

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

JEFFREY BURRIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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I. QUESTION PRESENTED FOR REVIEW

Whether a sixty-month sentence for the simple possession of unregistered firearms, without any evidence suggesting the defendant was doing anything illegal, dangerous or threatening with them, is unreasonable in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

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IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Burris*, 741 F. App'x 183 (4th Cir. 2018), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the issue presented in this Petition was presented to the district court during the sentencing hearing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

V. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on November 7, 2018. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VI. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of 18 U.S.C. § 3553, which provides, in pertinent part:

(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;

VII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the prosecution of Jeffrey Burris (“Burris”) for the possession of firearms. On May 11, 2017, a criminal complaint was returned in the Southern District of West Virginia charging Burris with possession of unregistered firearms, in violation of 26 U.S.C. § 5861(d). J.A 7.¹ On June 6, 2017, a grand jury returned an indictment against Burris charging the same offense. J.A. 8-9. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Burris pleaded guilty to the indictment. J.A. 10-12. A Judgment and Commitment Order was entered on April 19, 2018. J.A. 90-96. Burris filed a timely notice of appeal on April 26, 2018. J.A. 97. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

¹ “J.A.” refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

B. Facts Pertinent to the Issue Presented

This Petition involves a defendant who simply possessed firearms. Those firearms were unregistered and, therefore, that possession was a crime. However, there was no evidence that anything dangerous or illegal was done with those firearms. Nonetheless, the district court imposed a sentence of sixty months in prison.

1. Burris pleads guilty to the possession of unregistered firearms.

On May 8, 2017, investigators from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) received a tip from Burris’ estranged wife, Mayra, that Burris had unregistered firearms in his possession. Two days later, officers responded to a domestic violence call at Burris’ residence. Mayra told the officers that Burris had gone into the woods on an ATV and taken some items with him. Burris shortly returned to the residence and agreed that the officers could conduct a search. J.A. 70. Officers seized a total of seventy firearms and a small quantity of marijuana. J.A. 71. Among those seized firearms were a short-barreled rifle, a short barreled shotgun, and a machine gun. J.A. 103.

The next day, West Virginia State Police officers and ATF agents returned and searched the home along with “approximately 30 acres of property.” J.A. 71. In addition to seizing “several thousand rounds of ammunition,” the investigators found “a black cylindrical container and a blue bucket with a lid in the woods near the residence.” *Id.* In the bucket investigators found four “homemade silencers with mounting hardware and adapters.” *Id.* In the cylindrical container they found a

“semi-automatic shotgun,” a machine gun pistol with a partially obliterated serial number, and another machine gun. *Id.*

On May 11, 2017, Burris was charged with possessing firearms that were not registered as required in the National Firearms Registration and Transfer Record. J.A. 7. An indictment charging the same offense was returned against Burris on June 6, 2017. The indictment listed a total of eight unregistered firearms – a short-barreled rifle, a short-barreled shotgun, a semi-automatic shotgun classified as a destructive device, and five machine guns. J.A. 8-9. Burris pleaded guilty to the indictment without a plea agreement. J.A. 10-12, 101.

After Burris’ guilty plea a Presentence Investigation Report (“PSR”) was prepared to assist the district court at sentencing. J.A. 98-137. The probation officer recommended that Burris’ base offense level be eighteen. J.A. 114. There was a recommended enhancement of four levels based on the number of firearms involved, which included the ones listed in the indictment plus two machine gun trigger packs and the four handmade silencers. J.A. 112-113, 114. The probation officer also recommended upward adjustments for possession of a firearm with an obliterated serial number (four levels) and for possession of a destructive device (two levels). J.A. 114-115. After a three-level reduction for acceptance of responsibility, the recommended final offense level for Burris was twenty-five. J.A. 115. The reduction for acceptance was based on Burris’ statement to the probation officer that he “thought when I moved to West Virginia, and was out in the country, that having the

firearms I wanted and doing what I wanted to out on my own property was not illegal" and that "I now know that it very much was illegal." J.A. 114. Combined with a Criminal History Category I, Burris' advisory Guideline range was fifty-seven to seventy-one months in prison. J.A. 119, 128. The Government had no objections to those calculations. J.A. 131.

Burris had several objections to the PSR, particularly to the factual description of the offense of conviction, which included uncorroborated allegations of domestic violence against Mayra by Burris. J.A. 131-134, 136. Burris also objected to the enhancement for an obliterated serial number, arguing that the last time he "handled that gun he could see the complete serial number on it" and that if it now lacked a serial number someone else did the obliteration. J.A. 135. Burris also objected to the number of firearms attributed to him, although he conceded that a correct attribution would not change the Guideline calculations. *Id.*

Burris also filed a memorandum prior to sentencing that highlighted his personal history and characteristics. J.A. 13-30. To begin, he argued that portions of his history in the PSR were "distorted by one-sided, unsubstantiated assertions made by" Mayra "on matters unrelated to his offense or any potential relevant conduct in this case." J.A. 13.² Burris was born and lived in Delaware until he came to West Virginia in 2017. He was raised primarily by his father after his parents divorced.

² In a supplemental memorandum Burris denied at length the allegations made by Mayra that found their way into the PSR. J.A. 36-43.

J.A. 13-14. After graduating high school he enlisted in the Marine Corps but was discharged due to medical issues. J.A. 16. He met Mayra in 1996 and married her in 2002. J.A. 17. They had a son and Burris became an involved step father to Mayra's daughter. J.A. 14.

Burris explained that starting at age thirteen he had a consistent history of work, from menial service jobs to working for the construction company begun by his grandfather and run by his father. J.A. 16. When he was twenty years old and working for his father at the family construction company, his father (and another employee) was killed in a traffic accident. J.A. 14. After trying to stay with the construction company in the wake of his father's death, Burris eventually went to work for several other companies, settling in as an installer of security systems for ADT for fifteen years. J.A. 16-17.

Burris also argued that he had serious medical conditions which were set forth accurately in the PSR. J.A. 18. He walks with a limp as the result of a car accident in 1997 that broke his right leg and foot. He has been diagnosed with Meniere's Disease, from which he suffers weekly attacks of vertigo. He also suffers from Benign Paroxysmal Positional Vertigo, which involves "position-based micro vertigo attacks that last a few seconds, but which cause him to lose his balance." J.A. 124. As a result of his conditions Burris receives monthly disability payments from a private insurance company. J.A. 18.

Burris closed the memorandum by arguing for a sentence of probation. He argued that has been a “gun enthusiast since he was a teenager” and the seizure of his firearms, along with the permanent disability on possessing any in the future, “will be a substantial punishment.” J.A. 24. In its memorandum prior to sentencing the Government argued that a sentence within the advisory Guideline range was appropriate. J.A. 34.

2. The district court rejects Burris’ arguments and imposes a sentence within the advisory Guideline range.

A sentencing hearing for Burris was held on April 19, 2018. J.A. 44-89. At the outset the district court explained that “I decline . . . the opportunity to turn the criminal sentencing hearing into a domestic relations hearing.” J.A. 47. The district court explained that it was “not improper for the probation office to include contextual type information from law enforcement reports” in the PSR, but “the contested allegations . . . do not impact the guidelines and the Court will not consider those issues in imposing a sentence.” *Id.* The district court repeatedly reiterated its position on that evidence during the hearing. J.A. 49, 78, 86.

On the number of firearms calculation, Burris agreed that “it’s immaterial at this point with the guideline range,” but pointed out that the “other four were essentially FRAM oil filters or air filters that had a hole drilled through them.” J.A. 50. While they “meet the definition of a firearm,” the “point was he didn’t have 14 guns. He had 10.” *Id.*

As to the enhancement for an obliterated serial number, Burris argued that it served a “nominal deterrent effect” because of its strict liability application. J.A. 51-52. However, Burris admitted that although “we don’t have a fully obliterated serial number. We have a partial,” that “it still fits.” J.A. 53. Therefore, it was “appropriate for this guideline to apply” and “this could be part of a variance argument.” *Id.* That was because “there’s absolutely no evidence that [Burris] knew or had any reason to know that the serial number as obliterated.” J.A. 54-55.

The district court concluded that the enhancement was applicable. J.A. 55. It therefore adopted the Guideline calculations from the PSR, including the advisory Guideline range of fifty-seven to seventy-one months in prison. J.A. 60.

The Government reiterated its argument for a sentence within that range. J.A. 63. It argued that Burris “possessed 70 firearms,” although it conceded that “[m]ost of those were legal. So that’s not necessarily a problem.” J.A. 62. However, the Government argued that that “does show . . . that this defendant is familiar with firearms” and the “ownership requirements of firearms.” *Id.* Given Burris’ age, “this isn’t just something that was an accident or something that was the result of youthful indiscretion.” *Id.* The Government also expressed “some concern” that even though his Criminal History Category was I, Burris “has been involved with law enforcement and contact with law enforcement since the time he was a teenager up until recently.” J.A. 63.

Burris argued that while he has “had contact with law enforcement,” he “hasn’t been convicted of selling drugs or committing violence.” J.A. 63. He was “a gun collector all of his life” and the value of about half the seized firearms was over \$16,000. J.A. 63-64. Burris “has been around guns his entire life” and “has bought them for years.” J.A. 64. However, he “didn’t know the Gun Control Act. He didn’t really know the National Firearms Act.” J.A. 65. Burris also stressed that collecting, “something he’s done all his life is gone,” and that he “is suffering financial loss.” J.A. 67. The Guideline range, Burris argued, was increased based “on a number of arbitrary factors that are not really related to the harm at issue.” J.A. 69. Burris reiterated his position that “probation is totally appropriate in this case.” J.A. 66.

In his allocution, Burris told the district court that “I was flat out guilty and I apologize to the Court.” J.A. 77. He explained that he moved to West Virginia because “there was less and less area to ride and hunt and shoot” in Delaware. *Id.* He did not intend to “disregard the law” and “wanted to have everything properly registered” but that “it just, just jumped ahead for lack of a better phrase.” *Id.* He “wanted to say that I apologize and take total responsibility for my actions for the crime I pled guilty to.” J.A. 77-78.

The district court imposed a sentence of sixty months in prison, to be followed by a three-year term of supervised release. J.A. 79. After noting both the total number of firearms Burris possessed and those that he specifically possessed illegally, the district court noted that several of them “were found in containers out in the woods.”

J.A. 80-81. Moving them there “both increases the danger of possessing those devices and demonstrates, quite frankly, your awareness that despite statements made to the probation officer to the contrary that possessing those weapons was illegal.” J.A. 81. The district court further explained that Burris had “continued with the probation office to minimize your conduct and suggest that you were unaware that what you were doing was illegal.” *Id.* The district court concluded it was “not credible that someone with your level of interest in firearms and who had at least two prior convictions that involved firearms was unaware that possessing those firearms violated federal law.” *Id.* The district court called Burris’ statements that he intended to register the firearms “inconsistent with the statements made to the probation office during the pre-sentence investigation.” *Id.*

The district court also concluded that the Guideline range “somewhat underrepresents the seriousness of your history,” which included convictions for carrying a concealed weapon, possession of stolen firearms, and two assault convictions. J.A. 82. The district court recognized that Burris was “losing a significant hobby” because of his conviction but that “in no way . . . serves as an adequate punishment or deterrent” and it “does not make you deserving of more lenient treatment than other defendants with similar conduct.” J.A. 83.

3. The Fourth Circuit affirms Burris’ sentence.

Burris appealed his sentence, arguing that the advisory Guideline range overstated the seriousness of his offense. The Fourth Circuit disagreed and affirmed

the sentence in an unpublished opinion. *United States v. Burris*, 741 F. App'x 183 (4th Cir. 2018). The court concluded that it found “nothing in the record to support the claim that the sentence is unreasonable when measured against the statutory sentencing factors.” *Id.* at 183-184.

VIII. REASON FOR GRANTING THE WRIT

This Petition should be granted to determine whether a sixty-month sentence for the simple possession of unregistered firearms, without any evidence suggesting the defendant was doing anything illegal, dangerous or threatening with them, is unreasonable in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

The advisory Guidelines in this case were based on the nature of the firearms involved, not what Burris did or did not do with them. The district court's sixty-month sentence did not accurately reflect the nature of Burris' actual conduct. Whether such a sentence is unreasonable is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. The sentencing range under the Guidelines as calculated by the district court is not mandatory. Courts must therefore review Burris' sentence for unreasonableness.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that Washington state's sentencing guideline scheme violated the Sixth Amendment and the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A year later, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that there was no substantive distinction between the Guidelines and the Washington scheme struck down in *Blakely* and that the Guidelines as applied violated the Sixth Amendment.

Id. at 233. Specifically, this Court held that 18 U.S.C. § 3553(b)(1), which makes the Guidelines mandatory, was “incompatible with today’s constitutional holding.” *Id.* Rather than declare the entire Guideline sentencing scheme void, this Court excised the mandatory language from the statute. “So modified,” the Court concluded, “the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes the Guidelines effectively advisory.” *Id.*

After the removal of the “mandatory” provision of § 3553, sentencing judges are still required to “take account of the Guidelines together with other sentencing goals.” *Id.* at 259. Therefore, the “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” *Id.* at 264. In order to ensure some degree of nationwide consistency, “the Guidelines should be the starting point and the initial benchmark.” *Gall v. United States*, 552 U.S. 38, 49 (2007). They are “not the only consideration, however.” *Id.* If the district court decides that a sentence outside of the Guideline range is appropriate, it must “consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” *Id.* at 50.

Taking the place of the Guidelines as the driving force in criminal sentencing is the sentencing mandate found in 18 U.S.C. § 3553(a) that directs that the district court “shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.” (Emphasis added.)

Those purposes are: (1) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment; (2) the need for adequate deterrence; (3) the need to protect the public from further crimes of the defendant; and (4) to ensure the defendant is provided “with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2). In addition, the district court must also consider the nature of the offense and characteristics of the defendant, the kind of sentences available, the type and extent of sentence set forth by the Guidelines and related policy statements, avoiding unwarranted disparity in sentencing, and the need of victims to receive restitution. 18 U.S.C. § 3553(a)(1), (3)-(7).

In a post-*Booker* advisory system, Circuit Courts review the district court’s sentence to determine if it is “unreasonable.” *Booker*, 543 U.S. at 261. The reasonableness of a sentence “is not measured simply by whether the sentence falls within the statutory range, but by whether the sentence was guided by the Sentencing Guidelines and by the provisions of § 3553(a).” *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006). A sentence is not “unreasonable” simply because the appellate court reviewing it would have imposed a different sentence in that case. *Gall*, 552 U.S. at 51. With regards to a sentence imposed within the advisory Guideline range, the Fourth Circuit has held that “a sentence imposed ‘within the properly calculated Guidelines range . . . is presumptively reasonable.’” *Green*, 436 F.3d at 456, quoting *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005); *Rita*

v. United States, 551 U.S. 338 (2007)(upholding, but not mandating, the use of the presumption of reasonableness). “At bottom,” the court concluded, review for reasonableness requires a determination of “whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law.” *Id.* at 457.

B. It is an abuse of discretion for a district court to impose a Guideline sentence in a case such as this one.

The sixty-month sentence of imprisonment imposed by the district court in this case is unreasonable because it is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a). Specifically, it is greater than needed “to provide just punishment for the offense.” § 3553(a)(2)(A). The advisory Guideline range did not accurately reflect the severity of Burris’ offense. Therefore, the sixty-month sentence imposed by the district court was unreasonable.

The Guideline range in this case overstates the seriousness of Burris’ conduct because it is based on the nature of the firearms themselves, not how Burris was (or was not) using them. J.A. 114-115. The base offense level was tied to the nature of the firearms involved. U.S.S.G. § 2K2.1(a)(5). One enhancement was for the number of guns. U.S.S.G. § 2K2.1(b)(1)(B). Another applied because one of the firearms constituted a “destructive device.” U.S.S.G. § 2K2.1(b)(3)(A). The final enhancement applied because one of the firearms had an obliterated serial number, even though there was no evidence the Burris was aware of that fact. U.S.S.G. § 2K2.1(b)(4)(B).

None of the enhancements for actual conduct with the firearms, such as the four-level enhancement for possession in connection with another felony offense, U.S.S.G. § 2K2.1(b)(6)(B), applied. That is because there is no evidence that Burris ever did anything illegal or dangerous with these weapons. There is no evidence he threatened anyone with them. There is no evidence he fired them at or near anyone. There is no evidence that he was trafficking them to people who would use them for violent actions. That the Guidelines do not recognize that results in an advisory sentencing range level that overstates what Burris actually did. That is what his sentence must be based upon. 18 U.S.C. § 3553(a)(1).

When it imposed Burris' sentence, the district court emphasized several facts about the firearms that were found on his property. The district court noted that several of them "were found in containers in the woods," which "increases the danger of possessing those devices." J.A. 80-83. There was no basis in the record for this conclusion. Burris' property consisted of thirty acres in rural West Virginia. J.A. 71. There is no indication that anyone other than Burris and his wife had access to that land or the containers where the firearms were found. This is not a situation where weapons were haphazardly stored in a place easily accessible to others. By all indications the weapons were secure and out of the way of daily life. The district court also concluded that the storage of those firearms showed Burris' "awareness . . . that possessing those weapons was illegal." J.A. 81. That is irrelevant to the offense of which Burris was convicted, however. Ignorance of the law is no defense. *Yarborough*

v. United States, 230 F.2d 56, 61 (4th Cir. 1956). Whether Burris knew or did not know he was possessing weapons illegally does not justify the severe sentence imposed by the district court.

The district court also based its sentence on Burris' criminal history, which it concluded the Guideline range "somewhat underrepresents." J.A. 82. That is because, while Burris has several minor prior convictions, they are of such a nature and of such vintage that they say nothing about the person he currently is. The Guidelines recognize this by requiring prior convictions to have some recency before they count in a defendant's criminal history score. U.S.S.G. § 4A1.2(e). Burris' last conviction before the current case occurred in 2004, for which he received a probation term that he successfully completed. J.A. 118. While the offense did involve stolen firearms, Burris' role involved only the purchase of stolen items, not the actual theft of them. J.A. 118-119. The other convictions that concerned the district court all occurred earlier – in the prior century – and were all misdemeanors that were resolved with probationary sentences or fines. J.A. 115-118. Thirteen years of a law abiding life mean more than a handful of old misdemeanor convictions that were determined by courts to not require incarceration. In this case, the Guidelines were correct in treating Burris as if he had no criminal history at all.

Burris committed a regulatory offense. He was not a prohibited person and could have otherwise possessed all the firearms seized from him with the correct paperwork. He had not had problems with the law for more than a decade.

Nonetheless, the district court sentenced him as a dangerous criminal for whom a five-year sentence was necessary. The sentence imposed did not reflect Burris' actual conduct and was "greater than necessary" to comply with the purposes of sentencing. Therefore, it is unreasonable.

IX. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

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