence, the panel found that "[t]here was no error in rejecting Smith's contention of sentencing entrapment" because "[t]he finding that Smith 'was a willing seller of an unlawful substance [who] undertook that course of conduct willingly' was not clearly erroneous given Smith's concessions regarding the amount of methamphetamine he previously transported and his offers to sell increased amounts during controlled buys. *See United States v. Schafer*, 625 F.3d 629, 639–40 (9th Cir. 2010)."

The panel also found that there was "no error in rejecting Smith's contention of sentencing manipulation. One of the investigating officers testified during the sentencing hearing and identified several legitimate law enforcement purposes for continuing the investigation. *See United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995). Therefore, it was not clear error to find that Smith failed to demonstrate law enforcement continued its investigation solely for the purpose of increasing his sentence. *See id.*"

B. STATEMENT OF THE FACTS¹

Trent Scentail Smith distributed varying amounts of methamphetamine in Helena, Montana and the surrounding area from March 2015 through June 2015. The smallest amount purchased during the investigation was half an ounce and the most purchased was eight ounces of methamphetamine. The investigation ended with a traffic stop in July 2015

¹

This summary was derived from the Government's Offer of Proof -- July 2016. (*See*, Doc. 79 at 3-9 in District Court Cause No. CR 16-02-H-SEH).

where Petitioner possessed approximately three pounds of methamphetamine in Butte, Montana.

On March 25, 2015, the State of Montana Division of Criminal Investigation (DCI) conducted a controlled purchase where a DCI Confidential Informant (CI) # 1304 purchased about one ounce of methamphetamine for \$1,200.00 from Petitioner in Helena.

On March 31, 2015, DCI Agent Poteet was contacted by DCI CI # 1296, who advised that he/she just received approximately one ounce of methamphetamine in advance of payment from Petitioner. Agent Poteet and Federal Bureau of Investigation (FBI) Special Agent (SA) Mercer met with the CI at a prearranged location in Helena and took custody of the drug evidence.

On April 2, 2015, DCI completed a controlled payment where DCI CI # 1296 paid Petitioner \$1,200 for the one ounce of methamphetamine that was fronted to him/her on March 31, 2015. During this payment, Petitioner provided the CI with an additional one ounce of methamphetamine with the expectation of being paid at a later date.

On April 7, 2015, DCI completed a controlled payment where DCI CI # 1296 paid Petitioner's girlfriend \$1,200 for the one ounce of methamphetamine which was fronted to the CI by Petitioner on April 2, 2015.

On April 2, 2015, DCI Agent Poteet was contacted by DCI CI # 1304, who advised that he/she just received approximately one half ounce of methamphetamine in advance of payment from Petitioner. Agent Poteet and FBI SA Mercer met with the CI at a prearranged location in Helena and took custody of the drug evidence.

On April 3, 2015, DCI completed a controlled payment where DCI CI # 1304 paid

Petitioner \$600 for the one-half ounce of methamphetamine that was fronted to him/her on April 2, 2015.

On April 16, 2015, DCI conducted a controlled purchase where a DCI Undercover Agent (UA) purchased approximately one ounce of methamphetamine for \$1,200 from Petitioner in Wolf Creek, Montana.

On May 8, 2015, DCI completed a controlled purchase where a UA purchased approximately three ounces of methamphetamine for \$3,750 from Petitioner again in Wolf Creek, Montana.

On June 2, 2015, DCI conducted a controlled purchase where a UA purchased approximately eight ounces of methamphetamine for \$8,000 from Petitioner in Craig, Montana.

On July 22, 2015, a traffic stop was conducted on Petitioner in Butte, Montana. Following the traffic stop, DCI executed a search warrant on Petitioner's vehicle. The search of the vehicle resulted in the seizure of multiple ounces of suspected cocaine, and pound quantities of methamphetamine.

Three separately packaged items containing suspected methamphetamine were sent to the DEA laboratory for testing. Chemical analysis revealed that drug evidence item 1B1 contained 422.2 grams of actual methamphetamine with a purity of 96.6 percent. Item 1B2 contained 875.3 grams of actual methamphetamine with a purity of 98.9 percent. Item 1B3 contained 1 gram of actual methamphetamine with a purity of 96 percent.

Petitioner provided a number of statements to law enforcement after his arrest. The first was on July 22, 2015, to DCI Agents Poteet and Gremaux. After waiving his Miranda

rights, Petitioner admitted to transporting methamphetamine from California to Helena, Montana. He further admitted to selling methamphetamine to the UA. Petitioner stated that he had partners in drug distribution and that these partners would kill him if he cooperated with law enforcement. He also admitted to selling one-half pound of methamphetamine to the UA while he had a female suspect with him during the transaction. Petitioner admitted to getting nervous about selling one pound of methamphetamine to the UA.

On July 28, 2015, agents met again with Petitioner. After waiving his Miranda rights, he talked about his recent trip where he was stopped by law enforcement. He admitted that he purchased his methamphetamine in California and had started buying approximately 16 ounces of the drug at one time. Petitioner traveled to California, picked up quantities of methamphetamine at the price of \$10,000 for two pounds, and received two to three ounces of methamphetamine for every pound that he delivered from California to Helena. He bought approximately three pounds of methamphetamine and one ounce of crack cocaine in California and attempted to deliver it to Helena on the day that he was stopped, his vehicle searched, and he was placed under arrest. He was to receive nine ounces of methamphetamine for delivering the three pounds of methamphetamine. Petitioner also said that he started using his own money to buy more methamphetamine as the amounts increased on his trips.

A DEA Forensic Chemist analyzed the drug evidence submitted in the case from the vehicle seizure of July 22, 2015. The result of her analysis was: exhibit 1B1 contained Methamphetamine Hydrochloride, net weight 437.1 g $\pm$ 0.2 g; purity 96.6 $\pm$ 3.7%; actual methamphetamine 422.2 g $\pm$ 16.0 g; exhibit 1B2 contained Methamphetamine

Hydrochloride, net weight $885.1 \text{ g} \pm 0.2 \text{ g}$; purity $98.9\% \pm 3.7\%$; actual methamphetamine $875.3 \text{ g} \pm 32.4 \text{ g}$; exhibit 1B3 contained Methamphetamine Hydrochloride, net weight $1.1 \text{ g} \pm 0.001 \text{ g}$; purity $96.0\% \pm 3.6\%$; actual methamphetamine $1.0 \text{ g} \pm 0.04 \text{ g}$.²

Another DEA Forensic Chemist also analyzed the drug evidence submitted in the case, obtained from CI and UA purchases: exhibit 1B10 contained Methamphetamine Hydrochloride, net weight $27.9 \text{ g} \pm 0.001 \text{ g}$; purity $96.8\% \pm 3.7\%$; actual methamphetamine $27.8 \text{ g} \pm 1.0 \text{ g}$; 1B11 contained Methamphetamine Hydrochloride, net weight $25.7 \text{ g} \pm 0.001 \text{ g}$; purity $99.4\% \pm 3.7\%$; actual methamphetamine $25.5 \text{ g} \pm .9 \text{ g}$; exhibit 1B12 contained Methamphetamine Hydrochloride, net weight $27.6 \text{ g} \pm 0.001 \text{ g}$; purity $99.9\% \pm 3.7\%$; actual methamphetamine $27.5 \text{ g} \pm 1.0 \text{ g}$; 1B13 contained Methamphetamine Hydrochloride, net weight $13.8 \text{ g} \pm 0.001 \text{ g}$; purity $99.9\% \pm 3.7\%$; actual methamphetamine $13.7 \text{ g} \pm .5 \text{ g}$; exhibit 1B14 contained Methamphetamine Hydrochloride, net weight $27.7 \text{ g} \pm 0.001 \text{ g}$; purity $99.3\% \pm 3.7\%$; actual methamphetamine $27.5 \text{ g} \pm 1.0 \text{ g}$; exhibit 1B15 contained Methamphetamine Hydrochloride, net weight $84.4 \text{ g} \pm 0.2 \text{ g}$; purity $99.9\% \pm 3.7\%$; actual methamphetamine $84.3 \text{ g} \pm 3.1 \text{ g}$; exhibit 1B16 contained Methamphetamine Hydrochloride, net weight $223.5 \text{ g} \pm 0.4 \text{ g}$; purity $95.0\% \pm 3.6\%$; actual methamphetamine $212.3 \text{ g} \pm 8.1 \text{ g}$.

²

When questioned by the District Court at his Change of Plea Hearing, Petitioner stated that his only disagreement with the facts set forth in the Offer of Proof was the purity of the methamphetamine: "I'm a smoker, sir, and I actually smoked some of the drugs, and it wasn't the purity that they said it was." (See, Transcript of Hearing on Motion to Change Plea, Doc. 111 at 39-41 in District Court Cause No. CR 16-02-H-SEH).

REASON TO GRANT PETITION

PETITIONER IS ENTITLED TO BE RE-SENTENCED BECAUSE THE GOVERNMENT, BY MEANS OF SENTENCING ENTRAPMENT AND SENTENCING MANIPULATION, UNFAIRLY INCREASED HIS PRISON SENTENCE FROM 10 YEARS TO ALMOST 18 YEARS.

Petitioner is entitled to re-sentenced because the Government took control of the sentencing process, by sentencing entrapment and sentencing manipulation. This unfairly resulted in a much longer prison sentence for Petitioner based on greater quantities of methamphetamine than Petitioner was inclined to sell. “[A] violation of the Due Process Clause...occurs when the government unfairly exaggerates the defendant's sentencing range. (citations omitted).” *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009).

“Sentencing entrapment occurs where ‘a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.’” *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010) (quoting *United States v. Stauffer*, 38 F.3d 1103, 1106 (9th Cir. 1994)). “[A]ctive government involvement” or undue government pressure is required to establish sentencing entrapment. *United States v. Schafer*, 625 F.3d 629, 640 (9th Cir. 2010) (quoting *Stauffer*, 38 F.3d at 1107) (Emphasis added).

Here, there was active Government involvement as well as undue Government pressure. The Undercover Agent (UA) repeatedly communicated with Petitioner, requesting greater and greater quantities of methamphetamine. Ultimately, Petitioner sold and obtained greater quantities of methamphetamine which he would not have done without the active involvement of the undercover agent (UA).

Whereas sentencing entrapment focuses on the defendant's predisposition and conduct before and during the time of the offense, sentencing manipulation focuses "primarily – though not necessarily exclusively – on the government's conduct and motives." *United States v. Boykin*, 785 F.3d 1352, 1360 (9th Cir. 2015) (quoting *United States v. Fontes*, 415 F.3d 174, 181-182 (1st Cir. 2005)). Although the Government must disprove sentencing entrapment, a defendant must show "that the officers engaged in the later drug transactions solely to enhance his potential sentence" to prove sentencing manipulation. *Boykin*, *Id.* (quoting *Torres*, 563 F.3d at 734).

The Government never denied that the agents, over time, requested methamphetamine in ever increasing amounts. (Doc 104 at 2-3). There was no reason to prolong the investigation of Petitioner's methamphetamine trafficking except to make those requests to involve him in more transactions and with increasing quantities of methamphetamine. Furthermore, the agents delayed arrest until after a firearm was discovered in Petitioner's home because they were unlikely to create a Federal case, with the attendant mandatory minimum sentences and overly punitive Guideline ranges, until they connected Petitioner with a firearm.

"[W]here sentencing entrapment occurs, the amount of drugs used in calculating the defendant's sentence should be reduced by the amount that 'flow[s] from [the] entrapment.'" *Briggs*, 623 F.3d at 729 (quoting *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995) (The amount of drugs which flow). Like sentencing entrapment, "if a court finds sentencing manipulation, a downward departure should be applied to the guidelines range, 'since such manipulation artificially inflates the offense level by increasing the quantity of drugs

included in the relevant conduct.” *Boykin, Id.* at 1361 (quoting *Torres* at 734-735).

The drug quantities in Petitioner’s case come from controlled buys through confidential informants (CI’s) at the directive of law enforcement agents or directly by a UA. (Doc. 101-2 Record of Controlled Drug Buys, filed under seal.). The record does not contain any prior drug transactions or drug quantities for the time period prior to March 25, 2015, the date of the first controlled buy. (*Id.*).

The first transaction occurred on March 25, 2015. During this transaction, the CI purchased one ounce of methamphetamine from Petitioner. (Doc 116 Presentence Investigation Report (PSR) at 5, ¶ 8.). The following describes all of the controlled methamphetamine buys, amounts and buyer: March 25, 2015, 1 ounce purchased by CI #1; March 31, 2015, 1 ounce purchased by CI #2; April 2, 2015, 1 ounce purchased by CI #1; April 2, 2015, ½ ounce purchased by CI #1; April 16, 2015, 1 ounce purchased by UA; May 8, 2015, 3 ounces purchased by UA; and June 2, 2015, 8 ounces purchased by UA. (*Id.* ¶¶ 8-14). Thus, the total sold by Petitioner was 16½ ounces of methamphetamine.

“Typically, sentencing entrapment occurs when a government agent convinces a drug dealer to purchase or sell more drugs than he is otherwise inclined to deal in.” *Briggs*, 623 F.3d at 729 (citations omitted). During their relationship, the UA sent scores of text messages to Petitioner, encouraging him to engage in methamphetamine sales in ever increasing quantities. (Text Messages, Docs. 101-3 & 101-4 , filed under seal). Prior to the first transaction with the UA on April 16, 2015, the UA sent Petitioner three text messages. Prior to the May 8, 2015, controlled buy, the UA sent Petitioner 21 text messages.

Prior to the June 2, 2015, controlled buy, the UA sent Petitioner 24 text messages.

Several text message conversations occurred between the UA and Petitioner between late June and early July regarding an additional transaction for a pound of methamphetamine. (See, e.g., Doc. 101-4 at 58: “dam dude lookn 4 a LB”). However, Petitioner was unable to produce such a large quantity of methamphetamine at the time. (*Id.*; Doc. 16 (PSR) at 5, ¶ 15). He even expressed his inability to provide methamphetamine in quantities demanded by the UA and told the UA that he was trying to locate methamphetamine in the requested amounts and needed more time to do so. (See, e.g., Doc. 101-3 at 36; Doc. 101-4 at 73, 82: “All I have is 8 maybe”, 84, 85 & 86). Ultimately, Petitioner traveled to California to obtain sufficient methamphetamine to satisfy the demands of the agents.

Prior to becoming involved with the UA, Petitioner was a low-level methamphetamine dealer who sold an ounce or less quantities to support his addiction to methamphetamine. Although he was obviously predisposed to sell methamphetamine in ounce or less quantities, his methamphetamine sales increased from ounce (28 grams) quantities to a pound (453 grams) (an increase of over 1500% above his historical transactions) only after he became involved with the UA. (*Id.*). Moreover, in the incidents where the Government sought ever increasing amounts of methamphetamine, Petitioner was unable to accomplish the UA’s request son demand. (*Id.*).

Petitioner only succeeded in supplying the increased-amount demands for methamphetamine **after** the UA sent numerous text messages pressuring him to fulfill the requests and over a lengthy period of time. Thus, with more methamphetamine, the Government artificially inflated the Guidelines range that falsely amplified Petitioner’s true culpability. The Government continued the investigation of Petitioner for no other reason

than to enhance Petitioner's sentence. The Government did not have any legitimate reasons for continuing to pursue the investigation after his initial purchase from the UA, other than to increase his sentence.

Law enforcement had sufficient evidence to successfully indict and convict Petitioner as early as the first controlled buy with Petitioner on March 25, 2015 and no later than after the first controlled buy between Petitioner and the UA on April 16, 2015. At no point in time did the Government continue to pursue the investigation except to qualify the case for Federal prosecution and attempt to increase the methamphetamine quantities attributable to Petitioner with the resulting mandatory minimum sentences and very punitive Guideline ranges.

In the dozens of communications between law enforcement and Petitioner, the UA never asked for information regarding Petitioner's supplier or for information on other buyers. Law enforcement did not attempt to locate his supplier either through GPS monitoring, phone-taps, surveillance or other means. The agents did not attempt to identify any other buyers engaged with Petitioner through surveillance, GPS tracking or other measures.

Rather than attempt to continue the investigation, as soon as law enforcement became aware that Petitioner was returning from California, they arrested him outside of Butte, Montana before they could obtain any additional information, other than the fact he had obtained more methamphetamine to make the UA happy. Undeniably, the sole purpose of the ongoing investigation was to increase the drug amounts attributable to Petitioner to increase his prison time.

The Government's reasons for delay are red herrings thrown in long after this purpose was achieved. Although the Government asserted that this was "not a long or drawn out investigation by law enforcement" (Doc. 98 at 6), the District Court found that the controlled buys of methamphetamine "[took] place over an extended period of time." (ER 12; Sentencing Hearing Transcript (SHT at 13).

The claim by the Government that the agents were trying "to move up the supply chain" (Doc. 98 at 6) rings empty as there is no evidence that law enforcement made any attempt to ascertain additional co-conspirators or sources during the extended three month investigation. The District Court bought the "supply chain" argument hook, line, and sinker. If this Court considered "mov[ing] up the supply chain" to be a valid justification, there would never be any relief for sentencing entrapment or sentencing manipulation because, in every narcotics investigation, officers attempt to move up the supply chain or totem pole.

The District Court's findings are virtually non-existent and without support in the record. Furthermore, the District Court's reasons for rejecting sentencing entrapment and sentencing manipulation are dubious and unconvincing.

First, the judge primarily focused on the purity of the methamphetamine, an irrelevant fact. (ER 22; SHT at 53). Pure methamphetamine is widespread in Montana as in other states. "The Drug Enforcement Agency in Montana attributes the current resurgence to super labs in Mexico. The product is cheap, pure, and coming in large amounts, according to Joe Kirkland, resident agent in charge at the DEA who oversees Missoula's High-Intensity Drug Trafficking Area Task Force." (<http://www.ktvh.com/2016/05/the-meth-effect-how-spiking-meth-use-is-damaging-publ>

<http://www.ktvh.com/2016/05/the-meth-effect-how-spiking-meth-use-is-damaging-public-health>, May 17, 2016).

Second, the judge illogically concluded that because he sold increasing quantities of methamphetamine, Petitioner “was a commercial drug dealer...engaged in this activity for profit and to make money...[and for] profit motive only.” (ER 23; SHT 54-55, 56). However, Petitioner’s life history is replete with drug use and abuse. (Doc. 100 at 21; Doc. 16 (PSR) at 19-20, ¶¶ 77-80). Obviously, he was addicted to methamphetamine. Furthermore, Petitioner’s level of poverty (*Id.* at 21-22, ¶¶ 89-91) supports the conclusion that he sold drugs to support his habit, not for profit. (Doc. 100 at 21).

Third, the judge totally ignored the undisputed record of text messages from the UA to Petitioner to conclude that Petitioner a “drug dealer” who was “inclined” and “willing and did engage in increased quantities of drug sales.” (ER 23; SHT 55). By adding the additional amounts of methamphetamine as trumped up by the Government, the judge erroneously calculated a Guidelines range of 188 to 235 months (Total Offense Level 35; Criminal History Category II) and imposed a sentence of almost 18 years in prison (210 months) (*Id.* at 23 & 25; SHT 57 & 65).

Sentencing entrapment applies as Petitioner was predisposed to sell ounce amounts or smaller. “[T]he district court shall exclude from the calculation the amount of drugs which flow from sentencing entrapment.” *Naranjo*, 52 F.3d 250. By substituting the lower quantity into the Guidelines calculation, the base offense level for Petitioner would become 32 (8 transactions at an ounce per transaction). Factoring in the acceptance of responsibility, the total offense level is 29 (provided the firearm possession enhancement does not apply),

resulting in a Guidelines range of 97 to 121 months and a prison sentence of about 10 years at the most.

Sentencing manipulation applies because law enforcement delayed the arrest of Petitioner for a period of three months with the purpose of making a Federal case and to send him away with an excessive prison sentence. Thus, the District Court should have subtracted the drug amounts that accrued following the initial controlled by with the UA on April 16, 2016. The base offense level would be 30 (provided the firearm possession enhancement does not apply), reduced to a total offense level of 27 for acceptance of responsibility, resulting in a Guidelines range of 78 to 97 months and a prison sentence of about 8 years at the most.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 19th day of January, 2018.

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