No. ____________

IN THE

SUPREME COURT OF THE UNITED STATES

Louay Shaman — PETITIONER
(Your Name)

vs.

United States Of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Third Circuit Court Of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Louay Shaman , Reg. No. 70451-066
(Your Name)

FCI Allenwood Medium, P. O. Box 2000
(Address)

White Deer, Pennsylvania 17887
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

I. Whether defense counsel's ineffectiveness was the result of the Court's denial of Petitioner's right to Due Process when the sentencing Judge was sleeping during defense counsel's argument for a downward sentencing departure and/or a downward sentencing variance, thereby denying Petitioner the exercise of sentencing discretion by the sentencing Court?

LIST OF PARTIES

[X] 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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TABLE OF AUTHORITIES CITED

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

[X] 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,
[X] is unpublished.

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

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 17, 2017.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 24, 2017, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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

AMENDMENT 6

Rights of the accused.

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 ontaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 5

Criminal actions-Provisions concerning-Due Process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2422(b)

Coercion and enticement

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. §2423(a)

Transportation of minors

(a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3553(a)

Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragralh (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3553(a) (cont'd.)

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g) [18 USCS §3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28; and

(B) that, except as provided in section 3742(g) [18 USCS §3742

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3553(a) (cont'd)-

(g)], is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

On january 6, 2014, Petitioner pleaded guilty to a one-count superseding information charging him with interstate travel with the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. §2423(b)(Travel with intent to engage in illicit sexual conduct). However, under the plea agreement, Petitioner's advisory sentencing guidelines were calculated for the offense charged in the original indictment's Count Two, that is, transportation of a minor with intent to engage in sexual activity (18 U.S.C. §2423(a)). Petitioner was represented at both the guilty plea hearing and at his sentencing hearing by retained counsel David Scott Nenner.

The Court held the sentencing hearing in this matter during two days in March of 2015. On March 10, 2015, the Court reviewed the Presentence Report with the parties. There were no substantive objections to the report by either the defendant or the Government. The Court made corrections to the report, in paragraphs 1, 2 and 85 (relating to citation and description of the charge pleaded to, and to the counts the Government would move to dismiss.). At the first hearing, the Petitioner, through counsel, moved the Court for certain downward departures and downward variances, but it was discovered that the Court had still not yet received defense counsel's Sentencing Memorandum, wherein, counsel had argued for the downward departures and downward variance.

The Court continued the hearing to permit Petitioner to submit the Sentencing Memorandum. On March 13, 2015, the Sentencing hearing continued. During the hearing, it became apparent that the Court had still not received counsel's Memorandum and then allowed counsel to hand it up to the Judge. The Court adopted the Guideline calculation and the factual findings of the Presentence Report. Petitioner's sentencing guidelines offense level was 29 and his criminal history category was I. This resulted in a Guidelines sentencing range of 87-108 months. Defense counsel urged the Court to depart downward and to vary downward, and offered several reasons as a basis for these requests, but the sentencing Judge promptly fell asleep at the outset of counsel's arguments and remained asleep throughout counsel's arguments.

Counsel, during his arguments, urged the departure and variance based on Petitioner's psychological issues, the drugs he was taking at the time, the abusive behavior Petitioner was exposed to from age 12 to 19, and Petitioner's involvement in a very serious motor vehicle accident in Florida on September 25, 2011, in which his best friend was killed instantly. Counsel noted that Petitioner was under psychiatric treatment and was on a number of medications that had to have affected his actions. Counsel asked the Court to take these things into account in fashioning a sentence. Because the sentencing Judge was sleeping nearly throughout defense counsel's arguments, Petitioner was denied the sentencing Court's sentencing discretion.

The Court sentenced Petitioner to 96 months in custody, in the middle of the Guideline range, followed by 10 years of supervised release, no fine, a $100 special assessment and ordered forfeiture of Petitioner's BMW. The Court denied Petitioner's Motions for downward departure and for downward variance. Petitioner filed a timely notice of appeal. The Government filed a motion in the Court of appeals for summary affirmance and to enforce the appellate waiver that Petitioner had agreed to in his plea agreement. On September 11, 2015, the Court of Appeals granted the Government's motion to enforce the appellate waiver. The Court of Appeals dismissed the appeal. The mandate issued on October 5, 2015.

On March 16, 2016, Petitioner filed a motion with the District Court under 28 U.S.C. §2255. On June 22, 2016, the District Court denied Petitioner's §2255 and denied a Certificate of Appealability. On March 17, 2017, the Third Circuit Court of Appeals denied Petitioner's application for a Certificate of Appealability. Petitioner filed a Motion for rehearing, which was denied on April 24, 2017. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

The Writ should be granted to address an important question of Federal Law that should be settled by this Honorable Court. A United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings. or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's supervisory power and a United States Court of Appeals has decided an important question of Federal law that has not been, but should be, settled by this Court.

Petitioner believes his question may be one of first impression in this Honorable Court. Petitioner's claim is one of ineffective assistance of counsel, based on counsel being ill-prepared at sentencing. Further, Counsel's ineffectiveness was exascerbated by the Sentencing Court's denial of Due Process by nullifying the Court's discretion in fashioning a sentence by the sentencing Judge sleeping during defense counsel's arguments for a downward sentencing departure and a downward sentencing variance.

Legal Standard.

A §2255 petition may be based upon a violation of the Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). By claiming his counsel was ineffective, a defendant attacks "The fundamental fairness of the proceeding." Id. at 697. Therefore, as "fundamental fairness is the central concern of the Writ of Habeas Corpus," "[t]he principles governing ineffectiveness should apply in Federal collateral proceedings as they do on Direct Appeal or in Motions for a new trial." Id. Those principles require a convicted defendant to establish both that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Id. at 687.

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. See, U.S. Const. Amend. VI. To show ineffective assistance of counsel, Petitioner must establish first a deficient performance by counsel and, second, that the deficient performance prejudiced him. See, <u>Strickland</u>, at 687-88. In making this determination, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Furthermore, in considering the prejudice prong of the analysis, the Court, "can only grant relief under.... <u>Strickland</u>, if the 'result of the proceeding was fundamentally unfair or unreliable.'" See, <u>Lockhart v. Fretwell</u>, 506 U.S. 364, 369, 113 S.CT. 838, 122 L.Ed.2d 180 (1993). Under these circumstances, the Petitioner "bears the burden of affirmatively proving prejudice." If the Petitioner fails to meet this burden, a reviewing Court need not even consider the performance prong.

The Sixth Amendment entitles criminal defendants to the effective assistance of counsel - that is, representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms. See, <u>Bobby v. Van Hook</u>, 558 U.S. 4, 7, 130 S.Ct.

13, 175 L.Ed.2d 255 (2009)(per curiam). The Sixth Amendment right to counsel extends to all critical stages of a criminal proceeding, including plea negotiations, sentencing, and appeals. See, Missouri v. Frye, 132 S.Ct. 1399, 1405, 182 L.Ed.2d 379 (2012). Sentencing is a critical stage of trial at which a defendant is entitled to effective assistance of counsel, and a sentence imposed without effective assistance of counsel, (See also, Lafler v. Cooper, ,182 L.Ed.2d 398 (2012)), must be vacated and reimposed to permit facts in mitigation of punishment to be fully and freely developed.

When determining whether counsel's representation was objectively unreasonable, a Court must be "highly deferential" to counsel's performance and must attempt to "eliminate the distorting effects of hindsight." Id. at 689. Therefore, the "Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. A party also must show that counsel's deficient performance prejudiced the party. See, Id. at 691-96. A party does so by showing that there is a "reasonable probability" that, but for the deficiency, "the result of the proceeding would have been different." Id. at 694.

Discretion.

The use of private and independent judgment. The authority of a trial Court which is not controlled by inflexible rules, but can be exercised one way or the other as the trial judge believes to be best in the circumstances. It is subject to review, however, if it is abused. The ability to distinguish between good and evil. Wise conduct and management exercised without constraint; the ability coupled with the tendency to act with prudence and propriety. Freedom in the exercise of judgment; the power of free decision-making.

Judicial Discretion.

The exercise of judgment by a Judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.

Abuse Of Discretion.

A vague term discriptive of a judicial act that causes injustice; variously, an unjustified, unsound, unreasonable, or arbitrary action by a Court or Judge; a decision against reason and evidence. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. An Appellate Court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.

Due Process.

Right of Court to hear evidence for purposes of determining sentence to be imposed. After conviction the Due Process clause imposes some significant restraint to assure the essential fairness of the procedure by which a Judge shall exercise discretion in fixing punishment within perrmissible limits. See, Browning v. Hand, 284 F.2d 346 (10th Cir.), cert. denied, 369 U.S. 821, 7 L.Ed.2d 786, 82 S.Ct. 833.

Once the guilt of an accused has been properly established, the sentencing Judge, in determining the kind and extent of punishment, may, consistently with Due Process, exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. But, the Court is unable to exercise any discretion when the sentencing Judge sleeps during defense counsel's arguments and those arguments contain facts relevant to sentencing.

For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

In determining whether the procedure by which a State has determined the guilt of an accused person squares with the requirements of Due Process the Supreme Court has repeatedly taken the position that the question whether the accused was in fact innocent or guilty of the crime charged is irreleant and not to be considered. Thus, in the line of cases from Brown v. State of Mississippi, 1936, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, through Watts v. State of Indiana, 1949, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, the Court has held that the barbarity of extorted confession may not be part of the procedure which leads to a conviction of crime regardless of whether the matter confessed is true or false and regardless of any and all other strongly persuasive evidence of guilt in the record. It is the teaching of all these cases that 'the aim of the requirement of Due Process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.' See also, Lisenba v. California, 1941, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166.

A sentencing hearing satisfies Due Process if it is adequate to allow the District Court to exercise its discretion in an enlightened manner; Due Process is satisfied at sentencing hearing where Government contradicts presentence investigation report, but defense counsel is given chance to bebut prosecutor's comments. See, United States v. Vasquez, 966 F.2d 254 (7th Cir. 1992). Petitioner maintains that his sentencing hearing did not satisfy Due Process.

Sentencing Discretion.

Even in the post-Booker era of advisory U.S. Sentencing Guidelines and considerable sentencing discretion, Courts are constrained by the will of Congress, which the U.S. Constitution entrusts with the power to define crimes and set punishment for those crimes. Congress has the power to define criminal punishments without giving the Courts any sentencing discretion. Although the Court's role is always to do justice, it does not have unlimited latitude; America is a nation of laws, not Judges. Subject to the limits of the Constitution, the Court must uphold legislative choices on criminal punishment, made as they are by elected representatives. This is so regardless of whether the Court personally agrees with those choices. Sentencing is one of the most difficult tasks a District Court Judge must perform, especially when a Judge believes that the punishment mandated by Congress is not a just and proportional sanction for the conduct involved. But to the extent that the District Court is dissatisfied with this state of affairs, the remedy lies with Congress.

No one would doubt that the sentencing process has traditionally required sentencing Judges to consider factors and circumstances that are as numerous as they are varied. The exercise of the broad discretion endemic to the sentencing process demands that the Judge know as much about the offender, the offense, and the impact of the offense on the community and victim as practical given the limitations inherent in any judicial proceeding. Accordingly, no one would dispute that it is essential for a sentencing Judge to have "' the fullest information possible concerning the defendant's life and characteristics'" in deciding upon an appropriate sentence. United States v. Watts, 519 U.S. 148, 152, 117 S.Ct. 633. 136 L.Ed.2d 554 (1997)(quoting Williams v. New York, 337 U.S. 241, 247, 69 S.CT. 1079, 93 L.Ed. 1337 (1949)).

We all appreciate that Booker returned to sentencing Judges much of the discretion that they had exercised before the advent of the SRA and the Sentencing Guidelines. Booker, 543 U.S. at 264. Those Guidelines (like other guideline schemes adopted in many states before and after the SRA), resulted from legislative efforts to bring a degree of uniformity and predictability to the sentencing process while eliminating many of the troubling sentencing disparities that had so aften been criticised. Mistretta v. United States, 488 U.S. 361, 365, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)(explaining that Congress intended with the SRA to eliminate "[s]erious disparities in sentencing" and the "uncertainty as to the time the offender would spend in prison.").

It should be noted, however, that the Guidelines range is but one aspect of the sentencing calculus - and an advisory one at that. United States v. Booker, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005). In exercising its sentencing discretion, the District Court must also consider the "nature and circumstances of the offense," and the "need for the sentence imposed...to reflect the seriousness of the offense." 18 U.S.C. §3553(a). Both considerations require the sentencing Court to be aware of the actual extent of the criminal activity. The District Court must consider the proper facts when exercising its discretion. That did not occur in this case and the outcome could very likely have been different. The sentencing Court was unable to exercise its discretion because the fact finder was asleep.

CONCLUSION

Based on the foregoing....

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Louay Shaman, pro se

Date: July 20, 2017