NO. _____

In The Supreme Court of the United States

DONALD COVINGTON,

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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Dated: July 5, 2019

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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?

Whether the law should be extended and/or modified to hold that United States Sentencing Guideline § 4B1.2 was unconstitutionally applied in this case due to it being the cause of Petitioner's resentencing.

Whether the law should be extended and/or modified to hold that the district court abused its discretion in finding that a sentence of seventy-seven (77) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a).

Whether the district court's imposition of two mandatory "special assessments" pursuant to 18 U.S.C. § 3013 violated the Petitioner's Eight Amendment right against excessive fines.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States v. Donald Covington, United States Court of Appeals for the Fourth Circuit. Record No. 17-4120. Final Opinion Issued: January 18, 2018.

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 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 9 of the United States Constitution provides, in part, as follows:

> "No Bill of Attainder or ex post facto law shall be passed...."

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. § 16(b) provides as follows:

(A) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

5. W.Va. Code § 61-2-9(a) provides as follows:

If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or fill, he or she, except where it is otherwise provided, is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a state correctional facility not less than two nor more than ten years. If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction thereof, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500.00.

6. 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 . . . .

7. U.S.S.G. § 4A1.2 provides as follows:

(a) Prior Sentence

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contcndcre*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(e).

For purposes of applying § 4A 1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under § 4AI. I(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under § 4 A1.1(c) if a sentence resulting from that conviction otherwise would be countable.
In the case of a conviction for an offense set forth in § 4A 1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.
"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendcre.*

(b) Sentence of Imprisonment Defined

(1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

(c) 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.

(d) Offenses Committed Prior to Age Eighteen

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1 (a) for each such sentence.

(2) In any other case,

(A) add 2 points under § 4A 1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under § 4A 1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

(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).

(f) Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A l. I (c) even if a conviction is not formally entered, except that diversion from juvenile
court is not counted.

(g) Military Sentences

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) Foreign Sentences

Sentences resulting from foreign convictions are not counted, but may be considered under § 4A l .3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))

(i) Tribal Court Sentences

Sentences resulting from tribal court convictions are not counted, but may be considered under § 4AI .3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A 1.1 (a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences arc counted as provided in § 4A 1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (sec § 4A 1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see §4A 1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see § 4A1.2(d)(2)(B) and (e)(2)).

(1) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which

has been stayed pending appeal, § 4A1.1(a), (b), (c), (d), and (c) shall apply as if the execution of such sentence had not been stayed.

(m) Effect of a Violation Warrant

For the purposes of § 4A 1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) Failure to Report for Service of Sentence of Imprisonment

For the purposes of § 4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) Felony Offense

For the purposes of § 4A1.2(c), a "felony offense" means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) Crime of Violence Defined

For the purposes of § 4A1.1(c), the definition of "crime of violence" is that set forth in § 4B1.2(a).

STATEMENT OF THE CASE

On or about January 22, 2014, almost five and a half (5 1/2) years ago, a four (4) count indictment was filed against the Petitioner in the United States District Court for the Southern District of West Virginia for allegedly distributing heroin (three counts) and possession with intent to distribute heroin (one count) in violation of 21 U.S.C. § 841(a)(1). (JA 20-23). Petitioner was arrested and made an initial appearance before United States Magistrate Judge Dwane L. Tinsley on December 31, 2013 and was incarcerated from December 31, 2013 through January 25, 2017

and from August 24, 2018 to present. (JA 70-76, 120-26). Petitioner has been incarcerated over forty-seven (47) months to date.

On June 17, 2014, over five (5) years ago, a guilty plea hearing was held before United States District Judge Thomas E. Johnston.

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 VI, due to him allegedly being a career offender, pursuant to United States Sentencing Guideline § 4B1.2, even though he only had six (6) criminal history points, and would have otherwise had a criminal history category of III. (JA 141,144).

When the Petitioner was sentenced by the district court, however, on or about January 25, 2017, the district court found that Petitioner was not a career offender under U.S.S.G. § 4B1.2 and, as such, sentenced him to time served, which was approximately thirty-seven (37) months. The government subsequently appealed this finding, this Court ruled in favor of the government and on the basis of U.S.S.G. § 4B1.2, the case was remanded back to the district court for re-sentencing. (JA 86). The district court, through a different district judge, re-sentenced Petitioner to seventy-seven (77) months of incarceration on or about July 11, 2018. (JA 120-21) *Id.* This resentencing would not have happened but for this Court's ruling on its interpretation and application of U.S.S.G. § 4B1.2. As part of the resentencing order, Petitioner was ordered to report to serve his sentence on August 24, 2018. At this point, Petitioner had been living as a peaceful and law abiding citizen in society for approximately nineteen (19) months. During that time, he had obtained housing, his

commercial driver's license (CDL), employment as a commercial driver, and had become a valued volunteer at his local church. (JA 105-08) (*See also* Emergency Motion For Stay Of Imprisonment Pending Appeal).

Although, the district court granted a downward variance when it granted a sentence of seventy-seven (77) months of incarceration, that sentence was nonetheless an unreasonable abuse of the district court's discretion 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 four (4) years old at the time. (JA 21, 120) Further, the Petitioner had been living as a law-abiding citizen in the community for approximately nineteen (19) months at that point and had established a life including a residence, employment, and volunteering at his local church (JA 105-08; Emergency Motion For Stay Of Imprisonment Pending Appeal).

At that aforesaid July 11, 2018 re-sentencing hearing that was conducted before the district court, the sentence imposed by the district court also included a one hundred dollar ($100.00) special assessment, which the district court noted had already been paid (JA 126). 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 July 23, 2018 and, pursuant to the Petitioner's request, the undersigned was appointed as new counsel on August 14, 2018. (JA 127).

On December 17, 2018, the Petitioner filed his brief. On December 19, 2018, the government, in lieu of filing a responsive brief, filed a motion to dismiss. The Petitioner filed a response to the motion on January 11, 2019. On March 15, 2019, a

panel of the United States Court of Appeals for the Fourth Circuit issued a brief order grating the government's motion to dismiss. App. 1a. On March 26, 2019, 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 June 4, 2019.

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.

The government boilerplate assertion in its motion that it received "[a] significant benefit for which the United States bargained in the plea agreement [which] was to be relieved of the time and expenses of certain appellate litigation" rings hollow in this case. (Motion to Dismiss Appeal at 8). The government already voluntarily undid any benefit to itself in terms of time and/or money spent on an appeal when it decided to initiate an appeal and expend the time and money necessary to prosecute said appeal. Further, as a result of the remand following that

appeal, the government had to expend further time and money to resentence Petitioner. As a result of the District Court sentencing Petitioner to an additional term of imprisonment, the government is further expending the time and money of the Bureau of Prisons to incarcerate Petitioner. Therefore, the government's argument, quite simply, does not make any sense under these particular facts.

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.

This Court is presented with an issue of first impression in this motion. Specifically, when the initial appeal of a criminal sentence is initiated by the government, not the criminal defendant, and that government appeal results in a remand and a resentencing of said defendant, can that defendant appeal errors in that resentencing despite an appellate waiver in said defendant's plea agreement? Petitioner urges this Court to answer that question in the affirmative and to extend and/or modify existing law to hold that resentencing, pursuant to a successful government-initiated appeal, is a continuation of that appeal and, therefore, a defendant may appeal any errors in that resentencing despite the existence of an appellate waiver. Such a rule would be consistent with the interest of justice and equitable considerations. It was the government's act of appealing Petitioner's initial sentence which set the chain of dominos into motion which brings the parties once again before this Court. *See, e.g., United States v. McCarthen,* 707 Fed. Appx. 951,

*1 (11th Cir. 2017) (*per curium*), for the general proportion that the government's conduct can result in the unenforceability of an appellate waiver. Had the government not filed that appeal, Petitioner's initial sentence would have become final and Petitioner would still be living a law-abiding life in his local community, including working at his truck driving job and volunteering at his local church. It would be extremely unjust and inequitable if the government were permitted to appeal Petitioner's initial sentence, thus causing a resentencing, but the Petitioner were to be barred from appealing errors which occurred during that government-caused resentencing.

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 the United States Sentencing Guidelines as mandatory and, hence, subject to the void for vagueness doctrine and/or the Ex Post Facto Clause. 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 the sentencing guidelines on resentencing 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. UNITED STATES SENTENCING GUIDELINE § 4B1.2 WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE DUE TO IT BEING THE CAUSE OF PETITIONER'S RESENTENCING AND, HENCE, SUBJECT TO THE VOID FOR VAGUENESS DOCTRINE.

The only reason Petitioner was resentenced and now finds himself once again incarcerated was this Court's opinion in *United States v. Covington,* No. 17-4120 (4th Cir. Jan 18, 2018) (the "Earlier Appeal"). In the Earlier Appeal, this Court found that the crime of unlawful wounding under West Virginia Code § 61-2-9(a) was categorially a crime of violence pursuant to § 4B1.1 and thus, Petitioner was a career criminal pursuant to U.S.S.G. §4B1.2. *Id.* at 10.

Although in *Beckles v. United States,* 137 S. Ct. 886 (2017), this Court ruled that the United States Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause, the situation currently before this Court runs contrary to the reasoning of *Beckles.*[1]

[1] Further, in light of this Court's recent decision in *United States v. Davis*, No. 18-431 (U.S. June 24, 2019), in which this Court invalidated the residual clause as unconstitutionally vague, the Fourth Circuit's decision in the Earlier Appeal and this Court's opinion in *Beckles* may both need to be revisited by this Court as being inconsistent with *Davis*.

In *Beckles,* this Court stated that "[b]ecause they merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge." *Id.* at 894. Further, the Court opined that "[t[he advisory Guidelines also do not implicate the twin concerns underlying vagueness doctrine –providing notice and preventing arbitrary enforcement." *Id.*

Under the unique circumstances of this case, however, the risk that the Court believed was not possible has, in fact, come to pass. When Petitioner was initially sentenced to time served, the district court, in its discretion and after examining the § 3553(a) factors, imposed that sentence finding, among other things, that time served was a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in that statute. (JA 57-58, 71). However, the government appealed that sentence, not based upon the unreasonableness of the sentence itself, but upon an alleged miscalculation of the Guidelines. Earlier Appeal at 3. The Fourth Circuit reversed based on the Guidelines, not the reasonableness of the sentence. *Id.* at 10.

Upon remand, the case was assigned to a different district judge who then sentenced Petitioner to seventy-seven (77) months of incarceration. (JA 120-21). The new district judge even expressed regret at the sentence that he felt he had to impose based upon this Court's ruling on the interpretation of the Guidelines. (JA 111).

Clearly, therefore, in this particular case, the Guidelines were not merely guiding the district court's discretion. Rather, the Guidelines are the sole reason that Petitioner is not still living in society after having successfully rehabilitated himself. Absent the Guidelines, there would have been no government appeal and,

consequently, no vacating of the earlier sentence of time served. Likewise, the remand resulted in another district judge imposing a much harsher sentence, while still feeling boxed in by the Guidelines and this Court's opinion. Therefore, in this case, the Guidelines took on a mandatory-like character which should impose, in this case, the pre-*Booker* constitutional protections.

As applied in this particular case, the Guidelines failed to put Petitioner on notice as to the sentence he would likely receive when he plead guilty and, likewise, resulted in arbitrary enforcement where one district judge's discretion was substituted for another. The United States Sentencing Commission recognized these potential issues when it revised U.S.S.G. § 4B1.2 in 2017 to remove vague language.

Subsequent both to *Beckles* and the district court's resentencing of Petitioner, this Court decided *Sessions v. Dimaya,* 138 S. Ct. 1204 (April 17, 2018). Given that *Dimaya* was decided after *Beckles*, to the extent there is any conflict between the two, *Dimaya* would control.

In *Dimaya*, this Court ruled that 18 U.S.C. § 16(b), which contained almost identical language to U.S.S.G. § 4B1.2, was a violation of due process because it was void for vagueness. *Id.* at 1223 while the instant case does not focus on the residual clause, which was the focus in *Dimaya*, it is notable that *Dimaya* only stated approval of the list of specified crimes within the statute. *Id.* at 1233. In the instant case, the Earlier Appeal addressed "unlawful wounding," which is not on the specified list of offenses in U.S.S.G. § 4B1.2. Earlier Appeal, 1.

Further, as recognized in *Beckles*, this Court's holding "[did] not render, the advisory guidelines immune from constitutional scrutiny. *Beckles*, 137 S. Ct. at 895. In doing so, this Court re-affirmed that a "retrospective increase in the Guidelines range applicable to a defendant violates the *Ex Post Facto* Clause." *Id.* This Court reaffirmed that the *Ex Post Facto* Clause focus on the "significant" risk of a higher sentence and that changes in the guidelines qualify due to their role in "establish[ing] the framework for sentencing." *Id.* Therefore, alternatively, this Court should find that the change in the interpretation of the Guidelines, as described above, violated the *Ex Post Facto* Clause because, not only did it create a significant risk of a higher sentence, it did, under these circumstances, actually cause a higher sentence

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.

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 SEVENTY-SEVEN (77) MONTHS WAS UNREASONABLE UNDER THE CIRCUMSTANCES PURSUANT TO 18 U.S.C. § 3553(A) DUE TO, AMONG VARIOUS REASONS, THE APPELLANT'S REMARKABLE SELF-REHABILITATION DURING THE APPROXIMATELY NINETEEN (19) MONTHS HE WAS LIVING AS A LAW-ABIDING CITIZEN IN THE COMMUNITY.

This Court should extend and/or modify existing law to hold that the District Court abused its discretion in finding that a sentence of seventy-seven (77) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a) due to,

among various reasons, the Petitioner's remarkable self-rehabilitation during the approximately nineteen (19) months he was living as a law-abiding citizen in the community.

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). "[W]hen a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range." *Pepper v. United States*, 562 U.S. 476, 490 (2011).

In the instant case, Petitioner was initially sentenced to time served on January 25, 2017 and released. (JA 70-71). He lived as a law-abiding citizen for approximately nineteen months, obtaining housing and employment as well as becoming a valued volunteer at his local church.(JA 105-08; *see also* Emergency Motion For Stay Of Imprisonment Pending Appeal). In other words, Petitioner rehabilitated himself.

Therefore, the district court abused its discretion when it sentenced Petitioner to seventy-seven (77) months of incarceration. Petitioner had already rehabilitated himself and had shown, for about nineteen (19) months, that he was not a danger to

the community. Therefore, the sentence of incarceration did nothing to protect the community nor to rehabilitate the Petitioner. Rather, the instant sentence only served to destroy much of the progress Petitioner made during his approximately nineteen (19) months of freedom, leaving him to start again at square one when he is finally released years from now. 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 district court imposing a sentence sufficient for the particular circumstances brought before the district court. This is the same policy which lead to the United States Sentencing Guidelines being made advisory years ago. 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 126). 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.

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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