18-9060

No. 18A806

IN THE

SUPREME COURT OF THE UNITED STATES

Bruce Wayne Harrison — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals
for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bruce Wayne Harrison #39731-018
(Your Name)

Federal Correctional Complex
(Address)

P.O. Box 1031 (Low custody)
Coleman, Florida [redacted]
(City, State, Zip Code)

(Phone Number)

ORIGINAL

## QUESTION(S) PRESENTED

This Court provides that the Ex Post Facto Clause applies to any change in the law that creates a significant risk of a higher sentence, including changes in the Sentencing Guidelines. The 2011 Amendments to the U.S.S.G. § 1B1.10 caused Mr. Harrison to lose the benefit of the 2000 Guidelines Amendment Number 599. Should the district court have applied Amendment 599 to Mr. Harrison's pre-2011 sentence?

## LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 741 Fed. Appx. 765 (11th Cir. Nov. 1, 2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 1, 2018.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including March 25, 2019 (date) on February 6, 2019 (date) in Application No. 18 A 806.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution, Article I, Section 9, Clause 3:**
No Bill of Attainder or ex post facto Law shall be passed.

**18 U.S.C. § 3582(c)(2)**
**Modification of an imposed term of imprisonment.**——The court may not modify a term of imprisonment once it has been imposed except that in the case of a defendant how has been sentenced to a term of imprionsment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 944(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 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 (2000)**
(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

**U.S.S.G. § 1B1.10 (2011)**
**(b) Determination of Reduction in Term of Imprisonment**
(1) - **In General**——In determining whether, and to what a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

**U.S.S.G. Amendment 599**
The Commentary to § 2K2.4 captioned "Application Notes" is amended in Note 2 by striking the first paragraph in its entirety and inserting the following:
"If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 942(c).

## STATEMENT OF THE CASE

In 1995, the district court sentenced Bruce Wayne Harrison to 592 months of imprisonment. The sentenced included 292 months for conspiring to distribute drugs. The court imposed a 2 point firearm enhancement in deciding this sentence. The firearm also served as the basis for Mr. Harrison's 924(c) conviction.

The district court sentenced Mr. Harrison for one count of conspiring to possess with intent to distribute illegal drugs, five counts of possessing with intent to distribute cocaine, three counts of possessing with intent to distribute marijuana, and two counts of using a firearm in relation to a drug trafficking crime under 18 U.S.C. § 924(c). The presentence investigation report calculated a total offense level of 44 (criminal history category II), which included a two-level increase for Mr. Harrison's possession of a firearm during the offense under U.S.S.G. § 2D1.1(b)(1). At sentencing, the district court found Mr. Harrison had a criminal history of I. For compassionate reasons the court varied downward four levels before imposing sentence.

In 2000, the Sentencing Commission corrected a fundamental defect in the Guidelines: a double counting (double punishment) for carrying a firearm in the furtherance of a drug conviction. U.S.S.G. Amend. 599. Mr. Harrison's mandatory-era guideline sentence contained that defect.

In 2017, Mr. Harrison sought a reduction based on Amendment 599, which barred a court from using a firearm accounted for in a 924(c) conviction from applying an extra enhancement to the base offense level of the underlying offense. U.S.S.G. App. C, Amend. 599; see also **United States v. Brown**, 332 F.3d 1341, 1344-45 (11th Cir. 2003).

Mr. Harrison did not get the reduction because between the passage of Amendment 599 in 2000 and the 2017 motion, another guideline (1B1.10) had changed.

Mr. Harrison acknowledged that he could not obtain relief based on Amendment 599 under the current policy statement, U.S.S.G. § 1B1.10 (2011), and argued that the district court had inherent power to award a reduction by giving effect to the previous version of the policy statement, § 1B1.10 (2000). The version in effect when Amendment 599 became law. The 2000 version of **U.S.S.G. § 1B1.10** provided that the district court "[i]n determining whether, and to what extent [to grant] a reduction ... should consider the term of imprisonment that it would have imposed had the amendment ... been in effect at the time the defendant was sentenced, except that ... the reduced term of imprisonment [could not] be less than" the total time already served. Its third application note stated, "When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate .... " **Id.** cmt. n.3; (App. "A" at 2).

The district court acknowledged that "[u]nder USSG Amendment 599, [Mr. Harrison] would not receive the two level enhancment pursuant to USSG § 2D1.1(b)(1) for possessing a firearm during a drug offense," thus speaking in a positive rather than a negative voice, by natural operation of the amendment Mr. Harrison was entitled to a two level reduction in his sentence. Nevertheless, the district court ruled that Mr. Harrison was ineligible for a reduction under Amendment 599 because effective as of November 2011 Amendment 759 prohibited a court from "lower[ing] a defendant's sentence ... if that term of imprisonment was less than the term of imprisonment provided" under the amended guideline range. (App. "A" at 2).

What the district court did not recognize was that its inherent authorization included the power and a duty to apply the Constitution's Ex Post Facto clause to the Guidelines. Instead, the district court found it could not grant the relief to which Amendment 599 entitled Mr. Harrison.

Mr. Harrison appealed the decision to the Eleventh Circuit Court of Appeals. The appellate court also overlooked that applying the 2011 version of 1B1.10 effectively increased the punishment for every prisoner who, like Mr. Harrison, could have benefitted from retroactive guidelines adopted prior to 2011. That oversight resulted in the appeals court affirming the district court judgment. This petition ensued.

## REASONS FOR GRANTING THE WRIT

In 1995, the United States District Court sentenced Mr. Harrison to 592 months in prison, and this after a four level departure because the court believed the Guidelines and the statutory sentences were unnecessarily harsh. (App. B). In 2000, the Sentencing Commission and Congress concurred with the district judge's intuition; they enacted United States Guidelines Amendment 599, which eliminated the double counting that occurred when a person was convicted of both selling drugs and carrying a firearm. (Appx. "A" at 2); see U.S.S.G. Amend. 599.

If Amendment 599 had been in effect when Mr. Harrison was sentenced, then his 292 month sentence for violating the drug law would have been reduced to 235 months (low-end of level 40 to low end of 38). Apparently fortunate for Mr. Harrison, Congress made 599 retroactively applicable, thus upon request Mr. Harrison's aggregate sentence would decrease to 555 months. Because the benefit of the change was far in the future, Mr. Harrison did not rush into court.

In 2011, unbeknownst to Mr. Harrison, Congress modified a different guildline, U.S.S.G. 1B1.10 (Appx. "A" at 2)(U.S.S.G. Amend. 759), the effect of this guideline change was to retroactively (post hoc, ex post facto) prevent Amendment 599 from mandatorily[1] reducing Mr. Harrison's sentence by 57 months.

In 2017, in the thralls of prison reform, Mr. Harrison sought relief under 18 U.S.C. § 3582(c)(2) and Amendment 599 (Appx. "A" at 2). Although the district court appeared inclined to grant the reduction (Appx. "B" at 2), and Mr. Harrison's reducing his custody level from the penitentiary to the low through good behavior that would appear to support such a reduction, the district court ran into a jurisdictional barrier. (Appx. "B" at 3).

[1] Mr. Harrison's sentence and Amendment 599 were both in the mandatory-guideline era.

The presentencing report originally assigned Mr. Harrison a total offense level of 44; the sentencing court varied down to level 40; but since that variance did not involve substantial assistance, the district court could not drop the 4 levels in § 3582(c)(2) resentencing. Therefore, under the 2011 version of U.S.S.G. § 1B1.10 Amendment 599 did not lower the base guideline range, the district court could not hear, let alone grant, the § 3582(c)(2) motion. **18 U.S.C. § 3582(c)(2)**(requires an actual sentence range lowering event for a court to grant relief).

Stated otherwise, prior to the 2011 change to U.S.S.G. § 1B1.10, Amendment 599 lowered Mr. Harrison's sentence because his original variance counted. But after the 2011 procedural changes, the new rule effectively increased Mr. Harrison's original sentence. That is the new guideline creates not only a significant risk of, but also actually does, result in a higher sentence.

The Constitution prohibits the government from creating such a result. See **Peugh v. United States,** 569 U.S. 530 (2013). "Ex Post Facto Clause is not limited to laws that regulate primary conduct. It applies to any change in the law that creates a significant risk of a higher sentence." **Id.** A principle the Court recognized from the Republic's formation. See **Calder v. Bull,** 3 U.S. (Dall) 386, 390 (1798)(Chase, J.)(applying the Ex Post Facto Clause to changes in evidentiary rules); see also **Carnell v. Texas,** 529 U.S. 513, 531 (2000))(Ex Post Facto reflects "principles of fundamental justice that are broader than mere notice).

This Court recognizes that these type of obvious sentencing errors affect the integrity and public reputation of the justice system. **Rosales-Mireles v. United States,** 138 S.Ct. 1897 (2018). Thus providing even greater impetus to grant certiorari and realign the Eleventh Circuit with the Constitution.

The Eleventh Circuit validated an application of the Guidelines which runs afoul of the Ex Post Facto Clause. This Court should address the substantial questions poised by whether a change that would Ex Post Facto change in the Guidelines violates the Constitution either generally or on an as applied basis.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted on this 19 day of March, 2019 by:

Bruce Wayne Harrison

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**VERIFICATION**

Under penalty of perjury as authorized by 28 U.S.C. § 1746, I declare that the factual allegations and factual statments contained in this document are true and correct to the best of my knowledge.

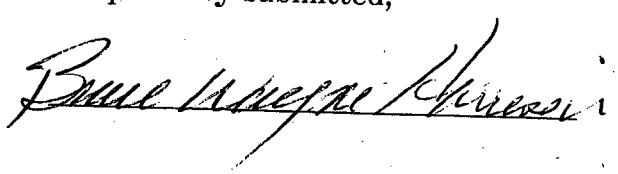
Bruce Wayne Harrison

Bruce Wayne Harrison

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 3-18-19