

No. _____

IN THE
Supreme Court of the United States

DARRELL SAFI DONAT

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On March 6, 2017, this Court issued its decision in *Beckles v. United States* holding that the advisory Sentencing Guidelines are not subject to a due process vagueness challenge. 137 S. Ct. 886 (2017). The Court's rationale rested entirely on the advisory nature of the Guidelines, reasoning that, if the historical system of unfettered discretion in sentencing comported with the constitution, it was difficult to see how the current system of guided discretion could fail to pass muster. Yet, for a critical 2-year period following *Booker*, sentencing retained critical features of the advisory regime. Mr. Donat was sentenced during this critical period and, as such, his case calls upon this Court to address the following question of exceptional importance with wide-ranging implications nationwide:

Whether *Beckles v. United States*, forecloses void-for-vagueness challenges to career offender sentences imposed prior to this Court's decisions in *Kimbrough*, *Gall*, and *Rita*, at a time when sentencing retained critical features of the mandatory regime?

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

Darrell Safi Donat petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The Ninth Circuit's order denying Mr. Donat's the issuance of a certificate of appealability ("COA") was not published. App. 1a. The district court issued a written order denying Mr. Donat a COA, and a written order denying his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. App. 2a-3a, 4a-6a.

JURISDICTION

The Ninth Circuit issued its order denying Mr. Donat a COA on January 30, 2018. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 4B1.1(a) (2007 ed.) provides:

Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction 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.

U.S.S.G. § 4B1.2(a) (2007 ed.) provides:

Definitions of Terms Used in Section 4B1.1

- (a) The 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 [hereinafter “the force clause”], 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 [hereinafter “the residual clause”]

STATEMENT OF THE CASE

Mr. Donat was sentenced on November 28, 2005.¹ (CR 1, Ex. A (Judgement and Commitment Order).) At sentencing, the district court concluded that he was a career offender. (CR 1 at 2-3.) On June 18, 2016, he filed a Motion to Vacate his sentence under 28 U.S.C. § 2255, challenging his career offender designation pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). (CR 1.) On July 28, 2017, the district court denied his request for relief, and, by way of a separate order, his request for a certificate of appealability, concluding that *Beckles v. United States*, 137 S. Ct. 886 (2017), foreclosed relief. (CR 19, 23.)

Mr. Donat requested a certificate of appealability from the Ninth Circuit on October 6, 2017. CA9 No. 17-56169, Dkt. No. 5. The Ninth Circuit denied his request on January 30, 2018. App. 1a.

REASONS FOR GRANTING THE WRIT

A. *Beckles* Does Not Foreclose Void-For-Vagueness Challenges to Sentences Imposed Prior to *Kimbrough*, *Gall*, and *Rita*

The Ninth Circuit found it to be a foregone conclusion that *Beckles* foreclosed relief for Mr. Donat. However, *Beckles*, by its terms, applies only to the advisory Guidelines and does not foreclose challenges to the mandatory regime. And, during a critical 2-year post-*Booker* period, sentencing retained essential features of the mandatory regime. Thus, Mr. Donat was not sentenced pursuant to the “advisory”

¹ “App.” refers to the attached appendix. CR refers to the clerk’s record in Mr. Donat’s underlying civil case, CV 16-4396-TJH.

Guidelines in the way that *Beckles* found relevant. This court should grant a writ and decide this question of exceptional importance that will impact all those who, like Mr. Donat, were sentenced prior to *Kimbrough*, *Gall*, and *Rita*.

1. *Beckles* Applies Only To Sentences Imposed Under Truly Advisory Guidelines

The Court's rationale in *Beckles* rested almost entirely on the discretionary nature of the Sentencing Guidelines. At the outset, *Beckles* noted that the void-for-vagueness doctrine has a circumscribed application in the sentencing context, which is grounded in our nation's "long history of discretionary sentencing[.]" *Id.* at 893. Prior to the passage of the Sentencing Reform Act of 1984, judges enjoyed near unfettered discretion in imposing a sentence within the proscribed statutory range of punishment—discretion which the Court "never doubted." *Id.* at 888 (citation and quotation marks omitted). If a purely discretionary sentencing regime was constitutionally sound, the Court reasoned, "then it is difficult to see how the present system of guided discretion could be [unconstitutionally vague]." *Id.* at 889. Thus, "[b]ecause they merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge." *Id.* at 894.

The Court further explained that Mr. Beckles's challenge to his advisory Guidelines sentence did not fall within the "two kinds of criminal laws" that are subject to vagueness challenges: "laws that define criminal offenses and laws that *fix* the permissible sentences for criminal offenses." *Id.* at 892 (emphasis in original, some emphasis omitted). While *Johnson* applied the vagueness doctrine to ACCA, a statute that "fixed—in an impermissibly vague way—a higher range of

sentences,” the same was not true of the advisory Guidelines, which “merely guide the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range.” *Id.* at 898. In other words, because application of the Guidelines to Mr. Beckles was purely advisory, the Guidelines did not “fix the permissible sentence” for his offense, obviating a vagueness challenge.

Beckles expressly distinguished the current discretionary Guidelines from the mandatory Guidelines regime overturned in *United States v. Booker*, 543 U.S. 220 (2005). *Id.* at 894-95. Specifically, *Beckles* noted that “the due process concerns that require notice in a world of mandatory Guidelines no longer apply,” because this expectation of notice “did not survive our decision in *Booker*, which invalidated the mandatory features of the Guidelines.” *Id.* at 894 (quotations and alterations omitted). Thus, unlike statutes like ACCA that “fixed the permissible range of petitioner’s sentence,” the post-*Booker* advisory Guidelines merely provide “advice in exercising [the sentencing court’s] discretion to choose a sentence within those statutory limits.” *Id.* at 895.

Sentences imposed under the mandatory guidelines, therefore, remain subject to a vagueness challenge. *See Beckles*, 137 S. Ct. at 903, n.4 (Sotomayor, J., concurring) (the majority’s “formalistic distinction between mandatory and advisory rules *at least leaves open* the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*]*—that is, during the period in which the Guidelines did ‘fix the permissible range of sentences,’—may mount vagueness attacks on their sentences.”*); *Beckles*, Tr. Of Oral Argument at 28 (J. Alito: “[I]f you

have mandatory guidelines, you may have to apply vagueness principles to the mandatory guidelines.”); *see also United States v. Lee*, 821 F.3d 1124, 1135 (9th Cir. 2016) (Ikuta, J., dissenting) (“[T]he discretionary Sentencing Guidelines do not raise the same constitutional concerns as mandatory sentencing provisions.”).

Indeed, a growing number of district courts have concluded, post-*Beckles*, that constitutional vagueness principles apply to pre-*Booker* sentences. *See Castaneda v. United States*, No. CV 16-03856-AK (C.D. Cal. June 19, 2017) (Kozinski, Retired Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation) (“The principles that motivated the Court’s holding in *Beckles* aren’t easily applied to the pre-*Booker* mandatory guidelines. Due process concerns motivated the Court in creating notice rules relating to the mandatory Guidelines. Sentencing ranges calculated under the mandatory Guidelines effectively established minimum and maximum penalties because such ranges were binding on the courts.”) (citing *Irizarry v. United States*, 553 U.S. 708, 713-14 (2008); *United States v. Booker*, 543 U.S. 220, 233-34 (2005)); *Sarracino v. United States*, No. CV 16-734 MCA/CG (D. N.M. Jun. 26, 2017) (“Considering *Johnson*, *Beckles*, and *Booker*, the Court finds *Johnson* applies to the mandatory Guidelines. The *Beckles* opinion rests almost exclusively on the premises that the advisory Guidelines do not bind the district court’s discretion and do not have the force and effect of law. But *Booker* makes clear that the mandatory Guidelines severely limited judges’ discretion and had the force and effect of laws that fix the permissible range of sentences.”) (citation omitted); *United States v. Mock*, No. 2:02-CR-0102-RHW, Dkt. No. 110 (E.D. Wash.

Jun. 23, 2017) (“[T]he Supreme Court’s decision in *Beckles* does not apply to sentences imposed under the U.S. Sentencing Guidelines pre-*Booker*, and does not preclude a *Johnson* claim based on an individual sentenced pre-*Booker*.”); *United States v. Tunstall*, No. 3:00-CR-050, Dkt. No. 81 (S.D. Ohio Jun. 16, 2017) (finding mandatory Guidelines are subject to vagueness challenges and noting that “the power to decide that an exception to a rule applies is far more cabined than the discretion to sentence within a statutory range after considering ‘advisory’ Guidelines”); *Reid v. United States*, No. 3:03-CR-30031-MAP (D. Mass. May 18, 2017) (constitutional vagueness principles apply to the mandatory Guidelines); *United States v. Parks*, No. 16-CV-01565-WYD (D. Col. Aug. 1, 2017) (same); *United States v. Costello*, 2017 WL 2666410, *1 (S.D. Oh. Jun. 21, 2017) (same); *United States v. Walker*, 2017 WL 3034445, *3 (N.D. Oh. Jul. 18, 2017) (same).

In sum, *Beckles* held only that sentences imposed under a system of guided discretion are immune from vagueness challenges. Because, as discussed *infra*, this does not describe the Guidelines at the time of Mr. Donat’s sentencing, this Court should grant a writ.

2. *Beckles* Does Not Foreclose Vagueness Challenges To Sentences Imposed During The Narrow Post-Booker Period When Sentencing Retained Critical Features of the Mandatory Regime

While *Booker* established that the Guidelines were advisory, it took several years for this Court to explain the full measure of the district court’s discretion under the advisory regime. It was not clear until *Kimbrough* that judges were permitted to vary solely on the basis of policy disagreements. And, it was not clear

until *Rita* and *Gall* that district courts were prohibited from assigning a presumption of reasonableness to the Guidelines, or requiring a showing of extraordinary circumstances to justify a sentence outside the Guidelines range. Sentences imposed after *Booker* but before *Gall*, *Rita*, and *Kimbrough*, therefore do not share the features of the advisory Guidelines that *Beckles* found to insulate them from vagueness challenges.

A hallmark of the truly advisory Guidelines—those that, per *Beckles*, are not subject to vagueness review—is the ability to challenge a Guideline based solely on a policy disagreement apart from any case-specific facts. 137 S. Ct. at 894 (stating that the “advisory Guidelines” do not implicate due process notice concerns in part because “a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views.”) (quoting *Pepper v. United States*, 562 U.S. 476, 501 (2011)); Br. Of the United States, *Vasquez v. United States*, No. 09-5370, 2009 WL 5423020 (2009) (then-Solicitor General Kagan arguing that, “[u]nder *Booker*, all guidelines are advisory, and *the very essence* of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline,” or even “lawfully conclude, therefore, that the policies underlying the career-offender [guideline] . . . yield a sentencing ‘greater than necessary’ to serve the objectives of sentenc[ing].”) (citation omitted, emphasis added).

It was not until *Kimbrough* that this Court made clear that *Booker* had empowered sentencing courts to reject a particular Guideline because it disagreed

with the Sentencing Commission, “even in a mine-run case.” *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); see also *id.* at 101-02 (holding that because “the Guidelines are now advisory[,] . . . courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”).

Until *Kimbrough*, many of the Circuits were in agreement that the district courts lacked such authority. See *United States v. Tzep-Mejia*, 461 F.3d 522, 527 (5th Cir. 2006) (holding that “*Booker* does not give sentencing courts the discretion to impose a non-Guideline sentence based on the courts’ disagreement with Congressional and Sentencing Commission policy.”); *United States v. Pho*, 433 F.3d 53, 62 (1st Cir. 2006) (holding that a “categorical, policy based rejection of the 100:1 [crack to powder cocaine] ratio amounted to error as a matter of law”); *United States v. Williams*, 456 F.3d 1353, 1366 (11th Cir. 2006) (holding that it was impermissible “to [take] into account its personal disagreement with Congress’s judgment as to how much harsher the penalties for crack offenders should be”); *United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006) (“the judiciary is not free to replace Congress’s approach with one that it deems superior”); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006) (“[W]ithout any justification for why the § 3553(a) factors lead to a below-Guidelines sentence, and with the non-Guidelines sentence based only on the district court’s generalized policy disagreement with the Guidelines, the sentence cannot be affirmed as ‘reasonable.’”); *United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) (“[I]n arriving at a reasonable sentence, the court simply must not rely on a factor that would result in a sentencing disparity

that totally is at odds with the will of Congress.”); *United States v. Brown*, 453 F.3d 1024, 1027 (8th Cir. 2006) (“a district court may not reasonably impose a sentence outside the advisory range based solely on a rejection of the disparate treatment of crack and powder cocaine under the guidelines”); *United States v. McCullough*, 457 F.3d 1150, 1172 (10th Cir. 2006) (holding that a sentencing court may not “impose a sentence outside the advisory guideline range based upon its own disagreement” with the applicable Guideline).

The Ninth Circuit provides a particularly illustrative example. There, the government took the position that the sentencing courts “could not deviate from the Guidelines simply because of a general disagreement with broad-based policies enunciated by Congress or the Sentencing Commission.” Br. for Appellee, *United States v. Medina Casteneda*, 2007 WL 738114 (9th Cir. 2007); *see also id.* (“In our constitutional system the power to define the penalties for crimes lies with the Congress. While federal courts possess the discretion to tailor individual sentences within the boundaries set by the statutory framework, that discretion is subject to the limitations imposed by Congress. A district court can therefore deviate from the guidelines set by Congress for reasons related to a particular defendant, but cannot do so based on its disagreement with general policies about sentencing.”).

That view gained traction in the district courts of the Ninth Circuit, and initially, in the Ninth Circuit itself. For example, in *Medina Casteneda*, the district court rejected the defendant’s argument that the court was free to reject the crack-to-powder ratio incorporated into the guidelines, explaining “that it did not believe

that it was ‘appropriate for the Court to specifically reduce a sentence under 18 U.S.C. § 3553(a) on the basis that Congress and the U.S. Sentencing Commission are wrong in establishing different penalties for different types of controlled substances.’” *Medina Casteneda*, 241 Fed. Appx. 411, 415 (9th Cir. 2007). “Rather, the court felt ‘[t]o the extent the differences in penalties are out of whack, it’s for the Congress to change them, not the trial court.’” *Id.* On appeal, and before *Kimbrough* was decided, the Ninth Circuit issued an unpublished memorandum disposition finding no “*Booker* violation” because the district court had “tak[en] into account all of the 18 U.S.C. § 3553(a) factors in determining the sentence.” *Id.* Following *Kimbrough*, however, the panel withdrew its opinion and reversed and remanded, calling *Kimbrough* an “extension of *Booker* discretion”—one that was not “forsee[n]” by many sentencing courts operating in the quickly shifting landscape of the post-*Booker* world. *United States v. Medina Casteneda*, 511 F.3d 1246, 1249 (9th Cir. 2008).

As the foregoing reveals, at the time of Mr. Donat’s sentencing, the Guidelines were not truly advisory in the sense that *Beckles* found relevant, because the district court was not free to vary from the career-offender Guideline simply because it disagreed with the Commission’s views on policy grounds. The Guidelines thus lacked the crucial feature that then-Solicitor General Kagan describes as the “very essence” of the advisory Guidelines.

But this was not the only constraint on the district courts in the years following *Booker*. Another crucial feature of the truly advisory Guidelines is, as argued by

the Deputy Solicitor General in *Beckles*, that they “do not impose an insuperable barrier that requires a specific finding of fact before the judge can sentence outside the Guidelines. *Beckles*, Tr. of Oral Argument at 41 (Deputy Solicitor General: “That was the problem with mandatory Guidelines. Advisory Guidelines allow the judge to look at the totality of the circumstances and to make policy judgments that may be at variance with the Commission.”).

But that feature of the Guidelines was not evident from *Booker* itself. For example, more than a year after *Booker* was decided, the Ninth Circuit invited supplemental briefing to an en banc panel about whether a district court had to find a “compelling” reason to vary from the Guidelines. Order, *United States v. Carty*, 465 F.3d 976 (9th Cir. 2006). No answer to that question came until *Gall*—decided the same day as *Kimbrough*—which rejected a rule that “extraordinary” circumstances were necessary to justify a sentence outside the guidelines range. *Gall v. United States*, 552 U.S. 38, 47 (2007).

Moreover, until *Rita v. United States*, district courts lacked guidance that they could not apply a presumption that the Guideline sentence was reasonable, and thus many continued to apply one. *See Rita*, 551 U.S. 338 at 351 (2007); *see, e.g., United States v. Gibson*, 286 Fed. Appx. 533 (9th Cir. 2008) (*Rita* and *Carty* were “not available at the time that sentence was imposed in this case, and the district court can’t be faulted for viewing the guidelines as presumptively reasonable, *as many others did at the time.*”); *United States v. Dallman*, 533 F.3d 755, 761 (9th

Cir. 2008); *United States v. Zavala*, 443 F.3d 1165, 1166 (9th Cir. 2006), *as amended en banc*, *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc).

A system that presumed the correctness of the Guidelines, or that required the district court to make some extraordinary finding in order to vary from the Guidelines, was not truly advisory. To the contrary, such a system shared more in common with the *mandatory* Guidelines, which “fix[ed]” the sentence, than with the purely advisory regime *Beckles* describes. 137 S. Ct. at 894.

In sum, at the time of Mr. Donat’s sentencing, the Guidelines lacked the hallmarks of the advisory regime that insulate them from constitutional scrutiny. *See Beckles*, 137 S. Ct. at 894. The limitations still in place on the district court’s discretion meant that the career offender Guideline played an outplaced role—not just guiding the district court at sentencing, but largely constraining its exercise of discretion and anchoring it to that Guideline. Thus, for all of these reasons, prior to *Kimbrough*, *Gall*, and *Rita*, sentencing retained the critical features of the mandatory regime, and remain, in accord with *Beckles*’ reasoning, vulnerable to vagueness challenges.

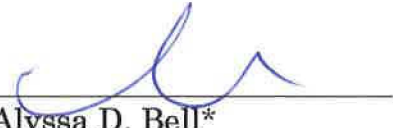
CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: March 29, 2018

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