No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Alimamy Barrie - PETITIONER

VS.

United States of America - RESPONDENT(s)

ON PETITION FOR A WRIT OF CERTIORARI FOR THE

United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented for Review

A. Whether Under 18 U.S.C. §3582 (C)(2) should the Petitioner be eligible for a resentencing when two clariying amendments relevent to his case was enacted by the Sentencing Commission during the pendency of his direct appeal when such is consistent with applicable policy statement issued by the Sentencing Commission under U.S.S.G. 1b1.11 (b)(2) but not listed under 1b1.10 as some circuits have held.

B. Whether under 18 U.S.C. § 3582 (C)(2) is the Petitioner eligible for a sentence reduction based on a sentencing range that has subsequently been lowered by the Sentencing Commission during the pendency of his direct appeal when the amendment is not listed under U.S.S.G. 1b1.10.

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Burke v. United States, 152 F.3d 1329, 1332 (11th Cir. 1998)

Cook v. United States, 2006 U.S. Dist. lexis 83425 (S.D. NY Nov. 15, 2006) 2nd Cir.

Hamilton v. United States, 67 F.3d 761,763-64 (9th Cir. 1995)

Isabel v. United States, 980 F.2d 60,62 (1st Cir 1992)

Rivera v. Warden, FCI Elkton, 27 F. App'x 511,514-15 (6th Cir. 2001)

Sun Bear v. United States, 644 F.3d 700,704 (8th Cir. 2011)

United States v. Addonizio, 442 U.S. 178,186-87, 99 S.Ct 2235 60 L. Ed 2d 805 (1979)

United States V. Brown, 694 Fed App'x 62 (3rd Cir 2017)

United states v. Cabrera Polo, 376 F.3d 29,32 (1st Cir. 2004)

United States V. Caceda, 990 F.2d 707,710 (2nd Cir. 1993)

United States V. Colon, 961 F.2d 41,46 (2nd Cir. 1992)

United States v. Cordoba, 1997 U.S. Dist. lexis 144,1997 WL 12795. *2 (N.D. ILL 1997)

United States v. Decarlo, 434 F.3d 447,458-59 (6th Cir. 2006)

United States v. Deigert, 916 F.2d 916-917-18 (4th Cir. 1990)

United States v. Douglas, 64 F.3d 450,453 (8th Cir. 1995)

United States v. Dowty, 996 F.2d 937,938 (8th Cir. 1993)

United States v. Drath, 89 F.3d 216,217-18 (5th Cir. 1996)

United States v. Evans, 782 F. Supp. 515; 1991 U.S. Dist. lexis 19456 D. Oregon (Dec. 23, 1991) 9th Cir.

United States v. Geerken, 506 F.3d 461,464-66 (6th Cir. 2007)

United States v. Guerrero, 691 F.Appx 179,179 (5th Cir. 2017)

United States v. Jewell, 1999 U.S. App lexis 34577 1999 WL 1278002 *1 (7th Cir 1999)

United States v. Kim, 193 F.3d 567 (2nd Cir. 1999)

United States v. LaCroix, 28 F.3d 223,227 (1st Cir. 1994)

United States v. Marmolejos, 140 F.3d 488 (3rd Cir. 1998)

United States v. Martinez, 946 F.2d 100 (9th Cir. 1991)

United States v. Mercado, 2017 U.S. Dist. lexis 29828 E.D. Wa (March 2nd 2017) 9th Cir

United States v. Ramsey, U.S. App lexis 2246 (10 Cir. 2017)

United States v. Renfrew, 957 F.2d 525,527 (8th Cir. 1992)

United States v. Sanders, 67 F.3d 855,856 (9th Cir. 1995)

United States v. Smith, 86 F. App'x 646,647 (4th Cir. 2004)

United States v. Torres-Aquino, 334 F.3d 939,941 (10th Cir. 2003)

United States v. Williams, 940 F.2d 176,182 (6th Cir. 1991)

STATUTES AND OTHER AUTHORITIES:

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18 U.S.C. §3553(a)

18 U.S.C. §3582(c)(2)

18 U.S.C. §3147

28 U.S.C. §994(o)

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28 U.S.C. §2255

IV. OPINIONS BELOW

The judgment of the United States District Court for the Southern district of Maryland is attached, **United States v. Barrie,** Case No PWG-14-6 See, Appendix (Apx) at 1. The Court of Appeals for the Fourth Circuit decision is not published but is attached, **United States v. Barrie,** App. No. 17-7654 (4th Cir. April 24th, 2018) Petition for rehearing en-banc denied on May 22nd, 2018. See Appendix (Apx) at 6.

V. STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1) because the Fourth Circuit Court of Appeals denied a petition for rehearing en-banc on May 22nd, 2018 and entered the formal mandate on May 30th' 2018.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. 3582 (C)(2)

(C) **Modification of an imposed term of imprisonment.** The Court may not reduce a term of imprisonment once it has been imposed except that----

(2) In the Case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has Subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994 (0), upon motion of the defendant of the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisionment after considering the factors set forth in section 3553 (a)[18 USCS §3553 (a)] to the extent that they are applicable, if such a reduction is consistent with applicable Policy Statements issued by the Sentencing Commission.

U.S.S.G. § 1B1.10

Reduction in term of imprisonment as a result of Amended guideline range (Policy Statement)

(a)(1) In general- in a case in which defendant is serving a term of imprisionment and the guideline range applicable to that de-fendant has subsequently been lowered as a result of an amendment to the Guidelines manual listed in subsection (d) below, the court may reduce the defendant's term of impri-sonment by 18 U.S.C. § 3582 (c)(2) any such reduction in the defendent's term of imprisonment shall be consistent with this policy statement.

U.S.S.G § 1B1.11 (b)(2)

Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

The Guidelines Manual in effect on a particular date shall be applied in its entirety. The Court shall not apply, for example, one guideline from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However if a court applies an earlier edition of the Guidelines Manual the court shall consider subsequent amendments to the extent that such amendments are clarifying rather than substantive changes.

STATEMENT OF CASE

After a Jury trial in September of 2104, the Defendant was found guilty and convicted of two (2) counts of Wire Fraud **18 U.S.C. § 1343**, Aiding and Abetting **18 U.S.C. § 2,** Commission of Offense while on Release **18 U.S.C. § 3147,** and One (1) count of Aggravated Identity Theft **18 U.S.C. § 1028A,** Aiding and Abetting **18 U.S.C § 2,** Commission of Offense while on Release **18 U.S.C. § 3147**. The District Court sentenced the Defendant on December 16, 2014 to a total of One Hundred Twelve (112) Months plus One (1) Day consecutive to the Forty Eight (48) Months the Defendant started serving on June 1, 2012 for an Unrelated Case in the Eastern District of Virginia (GBL 1:11CR00476-001). During sentencing trial counsel made several arguments for a lower sentence based on the Intended loss amount, running the sentence concurrent to the Undischarged Prison Sentence in the Eastern District of Virginia case, also that the Defendant didn't receive any funds from the Cashed Checks and that other suspects were implicated.

The Defendant timely filed a notice of appeal to the Fourth Circuit. On Appeal the Defendant raised three issues: (15-4001)

I. Whether the Admission of Greenfield's out of Court Identification violated the Defendant's due process.

II. Whether the District Court abused its discretion when it admitted evidence of the Defendant's prior Fraud Conviction.

III. Whether the District Court erred when it determined that the Intended loss amount under United States Sentencing Guidelines (hereinafter, "U.S.S.G") § 2B1.1 exceeded one million dollars.

The Court affirmed the Defendant's Judgment and conviction on November 23, 2015. **(United States v. Barrie** 629 F.Appx 541 (4th Cir 2015). During the pendency of the Defendant's direct appeal

in the fourth circuit, the United States Sentencing Commission (hereinafter, "U.S.S.C.") enacted several amendments to the U.S.S.G. that are relevant to the Defendant's case. Amendment 791 which amended the loss tables set forth in §2B1.1 to account for Inflation; Amendment 792 which inter alia revised the commentary in application note § 3(A)(ii) changing the definition of Intended loss as pertains to § 2B1.1; and Amendment 794 which amended the Mitigating Role Reduction in § 3B1.2 see supplement to Appendix C to the U.S.S.G. manual, Amendments 791, 792 and 794. The Fourth Circuit never considered any of these amendments in deciding the defendant's case on direct appeal **(United States vs. Barrie 629 F. Appx 541 (4th Cir 2015))** after these amendments was effective on November 1st 2015. The Defendant sought Certiorari from the Supreme Court which denied it on April 18, 2016 **(Barrie v. United States 136 S. Ct 1691 (2016))**. The defendant timely filed a motion under 28 U.S.C. 2255 through retained habeas Counsel Mathew Robinson of Robinson Brandt PSC in Convington, Kentucky but against my wishes Counsel refused to raise the issue that appellate counsel was ineffective on direct appeal for failing to notify the Fourth Circuit of the enacted clarifying amendments upon defendants repeated request to do so. During the pendency of the defendant's motion under 28 U.S.C. 2255, defendant wrote the Judge a letter complaining about the performance of his habeas counsel and defendants intent to included the amendments issue in his pending motion. Judge Grimm declined to address this issue and later denied the motion on June 7th, 2017. Defendant sought review from the Fourth Circuit in his denial of the motion 28 U.S.C. 2255 case No. 17-6782 which was affirmed on November 27, 2017. Defendant did not seek Certiorari from this Court. On July 6th, 2017 the defendant

filed a motion to recall mandate in the Fourth Circuit Court of Appeals under the appellate case (**United Stated v. Barrie 629 F. Appx 541 (4th Cir 2015)**) asking the Fourth Circuit to remand for resentencing based on the clarifying amendments that went into effect during his appeal citing Circuit precedent on clarifying amendment enacted during the Direct Reveiw process. The Fourth Circuit denied the motion on September 15, 2017 without any opinion. The Defendant thereafter filed a motion under 18 U.S.C. §3582 (c)(2) in the district court on September 29th, 2017 which denied it on December 5th, 2017. Defendant filed a notice of appeal asking the Fourth Circuit to reveiw the decision of the district court, the Court of Appeals affirmed the district court decision on April 24th, 2018 and a subsequent motion for Rehearing En-banc was denied on May 22nd, 2018. Defendant filed a motion under Fed. R. Civil Procedure Rule 60(B)(1)(b) in the district court on may 7th, 2018 asking the court to Re-open title 28 U.S.C. § 2255 for the limited purpose of deciding whether appellate counsel rendered IAC when he failed to ask the Fourth Circuit to remand for Resentencing based on the Enactment of the clarifying amendments, this motion is still pending in the district court but defendants intends to seek Certiorari from the Supreme Court of the United States of America in Regards to the decision he received when he filed his motion under 18 U.S.C. §3582 (C)(2) asking this court to address the circuit split and set the correct standards for the lower courts to apply in addressing a motion for modificaion of an imposed sentence consistent with the applicable policy statement of the United States Sentencing Commission.

IX REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10. The Court will grant review of the United States Court of Appeals decision for compelling reasons. A compelling reason exists when a United States Court fo Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departture by a lower court, as to call for an excercise of the court's supervisory power S. Ct. R. 10(a).

In the Instant case, the decision of the Fourth Circuit is in direct conflict with other circuits concerning the application of a sentence reduction of resentencing in a motion pursuant to 18 U.S.C. §3582 (C)(2) modification of an imposed term of imprisonment when the United States Sentencing Commission enacted two clarifying amendments and also lowered the Sentencing Range relevant to reduce the Defendant's sentence.

In the Paragraphs below petitioner would be attempting to show the inter circuit conflicts and intra circuit conflicting decisions, based on discretion rather than the application of the law and how it effects many defendants similarlly situated. For the most part several circuits have held that clarifying amendments apply Retroactively regardless if it's not listed under §1B1.10 but fails to apply it in a §3582 (C)(2) motion. The application ot this policy statement in the U.S.S.G. is only relevant in a §3582 (C)(2) motion not in the context of a direct appeal or motion under 28 U.S.C. 2255. See **Hamilton v. United States,**

67 F. 3d 761, 763-64 9th Cir. 1995, **Sun Bear v. United States**, 644 F. 3d 700, 704 (8th Cir. 2011). "A claim that the sentence imposed is contrary to a Post-Sentencing clarifying [U.S.S.G.] amendment is a non-constitution issue that does not provide basis for collateral relief in the absense of a complete miscariage of justice" **Burke v. United States**, 152 F. 3d 1329, 1332 (11th Cir 1998). In **United States v. Guerrero**, 691 F. Appx 179, 179 (5th Cir 2017) the court concluded that movant's claim that the district court should have retroactively applied Amendment 794 was not congnizable in a § 2255 proceeding. This court has held that Post-sentencing changes in sentencing policy do not support a collateral attack on the original sentence under § 2255 See **United States v. Addonizio**, 442 U.S. 178, 186-87 99 S. Ct 2235 60 L. ED 2d 805 (1979).

By its terms section 3582 (C)(2) authorizes a reduction in sentence only if the reduction is "Consistent with applicable policy statements issued by the Sentencing Commission "See **Braxton v. United States**, 114 L. Ed 2d 385, 111 S. Ct 1854, 1858 (1991)" for present purposes two policy statements are germane 1B1.10, 1B1.11(b)(2).

The second of these Policy Statements says that if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments to the extent that such amendments are clarifying rather than substantive changes" U.S.S.G. § 1B1.11(b)(2). Thus, clarifying amendments--- amendments that are purely expository---may be applied retroactively. See **United States v. LaCroix**, 28 F. 3d 223, 227 (1st Cir. 1994) **Isabel v. United States**, 980 F. 2d 60,62 (1st Cir. 1992). In **United States v. Cabrera Polo**, 376 F.3d 29, 32 (1st Cir. 2004)

the first circuit made it clear that clarifying amendments may apply retroactively but refused to apply it for the defendant because Amendment 640 worked a Substantive Change in the applicable guideline its principal effect was to create a new offense level cap for safety valve purposes it further states that amendment 640 was not retroactive under the "Clarification" doctrine. Some circuits have ruled both ways on the application of a clarifying amendment in a 3582 motion showing an inter-circuit split and discretionary ruling when such application should be based on law to promote fairness because section 3582 (c)(2) serves well the purposes of fitness and fairness: its sentence modification provisions eliminate unwarranted disparities in federal sentencing, promote the government ligitimate substantive Penological Interests, Foster Societal respect for the Criminal Justice System and save long term costs associated with excessive terms of incarceration.

The Second Circuit held that only amendments enumerated in 1B1.10 are to be applied retroactively even if appllate review has not concluded. See **United States v. Colon**, 961 F. 2d 41,46 (2nd Cir. 1992), **United Staes v. Caceda**, 990 F. 2d 707, 710 (2nd Cir. 1993) "holding that whatever the scope of §3582 (C)(2) it adequately indicates that congress did not wish appellate courts on direct review to revise a sentence in light of changes made by the Sentencing Commission after the sentence has been imposed". In **Cook v. United States**, 2006 U.S. Dist. lexis 83425 the district court granted a 3582 (c)(2) based on clarifying amendment 503 that was not enumerated in 1B1.10. The Second Circuit has also stated that a defendant sentenced under one version of the Guideline may be given the benefit of a later revision if the revision represents not a substantive change but merely a

clarification of the Sentencing Commission's prior intent. See **United States v. Kim**, 193 F. 3d 567 (2nd Cir. 1999). In **United States v. Marmolejos**, 140 F.3d 488 (3rd Cir. 1998) the third Circuit applied Clarifying Amendment 518 retroactively even though it wasn't listed under 1B1.10 but refused to apply clarifying amendments in **United States v. Brown**, 694 Fed Appx 62 (3rd Cir. 2017) citing that none of the amendments was listed under 1B1.10.

The Fourth Circuit has stated that "Clarifying Amendments apply retroactively when the amendment take place before sentencing or while direct appeal is pending" See **United States v. Smith**, 86 F. Appx 646, 647 (4th Cir. 2004). Courts can give retroactive effect to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in U.S.S.G. 1B1.10. **United States v. Deigert**, 916 F.2d 916,917-18 (4th Cir. 1990). The Fifth Circuit has held that if an amendment to the United States Sentencing Guidelines is not listed in U.S.S.G. 1b1.10 (c) then a reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. §3582 (c)(2) See **United States v. Drath**, 89 F.3d 216, 217-18 5th Cir. 1996). The applicable Policy Statement, U.S.S.G. §1B1.10 entitled "Retroactivty of Amended Guideline Range" and does not address the application of a clarifying amendment in a 3582 (c)(2) motion.

The Sixth Circuit case law has stated that a clarifying amendment to the sentencing guidelines can be applied retroactively in four possible situations: (1) the Criminal case is before the District for Original Sentencing; (2) the case is pending on direct appeal from a judgment of conviction and sentence; (3) the clarifying amendment is made Retroactive by the Sentencing Commission by being listed in U.S.S.G.

§ 1B1.10 (c) ; (4) a federal prisoner brings a motion for post conviction Relif under 28 U.S.C. 2255. See **United States v. Geerken**, 506 F.3d 461,464-66 (6th Cir. 2007) (finding it appropriate for a Sentencing Court to consider a clarifying amendment when calculating defendant's guidelines sentencing range) **United States v. Decarlo**, 434 F.3d 447, 458-59 (6th Cir. 2006) (finding it appropriate to consider a post sentencing clarifying amendment when reviewing a defendant's sentence on appeal); **United States v. Williams**, 940 F.2d 176, 182 (6th Cir. 1991) (same); **Rivera v. Warden**, FCI Elkton 27 F. Appx 511, 514-15 (6th Cir. 2001). Finding clarifying amendments that are not listed in U.S.S.G. § 1B1.10(c) and thus not retroactive for purposes of applying 18 U.S.C. §3582 (c)(2) may be applied in a §2255 proceeding).

The Seventh Circuit has said that while clarifying amendments to the sentencing guidelines generally are applied retroactively at initial sentencing and of on direct appeal pursuant to U.S.S.G. § 1B1.11 (b)(2) the question of whether an amendment is substantive or clarifying is irrelevant to a motion under §3582 (c)(2), as such motion may be premised only on an amendment specifically listed in U.S.S.G. § 1B1.10 (c). **United States v. Cordoba**, 1997 U.S. Dist lexis 144, 1997 WL 12795, 2(N.D. ill 1997). **United States v. Jewell**, 1999 U.S. App lexis 34577 1999 WL 1278002, 1 7th Cir. 1999.

The Eight Circuit has held in some cases that only amendments enumerated in §1B1.10 are to applied retroactively even if appellate review has not concluded **United States v. Dowty**, 996 F.2d 937,938 (8th Cir. 1993). The Eight Circuit has also said that clarifying changes or amendments apply retroactively even if not listed in section 1B1.10 See **United States v. Douglas**, 64 F.3d 450,453 (8th Cir. 1995) See also

United States v. Renfrew, 957 F. 2d 525,527 (8th Cir. 1992).

The Ninth Circuit held that amendments that occur between sentencing and appeal that clarify the guidelines rather than substantively change them are given retroactive application. See **United States v. Sanders**, 67 F.3d 855.856 (9th Cir. 1995). The Ninth Circuit has stated that a clarifying amendment was not an amendment to the guideline range and as such, was not subject to U.S.S.G. § 1B1,10 which provided that retroactive application of a new, lower guideline consistent with the Policy only for an "amendment specifically enumerated in 1B1.10. In **U.S. v. Martinez**, 946 F.2d 100 (9th Cir. 1991) the court found that a material change in the Drug Quantity Table could be used if there was an intent to clarify rather than alter the guideline. Martinez held "a subsequent amendment may be entitled to substantial weight in construing earlier law when it plainly serves to clarify rather than change existing law." In **United States v. Evens**, (1991 US Dist lexis 19456 Dec 23, 1991) District of Oregon and the **United States v. Mercado**, 2017 U.S. Dist lexis 29828 Eastern District of Washington the Court granted motions under 3582 (c)(2) based on clarifying amendments that were not listed under 1B1.10.

The Tenth Circuit has stated that a district Court is not authorized to modify a sentence under §3582 (c)(2) if the relevant amendment does not appear in § 1B1.10 See **United States v. Torres-Aquino**, 334 F.3d 939,941 (10th Cir. 2003). In **United States v. Ramsey**, US App lexis 2246 (th Cir. 2017) the Tenth Circuit stated that it does not matter whether the amendment is clarifying or substantive in the context of a §3582 (c)(2).

The Eleventh Circuit had considered retroactive application of a clarifying amendment in the context of appeal or §2255 motion but this "bears no relevance to determining retroactivity under §3582 (c)(2) **Burke v. United States**, 152 F.3d 1329,1332 (11th Cir 1998) only amendments clarifying or not listed under subsection (c) of 1B1.10, and that have the effect of lowering the Sentencing Range upon which a sentence was based may be considered for reduction of a sentence under §3582 (c)(2).

Most Courts have elected to say that a clarifying amendment can only be applied on direct appeal or §2255 motion and others have also elected to apply it in a §3582 motion. The underlying issue here is that the Courts of the Nation should apply the law as available to each defendan's case in a unifying matter of law and not discretion. Since the Sentencing Commission does not want to deem certain amendments as retroactive becasue of potential court filing overloads the District, Appellate Court should provide relief to defendants when the Sentencing Commission has enacted a clarifying amendment especially in the instant case when defendant was sentence to 112 months plus 1 day and given 16 point enhancement based on the then intended loss definition. The amendment reflects the Sentencing Commission's Continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually occured. Should focus more specifically on the defendant's culpability and subjective intentions. Amendment 794 states that a defendant who is accountable under 1B1.3 for a loss amount under 2B1.1 that great exceeds the defendant's personal gain from a fraud offense may receive an adjustment under this guideline. According to evidence presented at trial Petitioner did not gain from

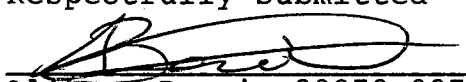
the offense and was also subject to a $26.500 restitution order due to checkes cashed in the fraud offense.

Accordinly, Petitioner's sentence should be vacated and remanded for resentencing so that the district court can properly sentence Petitioner in light of Amendments 791,792 inter alia and 794 which took effect while appellate review was pending.

CONCLUSION

Petitioner Respectfully Submits that he has demonstrated compelling reasons to grant Writ of Certiorari in this case. Accordingly Cweriorari should be granted.

Respectfully Submitted



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