NO. _____

In The Supreme Court of the United States

THOMAS EDWARD WRIGHT,

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

E. Ryan Kennedy
Counsel of Record
ROBINSON & MCELWEE PLLC
140 West Main Street, Suite 300
Clarksburg, West Virginia 26301
(304) 622-5022
erk@ramlaw.com

Counsel for Petitioner

Dated: August 8, 2019

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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 district court erred in sentencing Petitioner by improperly utilizing the commentary to United States Sentencing Guideline §2K2.1 to enhance the base offense level of Petitioner's offense.

Whether the law should be extended and/or modified to hold that the district court abused its discretion in finding that a sentence of one hundred three (103) months was reasonable under the circumstances pursuant to 18 U.S.C. § 3553(a).

Whether 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.

PARTIES TO THE PROCEEDING

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

STATEMENT OF RELATED CASES

None.

TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

GUIDELINES

OPINION BELOW

The Order and Judgment of the Fourth Circuit Court of Appeals, dated May 23, 2019, granting the government's Motion to Dismiss are reprinted on pages 1a through 3a of the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 16, 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. W.Va. Code 60A-4-401(a)

Except as authorized by this act, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. any person who violates this subsection with respect to:

(i) A controlled substance classified in Schedule I or II, which is a narcotic drug, is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than fifteen years, or fined not more than twenty-five thousand dollars, or both;

(ii) Any other controlled substance classified in Schedule I, II or III is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than five years, or fined not more than fifteen thousand dollars, or both;

(iii) A substance classified in Schedule IV is guilty of a felony and, upon conviction, may be imprisoned in the state correctional facility for not less than one year nor more than three years, or fined not more than ten thousand dollars, or both;

(iv) A substance classified in Schedule V is guilty of a misdemeanor and, upon conviction, may be confined in jail for not less than six months nor more than one year, or fined not more than five thousand dollars, or both: Provided, That for offenses relating to any substance classified as Schedule V in article ten of this chapter, the penalties established in said article

5. 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

6. U.S.S.G. § 4B1.2(b) provides as follows:

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense

7. U.S.S.G. § 2K2.1(a)(4)(A), (b)(4)(A), (b)(6)(B) provides as follows:

...

(a) Base Offense Level (Apply the Greatest):

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense ...

...

(b) Specific Offense Characteristics...

...

(4) If any firearm (A) was stolen, increase by 2 levels...

...

(6) If the defendant—

...

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to

> believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18

8. U.S.S.G. § 3E1.1 provides as follows:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF THE CASE

On or about October 9, 2018, Petitioner made his initial appearance and plead guilty to a one-count information before the Honorable Robert W. Trumble, United States Magistrate Judge for the Northern District of West Virginia for allegedly possessing stolen firearms in violation of 18 U.S.C. § 922(j) and U.S.C. § 924(a)(2). (JA 52). Petitioner has been incarcerated since that date. (JA 60-62).

After the Change of Plea hearing, a Presentence Investigation Report ("PSR") was prepared which recommended, among other things, that Petitioner's base offense level be 20, due to him allegedly having been convicted of a felony controlled substance offense, pursuant to United States Sentencing Guideline § 2K2.1. (JA 97-100, 254, 297). Petitioner objected to this guideline calculation based upon his previous conviction not meeting the definition of a "controlled substance offense."

When the Petitioner was sentenced by the district court, however, on or about January 22, 2019, the district court found that Petitioner had committed a previous controlled substance offense pursuant to U.S.S.G. § 2K2.1 and, as such, sentenced him to one hundred three (103) months of incarceration, which was the middle of the guideline range based on a base offense level of 20 (JA 103, 297). At that aforesaid January 22, 2019 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 107-08). 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 February 1, 2019 and, pursuant to the Petitioner's request, the undersigned was appointed as new counsel on February 6, 2019. (JA 111-12).

On April 15, 2019, the Petitioner filed his brief. On April 16, 2019, the government, in lieu of filing a responsive brief, filed a motion to dismiss. The Petitioner filed a response to the motion on April 26, 2019. On May 23, 2019, 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 June 6, 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 July 16, 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's boilerplate assertion in its motion that it received "[a] benefit that it has bargained for and obtained in the plea agreement containing the sentencing waiver" rings hollow in this case. (Motion to Dismiss Appeal at 7). The government had notice of this issue at the sentencing hearing and could have prevented this appeal by simply agreeing that Petitioner, who voluntarily pled to an information and was an extremely cooperative defendant, should be given the benefit of what is, at the very least, an ambiguity in the applicable guideline. The fact that at least two Courts of Appeals have recently recognized the correctness of Petitioner's position and other Courts of Appeals are currently considering the same issue further bolsters the unreasonableness of the government's position. 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 great importance in this motion. Specifically, whether the commentary to the United States Sentencing Guideline, which was never reviewed by Congress, can expand the scope of the corresponding Guidelines, which were reviewed by Congress, to the detriment of a criminal defendant. As Petitioner has argued in more detail in his brief, which he incorporates by reference as if fully set forth herein, Petitioner urges this Court to answer that question in the negative and to extend and/or modify existing law to hold that, as a matter of law, the commentary to a United States Sentencing Guideline cannot expand the scope of the corresponding Guideline to the detriment of a criminal defendant and that this principle is so fundamental that Petitioner may appeal this error despite the existence of an appellate waiver. Such a rule would be consistent with the interest of justice and equitable considerations.

It is a fundamental principle of our criminal justice system that an ambiguity in a criminal statute or sentencing guideline shall be construed in favor of the defendant and against the government. *See, e.g., United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994). Therefore, to the extent that the commentary to a guideline purports to expand the scope of that guideline beyond the plain language of the guideline itself, and that expansion would be contrary to the interest of a criminal defendant, the guideline should be read in the way which would be most favorable to

the defendant. For Petitioner, this would mean reducing his guidelines range by approximately fifty (50) months.

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 using the commentary to the United States Sentencing Guidelines to expand the scope of the corresponding Guidelines to the detriment of a criminal defendant. 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 expansion of the sentencing guidelines by commentary, 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 § 2K2.1 WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE DUE TO IT BEING IMPROPERLY EXPANDED USING COMMENTARY TO ENHANCE THE BASE OFFENSE IN PETITIONER'S CASE.

The district court erred, as a matter of law, when it found that Petitioner met the criteria required under U.S.S.G. § 2K2.1(a)(4)(A) to qualify for a base offense level of 20. Section 2K2.1(a)(4)(A) of the Guidelines provides, in relevant part, that a defendant's base offense level shall be 20 "if the defendant committed any part of the instance offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense."[1] To calculate Petitioner's base offense level at 20, the district court relied on the conclusion that his prior July 23, 2009 conviction for delivery of a controlled substance, in violation of W.Va. Code § 60A-4-401(a), qualifies as a "controlled substance offense" within the permissible meaning of U.S.S.G. § 4B1.2(b)'s text. (JA 80). In doing so, the district court expressly relied on Application Note 1 to Section 2K2.1, which purports to expand the Guidelines to include attempt, despite attempt not being listed in the Guideline itself. (JA 81-82). Petitioner's 2009 conviction for delivery of a controlled substance, however, does not categorically qualify as a "controlled substance offense" within the permissible meaning of U.S.S.G. § 4B1.2(b)'s text and the district court erred when it utilized Application Note 1 to expand the Guideline's scope. Accordingly, Petitioner's prior West Virginia delivery conviction cannot support a base offense level of 20 under

[1] It is undisputed that Petitioner does not have a prior felony conviction for a crime of violence. Therefore, Petitioner will only address the controlled substance offense issue.

U.S.S.G. § 2K2.1(a)(4)(A). A corrected base offense level in this case should equal 14. *See* U.S.S.G. § 2K2.1(a)(6)(A).

The facts behind Petitioner's 2009 offense involve a single delivery of 6.6 grams of marijuana to a Confidential Informant in exchange for Eighty Dollars ($80.00) (JA 259). That said, in determining whether this prior crime categorically qualifies as a "controlled substance offense," the sentencing court must "look only to the statutory definitions' *i.e.,* the elements of a defendant's prior offenses, and not 'to the particular facts underlying those convictions" to determine whether the offense qualifies as a predicate offense. *Descamps v. United States,* 133 S. Ct. 2276, 2283 (2013) (citing *Taylor*, 110 S. Ct. at 2143). The sentencing court must "ask whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime." *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016) (citing *Taylor v. United States,* 110 S. Ct. 2143 (1990)). "The prior conviction qualified as [a] ... predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* at 2281.

On the other hand, if the elements "cover a greater swath of conduct than the elements of the relevant [Guidelines] offense," that "state crime cannot qualify" as a predicate offense. *Mathis*, 136 S. Ct. at 2251. "In addition, if the statute of prior conviction provides various 'means' of satisfying an element, some of which would fall within the guidelines definition, and at least one other that would not, it is broader than the guidelines definition and is not categorically a predicate offense." *Mathis*, 136 S. Ct. at 2253-54.

a. Delivery Of A Controlled Substance Under W. Va. Code § 60A-4-401(a) Goes Beyond The Permissible Meaning Of A "Controlled Substance Offense" As Textually Defined In U.S.S.G. § 4B1.2(b).

For the purpose of applying a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A), Petitioner's prior conviction under W.Va. Code § 60A-4-401(a) must categorically match to a "controlled substance offense," which the U.S.S.G. defines as:

> An offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). The clear textual definition of a controlled substance offense in U.S.S.G. § 4B1.2(b) presents a very detailed definition that does not include the crime of attempted delivery. In contrast, attempt is a means by which one can commit the element of delivery under West Virginia's statute. Consequently, Petitioner's conviction for delivery of controlled substance cannot serve as a predicate controlled substance offense under U.S.S.G. § 2K2.1(a)(4)(A) because: (1) the means by which a person can violate W. Va. Code § 60A-4-401(a) includes attempt, which sweeps more broadly than U.S.S.G. § 4B1.2(b)'s textual definition of a controlled substance offense; and (2) the clear textual definition of U.S.S.G. § 4B1.2(b) should not be impermissibly expanded to include attempt offenses by virtue of the commentary in Application Note 1 of U.S.S.G. § 4B1.2.

1. The Element Of Delivery Under W.Va. Code § 60A-4-401(a) Can Be Satisfied By Various Means, Including Attempt, Which Falls Outside U.S.S.G. § 4B1.2(b)'s Textual Definition Of A Controlled Substance Offense.

The West Virginia Uniform Controlled Substance Act under which Petitioner was convicted for delivery of a controlled substance makes it "unlawful for any person to manufacture, *deliver*, or possess with intent to manufacture or deliver, a controlled substance." W. Va. Code § 60A-4-401(a). (emphasis added). As used in this act, "[d]eliver" or "delivery" means "the actual, constructive or *attempted* transfer from one person to another of: (1) [a] controlled substance, whether or not there is an agency relationship; (2) a counterfeit substance; or (3) an imitation controlled substance." W. Va. Code § 60A-1-101(g). (emphasis added).

In West Virginia, the element of delivery is accomplished, in relevant part, by one of three means: by "actual, constructive, or attempted transfer from one person to another of a controlled substance." *Id.* Thus, under the West Virginia statute, defendants who actually or constructively deliver a controlled substance – along with those who merely attempt to deliver – are all guilty of "delivery" under W.Va. Code § 60A-4-401(a). To this end, the West Virginia statute contains "various 'means' of satisfying an element, some of which would fall within the guideline definition, and at least one other that would not. "*Mathis*, 136 S. Ct. at 2253-54. Indeed, the detailed textual definition of a controlled substance offense in U.S.S.G. § 4B1.2(b) clearly excludes attempt. Accordingly, delivery of a controlled substance in West Virginia "covers a greater swath of conduct than the generic guideline offense," *Mathis*, 136 S. Ct. at 2251, and cannot qualify as a predicate offense for enhancement purposes

under U.S.S.G. § 2K2.1(a)(4)(A). The district court implicitly acknowledged this through its focus on Application Note 1. (JA 81-82).

2. The Textual Definition Of Controlled Substance Offense In U.S.S.G. § 4B1.2(b) Should Not Be Expanded By U.S.S.G. Commentary To Include Attempt Offenses.

Attempts are wholly absent from the textual definition of what constitutes a controlled substance offense under U.S.S.G. § 4B1.2(b). Although the definition in U.S.S.G. § 4B1.2(b) does not include attempt, the commentary contained in U.S.S.G. § 4B1.2 adds attempt and other inchoate offenses to the crime. The commentary states that "for purposes of this guideline – "controlled substance offense" include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. U.S.S.G. § 4B1.2, comment. (n.1). Commentary, however, has a limited authority and should only "be treated as an agency's interpretation of its own legislative rule." *Stinson v. United States*, 113 S. Ct. 1913 (1993) (citing *Bowles v. Seminole Rock & Sand Co.*, 65 S. Ct. 1215 (1945)). For example, commentary that interprets or explains a guideline is not authoritative if it "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.*

Based on the commentary contained in Application Note 1 of U.S.S.G. § 4B1.2, historic challenges to U.S.S.G. § 4B1.2(b) enhancements involving prior convictions for attempts have been disposed of. *See, e.g., United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017); *Warner v. United States*, Criminal Action No. 1:14CR81, 2017 WL 2377707 (N.D.W. Va. June 1, 2017), *appeal dismissed*, 701F. App'x 288 (4th Cir.

2017). In both cases, a sentencing enhancement was upheld, in relevant part, based on attempts being listed in the commentary to U.S.S.G. § 4B1.2. However, neither decision examined whether it was appropriate to defer to an expanded definition in the commentary of the U.S.S.G., in light of statutory interpretation and due process concerns recently raised in *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) and *United States v. Havis*, 907 F.3d 439 (6th Cir. 2018), overruled on rehearing *en banc* 927 F.3d 385 (6th Cir. 299). These more recent cases call into question whether the commentary of U.S.S.G. § 4B1.2 exceeds the Commission's authority by purporting to add attempted offenses to the clear textual definition of controlled substance offense, as contained in U.S.S.G. § 4B1.2(b). This case provides the opportunity for this Court to directly address the important issue of whether or not commentary, which was never reviewed nor approved by Congress, can alter the text of a Guideline which was reviewed and approved by Congress.

In *Winstead*, the United States Court of Appeals for the District of Columbia cited the Supreme Court's decision in *Stinson* to reject the basic foundational premise that U.S.S.G. § 4B1.2's commentary adds the crime, "attempted distribution," to the textual definition of controlled substance offense. *See* 890 F.3d at 1082. In breaking with the foundational premise of prior holdings, the court in *Winstead* ruled, "[c]ommentary to career offender Sentencing Guideline impermissibly expanded the definition of 'controlled substance offense' to include attempts to commit such offenses." *Id.* As a result, the *Winstead* court held that a "defendant's prior convictions for attempted possession with intent to distribute cocaine and attempted

distribution of marijuana did not qualify as predicate controlled substances offenses." *Id.*

The *Winstead* court considered whether it was appropriate to give deference to the commentary in U.S.S.G. § 4B1.2's Application Note 1 when determining whether a predicate attempt offense qualified as a controlled substance offense under the text of U.S.S.G. § 4B1.2(b). At sentencing *Winstead* had received a career offender enhancement for prior convictions including "attempted distribution" and "attempted possession with intent to distribute" drugs. *Id.* The *Winstead* court found "there [wa]s no question that [..] the commentary adds a crime, "attempted distribution," that is not included in the guideline" *Id.* at 1090. Continuing, the *Winstead* court found that while the commentary should "be treated as an agency's interpretation of its own legislative rule," *Id.* (quoting *Stinson*, 113 S. Ct. at 1913), and when there are inconsistencies between a guideline and its commentary, "the Sentencing Reform Act itself command compliance with the guidelines." *Id.* The *Winstead* court found the commentary inconsistent with the guideline's textual definition of controlled substance offense because the definition declared what the term meant, thereby excluding any meaning that was not stated. *See Id.* at 1091 (quoting *Burgess v. United States,* 128 S. Ct. 1572 (2008) ("[a]s a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated").

In addressing the "decisions of [five other] circuits, each of which defer to Application Notes 1 when applying § 4B1.2," the *Winstead* court concluded:

> Section 4B1.2(b) presents a very detailed "definition" of controlled substance offense that clearly excludes inchoate offenses. *Expressio*

> *unius est exclusion alterius*. Indeed, that venerable canon applies doubly here: the Commission when it intends to do so. *See* USSG § 4B1.2(a)(1) (defining a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force....")

Id. at 1091. The *Winstead* court further elaborated that, under *Stinson* and *Seminole Rock*, deference was not appropriate:

> If the Commission wishes to expand the definition of "controlled substance offenses" to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review. *See Stinson*, 508 U.S. at 44, 113 S. Ct. 1913. But surely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive via commentary – as it did following our decision in *Price* – to impose such a massive impact on a defendant with no grounding in the guidelines themselves.

Id. at 1092. Significantly, the *Winstead* ruling breaks from the preeminent Fourth Circuit case on this issue, *Dozier,* which cited to *Stinson* but gave deference to the commentary. *See* 848 F. 3d at 183, fn. 2. That said, the defendant in *Dozier* failed to raise the issue of whether the "commentary to § 4B1.2 violates the Constitution or federal law," nor did he "assert the commentary is inconsistent with § 4B1.2." *Id.* In consequence, the Fourth Circuit did not directly confront the issue as the Court of Appeals for the District of Columbia did in *Winstead* when it found that *Stinson* counseled against deference to the commentary because the commentary was in fact inconsistent with the text of the guideline. *See* 890 F.3d at 1082.

The analysis employed by the United States Court of Appeals for the District of Columbia in *Winstead* has gained traction. The United States Court of Appeals for the Sixth Circuit, which historically deferred to U.S.S.G. § 4B1.2's commentary in Application Note 1, initially favorably considered the *Winstead* decision in *United*

States v. Havis. *See* 907 F.3d 439 (6th Cir. 2018) before overruling that opinion *en banc* in *United States v. Havis* 927 F.3d 382 (6th Cir. 2019) (*en banc*). At issue in *Havis* was a predicate offense under a Tennessee drug statute that included "attempting to transfer drugs." *Id.* In initially siding with *Winstead*, the Sixth Circuit in *Havis* agreed that the Sentencing Commission "may only use commentary to Sentencing Guidelines to interpret text that is already there, and comment that increases range of conduct that Guidelines covers has clearly taken things a step beyond interpretation." *Id.* To be sure, deference to U.S.S.G. § 4B1.2's commentary is problematic because it adds offenses through commentary, "rather than through an amendment" and "[u]nlike the *text* of the Guidelines, the Commission does not have to give Congress a chance to review commentary it publishes along with the Guideline's text, nor must the Commission float commentary through notice and comment." *Id.* 443 (emphasis in original).

Although the *Havis* court agreed with *Winstead* in theory, it explained that its hands were tied in practice, since, "save an *en banc* decision of the Court of Appeals or an intervening Supreme Court decision," it was bound to follow a prior panel's decision to the contrary in *United States v. Evans*, 699 F.3d 858, 862 (6th Cir. 2012). *Id.* at 442. The fact that the court in *Havis* was foreclosed from reversing a prior panel, however, did not prevent it from acknowledging that such a challenge to the commentary had "legs." *Id.* Indeed, the court noted that "Havis' argument may ....warrant revisiting *Evans*." *Id.* at 444 (citing *Winstead*, 890 F.3d at 1090-92)

(holding that the Commission was without power to add attempts to controlled substance offenses to § 4B1.2(b) by way of commentary).

Following the original decision in *Havis* issued October 22, 2018, 907 F.3d 439 (6th Cir. 2018), Jeffery Havis took the *Havis* court's advice and petitioned the Sixth Circuit for rehearing *en banc*.[2] (JA 138-67) The Sixth Circuit concluded *en banc* that such an offense cannot constitute a controlled substance offense because the plain language of § 4B1.2(b) does not include attempt within the definition of "controlled substance offense" and the Sentencing Commission lacks the authority, through its commentary, to add attempt crimes to that definition. *See Havis*, 927 F3d at 386-87. In doing so, the Sixth Circuit concluded that "no term in § 4B1.2(b) would bear that construction" of including attempt and that allowing the Sentencing Commission to add attempt to the definition through its commentary would cause "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." (*Id.*)

In addition, while the *Havis en banc* petition was pending, the Sixth Circuit granted a stay in *United States v. Brown*, Case No. 18-5433, pending their decision in *Havis*. (JA 187-89). *Brown* – like *Havis*, and at issue for Mr. Wright here – concerns whether a prior *attempt* conviction is a controlled substance offense under the Guidelines. (*Id.)* In fact, in *Havis,* Judges Thapar, Stranch, and Daughtrey all agreed *Havis* reached the wrong conclusion, but Judges Thapar and Stranch also felt bound

[2] Records regarding the *Havis, Brown, Crum* and *Parker* cases cited herein are available on PACER and are also attached as exhibits to Defendant's Motion for Reconsideration which was filed with the district court and is found at pages 119 through 230 in the joint appendix filed with the Fourth Circuit.

by Circuit precedent. *Havis*, 907 F.3d at 447, 449. Judge Stranch went so far as to say Mr. Havis' argument "warrants revisiting *en banc* our published precedent." *Id.* at 448.

Presumably, the Sixth Circuit will now decide *Brown* in accordance with the *Havis en banc* decision. The Ninth Circuit recently held at least one oral argument on this issue, including *United States v. Crum*, 17-30261 (9th Cir. 2017), and has other oral arguments scheduled in the near future. (JA 191). Additionally, the Ninth Circuit has stayed other cases pending the outcome on *Crum*. Moreover, within the Fourth Circuit, and separate and apart from *Winstead*, the District of Maryland recently found that before it could even reach the question of whether the commentary text impermissibly expanded the Guidelines' text, the Rule of Lenity required it to resolve the ambiguity in defendants' favor. *United States v. Lisbon*, 276 F. Supp. 3d 456, 461(D. Md. 2017).

These recent developments in numerous courts make it clear that this argument is not isolated to one or two cases, but is rather in the process of being given significant consideration by courts across the country. A ruling in Petitioner's favor on this issue would be consistent with the D.C. Court of Appeal's opinion in *Winstead*, the Sixth Circuit's *en banc* opinion in *Havis*, and the District of Maryland's opinion in *Lisbon*.

3. Based On The Rationale In *Winstead* And Echoed In *Havis*, the district court Should have Declined To Enhance Petitioner's Base Offense Level Under U.S.S.G. § 2K2.1(a)(4)(A) Because His Prior Conviction Under W. Va. Code § 60A-4-401(a) Does Not Categorically Match U.S.S.G. § 4B1.2(b)'s Textual Definition Of A Controlled Substance Offense.

Post-*Winstead* and *Havis*, it is clear that a re-examination of premises upon which previous decisions throughout various circuits have relied is both necessary and warranted, both when it comes to both West Virginia delivery of a controlled substance (which includes the means of attempt), and attempts generally. Moreover, both the *Winstead* and *Havis* decisions counsel against sentencing enhancements based on the "attempt" language in Application Note 1 of the Commentary of U.S.S.G. § 4B1.2(b), if and until the Sentencing Commission acts to properly include attempts crimes within the U.S.S.G. itself. For all the forgoing reasons, Petitioner's prior conviction under W. Va. Code § 60A-4-401(a) should not count as a predicate controlled substance offense under U.S.S.G. § 4B1.2(b) for purposes of an enhanced base offense level under U.S.S.G. § 2K2.1(a)(4)(A).

Instead, Petitioner's base offense level should equal 14 under U.S.S.G. § 2K2.1(a)(6)(A) because he was a prohibited person at the time of the instant offense. Under U.S.S.G. § 2K2.1(b)(4)(A), 2 levels should be added to his offense level. Under U.S.S.G. § 2K2.1(b)(6)(B), an additional 4 levels should be added to his offense level. Mr. Wright's offense level should, then, be reduced by 3 levels under U.S.S.G. § 3E1.1(a)-(b). Taken together, Mr. Wright's total adjusted offense level should equal 17. A total adjusted offense level of 17 and a criminal history category of VI equals a Guidelines range of 51 to 63 months of incarceration.

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 ONE HUNDRED THREE (103) MONTHS WAS UNREASONABLE UNDER THE CIRCUMSTANCES PURSUANT TO 18 U.S.C. § 3553(A) DUE TO, AMONG VARIOUS REASONS, THE AGE OF THE FIREARM AT ISSUE.

The sentencing considerations set forth in 18 U.S.C. § 3553(a) support a sentence that is not greater than 51 to 63 months imprisonment. The atypical nature of the firearms involved in the offense and the narrow circumstances behind Petitioner's possession of those firearms greatly mitigate the seriousness of his misconduct. Examination into his history and characteristics indicate a reduced need for lengthy incarceration. Departures or variances, below the advisory Guidelines range, were warranted here and the district court erred in not doing so.

This case stems from a string of breaking and entering offenses committed by Petitioner on or around February 9, 2016. (JA 9). Among the items stolen during that spree were two old rifles. *Id.* The PSR identifies the stolen rifles at a Winchester, 22-caliber long rifle and a British Long Rifle. (JA 252). The very nature of these rifles mitigate the seriousness of Mr. Wrights' offense. First, rifles are not the typical firearms targeted for use during crimes. (JA 88). Second, these particular rifles do not pose the typical level of danger associated with firearms commonly involved in

crimes. (*Id.*) In fact, these rifles barely meet the federal definition of a "firearm," by virtue of their age. (JA 87). The term "firearm" means:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. *Such terms does not include an antique firearm.*

18 U.S.C. § 921(a)(3) (emphasis added).

The federal definition of "firearm" explicitly excludes antiques. In pertinent part, "antique firearm" means, "any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898." 18 U.S.C. § 921(a)(16)(A). The government's technical examination of the Winchester .22-caliber long rifle involved in this case indicates that firearm was manufactured in Winchester, Connecticut, between 1899 and 1902. (JA 245). The government's technical examination of the British Long Rifle is even less revealing. According to the technical examination report, the second rifle involved in Mr. Wright's offense "is a crudely manufactured Pakistani copy of a British Magazine Lee-Metford/Lee-Enfield type .303 caliber rifle." (JA 246). According to the report, which examines the unique features of this counterfeit rifle, it "would have been produced after 1898." *Id.* However, because the rifle is a counterfeit, the year of production remains unknown.

Based on the government's technical examination report, the date of manufacture for both rifles could have been as early as 1899. Quite literally, if these rifles were any older they would meet the criteria of antiques and fall out the federal

definition of a firearm. Although they may meet the legal definition of firearms, the district court should still have considered their age and diminished functionality when imposing Petitioner's sentence. Both of these factors mitigate the seriousness of the offense. To be sure, the stolen rifles possessed by Mr. Wright are more artifact than weapon. Granted, all firearms are dangerous and that danger makes all firearms offenses serious in nature. However, rifles that are over 100 years old, including the stolen rifles possessed by Mr. Wright in this case, fall on the lower end of the spectrum. Based on the nature of the rifles involved here, the district should have treated Petitioner leniently at sentencing than someone who possess stolen firearms of a more dangerous nature and abused its discretion when it did not.

Petitioner should also have been treated more leniently at sentencing given the short period of time in which he possessed the stolen firearms. On information and belief, his possession was limited to handing the rifles to another person during what the government describes as "a string of breaking and enterings," in which Petitioner "[stole] items from various sheds in the Keyser, Mineral County, area." (JA 253). The State of West Virginia indicted him for this conduct in multiple related cases out of Mineral County. (JA 255). The Mineral County Circuit Court Case Numbers for these offenses include 16-F-56, 16-F57, 16-F58, 16-F59, and 16-F60. (JA 266). On March 2, 2017, Petitioner pleaded guilty to three counts of breaking and entering, in connection with Case Number 16-F56, 16-F-57, and 16-F-59. In exchange for Petitioner's guilty plea, Case Numbers 16-F-56, 16-F-57, and 16-F-59 were also dismissed. (JA 265-66). Petitioner received sentences of 1-10 years for each count of

conviction and those sentences were set to run concurrently. (JA 265). He also received credit for time served in state custody from the date of his initial arrest on February 12, 2016, through the date of his sentencing on March 2, 2017. (JA 265).

Notably, no other firearms were stolen during the string of breaking and entering offenses related to this case. No evidence indicates that Petitioner intentionally sought out firearms during the commission of his offense. Petitioner does not have a history of stealing or possessing stolen firearms. In fact, the circumstances behind his instant offense conduct, viewed alongside his criminal history suggest that Petitioner's primary motivation during the offense was to obtain tools and equipment. This conclusion finds further support in the fact that Petitioner's string of breaking and entering offenses targeted tool sheds. By design, tool sheds are less secure structures not commonly utilized to store firearms.

In this case, Petitioner accepted responsibility for his offense and cooperated with the government without requiring a federal indictment. (JA 9, 52). By cooperating with the government early on, he put himself at risk of a significant detriment. Namely, he provided inculpatory information to the government at a time when there was no plea agreement or any other promise of protection or benefit for his cooperation. This cooperation speaks to the strength of Petitioner's character and his sincere desire to accept responsibility in a timely manner. He also accepted responsibility for the portions of his offense conduct prosecuted at the state level. Petitioner's early and extensive cooperation with both the state and federal government about his string of breaking and entering offenses warranted a below

Guidelines sentence that provided some form of credit for his time served in state custody on related offenses. Given the lengthy state sentences already imposed on Petitioner for his breaking and entering offenses, a federal sentence that departed, varied and/or ran concurrent to his state term of incarceration would have achieved reasonable punishment for the instant offense. The district court abused its discretion and authority when it did not impose this kind of sentence in this kind of case. Here, the terms of the plea agreement even recommended it through the imposition of a concurrent 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 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", which the district court noted had already been paid. (JA 107-08). 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 Supreme Court of the United States, in *Timbs v. Indiana,* 2019 WL 691578 (U.S. February 20, 2019), reaffirmed the importance of the Excessive Fines Clause of the Eighth Amendment. "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.' *Id.* at *2. The Court further explained that

> The excessive Fines Clause traces its venerable linage back to at least 1215, when Magna Carta guaranteed that "[a} Free-man shall not

be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement..." 20, 0 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225). [2] As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong' and not "not be so large as to deprive [an offender] of his livelihood. *Browning-Ferris*, 492 U.S. at 271, 109 S. Ct. 2909. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear....'). But ef. *Bajakajian*, 524 U.S., at 340, n. 15, 118 S. Ct. 2028 (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine).

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. E.g., The Grand Remonstrance ¶¶ 17, 34 (1641), in The Constitutional Documents of the Puritan Revolution 1625-1660, pp. 210, 212 (S. Gardiner ed. 3d ed. rev. 1906); *Browning-Ferris*, 492 U.S., at 267, 109 S. Ct. 2909. When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta's guarantee by proving that "excessive Bial ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Adoption of the Excessive Fines Clause was in tune not only with English law, the Clause resonated as well with similar colonial-era provisions. *See, e.g.,* Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682). In 5 Federal and State Constitutions 3061 (F. Thorpe ed. 1909) ("[A]ll fines shall be moderate, and saving men's contenements, merchandize, or wainage."). In 1787, the constitutions of eight States – accounting for 70% of the U.S. population – forbade excessive fines. Calabresi Agudo, & Dore, State Bills of Rights in 1787 and 1791, 85 S. Cal. L. Rev. 1451, 1517 (2012).

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment Was Ratified in 1868, 87 Texas L. Rev. 7, 82 (2008).

Notwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil Was, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on "vagrancy" and other dubious offenses. See, e.g., Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming Documentary History of Reconstruction 283-285 (1950). When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. *E.g. id*. § 5; see Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev 671, 681-685 (2003) (describing Black Codes' use of fines and other methods to "replicate, as much as possible, a system of involuntary servitude."). Congressional debates over the Civil Rights Act of 1866, the joint resolution measures repeatedly mentioned the use of fines to coerce involuntary labor. *See e.g.* Cong. Globe, 39th Cong., 1st Sess, 443 (1866); *id.,* at 1123-1124.

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8-9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. *Id.*, at 9 (citing *Norris v. State*, 271 Ind. 568, 576, 394 No. E. 2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history; Exorbitant tools undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. *See Browning-Ferris*, 492 U.S., at 267, 109 S. Ct. 2909. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (opinion of Scalia, J.) ('it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. *See* Brief for American Civil Liberties Union et al. as *Amici Curiae 7* ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").

Importantly for the case at issue, the Supreme Court took a broad approach to the scope of the Excessive Fines Clause to find that it applies to any required payment which is "at least partially punitive." *Id.* at *5.

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. Further, as per the recent guidance from *Timbs,* this fine is subject to closer scrutiny because the government benefits from collecting these fines and it is at least partially punitive.

2019 WL 69, 578, *4. Clearly a uniform fine for every felony is out of accord with the penal goals of retribution and deterrence." *Id.*

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 are other strong public policies 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.

THOMAS EDWARD WRIGHT

By Counsel

_____/s/_____

E. Ryan Kennedy (W.Va. State Bar. #10154)
Counsel of Record
ROBINSON & McELWEE PLLC
P.O. Box 128
Clarksburg, West Virginia 26302
Phone: 304/622-5022
Counsel for Petitioner