

ORIGINAL

No.

25-7317

FILED

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SUPREME COURT, U.S.

In The  
SUPREME COURT OF THE UNITED STATES

Eric Krieg - Petitioner

v.

United States of America - Respondent

On Petition for a Writ of Certiorari  
From the United States Court of Appeals for the 7th Circuit,  
Case No.: 24-3267

PETITION FOR WRIT OF CERTIORARI

Eric Krieg - #17161-027  
United States Penitentiary McCreary  
P.O. Box 3000  
Pine Knot, KY 42635

QUESTIONS PRESENTED

- 1) Does an appeals court order denying a claim with the terse phrase that it was "without merit", with no other explanation, violate Concepcion v. United States, because there is no evidence that the well argued claim was considered?

Krieg answers "yes".

- 2) Must the government provide a "historical analogue" to the Rational-Basis Test before it uses it to regulate Krieg's due process and equal protection rights under the United States Constitution?

Krieg answers "yes"

**LIST OF PARTIES**

- 1) Eric Krieg
- 2) The United States of America

**RELATED CASES**

United States v. Krieg, United States District Court for the Northern District of Indiana Case No. 2:17-CR-00146-JVB (Criminal Case)

Krieg v. United States, United States District Court for the Northern District of Indiana Case No.: 2:19-CV-273 (§2255 Petition)

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

**OPINIONS BELOW**

The opinion of the United States court of appeals appear at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix F and is unpublished.

## JURISDICTION

The date on which the United States Court of Appeals decided my case was December 18, 2025.

No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendment V

No person shall... be deprived of life, liberty, or property without due process of law.

### Amendment XIV

...No State shall... deny to any person within its jurisdiction the equal protection of the laws.

"The Fifth Amendment, which, unlike the Fourteenth, contains no equal protection clause, restrains only such discriminatory legislation as, due to its arbitrary or injurious character, amounts to a denial of due process." Hirabayashi v. United States, 370 U.S. 81, 100 (1943)

"Equality before the law (18c) The status or condition of being treated fairly according to regularly established norms of justice; esp. in British constitutional law, the notion that all persons are subject to the ordinary law of the land administered by ordinary law courts, that officials and others are not exempt from the general duty of obedience to the law, that discretionary governmental powers must not be biased, and that the task of superintending the operation of the law rests with an impartial, independent jury." Black's Law Dictionary, 14th Ed.

## STATEMENT OF THE CASE

In 2017, angered by an attorney who helped bring a lawsuit against him, tried to mail to the attorney a package containing a pipe bomb. The bomb exploded at the Post Office in East Chicago, Indiana, where Krieg had dropped it off, injuring a postal worker. About three weeks later, Krieg mailed to someone else an envelope that contained a bullet and a note saying, "the next one will be in the back of your head."

Krieg was indicted for making an unregistered destructive device, 26 U.S.C. §§5861(f), 5845(a), (f) (Count 1); mailing a destructive device, 18 U.S.C. §1716(j)(2) (Count 2); malicious use of explosive materials, id. §844(i) (Count 3); possessing a destructive device in furtherance of a crime of violence, id. §924(c)(1)(A)(iii), (B)(ii) (Count 4); and mailing a threatening communication, id. §876(c) (Count 5). Counts 1, 2, 3, and 5 carried a combined statutory maximum of 900 months imprisonment. Count 4 carried a statutory minimum of 360 months imprisonment and a maximum of life imprisonment.

Krieg pleaded guilty under a plea agreement to Counts 1, 2, 3, and 5. In exchange for the dismissal of Count 4, Krieg and the government agreed to a binding 348-month prison sentence. The agreement acknowledged that a judge would ultimately determine Krieg's sentence after considering the presentence investigation report, the parties' input, relevant sentencing statutes, and the Guidelines.

The district judge adopted the sentencing calculations set forth in the PSR. In that report, the probation officer calculated a guidelines range of 97 to 121 months (based on a total offense level of 30 and a criminal history category of I, with zero criminal history points). The probation officer addressed the plea agreement's impact, noting that Krieg stood to receive a "significant" - the dismissal of Count 4 and its 360-month statutory minimum sentence, up to a maximum of life. The judge imposed the agreed 348-month sentence, concluding that it was sufficient but not greater than necessary to accomplish the purposes set forth in 18 U.S.C. §3553(a)(2), that the counts to which Krieg pleaded guilty adequately reflected the seriousness of his crimes, and that accepting the plea agreement would not

undermine the statutory purposes of sentencing or the Guidelines.

In 2024, Krieg moved for a sentence reduction under 18 U.S.C. §3582(c)(2) based on Amendment 821 to the Guidelines, a retroactive amendment that authorized a two-level reduction for offenders with zero criminal history points and whose offense conduct did not involve specific aggravating factors such as credible threats of violence and possessing or transferring a dangerous weapon. U.S.S.G. §4C1.1(a)(1), (3), (7). Krieg conceded that he did not qualify for the adjustment challenged the Sentencing Commission's basis for creating the eligibility criteria. He also asserted that the government was required under New York State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) to present a historical analogue for the Rational-Basis Test. Krieg asked to use the Irrebuttable Presumption Test instead.

The District judge denied the motion, agreeing with Krieg's assessment that he did not meet the §4C1.1(a) criteria for relief. The judge also determined that the Sentencing Commission acted within its authority when it enacted §4C1.1(a) based on extensive data analysis and public comment. Noting that the Sentencing Guidelines are subject to rational-basis review, the judge further determined that §4C1.1(a)'s exclusionary criteria relate rationally to the government's legitimate interest in sentencing offenders based on the seriousness of their offenses and aggravating factors. As for Krieg's Bruen based argument, the judge distinguished the case on the grounds that it applied only to challenges to firearm regulations. Krieg appealed.

In Krieg's timely appeal, he claimed that (1) the court did not consider all of his non-frivolous arguments; (2) the Sentencing Commission exceeded its Congressional Mandate under 28 U.S.C. §991 at all in promulgating the exceptions; (3) the exceptions do not meet the rational-basis test; (4) the government must prove a historical analogue to the rational basis test.

In its order denying Krieg's appeal, the appeals court does not address any of Krieg's arguments. It simply says that that §4C1.1(a) meets the rational basis test, ignoring Krieg's claims about the Sentencing Commission exceeding its mandate. It says that Krieg's

claim that the Sentencing Commission's claims about its own data supporting the exclusions is wrong was "not sufficiently developed", a mistake of fact, as Krieg proved statistically that the data does not support the exceptions. Finally, his other claims are dismissed with nothing more than a quip that "none has merit".

## REASONS FOR GRANTING THE PETITION

- A. Neither the Appeals Court nor the District Court properly considered all of Krieg's non-frivolous arguments, in violation of Concepcion v. United States, 597 U.S. 481 (2022).
- B. The Government must prove a "historical analogue" to the Rational-Basis Test before it can regulate one's due process and equal protection rights.

**A. The Appeals Court and the District Court did not properly consider all of Krieg's non-frivolous arguments, in violation of Concepcion v. United States.**

The 7th Circuit Court of Appeals in its order denying Krieg's Appeal stated the following as its reasons:

We agree with the judge that §4C1.1(a) readily passes rational-basis review. A sentencing provision survives scrutiny under this deferential standard if it rationally related to a legitimate governmental interest. U.S. v. Carroll, 110 F.3d 457, 461-62 (7th Cir. 1997); U.S. v. Sharma, 119 F.4th 1141, 1145-46 (9th Cir. 2024). (addressing U.S.S.G. §§2G2.2(b)(6) and 2G2.2(b)(7), cert. denied, 145 S. Ct. 1457 (2025)). We agree with the judge that §4C1.1(a)'s exclusionary criteria have a rational basis: they, recognize that some offenses or offense conduct can be so serious (e.g. involving violence or credible threats of violence) to disqualify zero-point offenders from eligibility. U.S.S.G. app. C at 242 (2024). To the extent that Krieg challenges the data relied on by the Commission when promulgating Amendment 821, he fails to develop this argument sufficiently. See Fed. R. App. P.28(a)(8).

We have considered Krieg's remaining arguments and none has merit.

Order of Denial, 24-3267 at 3 (Appendix A). With this terse denial, the appeals court fails to consider all of Krieg's non-frivolous arguments.

In Krieg's Brief in support of the appeal (Appendix B) he made four claims: (1) the district court did not consider all of Krieg's non-frivolous arguments; (2) the government must show a "historical analogue" to the rational basis test; (3) the Sentencing Commission exceeded its Congressional mandate when it implemented the exceptions to Amendment 821, Subpart One because they are not based on data, are not fair, and create unwarranted sentencing disparities between similarly situated defendants; and (4) the exceptions do not meet the Rational-Basis Test. See Brief at ii (Appendix B).

In the Appeals Court's opinion quoted above, arguably the only of the four claims by Krieg that was addressed by the Appeals Court was claim 4, where they ruled that §4C1.1(a) meets the Rational-Basis Test. But even in doing so, it did not meaningfully address all of Krieg's claim on that issue, as it is intertwined with Krieg's claim about the Sentencing Commission exceeding its Congressional mandate, as the exceptions violate 28 U.S.C. §§994(c), (d), (f), (o) and 991(b)(1). See Brief at 10 to 14. Krieg also showed how the Sentencing Commission's own data does not support the exclusions, as when analyzed statistically, recidivism is a strong function of age at release and prior criminal history as measured either by Criminal History Category or Criminal History Points. Brief at 7 to 10. The court's quip about Krieg's argument being insufficiently developed is a mistake of fact. Krieg shows exactly what data he used to support his argument, what statistical analysis he used, what the statistics say, and even asked for a statistician to overlook his work. Brief at 14. None of this was properly considered.

Also not considered were Krieg's argument about the need for a "historical analogue" before his due process and equal protection rights can be regulated.

Under Concepcion v. United States, 597 U.S. 481, 501 (2022), this court said:

It is well established that a district court must generally consider the parties' non-frivolous arguments before it. See Golan v. Saada, 596 U.S. \_\_\_, 2022 U.S. LEXIS 2929 (2022) (slip op. at 11). Of course, a district court is not required to be persuaded by every argument parties make, and it may, in its discretion, dismiss arguments that it does not find compelling, without a detailed explanation. Not is a district court required to articulate anything more than a brief statement of reasons. See Rita v. U.S., 551 U.S. 338, 356 (2007).

...All that that is required is for a district court to demonstrate that it had considered the arguments before it.

Concepcion, 597 U.S. at 501. But Krieg made specific objection that the District Court denied his motion because Bruen only applies to the Second Amendment, ignoring his citations within Bruen itself applying the historical analogue standard to other rights, as will be documented in the next section. How can this sophisticated, well developed, well cited argument be dismissed simply as "without merit"? Moreover, how can Krieg even properly appeal such a sparse ruling?

What actually appears to be the case is that Krieg's Bruen based historical analogue argument cannot be argued against. Indeed, the Government did not even really do so (See Appendix E), instead providing a "historical analogue" for the Guidelines themselves, not the Rational-Basis Test, which is not a defense to Krieg's claim. How convenient that the Court of Appeals can dismiss Krieg's claim with so little work!

While the abuse of discretion standard is difficult to meet, doubly so at the Appellate level (Concepcion at 501), in this particular case, more is required than that Krieg's historical analogue claim is "without merit".

**B. The Government must prove a "historical analogue" to the Rational-Basis Test before it can regulate one's due process and equal protection rights.**

In Krieg's appellant brief, he showed how the district court did not meaningfully analyze Krieg's argument that, under a series of cases ending in New York State Rifle & Pistol Ass'n v Bruen, 597 U.S. 1 (2022) ANY regulation of a constitutional right requires the government to prove a historical analogue. The Appeals Court did not meaningfully review this claim. See Appendix B at 6-7.

In Krieg's Motion to the District Court (Appendix F), he showed by quoting Bruen itself that Bruen is just the latest of a long line of cases requiring a "historical analogue" when regulating a constitutional right. See Appendix G at 9-13 (quoting Bruen, 597 U.S. at \*12-13). While Bruen applied the historical analogue standard to the 2nd Amendment, U.S. v. Stephens, 559 U.S. 460, 468-71 (2010) applied it to the First Amendment, Giles v. California, 554 U.S. 353, 358 (2008) applied it to the Confrontation Clause, American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion) applied it to the Establishment Clause, and none of them claimed that it only applied to those certain rights.

But in the District Court's denial, it ruled that Bruen only applied to the Second Amendment, ignoring the other cases cited by Krieg concerning other rights. Thus, it did not consider all his non-frivolous arguments under Conception v. U.S. This was the basis for Krieg to ask the 7th Circuit if all of his non-frivolous arguments were addressed. See Appendix A at 6-7, Appendix C at n. 2. (App. Order, D.C. Order, resp.). Thus, the Appeals Court also failed to consider Krieg's claim regarding Bruen et al and the requirement that the government must prove a historical analogue before it regulates a right.

As to the substance of Krieg's claim, in his §3582(c)(2) motion he attempts to do a historical analysis. See Appendix F at 3-9. Krieg does so by looking at definitions of terms like "due process" and "equal protection" in Black's Law Dictionary, noting the dates that Black says the term arose. For example, while the "Due Process Clause" has a date

of 1890, "Due Process" itself has a date of "16c", i.e. the 16th Century. Thus, under Bruen et al, Krieg believes that there is ample historical evidence that the Due Process clause cannot be regulated via a Rational-Basis Test that has a date of 1947. See Appendix F at 4 & 7, respectively. Also suspect are "Substantive Due Process" (1933), "Procedural Due Process" (1934), "Strict Scrutiny" (1941), "Intermediate Scrutiny" (1974), "Suspect Classification" (1949), and "Quasi-suspect Classification" (1960's). Appendix F at 5, 6, and 7, respectively. While "Equal Protection" (the 14th Amendment) is dated 1866, "Equality before the law" upon which it is based, is dated "18c", i.e. the 18th Century, i.e. the 1700s. Again, Krieg claimed that this right predated the Constitution and therefore the government must produce a historical analogue. Appendix F at 8.

While the District Court did not properly address this argument, the government did try to produce a historical analogue. Unfortunately, they provided a historical analogue for the Sentencing Guidelines, not the Rational-Basis Test. See Appendix E at 10, citing U.S. v. Pinto, 875 F.2d 143, 144-46 (7th Cir. 1989). And, in fact, Krieg has found that Pinto's claim that "From the beginning of the nation, Congress specified specific sentences" (Pinto, 875 F.2d at 145) isn't even true. See Appendix D at 2-3, citing Supreme Court Justice Jackson's dissent in Earlinger v. U.S., 602 U.S. (2024) at \*11 (showing that the First Congress enacted crimes with variable sentences to be determined by a judge, and that the common law had no fixed rule on the subject).

Because neither the District Court nor the 7th Circuit gave this claim due consideration, Krieg respectfully requests that this case be remanded so that they can do so. Also note that Krieg has since found a case that does the hard work of historical analysis with regards to due process<sup>1</sup>, and equal protection<sup>2</sup>, Long Island Lighting Co. v. Cuomo, 666 F.Supp 370, 405-406, 409-419 (2nd Cir. 1987), showing that West Coast Hotel v. Parish, 300 U.S. 379 (1937) was the watershed case redefining how due process and equal protection were regulated, thus verifying Krieg's Black's Law based claim.

CONCLUSION

As the 7th Circuit Court of Appeals did not properly consider all of Krieg's arguments under Concepcion v. United States, Krieg respectfully requests that his case be remanded to do so.

Respectfully Submitted,

x 

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I swear under the penalty of perjury that the foregoing was deposited into the USP McCreary Legal Mail System on this 13<sup>th</sup> day of March, 2026 with first-class postage pre-paid.

PROOF OF SERVICE

I swear under the penalty of perjury that I deposited into the USP Prison Legal Mail System on this 13<sup>th</sup> day of March, 2026 with first-class postage prepaid one copy of the foregoing addressed to

Soliciter General of the United States  
950 Pennsylvania Ave.  
Washington, D.C. 20530-0001