

No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

CHAD PYLES

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

John A. Briley, Jr.
DC Bar No. 65763
6205 30th Street, NW
Washington, DC 20015
(202) 362-5749
Counsel for Petitioner

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	ii
OPINION BELOW.....	1
JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	4
I. THERE IS A WELL-DEVELOPED CIRCUIT SPLIT ON THE QUESTION WHETHER THE FAILURE OF DEFENSE COUNSEL AT THE CONCLUSION OF SENTENCING PROCEEDINGS TO NOTE AN OBJECTION THAT COUNSEL’S REPEATED ARGUMENTS HAD GONE UNHEEDED CONSTITUTES A FORFEITURE OF THE DEFENDANT’S RIGHT TO PRESENT HIS CLAIM THAT THE PROCEDURAL ERROR WAS AN ABUSE OF DISCRETION	4
II. PETITIONER ESTABLISHED THAT THE APPELLATE DECISION COURT OF APPEALS COMPLETELY IGNORED ITS CONSTITUTIONAL DUTY TO ASSESS THE REASONABLENESS <i>VEL</i> <i>NON</i> OF PETITIONER’S SENTENCES AND THE RECORD DEMONSTRATED THAT THE DISTRICT COURT COMMITTED PLAIN ERROR WHICH SIGNIFICANTLY AFFECTED PETITIONER’S SUBSTANTIAL RIGHTS.....	9
CONCLUSION	12

QUESTIONS PRESENTED

I. Whether, in reviewing a claim that the district judge failed to consider nonfrivolous arguments for leniency and imposed an unfair and harsh sentence, an appellate court must 1) apply abuse-of-discretion review where the comments by the federal sentencing judge did not indicate that he had considered either of two such arguments as reasons for an alternative sentence; and 2) review the terms of the sentence for reasonableness?

II. Whether appellant had established a claim of plain error based on the failure of the district judge to set forth specific reasons for the imposition of a near-top-of-the-guideline sentence of incarceration of 132 months when (a) the prosecutor had recommended a sentence of not more than 87 months; (b) defense counsel had presented several arguments for leniency; and (c) the district judge had not explicitly acknowledged his consideration of two such arguments?

TABLE OF AUTHORITIES

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	6, 10
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	5, 11
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	4
<i>United States v. Bartlett</i> , 567 F.3d 901 (7 th Cir. 2009).....	6
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	10
<i>United States v. Bonilla</i> , 463 F.3d 1176 (11 th Cir. 2006)	7
<i>United States v. Davila-Gonzales</i> , 595 F.3d 42 (1 st Cir. 2010).....	7
<i>United States v. Lynn</i> , 592 F.3d 572 (4 th Cir. 2010)	6
<i>United States v. Mondragon-Santiago</i> , 564 F.3d 357 (5 th Cir. 2009).....	7
<i>United States v. Rangel</i> , 697 F.3d 795 (9 th Cir. 2012)	7
<i>United States v. Rice</i> , 699 F.3d 1043 (8 th Cir. 2012).....	7
<i>United States v. Romero</i> , 491 F.3d 1173 (10 th Cir. 2007)	7
<i>United States v. Vonner</i> , 516 F.3d 382 (6 th Cir. 2008) (en banc).....	7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

CHAD PYLES

PETITIONER

v.

UNITED STATES OF AMERICA

RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

Chad Pyles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for The District of Columbia Circuit in this case.

OPINION BELOW

The decision of the D.C. Circuit, *United States v. Pyles*, 862 F.3d 82 (D.C. Cir. 2017), is reproduced in the appendix to this petition at Pet. App. 1-21. The Court's Judgment is at Pet. App. 22. The Court's orders denying panel rehearing and rehearing *en banc* are at Pet. App. 23-24.

JURISDICTION

The District of Columbia Circuit issued its opinion and judgment on July 17, 2017. Pet. App. 1-22. Panel rehearing and rehearing *en banc* were denied on October 6, 2017. Pet. App. 23-24. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Less than four months after his arrest, Petitioner accepted the Government's plea offer premised, *inter alia*, on a calculation that the appellant's sentence would be in the Sentencing Guideline Range of 78-97 months. Petitioner waived Indictment and pleaded guilty to a two-count information alleging (in Count One) that appellant had traveled with Intent to Engage in Illicit Sexual Conduct, in violation of 18 U.S.C. Sec. 2423(b); and, (in Count Two) that appellant had Possessed Child Pornography, in violation of 18 U.S.C. Sec. 2252A(a)(5)(B).

The parties had initially calculated a sentencing guideline range of 78-97 months based on a combined offense level of 28 and a criminal history category II. Subsequently, the PSR calculated the appropriate guideline range as 108 to 135 months, based on a combined total offense level of 30 and Petitioner's criminal history.

At sentencing, counsel for the Petitioner presented several arguments for a lenient sentence. Even the prosecutor advocated for the lower sentencing

range based, *inter alia* on the fact that appellant had agreed to an early, pre-indictment plea offer and the prosecutor's vast experience in similar cases.

Instead, the prison sentences the District Judge imposed were much higher: *viz.* concurrent sentences of **132** months' incarceration on each count. The district judge also imposed a period of supervised release of **twenty-five (25)** years.

Petitioner appealed and argued in the D.C. Circuit that the district judge had failed to comply with the procedural requirement under *Rita v. United States*, 551 U.S. 338, 356-57 (2007) that the District Court must provide a "reasoned basis" for its sentencing determination. The D.C. Circuit rejected this argument on appeal, with Judge Williams dissenting. The panel majority erroneously determined that appellant had forfeited his right to claim procedural error as an abuse of discretion and conducted its review under the "plain error" standard. In addition, the opinion did not address the substantive reasonableness of the sentences.

Petitioner filed a timely petition for panel rehearing and rehearing *en banc*; and, the D.C. Circuit ordered the government to file a response to the petition. Rehearing and rehearing *en banc* were denied on October 6, 2017. (Pet. App. 23-24).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL-DEVELOPED CIRCUIT SPLIT ON THE QUESTION WHETHER AT THE CONCLUSION OF SENTENCING PROCEEDINGS THE FAILURE OF DEFENSE COUNSEL TO NOTE AN OBJECTION THAT COUNSEL'S REPEATED ARGUMENTS HAD GONE UNHEEDED CONSTITUTES A FORFEITURE OF THE DEFENDANT'S RIGHT TO APPELLATE REVIEW OF HIS CLAIM THAT THE PROCEDURAL ERROR WAS AN ABUSE OF DISCRETION.

Prior to the sentencing proceedings counsel for Petitioner filed a lengthy Presentence Memorandum, setting forth several nonfrivolous arguments that would warrant leniency for his client. At the sentencing hearing, in a very lively exchange with the district judge which lasted an hour or more, counsel for Petitioner vigorously elaborated on all the arguments. However, the district judge did not make any reference to two of Petitioner's arguments either in his colloquy with counsel (defense and prosecutor) or in the pronouncement of sentence. Pet. App. 12. At the end of the proceedings, after the sentence was formally imposed, defense counsel did not voice any additional objection.

On appeal, Petitioner argued that the sentencing decisions were procedurally flawed because the district judge had not actually considered the two arguments as required by *Rita v. United States*, 551 U.S. 338, 356-57 (2007). More specifically, the Petitioner argued that the district judge had failed to comply with the procedural obligation to provide a "reasoned basis" for its sentencing determination as evidence that it has, in reality, "considered" all non-frivolous mitigation arguments. *Id.*, at 356.

The D.C. Circuit rejected this argument, with Judge Williams dissenting.

The D.C. Circuit panel majority acknowledged that the District Court had “not explicitly address(ed) each of [Petitioner’s] mitigation arguments.” Pet. App. 8. Nevertheless, citing *Puckett v. United States*, 556 U.S. 129 (2009), the panel majority ruled that Petitioner had not registered a timely objection to the sentences that had been imposed. Accordingly, the panel majority erroneously concluded that appellant had forfeited his right to claim procedural error as an abuse of discretion. (“Because the District Court gave the defendant ‘ample opportunity to object’ when it asked the parties if they ‘know of any reason *other than the reasons already stated and argued* why the sentence should not be imposed,’ and defense counsel simply replied ‘[n]othing else, [y]our Honor,’ plain error review was appropriate.) (Emphasis supplied.) Pet. App. 5

The appeal panel, both majority and dissent, analyzed the perceived inconsistencies among various intra-circuit precedents regarding the requirement that the defendant must register clear *post-decision* objections in order to preserve for appellate review a claim that the sentencing decision was improper. Pet. App. 5-7, 12. Relying on selected intra-circuit precedents, the majority arrived at the belief that Petitioner had forfeited his right to argue that the district judge had abused his discretion and, instead, rejected Petitioner’s claims under plain-error standard.

Rather, so long as the judge provides a reasoned basis for exercising his own legal decisionmaking authority, we generally presume that he adequately considered the arguments and will uphold the sentence if it is otherwise reasonable.

Pet. App. 6.

Judge Williams disagreed. (“The record . . . reflects no consideration of either of counsel’s nonfrivolous reasons for an alternative sentence – consideration required by our and the Supreme Court’s cases.”) Pet. App. 12. (Internal quotations omitted.)

The Court of Appeals decision conflicts with *Gall v. United States*, 552 U.S. 38, (2007), where this Court established the two-pronged fundamentals for appellate review of a sentence. First, “(r)egardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court *must* review the sentence under an abuse-of-discretion standard.” [Emphasis supplied.] Second, “[a]ssuming the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence under an abuse-of-discretion standard.” *Id.* at 51. Here, once the Court of Appeals had no success in its search for plain error in the procedures followed by the district court, there was no further analysis. The panel majority apparently presumed that the *within*-Guideline sentence was *per se* reasonable. Ignoring both of those prongs, the Court of Appeals plainly violated this Court’s mandates.

The Court of Appeals decision is also in conflict with decisions by two sister circuits. See *United States v. Lynn*, 592 F.3d 572, 578-79 (4th Cir. 2010); *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009). In fact, as noted in *Lynn*, the “formulaic” approach of the D.C. Circuit was presumably obviated by Fed. R.Crim. P. 51(b):

(T)he Rules expressly provide that “[a] party may preserve a claim of error by informing the court – when the court ruling or order is made or *sought* – of the action the party *wishes the court to take*, or the party’s objection to the court’s action and the grounds for that objection.” Fed.R.Crim.P. 51(b) (emphasis added). Thus, the Rules abandon the requirement of formulaic “exceptions” --

after the fact -- to court rulings. . . Rule 51 does “not require a litigant to complain about a judicial choice after it has been made.” (Quoting *Bartlett*.)

Accord: United States v. Bonilla, 463 F.3d 1176, 1181(11th Cir. 2006). (“The question of whether a district court complied with 18 U.S.C. Sec3553(c)(1) is reviewed *de novo*, even if the defendant did not object below.”)

Petitioner concedes that several other circuits require the defendant to object when sentence is pronounced in order to preserve the claim of procedural error. *See United States v. Davila-Gonzales*, 595 F.3d 42, 47 (1st Cir. 2010); *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009); *United States v. Vonner*, 516 F.3d 382, 385-86 (6th Cir. 2008) (en banc); *United States v. Rice*, 699 F.3d 1043, 1049 (8th Cir. 2012); *United States v. Rangel*, 697 F.3d 795, 805 (9th Cir. 2012); *United States v. Romero*, 491 F.3d 1173, 1177-78 (10th Cir. 2007).

The majority opinion determined that Petitioner’s claim failed, under the “plain error” standard of review, because 1] the district judge stated that he had “spent a considerable amount of time reviewing the materials in the case”; 2]“interacted frequently” with the parties; 3] “explicitly sought to hear the mitigation arguments” ; and, 4] “the context makes clear why the District Court rejected Pyles’ Sentencing Guidelines argument.” Pet. App. 9.

In short, the panel majority found the sentencing procedures to be sufficient because the district judge had adequately expounded on *some* of the Petitioner’s legal arguments. However, Petitioner was entitled to have the district judge fully consider *all* the reasons for mitigation which were presented by counsel on behalf of the Petitioner.

As the dissenting opinion unequivocally proclaims, the district court totally ignored other significant arguments that had been presented by Petitioner’s counsel.

The record, including the district court’s oblique and in part *mistaken* comments, reflects no consideration of either of [defense] counsel’s “non- frivolous reasons’ . . .for an alternative sentence” – consideration required by our and the Supreme court cases. (Citations omitted.)

Pet. App. 11 (emphasis supplied). And, Judge Williams subsequently observed:

If the district court’s reasoning seems incomplete, there is good reason for that: the court never responded to two arguments that intersected with most of the issues in this case. The court clearly erred by not addressing Pyles (sic) arguments and leaving us with the type of incomplete record that *Rita* and its sequels in our and other circuits sought to prevent.

Pet. App. 19.

This Court should confirm that “abuse of discretion” is the appropriate standard of review for a claim that the federal sentencing judge failed to explicitly address the defendant’s specific non-frivolous arguments for a lenient sentence, proffered by counsel in writing and in lengthy allocution, but defendant’s counsel did not further object after sentence was pronounced.

II. PETITIONER ESTABLISHED THAT THE APPELLATE DECISION COURT OF APPEALS COMPLETELY IGNORED ITS CONSTITUTIONAL DUTY TO ASSESS THE REASONABLENESS *VEL NON* OF PETITIONER'S SENTENCES AND THE RECORD DEMONSTRATED THAT THE DISTRICT COURT COMMITTED PLAIN ERROR WHICH SIGNIFICANTLY AFFECTED PETITIONER'S SUBSTANTIAL RIGHTS.

At the sentencing hearing, both counsel argued forcefully for a sentence at the low end of the guideline range, and Government counsel re-affirmed the recommendation of a sentence of imprisonment of 87 months. Instead, the sentences the District Judge imposed were much higher than the Government proposal: *viz.* concurrent sentences on each count: **132** months' incarceration (a 52% increase) to be followed by **twenty-five (25)** years of supervised release (a 150% increase).

Significantly, even the prosecutor had agreed that a below-Guideline sentence would be appropriate based on the Petitioner's early and ready acceptance of the pre-indictment plea offer and other personal characteristics. Pet. App. 4, 11. While the record (and the end result) of the sentencing hearing demonstrates that the district judge was not swayed in any way, the judge failed to articulate that he had a "reasoned basis" for the sentences that, in reality, were severe, especially since the sentences were considerably harsher than the US recommendation.

The D.C. Court of Appeals made no effort to validate the reasonableness of the sentences imposed on Petitioner. Indeed, the majority opinion made no comment on the significant disparity between the final sentences and Petitioner's post-plea expectations or his counsel's requests for leniency. Instead, the appellate tribunal was satisfied that "(t)he fact that we are reviewing a within-Guidelines sentence also impacts the analysis." Pet App 7.

The majority opinion concluded that appellate review was limited to a search of the record for blatantly “significant procedural error” [citing *Gall v. United States*, 552 U.S. 38, 51 (2007)]. “[O]ur precedent does not require the judge to *address expressly* each argument on the record . . . (nor) “fastidious compliance with protocol.” Pet. App. 10. (emphasis in original). Similarly, “several factors from the record and surrounding context. make it clear that the judge considered and *implicitly* rejected Pyle’s’ contentions.” Pet. App. 9 (Emphasis supplied). Noting there was enough evidence to be found in the record that the district judge considered *some* arguments, the majority in the record claimed

“it would be entirely unfair conclude that the District Court did not consider . . . (all) the various arguments in favor of mitigation.” [p. 17]

“there is no valid reason to presume that a judge who expresses a tentative view of the sentence refused to consider all arguments made thereafter.” [p 17] Pet. App. 9.

As a result, the panel concluded that “[r]equiring a contemporaneous objection to a failure of consideration is neither pointless nor formulaic.” (Internal quotations omitted) citing *Puckett v. United States*, 556 U.S. 129 (2009).

The reliance on *Puckett* however, is most misleading. It was undisputed that Puckett had presented a totally new theory of sentencing error (i.e., government breach of plea agreement) only at the appellate stage; and, had not even alluded to that particular issue at the time of sentencing. The opinion of this Court stressed that

Importantly, ***at no time*** during the exchange [with the sentencing judge] did Puckett’s counsel object that the Government was violating its obligations

under the plea agreement . . . He *never* cited the relevant provision of the plea agreement . . .

556 U.S. at p. 133) (Emphasis supplied.)

Moreover, in *Booker v. United States*, 543 U.S. 220 (2005) this Court invalidated an Act of Congress that required courts of appeal to accord “due deference” to within-Guideline sentences. The opinion instead recognized the capabilities of an appellate tribunal to evaluate sentencing decisions for “unreasonableness” under the long “familiar and practical” standard of review (i.e. abuse of discretion).

Thus, it was incumbent on the appeals court to thereby ensure that the sentence avoids the risk of “work(ing) to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” In this matter, the D.C. Court of Appeals avoided its responsibilities under *Gall*, *supra* which included an obligation to evaluate the final sentence to determine that it is (or isn’t) “reasonable.”

Here in contrast, Petitioner (as well as the prosecutor) had furnished the district court with specific nonfrivolous grounds for his consideration of their respective requests for mitigation and a lenient sentence. In particular, counsel for Petitioner had filed an extensive pre-sentence memorandum and, at the hearing, argued at length in his vain attempts to obtain a more reasonable sentence from the district judge.

Pursuant to *Booker, Rita and Gall*, the district court's sentence was not entitled to due deference nor any presumption of reasonableness. As Judge Williams concluded, even applying the more demanding plain-error standard, the sentence imposed by the district judge required a finding of procedural error.

In fact, Pyles' s two reasons for variance were more than compelling . . . appropriately rooted in the sentencing factors of 18 U.S.C. Sec.3553(a) (; each was relevant to Pyles' s circumstances, and neither was addressed by the district court.

Pet. App. 18.

Assuming *arguendo* the correctness of the finding of no procedural error, the court of appeals was still required to assess the reasonableness of the sentences. "Closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the guidelines range fails properly to reflect Sec. 3553(a) considerations."

CONCLUSION

This Court should therefore remand to the D.C. Circuit with instructions to review, under the abuse-of-discretion standard, whether the district court's sentencing determination was reasonable.

Respectfully submitted,

/s/ John A. Briley, Jr.
John A. Briley, Jr.
DC Bar No. 65763
6205 30th Street, NW
Washington, DC 20015
(202) 362-5749
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.3, I hereby certify that on this 4th day of January 2018 a copy of the foregoing Petition for Writ of Certiorari has been mailed to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania, Washington, D.C. 20530-0001, counsel for the United States.

I further certify that, on January 11, 2018, the foregoing Petition for Writ of Certiorari was submitted via the Supreme Court's electronic filing system.

/s/ John A. Briley, Jr.
John A. Briley, Jr.