

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony C. Willoughby Jr — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony C. Willoughby Jr Reg. No 56382-060
(Your Name)

Low Security Correctional Institution

LSCI, Allenwood, P.O. BOX 1000 Gregg - A
(Address)

White Deer, PA 17887-1000
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) Does the United States Court of Appeals for the Sixth Circuit decision contravene *Buck v. Davis*, 85 U.S.C.W. 4037, 2017 BL 5411 (U.S. Feb. 22, 2017), because the Sixth Circuit in declining to expand a certificate of appealability application decided the merits of Willoughby's Section 2255 claims and decided an issue of first impression in that court which conflicts with *Mathis v. United States*, 136 S.Ct. 2243, 195 L.Ed. 2d 604 (2016)?

2) Does the Rule of Lenity apply to the sentencing guidelines, and if so, can Willoughby's Career Offender enhancement and sentence still stand pursuant to 15 words that this Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015) identified as permitting guesswork by sentencing Courts?

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:

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INTRODUCTION

This petition brings about some issues of importance to criminal proceedings on which courts are conflicted as well as important to the public. In each instance, the Sixth Circuit ruled for the government in ways that permit sentencing courts to increase penalties on defendants by doing no more than guessing as to what the Sentencing Commission intended to be a crime of violence under the Sentencing Guidelines -- permit violations of defendants' most basic rights to be protected against the risk of double jeopardy, enjoy the right of notice to the specific crime charged that he has to defend against at trial and the elements of such crime, be convicted only on charges made by a Grand Jury, and to receive effective assistance of counsel during plea negotiations, pre-trial and trial proceedings. This case concerns the conviction of an alleged Pimp -- Anthony C. (Party Time) Willoughby.

The first issue implicates the Sixth Circuit's holding approach to the rule of lenity application when interpreting the United States Sentencing Guidelines (U.S.S.G.) in United States v. Galaviz, 645 F.3d 347, 361-362 (6th Cir. 2011), and this Court's message about 15 specific words utilized by sentencing judges to make crime of violence determinations for the

purpose of classifying defendants as career offenders and thereby enhancing their sentences in Johnson v. United States, 135 S.Ct. 2551 (2015). The Sixth Circuit in this case created a conflict between its decision here, which review is sought, and its Galaviz holding regarding applying the rule of lenity when interpreting the U.S.S.G.'s. The court below held that "the advisory sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause and that, as a result, the career offender guideline's residual clause is not void for vagueness [thus], Petitioner [argument] is without merit." (See attached Sixth Circuit Appeal order at Appendix B). This holding ignores Petitioner Willoughby's rule of lenity argument and cannot be squared with Galaviz itself and decisions of other circuit courts that hold the rule of lenity applies when interpreting the U.S.S.G.'s.

The second issue implicates this Court's approach to lower courts - exceeding the limited scope of the Certificate of Appealability (COA) analysis in Buck v. Davis, 85 U.S.C.W. 4037, 2017 BL 5411 (U.S. Feb.

22, 2017). The Sixth Circuit in this case created a conflict with this Court by applying erroneous legal analysis in denying an application to expand the COA. The court below held that (1) "reasonable jurist would not find the district court's assessment that counsel was not ineffective in omitting these meritless arguments debatable or wrong." But it reached its conclusion

only after essentially deciding the issues on the merits, faulting petitioner Willoughby for having an erroneous belief that section 1591(a) charges two different offenses. It then went on to decide that the statute is one that "charges a single offense that can be committed in two ways", thereby deciding an important federal question of first impression within the Sixth Circuit. It also faulted Willoughby for failing to demonstrate "prejudice" in connection with two different constructive amendment claims, thereby creating an intra-circuit conflict regarding constructive amendments being prejudicial per-se, and (2) "reasonable jurist would not debate the district court's conclusion that Willoughby did not establish a reasonable probability that he would have pleaded guilty". But again, it reached its conclusion only after essentially deciding the issue on the merits, faulting Willoughby for having failed to demonstrate that he would have pled guilty to a lesser offer when advised properly on the prospect of receiving a much greater sentence if convicted at trial. (See attached decision of Sixth Circuit denying COA at Appendix A). Both holdings announce COA analysis that run afoul of Buck itself. Some circuits have suggested that section 1591(a) sets forth multiple offenses, while some district courts have held squarely that section 1591(a) sets forth two separate offenses. Some circuits, including the Sixth, hold squarely that a constructive amendment of the indictment

occurs when the district court's jury instruction allows the jury to convict the defendant based on an alternative basis permitted by the statute, but not charged in the indictment, and the government introduces evidence on the uncharged alternative basis conduct -- and such actions are viewed as per se prejudicial. Some circuits, including the Sixth, hold squarely that a defendant maintaining his innocence does not show that there is no reasonable probability that if properly advised he would not have pled guilty to a lesser offer instead of going to trial. The decisions below is inconsistent with the decisions of this Court and other circuit courts, which prohibit the consideration of merits to grant or deny COA's.

The combined effect of those three Sixth Circuit errors is to permit petitioner Anthony C. (Party Time) Willoughby to serve an enhanced sentence due to a crime of violence determination made from nothing more than a guess by the sentencing judge -- and to deprive him of his constitutional rights to be protected against the risk of double jeopardy, have sufficient notice of the specific crime charged in the single count indictment and the elements of that offense, be convicted only on charges made by a Grand Jury, and enjoy his right to effective assistance of counsel at all stages. Were it not for the crime of violence determination, Willoughby would not be classified as a career offender, he would

not have a crime of violence conviction in his record, and he would not have a criminal history category (CHC) of six. Were it not for his counsel failing to advise him properly that if he went to trial and was convicted, his advisory sentencing guideline could be 360-life, he would have pleaded guilty to an offense where his advisory sentencing guideline range would have been 121-151 or 135-168 months - either one would be a sentence just about served by now if he was sentenced at the bottom end. Were it not for his counsel failure to object to the legally insufficient indictment, there may not have even been a trial to begin with. And were it not for his counsels failure to object to the two constructive amendments of the indictment, he may have been acquitted at trial. Unless this Court grants review and reverses the Sixth Circuit's erroneous judgements, Anthony C. (Party Time) Willoughby will spend 17 more years in prison.

To this day, the Government and the Sixth Circuit continue to contradict themselves over what the specific charge is that was charged by the Grand Jury in the single count indictment. The Government has never rebutted the factual presentation that Congress clearly confirmed that section 1591 (a) sets forth two separate offenses, that the Government and district court presented alternative basis for conviction permitted by the statute but not charged in the indictment, that defense counsel failed during plea negotiations to inform Willoughby that if he proceeded to trial and was convicted that

his advisory sentencing guideline range could be 360-life, and that under the rule of lenity, there could not be a crime of violence determination made regarding any section 1591(a) conviction. Because both issues are cleanly presented and important legal questions of first impression, as well as questions already addressed by this Court, and questions on which circuit conflicts exist -- and a judgement from this Court reversing the Sixth Circuit would provide immediate and substantial relief to petitioner, the petition should be granted.

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.
United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A, B, D 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 C 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 August 17, 2017.

☐ 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: December 11, 2017, and a copy of the order denying rehearing appears at Appendix D.

☐ 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).

STATEMENT OF THE CASE

On September 29, 2010 pursuant to a single count indictment, returned by a federal Grand Jury, Petitioner Willoughby was charged with violating 18 U.S.C. 1591 (a)(1) and (b)(1), and 18 U.S.C. 2. Subsequently, Willoughby was arrested on October 06, 2010. (See attached indictment at Appendix E)

During pre-trial plea negotiations, Willoughby was informed by his counsel that a conviction at trial would result in an offense level of 34 and a CHC of IV-- and as such, his advisory sentencing guideline range would be 210-262 months and the sentencing judge would probably sentence at the bottom of that range. Willoughby was offered plea agreements and even suggested terms he'd plea to. However, there was no scenario where he could receive a sentence below a mandatory minimum of ten (10) years without providing substantial assistance to the government. Willoughby elected to stand trial. At no point was he informed that his CHC could be VI and his offense level could be no lower than 37 if he was convicted at trial. (See opinion of U.S. District Court at Appx dix C)

Willoughby received a 30 year prison sentence. Due to an advisory guideline sentencing range of 360-life where his CHC was deemed by the sentencing court to be VI, and his offense level no lower than 37.

A jury trial began on December 13, 2011, and on December 16, 2011, the jury returned two guilty verdicts. The jury was instructed to not answer the second question of the verdict form if they did not circle guilty as to the first question. (See attached general verdict form at Appendix F)

Neither the jury instructions provided by the district court nor the language making up question 3.

numbers one and two of the verdict form match the charges made by the Grand Jury in the single count indictment. The jury instructions instructed that the Grand Jury's charged crime had three elements. As to the first element however, the district's instruction permitted the jury to convict Willoughby based on an alternative basis permitted by the statute, but not charged by the Grand Jury in the indictment. The instruction regarding the second element did likewise. The uncharged alternative basis of topic is "maintains" and "threats of force". (See attached jury instruction proposal at Appendix G). The jury verdict form also included these uncharged alternative basis as options for the trial jury. (See attached general verdict form at Appendix E). In its presentation to the trial jury, the government introduced evidence to persuade the jury that Willoughby used "Threats of force" to get the minor to comply. (See attached excerpt of FBI Agent James E. Hardie trial testimony at Appendix H). The government then argued to the jury that it had provided proof that Willoughby "maintained" the minor. (See attached excerpt of government closing argument at Appendix I). Additionally, the Grand Jury charged a mens rea element of "knowing and in reckless disregard", and attached it to the force, fraud and coercion charge in the indictment. (See attached indictment at Appendix E). But question number two of the verdict form omitted the essential mens rea element. (See attached general verdict form at Appendix F).

On November 18, 2015, the district court denied Petitioner Willoughby's motion to vacate under 28 U.S.C. § 2255. (See attached decision at Appendix C). Willoughby argued to the district court that 18 U.S.C. § 1591(a) set forth multiple offenses and as such the single count indictment was duplicitous and violated his right to be protected against the risk of double-jeopardy

as well as his right to notice of the specific crime he'd have to defend against at trial. At trial, the government pursued its conviction on its theory that the jury could either find Petitioner Willoughby guilty of a crime that called for a 10 year mandatory minimum sentence -- or a crime that called for a 15 year mandatory minimum sentence. Willoughby also argued that he could not have been legally sentenced to the crime associated with a 10 year mandatory minimum because the grand jury only charged him with allegedly violating 18 U.S.C. § 1591 (a)(1) and (b)(1), -- and not 18 U.S.C. § 1591 (b)(2) and as such, he is actually innocent of sex trafficking of a minor in violation of 18 U.S.C. § 1591 (a)(1) and (b)(1). He also argued that the indictment was constructively amended during trial by the actions of the government and district court, thereby denying him his right to be convicted only on charges made against him by a grand jury. Petitioner Willoughby also argued that his counsel was ineffective for failing to alert him that if he went forward with trial and was convicted, that his advisory sentencing guideline range could be that of 360-life. Petitioner also argued that in light of Johnson v. United States, 135 S.Ct. 2551 (2015) he is not a career offender.

On November 19, 2015, an attorney out of the Federal Public Defenders office contacted Petitioner Willoughby and got on his case to file a motion to reconsider. On June 24, 2016 the attorney constructed and filed an application to expand the Certificate of Appealability with the Sixth Circuit Court of Appeals. On December 07, 2016 the Sixth Circuit denied the application by making a finding that 18 U.S.C. § 1591 (a) sets forth only one offense which can be violated in two different ways, and as such ruled that Petitioner Willoughby had no due process right to know

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which way he was charged to have violated 18 U.S.C. § 1591(a), thus his rights of notice was not violated, and his right to be protected against the risk of double jeopardy was not disrupted. The Sixth Circuit then observed that the jury verdict form contained alternative basis for conviction that was not charged by the grand jury, but such broadening did not prejudice Willoughby. After deciding the merits of Petitioner Willoughby's section 2255 constructive amendment claim and double jeopardy risk and rights of notice claims, and addressing the issue of first impression in the Circuit regarding whether 18 U.S.C. § 1591(a) charges multiple offenses or charges only one offense that can be committed in two ways -- the Sixth Circuit ruled that "Reasonable jurist would not find the district court's assessment that counsel was not ineffective in omitting these meritless arguments debatable or wrong." (See attached Sixth Circuit order denying COA at Appendix A).

Additionally, after deciding the merits of Petitioner Willoughby's section 2255 ineffective assistance of counsel during plea negotiations claim, the Sixth Circuit ruled that "reasonable jurist would not debate the district court's conclusion that Willoughby did not establish a reasonable probability that he would have pleaded guilty." (See attached Sixth Circuit order denying COA at Appendix A).

On August 17, 2017 the Sixth Circuit affirmed the district court's judgement citing to Beckles v United States, 137 S.Ct. 886, 892 (2017) -- while ignoring Willoughby's claim in his prose Brief and Reply Brief of the district court used the wrong framework to determine

6.

that section 1591(a) was categorically a crime of violence, and Petitioner Willoughby's claim that under the rule of lenity, any section 1591(a) conviction does not qualify as a predicate offense for crime of violence treatment under the career offender guideline's residual clause in light of what this Court in Johnson v. United States, 135 S.Ct. 2551 (2015) said about 15 specific words. In its August 17, 2017 order, the Sixth Circuit also ignored Petitioner Willoughby's request for the court to expand the COA to include additional issues. (See attached Sixth Circuit Appeal order at Appendix B).

In his submitted pro-se Brief of the Appellant and Reply Brief, Petitioner Willoughby very clearly demonstrated the errors committed by the counsel that crafted Willoughby's Application to Expand the Certificate of Appealability as compelling reasons for the merits panel to reconsider the motions panel interlocutory order -- in order to prevent a manifest injustice.

Following the Sixth Circuit's Appeal order, Petitioner filed a timely Petition for Rehearing with Suggestion for Rehearing En banc to the Sixth Circuit. On December 11, 2017 the Sixth Circuit denied the petition. (See attached Sixth Circuit order denying Rehearing).

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S ANALYSIS OF THE RULE OF LENITY AS APPLIED TO THE SENTENCING GUIDELINES WAS ERRONEOUS AND IN CONFLICT WITH IT'S OWN PRECEDENT AS WELL AS OTHER CIRCUITS

A. Federal Courts Agree That the Rule of Lenity Applies When Interpreting the Sentencing Guidelines

The Sixth Circuit's decision in this case implicates a split among the Federal courts concerning whether the rule of lenity applies when interpreting the Sentencing Guidelines. The judgement below creates a conflict regarding a sentencing court relying on nothing more than guesswork to determine whether the Sentencing Commission intended certain crimes to be considered crimes of violence under the now defunct residual clause of the Guidelines.

1. Application of the rule of lenity

a. In the Sixth Circuit, "the rule of lenity applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the Guidelines such that the Court must simply guess as to what Congress [or the Sentencing Commission] intended." Galaviz, 645 F.3d at 362.

II. THE SIXTH CIRCUIT'S COA ANALYSIS RUNS AFoul OF THIS COURTS RULING IN BUCK V. DAVIS

- A. The Supreme Court Made it Clear About What Constitutes a Circuit Court Exceeding the Limited Scope of a COA Analysis

The Sixth Circuit's decision in this case represents a blatant disregard of this Court's mandate concerning the granting and denying of COA's based on the merits of the claims.

1. Scope of COA analysis

a. In the Sixth Circuit, that court denied Petitioner Willoughby a COA as to 4 claims presented by his counsel, but only after essentially deciding whether the claims had any merit.

b. This Court forbids such an expanded scope, and instead instructs that the question is not whether the claims presented have merit, but rather whether jurist of reason could debate the claims presented. The claims raised by Petitioner Willoughby himself as presented in his 28 U.S.C. § 2255 petition are that (1) since section 1591(a) sets forth multiple offenses, the single count indictment improperly charged two separate offenses, and as such failed to protect him against the risk of double jeopardy and failed to provide him with sufficient notice of the specific offense intended to be stood trial on and the elements of that offense (2) he is actually innocent of sex trafficking of a minor in violation of

18 U.S.C. § 1591 (a)(1) and (b)(1) (3) the jury failed to find an essential mens rea element associated with a section 1591 (a) use of force offense (4) the combined actions by the Government and district court resulted in two different constructive amendments of the indictment (5) in light of Johnson, he is not a career offender and (6) his counsel was ineffective during plea negotiations and pre-trial and trial proceedings.

CONCLUSION

To prevent a manifest injustice based on the aforementioned reasons and facts, petitioner Willoughby prays,

The petition for a writ of certiorari should be granted.

Respectfully submitted,

h.c. Willoughby Jr

Date: March 11, 2018