NO. _____

In The
Supreme Court of the United States

ANTHONY JEROME ADDISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in granting the government's motion to dismiss by denying the Petitioner the ability to have his substantive constitutional, statutory, and other legal claims addressed, such constitutional, statutory, and other legal claims being of such a fundamental nature that grave injustice will result to Petitioner and similarly situated incarcerated persons if these claims are not addressed?

Did the District Court misapply the United States Sentencing Guidelines ("USSG") when it found Petitioner was in Criminal History Category V?

Did the district court abuse its discretion in finding that a sentence of eighty-four (84) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a)?

Did the District Court's imposition of mandatory "special assessments" pursuant to 18 U.S.C. § 3013 violate the Petitioner's Eighth Amendment right against excessive fines by allowing no discretion or proportionality to relate the fine in any reasonable way to the offense charged?

Does the mandatory "special assessment," as it is currently administered, violate the Origination Clause of the Constitution of the United States because it provides significant revenue to the general treasury and the bill originated in the Senate of the United States?

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. Article 1, Section 7 of the United States Constitution provides as follows:

> "All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

3. 18 U.S.C. § 3553(a) provides as follows:

> (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 paragraph (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--

(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), 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), 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.

4. 18 U.S.C. § 922(a)(1) provides as follows:

(a) It shall be unlawful--
(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or received any ammunition in interstate or foreign commerce.

5. 18 U.S.C. § 924(a)(2) provides as follows:

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

6. 42 U.S.C. § 10601(a) provides as follows:

(a) Establishment

There is created in the Treasury a separate account to be known as the Crime Victims Fund (hereinafter in this chapter referred to as the "Fund").

(b) Fines deposited in Fund; penalties; forfeited appearance bonds

Except as limited by subsection (c) of this section, there shall be deposited in the Fund--
. . .

(2) penalty assessments collected under section 3013 of Title 18 . . . .

7. 18 U.S.C. § 3013 provides as follows:

> (a) The court shall assess on any person convicted of an offense against the United States—
>
> (2) in the case of a felony—
>
> (A) the amount of $100 if the defendant is an individual; and
>
> (B) the amount of $400 if the defendant is a person other than an individual . . . .

8. U.S.S.G. § 4A1.2(c),(e) provides as follows:

(e) Sentences Counted and Excluded

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, as counted only if (A) the sentence was a term of probation or more than one year or a term of imprisonment of at least thirty-days, or

(B) the prior offense was similar to an instant offense:

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

Fish and game violations
Hitchhiking
Juvenile status offenses and truancy
Local ordinance violations (except those violations that are also violations under state criminal law)
Loitering
Minor traffic infractions (e.g., speeding)
Public intoxication
Vagrancy.
...
(e) Applicable Time Period

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2).

STATEMENT OF THE CASE

The procedural background and facts pertinent to this Petition are as follows:

On or about January 18, 2017, an one (1) count indictment was filed against the Petitioner in the United States District Court for the Northern District of West Virginia for allegedly being a prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(a)(1) and 924(a)(2). (JA 10-13)[1] Petitioner was arrested and made an initial appearance before United States Magistrate Judge Robert W. Trumble on

[1] All "JA" references are to the joint appendix in the underlying appeal.

May 8, 2017 and was incarcerated from June 28, 2016 through June 29, 2016 and from October 25, 2016 to present (JA 92).

Thereafter, on June 8, 2017, a guilty plea hearing was held before United States Magistrate Judge Robert W. Tremble pursuant to Petitioner's waiver on Article III Judge for that hearing.(JA 55, 62-66) During the course of that hearing, a signed plea agreement was presented to the Court by counsel for the government and counsel for Petitioner which set forth that, if the district court accepted Petitioner's guilty plea to Count 1 Indictment, the government would, under certain circumstances outlined therein, recommend a three (3) level reduction in offense level and recommend sentencing at the low end of the applicable guideline range.(JA 56-61)

After the Guilty Plea Hearing, a Presentence Investigation Report ("PSR") was prepared which recommended among other things, that Petitioner's Criminal History Category be a V based upon ten (10) criminal history points, the tenth (10^{th}) criminal history point was for a conviction for leaving the scene of an accident for which he was sentenced on or about May 9, 2007, almost ten (10) years before the incident at issue. (JA 167)

When the Petitioner was sentenced by the same district court for a different offense in 2009, a presentence report was prepared for the same district court which listed this same offense as a zero (0) criminal history point offense. (JA 139) Had the offense been treated consistently by the district court in 2017 with the same district court's position in 2009, Petitioner's total Criminal History Points would have been

nine (9), which would have lowered him to Criminal History Category IV. U.S.S.G. Ch. 5, Pt. A. This change would have reduced Petitioner's applicable guidelines range to 70 to 87 months, *Id*. Under that new guidelines calculation, eighty-four (84) months would have been near the high end of the guidelines and that low end of the guidelines would have been seventy (70) months. In short, fourteen (14) months of Petitioner's life hangs in the balance based upon that one (1) criminal history point.

Petitioner objected to the assessment of that one (1) point in the PSR but the probation officer did not amend the PSR[2]. (JA 186-90) The Petitioner also filed a sentencing memorandum, asking the Court for a downward variance based upon a sentence of seventy (70) months of incarceration being a more than reasonable sentence under the circumstances for reasons including, but not limited to, the fact that the offense in question was a non-violent offense and it was almost ten (10) years old. (JA 150-55) Had the instant offense occurred just fourteen (14) months later, or the sentencing for previous offense fourteen (14) months earlier, the old offense would not have counted for criminal history points because it would have been over ten (10) years old. *See* U.S.S.G. §§ 4A1.2(e)(2)-(3). Similarly, had Petitioner been sentenced to one (1) less day for the leaving the scene of an accident offense, that offense would have been assessed zero (0) criminal history points. *See* U.S.S.G. § 4A1.2(c)(1).

Subsequently, on September 21, 2017, a sentencing hearing was conducted before United States Chief District Judge Gina M. Groh. At that hearing, the District Court found that the guidelines had been properly calculated by the probation officer.

[2] The objection was later withdrawn by trial counsel at the sentencing who then argued for a variance.

(JA 73) The sentence imposed by the District Court also included a one hundred dollar ($100.00) special assessment. (JA 96) This special assessment was imposed regardless of any of the characteristics of the Petitioner or details of the offense.

A notice of appeal was filed on May 9, 2018 and, pursuant to the Petitioner's request, the undersigned was appointed as new counsel on May 11, 2018. (JA 98-106)

On July 23, 2018, the Petitioner filed his brief. On August 9, 2018, the government, in lieu of filing a responsive brief, filed a motion to dismiss. The Petitioner filed a response to the motion on August 20, 2018. On September 17, 2018, a panel of the United States Court of Appeals for the Fourth Circuit issued a brief order granting the government's motion to dismiss. App. 1a. On September 25, 2018, petitioner filed a timely Petition for Rehearing and Rehearing *En Banc* which was subsequently denied by the United States Court of Appeals for the Fourth Circuit on October 23, 2018. App. 11a.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT'S DECISION TO GRANT RESPONDENT'S MOTION TO DISMISS DENIED THE PETITIONER THE ABILITY TO HAVE HIS SUBSTANTIVE CONSTITUTIONAL, STATUTORY AND OTHER LEGAL CLAIMS ADDRESSED AND SUCH CONSTITUTIONAL, STATUTORY AND OTHER LEGAL CLAIMS ARE OF SUCH A FUNDAMENTAL NATURE THAT GRAVE INJUSTICE WILL RESULT TO PETITIONER AND SIMILARLY SITUATED INCARCERATED PERSONS IF THESE CLAIMS ARE NOT ADDRESSED.

In this petition, Petitioner challenges the decision of the United States Court of Appeals for the Fourth Circuit and asks this Court reverse the decision and then

grant the appeal on its merits. In the alternative, the Petitioner asks this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit and remand with instructions to consider the appeal on its merits.

In the government's motion, it cited various cases for the proposition that appellate filing time limits are generally enforceable and that, therefore, it argued, the United States Court of Appeals for the Fourth Circuit should dismiss this appeal due to the alleged untimeliness of the appeal.

The Petitioner does not assert, of course, that appellate time limits can never be enforced. Rather, the Petitioner argues that his appeal was timely filed because the *pro se* document at district court docket number 47, postmarked November 22, 2017 and filed on November 27, 2017, met the requirements of a timely filed notice of appeal.

As Petitioner argued before the Fourth Circuit and described in more detail below, this Court should extend and/or modify existing law to hold that the District Court misapplied the United States Sentencing Guidelines ("U.S.S.G.") and committed reversible error when it found Petitioner was in Criminal History Category V due to the District Court being estopped and/or subject to waiver by its earlier categorization of an earlier offense as a zero (0) point offense.

As Petitioner argued before the Fourth Circuit and described in more detail below, this Court should extend and/or modify existing law to hold that the District Court abused its discretion in finding that a sentence of eighty-four (84) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a) due to, among

various reasons, the District Court's earlier categorization of an earlier offense as a zero (0) point offense.

Therefore, for the reasons stated above and below, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Respondent's motion to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

These arguments are predicated on the idea that once a district court determines a criminal history point value of a past offense, a criminal defendant should be entitled to rely on that interpretation in the future such that, if that same defendant is later before the same district court for another sentencing, the doctrines of waiver and/or estoppel, as well as basic fairness, should not allow the district court to impose a higher criminal history point value on the same previous offense than the district court found in its earlier sentencing. Therefore, the Fourth Circuit erred and this Court should grant the petition and require the government to address Petitioner's arguments on the merits.

Petitioner's brief also argues that, based upon the same criminal history point error described above, the district court abused its discretion in imposing a sentence of eight-four (84) months. Again, the Fourth Circuit erred and should grant the petition so that the government will have to address the substance of that argument.

The other arguments within Petitioner's brief before the Fourth Circuit and this petition address constitutional issues which discuss defects in the mandatory special assessment process and which relate to all persons sentenced in federal court

since at least 2000. Therefore, the Court should require the Fourth Circuit to receive briefing on those issues as well, due to the importance of these matters.

At the motion to dismiss stage, the issue before the Fourth Circuit was merely whether the government would need to file a brief addressing the appeal on its merits or not. The substance of the appeal was not being considered by the Fourth Circuit at that time. Therefore, by granting this petition, this Court would merely give the Fourth Circuit the opportunity to hear fully briefed arguments on the substance of Petitioner's appeal and to rule on the issues raised therein.

Allowing this appeal to go forward on its merits would also only minimally prejudice the government, whereas the Petitioner suffered great injury when this appeal was denied before reaching the merits. Petitioner was denied the ability to challenge whether the district court erred in assessing him one (1) criminal history point for an offense which that same court had previously determined to be a zero (0) point offense. Also, there would be a small expenditure of time and copying charges on the part of the government to prepare a responsive brief. Therefore, hearing this appeal places, at most, a *de minimus* burden on the government, given the size of the federal budget.

Due to there being many similarly situated inmates throughout the federal prison system regarding the application of previously established criminal history point values, and special assessments, deciding this case now would prevent future injuries which are occurring daily to various inmates around the country. The Petitioner is simply asking for the merits of his appeal to be heard.

II. THIS COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT SHOULD HAVE DENIED THE GOVERNMENT'S MOTION TO DISMISS AND FOUND, ON THE MERITS, THAT IT SHOULD EXTEND AND/OR MODIFY EXISTING LAW TO HOLD THAT THE DISTRICT COURT MISAPPLIED THE UNITED STATES SENTENCING GUIDELINES ("USSG") AND COMMITTED REVERSIBLE ERROR WHEN IT FOUND PETITIONER WAS IN CRIMINAL HISTORY CATEGORY V DUE TO THE DISTRICT COURT BEING ESTOPPED AND/OR SUBJECT TO WAIVER BY ITS EARLIER CATEGORIZATION OF AN EARLIER OFFENSE AS A ZERO (0) POINT OFFENSE. THIS COURT SHOULD VACATE PETITIONER'S SENTENCE.

After the Guilty Plea Hearing, a Presentence Investigation Report ("RSR") was prepared which recommended among other things, that Petitioner's Criminal History Category be a V based upon ten (10) criminal history points. The tenth (10^{th}) criminal history point was for a conviction for leaving the scene of an accident for which he was sentenced on or about May 9, 2007, almost ten (10) years before the incident at issue. (JA 167)

When the Petitioner was sentenced by the same district court for a different offense in 2009, a presentence report was prepared for the same district court which listed this same offense as a zero (0) criminal history point offense. (JA 139) Had the offense been treated consistently by the district court in 2017 with the same district court's position in 2009, Petitioner's total Criminal History Points would have been nine (9), which would have lowered him to Criminal History Category IV. U.S.S.G. Ch. 5, Pt. A. This change would have reduced Petitioner's applicable guidelines range to 70 to 87 months, *Id*. Under that new guidelines calculation, eighty-four (84) months would have been near the high end of the guidelines and that low end of the

guidelines would have been seventy (70) months. In short, fourteen (14) months of Petitioner's life hangs in the balance based upon that one (1) criminal history point.

Petitioner objected to the assessment of that one (1) point in the PSR but the probation officer did not amend the PSR. (JA 186-90) The Petitioner also filed a sentencing memorandum, asking the Court for a downward variance based upon a sentence of seventy (70) months of incarceration being a more than reasonable sentence under the circumstances for reasons including, but not limited to, the fact that the offense in question was a non-violent offense and it was almost ten (10) years old. (JA 150-55) Had the instant offense occurred just fourteen (14) months later, or the sentencing for the previous offense fourteen (14) months earlier, the old offense would not have counted for criminal history points because it would have been over ten (10) years old. *See* U.S.S.G. §§ 4A 1.2(e)(2)-(3).

Similarly, had Petitioner been sentenced to one (1) less day for the leaving the scene of an accident offense, that offense would have been assessed zero (0) criminal history points. *See* U.S.S.G. § 4A1.2(c)(1).

This Court should extend and/or modify existing law to hold that, once a District Court assesses a particular criminal history point value to a past offense when calculating the advisory United States Sentencing Guidelines, that Court is estopped from and/or has waived the ability to assess a higher criminal history point value later.

The policy behind this extension/modification of the law is based upon fairness to the accused. Once the accused has stood before a district court and had that district

court calculate their criminal history category based upon prior convictions, the accused should be able to reasonably rely upon that Court's point assessment of his or her post criminal history should that person find themselves being sentenced by the same court again on a future charge.[3]

It is black letter law that once a party in earlier litigation takes a position, that party is judicially estopped and/or has waived his or her ability to change that positon in later litigation. See, e.g., *Lowery v. Stovall* 92 F.3d 291, 224 (4th Cir. 1996). In the context of a criminal sentencing, when the defendant's liberty is literally imperiled, the district court should be similarly bound by its earlier positions.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Respondent's motion to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

[3] Petitioner does not take a position on whether or not an earlier criminal history point determination by one district court can bind a different court in the future because that question is beyond the scope of the instant appeal.

III. THIS COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT SHOULD HAVE DENIED THE GOVERNMENT'S MOTION TO DISMISS AND FOUND, ON THE MERITS, THAT IT SHOULD EXTEND AND/OR MODIFY EXISTING LAW TO HOLD THAT A SENTENCE OF EIGHTY-FOUR (84) MONTHS WAS UNREASONABLE UNDER THE CIRCUMSTANCES PURSUANT TO 18 U.S.C. § 3553(A) DUE TO, AMONG VARIOUS REASONS, THE DISTRICT COURT'S EARLIER CATEGORIZATION OF AN EARLIER OFFENSE AS A ZERO (0) POINT OFFENSE. THIS COURT SHOULD VACATE PETITIONER'S SENTENCE.

This Court should extend and/or modify existing law to hold that the District Court abused its discretion in finding that a sentence of eighty-four (84) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a) due to, among various reasons, the District Court's earlier categorization of an earlier offense as a zero (0) point offense.

Pursuant to 18 U.S.C. § 3553(a), the district court is required to weigh various factors to determine, among other things, the nature and circumstances of the offense at issue and the individual history and characteristics of the defendant in order to determine what is a reasonable sentence under the circumstances. 18 U.S.C. § 3553(a); *McManus*, 734 F.3d 315, 317 (4th Cir. 2013).

In the instant case the sentencing for the aforesaid leaving the scene of an accident occurred on or about May 9, 2007. (JA 113-19) The instant firearms offense occurred on or about June 28, 2016. (JA 10-13)

Therefore, had either the leaving the scene offense occurred fourteen (14) months earlier and/or had the firearm offense occurred fourteen (14) months later, the earlier offense would have been assessed zero (0) criminal history points.

Similarly, had Petitioner been sentenced to one (1) less day for the leaving the scene of an accident offense, that offense would have been assessed zero (0) criminal history points which would have lowered Petitioner to Criminal History Category IV. U.S.S.G. § 4A1.2(c)(1).

Further, as stated above, the district court had already previously found that the earlier offense was a zero (0) criminal history point offense. Given that the earlier offense was a non-violent misdemeanor, the ten (10) year period had almost expired, and the district court had previously assessed zero (0) points for the earlier offense, this Court should extend and/or modify existing law and hold that it was an abuse of discretion for the District Court to not vary downward to seventy (70) months of incarceration which would have been the low end of the Guideline Standard there not been a point assessed for the leaving the scene of an accident offense.

As stated above, the policy behind this extension/modification of the law is based upon fairness to the accused that he or she can reasonably rely upon the past decisions of the Court regarding criminal history.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Petitioner's motion to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

IV. THE COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT SHOULD HAVE DENIED THE RESPONDENT'S MOTION TO DISMISS AND FOUND, ON THE MERITS, THAT THE DISTRICT COURT'S IMPOSITION OF A MANDATORY "SPECIAL ASSESSMENT" PURSUANT TO 18 U.S.C. § 3013 VIOLATED THE PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST EXCESSIVE FINES BY ALLOWING NO DISCRETION OR PROPORTIONALITY TO RELATE THE FINE IN ANY REASONABLE WAY TO THE OFFENSE CHARGED.

In its judgment order, the district court imposed, among other things, a one hundred dollar ($100) "mandatory special assessment." (JA 96). This special assessment is created by 18 U.S.C. § 3013 which reads, in relevant part, "The court shall assess on any person convicted of an offense against the United States . . . in the case of a felony-the amount of $100 if the defendant is an individual . . . ." This statute applies equally to all individuals convicted of any federal felony, regardless of the individual characteristics of the accused, including their financial circumstances. It also applies regardless of the offense committed. The most brutal of federal crimes, involving the death or disfigurement of the victim, are punished no less or more severely than the most technical SEC or IRS violations.

The Eighth Amendment to the Constitution of the United States reads "Excessive bail shall not be required, ***nor excessive fines imposed***, nor cruel and unusual punishments inflicted." (Emphasis added). Clearly, the "special assessment" is, in fact, a fine. It is a sum of money a person is bound to surrender to the United States treasury as a penalty for being convicted of a violation of federal criminal law. So, logically, if the special assessment is excessive, then it is unconstitutional and if it is not excessive, then it is constitutional.

The broad brush with which the special assessment is applied and the uniformity across all individuals convicted of all felonies show the excessiveness. To impose a uniform fine for all felonies, regardless of circumstances, is no more reasonable than to impose a uniform sentence of incarceration or death for all felonies, regardless of circumstances. In both cases, the penalty would be excessive because it is not rationally tied to any criteria which could be used to justify it. In order to determine what is usual, necessary, or the proper limit or degree, it is necessary to have some facts and standards with which to compare. By requiring the district court to completely disregard all facts and circumstances of which it may be aware which are relative to sentencing, the special assessment regime has unconstitutionally established an excessive fine. This directive flies in the face of the intent behind the Supreme Court's decisions regarding advisory sentencing. *See*, *e.g.*, *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *United States v. Booker*, 543 U.S. 220 (2005). Just as a district court has broad discretion in setting the amount of incarceration or probation for an offender, so should that district court enjoy broad discretion in setting fines.

Because the *Gall/Kimbrough/Booker* line of cases should be also applied to decisions regarding fines, the district court's treating of the one hundred dollar ($100) special assessment as mandatory, instead of advisory, violated the Petitioner's constitutional right against excessive fines. See *Gall*, 128 S. Ct. at 598 ("[The Court of Appeals] must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the

Guidelines range, treating the Guidelines as mandatory**, failing to consider the 3553(a) factors**, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence–including an explanation for any deviation from the Guidelines range.")(emphasis added).

In addition to this legal precedent, there is a strong public policy that society has in preventing excessive fines. This policy stems both from the potential that excessive fines flowing into the coffers of government would corrupt the officials imposing the fines and it also could damage the economy by pulling more money out of private hands.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Respondent's motion to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

V. THE COURT SHOULD GRANT THIS WRIT BECAUSE THE FOURTH CIRCUIT SHOULD HAVE DENIED THE RESPONDENT'S MOTION TO DISMISS AND FOUND, ON THE MERITS, THAT THE MANDATORY "SPECIAL ASSESSMENT," AS IT IS CURRENTLY ADMINISTERED, VIOLATES THE ORIGINATION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES BECAUSE IT PROVIDES SIGNIFICANT REVENUE TO THE GENERAL TREASURY AND THE BILL ORIGINATED IN THE SENATE OF THE UNITED STATES.

As stated above, part of the sentence imposed upon the Petitioner was the one hundred dollar ($100) mandatory "special assessment" as per 18 U.S.C. § 3013(a)(2)(A). During the sentencing hearing, the district court implicitly acknowledged that it was required by law to impose this "special assessment" without

any discretion whatsoever. (JA 38) See above for the Petitioner's argument regarding the unconstitutionality of a mandatory, as opposed to an advisory, special assessment regime, which the Petitioner hereby incorporates by reference as if fully set forth herein.

Article 1, Section 7 of the Constitution of the United States reads, in relevant part, "All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." "[R]evenue bills are those that levy taxes in the strict sense of the word, and are not bills of other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (emphasis added). In other words, a bill which raises non-incidental revenue for the general treasury of the United States must originate in the House of Representatives or such bill was never constitutionally enacted into law.

The mandatory "special assessment" was established in 1984 at the same time as the Crime Victims Fund. 42 U.S.C. § 10601(a). The money collected from these special assessments flowed into this fund, with the proviso that if the amount collected in one year ever exceeded the statutory cap (at that time $100 million), the remaining funds would be deposited into the general treasury of the United States. *Id*.

In *United States v. Munoz-Flores*, 495 U.S. 385, 398-99 (1990), the Supreme Court of the United States considered whether the mandatory "special assessment" violated the Origination Clause and determined that the bill had, in fact, originated

in the Senate and it did, in fact, raise revenue. The Court also determined, however, that the amount paid into the general treasury from this assessment up until the date of decision (1990) was incidental and, therefore, the Court held that the special assessment did not violate the Origination Clause under the set of facts before the Court. *Id*. at 399.

At the time of *Munoz-Flores*, the amount collected by the special assessment had only exceeded the statutory cap one time, in 1989. *Id*. In 1989, the total amount collected was $133.5 million, but statutory cap that year was $125 million. *Id*.; OVC Fact Sheet p. 2.[4] So, at the time of the *Munoz-Flores* decision, only $8.5 million had ever flowed from the special assessments to the general revenue. It was this amount that the Court found "incidental."

Since *Munoz-Flores*, however, the administration of the special assessment has changed dramatically. First, in 1990, 1992 and 1999, the amount collected continued to exceed the statutory cap by a total of $578 million. OVC Fact Sheet, October 2005, p. 2. During those three years alone, over half a billion dollars flowed from special assessments into the general treasury. The Petitioner submits that this amount of money no longer qualifies as "incidental."

Then, in 2000, Congress completely changed the administration of the special assessment, shifting it from a system where the money went into a segregated fund, with leftover funds above a statutory cap to be distributed to the general treasury, to a system where the money all flowed into the general treasury and then Congress

[4] The "OVC Fact Sheet" references refer to documents which were attached to Petitioner's opening brief in the underlying appeal pursuant to an agreed order entered by the Court of Appeals.

made appropriations each year for the Crime Victims' Fund. OVC Fact Sheet October 2005, p. 1. From 2000 to present, approximately eighteen (18) years, the amount of special assessments collected no longer has any rational relationship to the amount of funding available to the Crime Victims' Fund. *See*, *e.g.*, OVC Fact Sheet, June 2013, p. 1-2, Figure 1.

In 2001, for example, the amount collected was $544.4 million, but the amount appropriated was $550 million. OVC Fact Sheet, October 2005, p. 2. This year marked the first time that general revenue funds flowed into the Crime Victims' Fund. Similarly, in 2002, $519.5 million was collected, but $600 million was appropriated. OVC Fact Sheet, October 2005, p. 2. The next year, 2003, $361.3 million was collected, but $621.3 million was appropriated. OVC Fact Sheet, October 2005, p. 2. The following year, 2004, $833.7 million was collected, but only $620 million was appropriated. OVC Fact Sheet, October 2005, p. 2. From 2004 to 2012, the most recent year listed in the June 2013, OVC Fact Sheet, the amount collected far exceeded the maximum made available to the Crime Victims' Fund with the last four (4) reported years creating surpluses of over One Billion Dollars ($1,000,000,000) annually and the most recent reported year a surplus of approximately Two Billion Dollars ($2,000,000,000). With billions of dollars flowing to the general revenue of the United States, the amount of general revenue is clearly not incidental. In short, the special assessments have become just another general revenue source and the Crime Victims' Fund just another general budget line item.

Clearly, the current facts vary so greatly from the facts as they existed at the time of *Munoz-Flores*, that *Munoz-Flores* no longer controls. Applying the test of *Munoz-Flores* anew today to the current facts, an Origination Clause violation has certainly occurred. Congress, prior to 2000, siphoned over half a billion dollars into the general fund from the special assessments and, since 2000, every dollar of the special assessments has gone into the general fund, with huge surpluses being poured into the general fund in recent years.

As to this argument and the three (3) other arguments preceding in this petition, the Petitioner is not asserting a typical criminal case error personal just to his case, such as inappropriate admission of prejudicial evidence or improper jury instructions. This Petitioner is rather arguing that a new rule should be established as to calculation of criminal history points and that a statute under which he was punished is unconstitutional, both in its substance and enactment. Hence, although this Petitioner has been personally injured, the injury further extends to everyone who has been sentenced using a higher criminal history point value for a previous offense in a subsequent sentencing than that same court did in an earlier sentencing of that same defendant and further to everyone who has been sentenced for a federal felony since at least 2000. This is an injustice which has been continuing for at least eighteen (18) years to countless individuals and needs to be stopped as soon as possible.

Therefore, for the reasons stated above, the Petitioner urges this Court to grant the writ, reverse the decision of the Fourth Circuit granting the Respondent's motion

to dismiss, and then either grant the appeal on its merits or remand with instructions to the Fourth Circuit to consider the appeal on its merits.

CONCLUSION

Based on the foregoing reasons, arguments, and authorities, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

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