

19-5425
IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

DAMIEN RILEY

PETITIONER, PRO SE

V

UNITED STATES OF AMERICA

FILED

DEC 13 2018

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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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OFFICE OF THE CLERK
SUPREME COURT, U.S.

* PETITIONER, PRO SE

QUESTION PRESENTED

Whether the district court's sentence is substantively unreasonable, in reliance on the career offender guidelines residual clause, due to the subsequent, 798, amendment to the guidelines, in order to comply with the second, discretionary, step of a district court's sentencing procedures pursuant to *United States v Booker* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). 18 U.S.C. 3553(a)?

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NO. _____

IN THE
SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM 2018

DAMIEN W. RILEY

pro se, PETITIONER

V

UNITED STATES OF AMERICA

Respondent

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

pro se, PETITIONER DAMIEN RILEY, respectfully prays that a writ of
CERTIORARI issue to review the decision of the United States Court of Appeals
for the Fourth Circuit rendered in this case on May 9, 2017.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth
Circuit is found at United States v Riley, 856 F.3d 326 (4th Cir. May 9,
2017). The opinion is reproduced in the Appendix. (App. A at 2).²

² "App." refers to the Appendix and is followed by the page number.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit WAS BASED ON 28 U.S.C. § 1291. The Fourth Circuit ISSUED A decision on May 9, 2017, affirming the judgement of the United States District Court for the District of Maryland. SEE United States v Riley, 856 F.3d 326 (4th Cir. 2017). (App. A at 2). This Court has jurisdiction to REVIEW the decision pursuant to 28 U.S.C. 1254(2).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

18 U.S.C. § 3553 (A): IMPOSITION of SENTENCE

(A) FACTORS to be CONSIDERED in imposing 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, MEDICARE/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)(2) 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 statement issue 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.

18 U.S.C. 3742(E): REVIEW OF SENTENCE.

(E) Consideration.-- Upon review of the Record, the Court of Appeals shall determine whether the sentence --

- (1) was imposed in violation of Law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is outside the applicable guideline range, and
 - (A) the district court failed to provide the written statement of reasons required by 3553(c);
 - (B) the sentence departs from the applicable guideline range based on a factor that --
 - (i) does not advance the objectives set forth in section 3553(a)(2); or
 - (ii) is not authorized under section 3553(b); or
 - (iii) is not justified by the facts of the case; or
 - (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reason for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
- (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The Court of Appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A), the court of appeals shall review de novo the district

Courts Application of the guidelines to the facts.

UNITED STATES SENTENCING Guidelines § 4B1.1(A)(b); CAREER OFFENDER

(A) A defendant is a career offender if (1) the defendant was at least 18 yrs old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction; ~~(2)~~ is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

DEFENSE Statutory Maximum	OFFENSE LEVEL *
(1) Life	37
(2) 25 yrs or more	34
(3) 20 yrs or more, but less than 25 yrs	32
(4) 15 yrs or more, but less than 20 yrs	29
(5) 10 yrs or more, but less than 15 yrs	24
(6) 5 yrs or more, but less than 10 yrs	17
(7) more than 2 year, but less than 5 yrs	12

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

UNITED STATES SENTENCING GUIDELINES 4B1.2(A); DEFINITION OF TERMS USED IN SECTION 4B1.1

(A) Term "CRIME OF VIOLENCE" MEANS ANY OFFENSE UNDER FEDERAL OR STATE LAW, PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, THAT -

(1) HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER, OR

(2) IS BURGLARY OF A DWELLING, ARSON, OR EXTORTION, INVOLVES USE OF EXPLOSIVES, OR OTHERWISE INVOLVES CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER.

U.S.S.G 4B1.2 (2014)

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE DISTRICT COURT.

ON JANUARY 29, 2013, PROSE PETITIONER, DAMIEN 'RILEY', WAS CONVICTED BY A JURY IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND ON FOUR COUNTS OF POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED DANGEROUS SUBSTANCE. SPECIFICALLY, MR. RILEY MADE THREE DRUG TRANSACTIONS WITH UNDERCOVER LAW ENFORCEMENT OFFICERS ON THE FOLLOWING DATES: ON AUGUST 13, 2013 A SALE FOR 1.66 grams of heroin; AUGUST 19, 2013, 4.1 grams of heroin sold to undercover officer; SEPT 4, 2013, 3.99 grams of heroin AND 1.16 grams of COCAINE WERE SOLD TO THE SAME OFFICER MENTION ABOVE.

ON MAY 28, 2015, MR. RILEY WAS SENTENCED IN THE DISTRICT COURT. INITIALLY, HE WAS DEEMED TO HAVE A CRIMINAL HISTORY CATEGORY OF **IV** AND AN OFFENSE LEVEL OF **12**, WITH

A guidelines range of 21-27 months. However, the U.S. Probation Office designated Mr. Riley as a career offender based upon two prior convictions in Maryland State Court: (1) 1999 - robbery deadly weapon, and (2) 2002 - distribution of a controlled dangerous substance. Upon application of the career offender guideline, the resulting guideline range rose to a level of 210-262 months.

The district court adopted the recommendation made in the presentence report and designated Mr. Riley as a career offender pursuant to the United States Sentencing Guidelines (USSC 4B1.1). The district court sentenced Mr. Riley to a term of 210 months on each count, to be served concurrent to each other followed by 3 yrs of supervised release.

B. Proceedings on Appeal in the Fourth Circuit.

Mr. Riley then appealed his sentence to the United States Court of Appeals for the Fourth Circuit. On appeal, Mr. Riley argued that the district court erred in sentencing him as a career offender because his conviction for robbery with a dangerous weapon did not qualify as a crime of violence. (App. at A)

However, between the time that the normal briefing period had ended and oral argument was scheduled to begin, this Court issued its decision in *Beckles v. United States* 137 S. Ct. 886 (2017), which held that the career offender guidelines residual clause was not, as most circuits thought, constitutionally void for vagueness. The Fourth Circuit ordered ~~sup~~ supplemental briefing from both sides, which were submitted to the court a matter of days before oral argument. (App. A)

In his supplemental brief and at oral argument, Mr. Riley argued that despite this court's ruling in *Beckles*, the language of the career offender guidelines residual

CLause is still just as hopelessly indeterminate as the ACCA's identical residual clause that was invalidated in Johnson, and, even if the Guidelines are not subject to a constitutional 'void for vagueness' challenge, Beckles did nothing to undo Johnson's conclusion that the residual clause's language is impossible to interpret. Therefore, Mr Riley argued, the district court could not have correctly calculated and applied the Guidelines in accordance with the mandates of *Gall v United States*, making the sentence procedurally unreasonable. The Court ignored the procedural argument altogether. (App. A)

On May 9, 2017, the ~~Fourth~~ Fourth Circuit issued a decision affirming the sentence imposed by the district court on the ground that Mr. Riley's conviction for robbery with a dangerous weapon qualified as a "crime of violence" under the residual clause of the career offender guideline. (U.S.S. G 4b1.2(a)(2)). Relying entirely on Beckles, the Fourth Circuit concluded that the career offender guidelines residual clause is valid and was permissibly relied upon by the district court. Reaching this conclusion, the Fourth Circuit declined to address Mr. Riley's argument regarding the force clause. (App. A)

C. Proceeding in the Supreme Court.

On Oct 2, 2017, Certiorari was denied by this Court.

D. Proceeding in the District Court pursuant to (28 USC 2255).

On Nov 1, 2017, Mr Riley filed a self represented Motion to Vacate under 28 USCS 2255. (App. B)

On May 14, 2018, Mr Riley's motion pursuant to 28 USCS 2255 to vacate, set aside or correct sentence by a person in custody, was denied. (App. B)

E. Proceeding in the District Court For Reconsideration pursuant to Rule 59(E).
(App. C)

On June 7, 2018, Mr Riley's motion For Reconsideration, Pursuant to Rule 59(E) of the Fed. Rules of Civil Procedures was ultimately denied. (App. C)

F. Proceeding on Appeal in the Fourth circuit in (2018).

Mr. Riley then submitted a timely motion to appeal the Districts decision in the Fourth Circuit Court of Appeals, which was denied on Aug 21, 2018, Case NO 18-6717. (App. D)

G. Proceeding in the Fourth Circuit Court of Appeals For Re-Hearing. (App F)

On September 27, 2018 Mr Riley filed a timely Petition For Re-Hearing citing the conflicting Appellate decision, on the same EXACT issue in this case, in United States v FRATES, 522 F3d 133 (1st Cir. 2018), which recognized the Commissions current policy position MAYBE RELEVANT at the SECOND, DISCRETIONARY, STEP of a district courts sentencing pursuant to United States v BOOKER, 543 US 220, 125 S. CT 738 160 L. ED 2d 621 (2005), SEE 18 USC 3553(A), EVEN when a NON-RETROACTIVE AMENDMENT PREVENTS the district court from ALTERING the advisory Guideline range at the first step. (App. F)

On Sept 27, 2018 the Fourth circuit issued the Stay of MANDATE under Fed. Rules. App. P 41(D)(2). In accordance with Rule 41(D)(2), the MANDATE WAS STAYED pending further order of the Court. (App. E)

On Nov 5, 2018, the United States Court of Appeals For the Fourth Circuit

ISSUED A ORDER ultimately denying the Petition for Re-Hearing. Therefore, the issue raised in this petition is narrow. (App. F, G)

Reason For Granting Writ

I. The Result in Beckles v United States 137 S. CT 886 (2017) created a quirk for defendants (1) sentenced to sections 461.2(a) residual clause prior to amendment 798, and (2) who's appeals were pending when the amendment became effective. Although stricken by the Sentencing Commission, the residual clause remains valid as applied to them. Hence, they will be the last group subjected to the disfavored -- yet constitutional -- residual clause. Pursuant to US v Booker, 543 US 220 S. CT (2005), The Court in United States v Frates, 522 F3d 133 (1st Cir. 2018), recognized the Commission's current policy position maybe relevant at the second, discretionary, step of a district court's sentencing. 18 USC 3553(a). The 1st Circuit allowed the district court to consider the Commission's revised policy position in exercising its discretion to select an appropriate sentence for the defendant pursuant to United States v Booker, 543 US 220, 125 S. CT 738 160 (L. ED 2d 621 (2005)), even when a non-retroactive amendment prevents the district court from altering the advisory Guidelines range at the first step.

Under Federal sentencing procedures post Booker, district courts begin by calculating a defendant's guidelines sentencing range. The range is merely advisory. See Booker, 543 US at 245 S. CT. Courts then exercise their discretion to select a sentence, either inside or outside of the advisory guideline range, that is sufficient, but not greater than necessary to fulfill certain sentencing objectives. 18 USC 3553(a)

Petitioner contends that the district court, in reliance upon the career offender guideline residual clause in its discretionary determination during sentencing, could not have properly considered the, subsequent, 798, amendment to the Guidelines for the

*1
purpose of tailoring an appropriate sentence for the defendant under 18 USC 3553(A).
Thus, if the district court does not have the opportunity to consider the subsequent,
798, amendment in its sentencing determination the district court's sentence would
conflict with Frates, 522 F.3d 133 (1st Cir 2018) and, more importantly, and would not
comport with the sentencing regime post United States v Booker, 543 U.S. at 245
S.Ct., making the sentence Mr Riley has substantively unreasonable. *2

The Appellate Court in United States v Frates, 522 F.3d 133 (1st Cir 2018), recognized
the same quick at issue in United States v Riley, 856 F.3d A 328 (4th Cir 2017). The First
Circuit followed a narrow doctrine that gives the appellate court discretion to remand
a defendant when (i) the Sentencing Commission adopts a substantive, non-retroactive
amendment to the United States Sentencing Guidelines; (ii) the amendment is adopted
before the defendant's sentence becomes final on appeal; and (iii) the amendment
would have lowered the defendant's guideline range if it had been in effect at the initial
sentencing. However, the appellate court will ordinarily not exercise its discretion
under the narrow doctrine used, when the district court was aware of the
amendment during the initial sentencing.

Also if the appellate court does remand a case pursuant to the narrow doctrine
used in Frates, the court is prohibited from re-calculating the defendant's guideline
range in light of the intervening amendment, lest it circumvent the Sentencing Commission's
non-retroactive determination. It may, however, consider the Commission's revised policy
position in exercising its discretion to select an appropriate sentence for the def-
endant pursuant to USC 18. 3553(A), see also United States v Booker, 543 U.S. at 245 S.Ct.

The decision in U.S. v Frates, 522 F.3d at 133 derived from two principle factors.
The first involved the posture of the case and the manner in which the Sentencing
Commission chose to amend the guideline. In Godin II, the court explained that "the

posture of this case is peculiar; the amendment is not applicable retroactively, but neither has the pending appeal yet resulted in a final disposition". 522 F.3d at 135. The non-finality of Godin's sentence interacted with 709 ~~would~~ to produce 'a procedural inequity'. Amendment 709 would not alter Godin's guideline range because the amendment substantively changed the guideline and applied only prospectively. However, if the Sentencing Commission had issued a clarifying amendment -- one that is "purely expository". United States v. Cabrera-Polo, 376 F.3d 29, 32 (1st Cir. 2004) -- we could have chosen to alter our own prior reading of [the] newly clarified guideline" on appeal, and given Godin the benefit of the lower guideline range. Godin II, 522 F.3d at 135.

FOOTNOTE *

^{1*} SEE United States v. Marious Deland Taylor, 640 F.3d 417 (6th Cir. 2011) (we make explicit and join a number of our sister circuits in holding that the district court can consider subsequent amendments to the guidelines for purposes of fashioning an appropriate sentence under the 3553(A) factors; United States v. Rodriguez, 630 F.3d 39, 42 (1st Cir. 2010) ("exercising their Booker discretion, mulling over the multiple criteria in 3553(A) can turn to post offense Guidelines revisions to help select a reasonable sentence"); United States v. Gilmore, 599 F.3d 160, 166 (2nd Cir. 2010) (approving of district courts consideration of Guidelines amendments at re-sentencing for the purpose of assessing the seriousness of the offense and reasonableness of the sentence); United States v. Angle, 598 F.3d 352, 360 (7th Cir. 2010) (even though 3742(g) precluded the district court from applying the 2006 guidelines, the statute did not bar the court from consulting the Sentencing Commission's current views as a guide to its exercise of Booker's discretion."); United States v. Godin, 522 F.3d 133, 136 (1st Cir. 2008) ("The relevant amendment does not alter the guideline range applicable in this case, but in dealing with a sentence that has not become final, it might alter the district court's ultimate choice of a discretionary sentence in the post-Booker era.")

Thus without remand to allow the district court to consider the commissions revised policy, Godin would have been "irremediably" worse off because the Commission went further in her discretion by substantively revising the offending provision of the Guidelines instead of issuing a "mere clarification" Id at 136.

The second factor that led the Court in its final disposition, in FRATES, was the discretionary nature of the federal sentencing regime after United States v. Booker 543, U.S. 220, 125 S. Ct 738, 160 L. Ed 2d 621 (2005). Under federal sentencing procedures post-Booker, district courts begin by calculating a defendant's guideline range. See e.g. Molina-Martinez v. United States 136, S. Ct 1338, 1345, 194 L. Ed 2d 444 (2016). This is merely advisory. See Booker, 543 U.S. at 245. Courts then exercise their discretion to select a sentence -- either inside or outside of the advisory guideline range -- that is sufficient, but not greater than necessary to fulfill certain sentencing objectives. 18 U.S.C. 3553 (A). The Court recognized that the commissions current policy position is relevant at this second, discretionary, step of a district court's sentencing procedures, even when a non-retroactive amendment prevents the district court from altering the advisory guideline range calculated at the first step.^{*3} See Godin II, 522 F.3d at 136; Ahrendt, 560 F.3d at 79.

FOOTNOTE *

^{*2} In reviewing a sentence for substantive reasonableness, the Court examines the totality of the circumstances, and, if the sentence is within the properly calculated guideline range, apply a presumption on appeal that the sentence is substantively reasonable. United States v. Mendoza-Mendoza, 597 F.3d 212, 216-17 (4th Cir 2010). Such a presumption is rebutted only if the defendant shows "that the sentence is unreasonable when measured against the 3553 A factors" United States v. Montes-Pineda 445 F.3d 375, 379 (4th Cir 2006).

X The Fourth Circuit issued a 'Stay of MANDATE' in this case pursuant to FED. R. App. P 41(D)(1), but ultimately DENIED the Petition for Re-Hearing, Thus, Affirming the District Court SENTENCE in reliance on the CAREER OFFENDER guidelines residual clause, which was subsequently AMENDED. SEE Amendment 798. However, Petitioner contends that the Fourth Circuits decision conflicts with the NARROW DOCTRINE EXERCISED in FRATES, 522 F3d 133 (1st cir 2018). But more importantly the Fourth Circuit decision does NOT comport with the existing, discretionary, sentencing regime of this Courts decision in United States v Booker, 543 U.S 220, 125 S.CT 160 L.ED 2d 621 (2005), and respectfully assert that action by this Court is NECESSARY AND in the publics interest in order to correct error that has already occurred in this case AND to provide guidance to the lower courts that must contend with this issue NOW AND in the future.

Conclusion

For the foregoing reason, Mr Riley respectfully requests that this Honorable Court grant his petition for Writ of Certiorari.

FOOTNOTE #3

*3 The following circuits reject this view. SEE United States v. Alexander, 553 F.3d 591, 593 (7th cir. 2009) (Noting the 5th, 7th, 9th, 11th circuits do not permit a sentence to be re-opened after a non-retroactive amendment to the Guidelines