No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

GEORGE E. BROWN

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE E. BROWN #32507-044
FCC-Forrest City Low
P.O. Box 9000
Forrest City, AR 72336
Pro Se

QUESTION(S) PRESENTED

I. DOES A POLICE OFFICER'S BELIEF THAT HE ALLEGEDLY HAS REASONABLE SUSPICION A MOTORIST DOES NOT HAVE A DRIVER'S LICENSE DIMINISH TO AN INCHOATE HUNCH OR SUSPICION WHEN ANOTHER POLICE OFFICER SUBSEQUENTLY CONDUCTS AN INVESTIGATION AND DISCOVERS THE MOTORIST IS LICENSED?

II. SHOULD AN APPEAL WAIVER BE ENFORCED WHEN A JUDGE CONSIDERS AN IMPROPERLY CALCULATED GUIDELINE RANGE TO IMPOSE SENTENCE AND AFTER SENTENCE BECAME FINAL THE GOVERNMENT SUBMITS EVIDENCE NOT PREVIOUSLY DISCLOSED THAT IMPACTED THE PROCEEDING?

III. DOES THE LAW IN EFFECT DURING ORIGINAL SENTENCING OR THE LAW IN EFFECT DURING A SENTENCE MODIFICATION/RESENTENCING UNDER 18 U.S.C. §3582(c)(2) CONTROL THE MAXIMUM PUNISHMENT FOR A SUPERVISED RELEASE VIOLATION?

TABLE OF CONTENTS

INDEX TO APPENDICES

AUTHORITIES

Public Acts

Statutes

Guidelines

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

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 9, 2018.

The petition for rehearing was denied by the United States Court of Appeals on March 30, 2018.

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

STATEMENT OF THE CASE

On March 14, 2015 police officers of the Sikeston Department of Public Safety, Chris Rataj and Bobby Penrod were driving an unmarked vehicle and wore no department uniform as they were detectives in the Black Community of town. Rataj claimed that at least thirty days before he observed Petitioner driving a motor vehicle and he did a license check and determined Petitioner did not have a driver's license. Rataj at no point stated where or who he got his information from. Penord stated that an informant had given him information implicating Petitioner in criminal activity. As such Penrod conducted an investigation and contacted the Department of Motor Vehicles (DMV) more than two weeks after Rataj's investigation but he did not know Petitioner nor could he identify Petitioner. He stated that he was able to identify Petitioner during his investigation through his driving license photograph. He did not give any indication there was any problem with the license such as revoked or suspended or any abnormalities. Penrod testified during an evidentiary hearing that he had contacted a reputable agency and identified Petitioner through his driver's license, again, more than two weeks after Rataj's investigation. They observed Petitioner earlier at a location called the "Tree" where people gather according to their testimony and they believed the location to be a crime spot. Later that night Petitioner observed an unmarked vehicle being driven by two white

men but was not able to identify them as they wore plain clothes. Petitioner first noticed them at the corner of Alabama and Osage headed north but made a right turn onto Osage without signaling and drove east for one block and turned right again without signaling onto Dixie and drove to Washington and stopped at a stop sign. Meanwhile Petitioner signaled and turned left onto Alabama all the while with an unobstructed view of the vehicle drove also to Washington and stopped at a stop sign. Petitioner noticed the now suspicious vehicle (after committing traffic violations) still sitting at the stop sign at Washington and Dixie which is only one block east of Washington and Alabama. Petitioner signaled and turned left onto Washington and proceeded east and reached the very same stop sign that the unmarked vehicle (later determined to be a police cruiser driven by Rataj and Penrod) had stopped at had not moved. After Petitioner reached the intersection the unmarked vehicle already had the right of way but gave no indication of which direction it would continue to travel at the two-way stop. The vehicle just continued to just sit in the middle of the one-way road. After this observance Petitioner continued to travel east on Washington and after he had drove through the intersection the unmarked vehicle makes a left turn without signaling and gets in behind Petitioner's vehicle. Petitioner drove one block and signaled left and turned north onto Luther. The unmarked vehicle also turned left without signaling onto Luther. Petitioner thereafter became even more suspicious following the continued traffic violations by the unmarked ve-

hicle and continued to observe the vehicle. While traveling down Luther Petitioner noticed a blue flashing light coming from the grill area of the unmarked vehicle. At this point Petitioner was confused and became afraid because although this could be a police vehicle it does not appear to be police officers driving in light of the numerous traffic violations committed previously. Petitioner was aware that during this time period white police officers all over the country were killing unarmed Black men as had just occurred months prior less than two hundred miles north in St. Louis, Missouri to multiple Black men. The two men (as indicated above) were later identified as Rataj and Penrod testified that Petitioner committed traffic violations before stopping and jumping out of the car and fled. Police say they chased Petitioner and observed him discard items before he was tased by Rataj that they say were drugs. Petitioner was subsequently indicted and after a plea of guilty was convicted and sentenced to 70 months for Possession With Intent to Distribute Cocaine Base and Methamphetamine under §841 and also sentenced to 60 months for a supervised release violation for a previous conviction of Possession With Intent to Distribute 5 Grams or More of Cocaine Base wherein Petitioner was originally sentenced to 240 months imprisonment. Following the Fair Sentencing Act of 2010 Petitioner was resentenced or sentence modified pursuant to 18 U.S.C. §3582(c)(2) in November of 2011 to 144 months. Petitioner's conviction and sentnece were affirmed on appeal.

REASONS FOR GRANTING THE WRIT

DOES A POLICE OFFICER'S BELIEF THAT HE ALLEGEDLY HAS REASONABLE SUSPICION A MOTORIST DOES NOT HAVE A DRIVER'S LICENSE DIMINISH TO AN INCHOATE HUNCH OR SUSPICION WHEN ANOTHER POLICE OFFICER SUBSEQUENTLY CONDUCTS AN INVESTIGATION AND DISCOVERS THE MOTORIST IS LICENSED?

On or about February 15, 2015 Detective Chris Rataj (Rataj) allegedly observed Petitioner driving a motor vehicle. He alleges that he checked Petitioner's driving status and determined Petitioner did not have a driver's license. On or about March 1, 2015 Detective Bobby Penrod had received information from an informant implicating Petitioner in criminal activity. Penrod did not know Petitioner but began an investigation of Petitioner. Penrod testified that to identify Petitioner he contacted the Division of Motor Vehicles (DMV) and he discovered Petitioner's driving license and was able to identify Petitioner from the driver's license photo. As stated above this information was obtained about two weeks after Rataj allegedly discovered his information. On March 14, 2015 both officers were in an unmarked vehicle together and observed Petitioner driving a motor vehicle and based on the information that he allegedly previously received on or about February 14, 2015, Rataj decided to stop Petitioner. Rataj at no time revealed who or where he got his information. The reasonable suspicion necessary to justify such a stop is dependent upon both the content of information possessed

by police and its degree of reliability. **Navarette v California 134 S. Ct. 1683, 1687 (2014)**(quoting **Alabama v White 496 U.S. 325, 330 (1990)**). The Court of Appeals credited the district court's credibility findings that "police" had performed a check of official records and determined that, as of a month prior, Brown did not have a valid driver's license. The district court relied on **United States v Sandridge 385 F. 3d 1032, 1036 (6th Cir. 2004)**(officer reasonably suspected that the defendant was driving without a valid license because the officer had run a license check on the defendant just three weeks earlier and learned that he did not have a valid license). Although a factual finding based on a determination that a witness is credible "can virtually never be clear error," when "[d]ocuments or objective evidence ... contradict the witness story; or the story itself [is] so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it ... the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." **United States v Prokupek 632 F. 3d 460 (8th Cir. 2011)**. The district court's finding is troubling for a number of reasons. It determined that police checked official records, but in actuality the record revealed that it was only Penrod who checked official records, the DMV, reputable state agency which verified that Petitioner did have a driver's license and there were no indications the license were invalid. Whereas Rataj did not reveal where he got

his information, simply no way to test the degree of reliability of Rataj's information. The district court relied on Sandridge, but that case also found there were no facts in the record suggesting the officer should have assumed that the alleged offense had ceased since he last checked. But in case at bar there does exist such a fact, Penrod's investigation was conducted after Rataj's alleged investigation and he discovered there was indeed a license that was valid enough for him to even rely on to identify Petitioner's physical appearance. The district court's crediting Rataj's account runs afoul of **Prokupek**. The court of appeals relied on in part **United States v Chartier 772 F. 3d 539, 543 (8th Cir. 2014)**, but the circumstances in that case are very different from case at bar. Chartier involved only one officer that believed the defendant did not have a license and there was no other evidence contradicting his contention or subsequent investigations into the license status. The fact that Penrod conducted an investigation and found there did exist a license cannot be divorced from Rataj's alleged investigation that has no reliability that occurred allegedly before Penrod's most recent investigation. Penrod's investigation returns diminished Rataj's alleged investigation returns to at most an inchoate hunch or suspicion. Thus reasonable suspicion could not be found based on Rataj's investigation when the totality of the circumstances require that Penrod's investigation be considered in conjunction with Rataj's investigation. Penord's investigation should be the controlling investigation because it is the most recent. Rataj

wrote a traffic citation (that was not prosecuted) alleging that Petitioner had no operator's license with no indication of there being invalid license. Following Penrod's investigation results, if Rataj still believed there was no license then before stoping the vehicle on March 14, 2015 he could have employed a less intrusive means of dispeling his suspicions such as run a MDT check right from his patrol unit without having to stop the vehicle as it takes on most occasions less than one minute to do so while he was behind the vehicle. **Delaware v Prouse v Prouse 440 U.S. 648 (1979)**(we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile isn't registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and de-detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment). If Rataj believed that Petitioner committed a traffic violation on or about February 14, 2015 he would have needed a warrant to conduct a stop and arrest of Petitioner on March 14, 2015 in which he did not have. The district court's decision seems to indicate there was a license but that it was not valid, **"the Court holds that the detectives could conduct a traffic stop of Brown based upon their reasonable suspicion that Brown's license was not valid."** The court of appeals affirmed this finding that was not a part of the record thus clearly erroneous. The issue before the district court was never that Petitioner had an invalid license, rather that he had no license.

Although the search of the residence was not the subject of an Indictment, the district court held that the search was conducted pursuant to a properly executed search warrant. However, the informant used in the search warrant was the same person that gave information to police that implicated Petitioner in criminal activity. However, at the onset of the suppression hearing the Magistrate announced that she would not be hearing evidence on the reliability of the informant. And in doing so she would not allow a subpoenaed police officer that had previously arrested the informant in the police department parking lot after she was driving erratically and lied to police that drugs the police observed her throw to the ground was placed there by Petitioner while he sat in the passenger seat of the informant's vehicle, testify as to his interactions with the informant which had a grave bearing on the informant's reliability, the officer would have testified that the informant had recently lied to police just a few days prior to the police receiving information from her that implicated Petitioner in criminal activity. The Magistrate would not allow evidence on the informant's credibility/reliability, however, she credited the informant's information to police in finding police had reasonable suspicion to stop the vehicle. The proceeding was totally unfair in this respect when Petitioner was not allowed to present evidence that the informant was not credible thus nullifying reasonable suspicion findings on the informant's information. The good faith exception would have not purged the unreliable information.

SHOULD AN APPEAL WAIVER BE ENFORCED WHEN A JUDGE CONSIDERS AN IMPROPERLY CALCULATED GUIDELINE RANGE TO IMPOSE SENTENCE AND AFTER SENTENCE BECAME FINAL THE GOVERNMENT SUBMITS EVIDENCE NOT PREVIOUSLY DISCLOSED THAT IMPACTED THE PROCEEDINGS?

The court of appeals held, "with respect to the sentencing issue, we enforce the appeal waiver in Brown's plea agreement, citing United States v Andis 333 F. 3d 886, 889-92 (8th Cir. 2003)(en banc). (2) **Sentencing Issues:** In the event the Court accepts the plea, ... and, after determining a Sentencing Guidelines range, sentences the defendant within or below that range, then, as part of this agreement, the defendant hereby waives all rights to appeal all sentencing issues other than Criminal History.

However, it is anticipated by a defendant that the Court will properly calculate the Guideline range when he agrees to such an arrangement. In this matter the Guideline range had to be determined based on amounts of drugs that were part of the charged offense. In this matter, at Sentencing the district court considered weights of packaging and uncharged conduct to determine the offense level and Guideline range. To consider such is improper and unconstitutional. In Blakely v Washington 542 U.S. 296 (2004), the Supreme court held that the statutory maximum for purposes of Sixth Amendment analysis is not the maximum sentence stated by the statute but is "the maximum [a judge] may impose without any additional findings" found by a jury. In United States v Booker 543 U.S. 220 (2005), the Court held that the upper end of the sentencing guidelines was

the statutory maximum a sentencing judge could not sentence above the guideline range based on his or her own factfinding. The matter in question involves the Court's use of wrappings that contained controlled substances that are the exact same substances that was calculated in determining relevant conduct and drug amount attributable to Appellant. And in using or considering these items the Court imposed an illegal sentence. The relevant conduct attributed in this matter derived from uncharged conduct. Uncharged conduct just as acquitted conduct carries carries with it a **presumption of innocence**. When, based on the above courts decisions a judge sentences a defendant above the guidelines it is in essence sentencing above the statutory maximum, thus the same would be jurisdictional defect which is an illegal sentence in its own right. In most circumstances when a judge uses relevant conduct including drug amounts based on ghost dope or drugs that have not been presented to the court other than someone saying they existed, he is imposing an illegal sentence. At the time of sentencing an argument challenging the use of uncharged conhad been foreclosed by both Supreme Court precedent and Eighth Circuit precedent. See **United States v Watts** 519 U.S. 148 (1997); **United States v Running Shield** 831 F. 3d 1079 (8th Cir. 2016); **United States v Garcia-Gonon** 433 F. 3d 587, 593 (8th Cir. 2006). Now in its 30th year of existence, despite the noble intentions of bringing uniformity, uncertainty and proportionality to federal sentencing, the U.S. Sentencing Guidelines (Guidelines) have been the subject of a significant and sustained criticism. Among

the features of the Guidelines that have received the most critical attention is the use of acquitted conduct at sentencing. A recent ruling by the U.S. Supreme Court, however, may indicate that such a controversial practice may finally be coming to an end. At sentencing, federal judges consider "relevant conduct" for purposes of calculating the Guidelines, which may include uncharged conduct otherwise inadmissible-at-trial evidence, and even acquitted conduct. Twenty years ago, in **Watts**, the Supreme Court ruled "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." The Court reasoned that as an acquittal does not indicate actual innocence, the government is not precluded from proving up the conduct at sentencing since all that is required is a preponderance of the evidence. The U.S. Supreme Court's recent decision in **Nelson v Colorado** 137 S. Ct. 1249 (2017) regarding a restitution matter may provide a legal foundation for reining in the inclusion of acquitted conduct with relevant conduct. At issue in **Nelson** was whether a reversal of a conviction by an appellate court on direct or collateral review entitles a defendant to reinbursement of any restitution the defendant may have paid pursuant to the sentence imposed for the now-vacated conviction. Under Colorado's Exoneration Act, "an innocent person who was wrongly convicted" could recover any restitution, costs, fees, or fines paid as a result of the conviction, provided the "convic-

tion has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence. Furthermore, the defendant-claimant had to prove his actual innocence by clear and convincing evidence. The Supreme Court held that Colorado's Exoneration Act violated due process. "[O]nce those convictions were erased [for any reason], the presumption of innocence was restored." citing **Johnson v Mississippi** 486 U.S. 578, 585 (1988)(After a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.")). Accordingly, as the defendants in **Nelson** were now innocent **simpliciter**, the state held no right to retain the restitution, costs, fees or fines paid by them. The tension between **Nelson** and **Watts**, therefore, is the effect of an acquittal. **Watts** held that an acquittal is irrelevant for purposes of sentencing because it is not a finding of innocence. In stark contrast, **Nelson** held that an acquittal absolutely is relevant because of the reversion to a presumption of innocence--so relevant in fact as to preclude any penalty being sustained subsequent to the acquittal. As the Court in Nelson observed, "[]he vulnerability of the State's argument that it can keep the amounts exacted so long as it prevailed in the court of first instance [and thus met some burden of proof] is more apparent still if we assume a case in which the sole penalty is a fine. On Colorado's reasoning, an appeal would leave the defendant empty-handed; regardless of the outcome of an appeal, the State

would have no refund obligation." Nelson, 137 S.Ct. @1256. Arguably, Nelson (7-1) may have effectively overruled the Court's per curiam decision in Watts. After all, it is difficult, if not impossible, to square the reasoning of Nelson with that of Watts. As the Nelson Court observed, "once ... the presumption of their innocence was restored," a state "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions," including costs, fees, and restitution. The same surely holds true where liberty, as opposed to property, is at stake. The presumption of innocence precludes penalizing conduct underlying acquitted counts, but conduct underlying counts of conviction (that have been finalized) may, of course, be penalized. And never the two shall mix. Furthermore, and to be sure, it matters not the form of acquittal--be it jury, by an appellate court on direct appeal, by a court on collateral review, or by death during pendence of an appeal. An acquittal is an acquittal is an acquittal. The reasoning of Nelson is more far-reaching than just acquitted conduct. To illustrate, see scenarios of increasing scope below. All scenarios are based on the following fact pattern: Defendant X has defrauded Company A of $1 million and, in separate conduct, also defrauded Company B of $1 million. Uncharged conduct is perhaps the most startling result of the reasoning of Nelson. Assume that X is charged only with one count of fraud, the fraud pertaining to Company A. The government, for whatever reason, decides to not charge X with the $1 million fraud pertaining to Company B. X now decides to plead guilty to the single count indictment. As

the presumption of innocence can only be overcome by a final conviction, X cannot be held criminally liable for the uncharged fraud pertaining to Company B. Otherwise, the government could easily circumvent **Nelson** by simply not charging a defendant with conduct it subsequently will use to penalize the defendant at sentencing. Put differently, if a defendant is presumed innocent upon acquittal, then it necessarily follows that he is innocent of charges for which he was never convicted regardless of whether the "non-convictions" are a result of a dismissal or a failure to charge outright. **Nelson** entails not only that X may not be penalized for acquitted conduct, but also that X may not be punished for dismissed or even uncharged conduct, to be sure, this does not mean that X may only be sentenced based exclusively on facts he either admitted to pursuant to a plea of guilty, or were found by a jury beyond a reasonable doubt at trial. X may of course, be sentenced on facts arising out of any count of conviction, for example, the amount of loss underlying Count 1 and the number of victims arising from the conduct underlying that count. But if X may not be penalized for even uncharged conduct, then that entails that any facts that could constitute elements of a separate offense from the offense conviction, may not be considered for purposes of sentencing. This is so if, as has been emphasized in **Nelson**, the presumption of innocence is to be given weight. Or put differently, a state may not engage in an end-run around the Constitution by characterizing at sentencing (acquitted, dismissed, or uncharged) facts that are ac-

tually elements of a separate offense as mere sentencing factors. To do so eviscerates the presumption of innocence. And this ultimately is where the Court in Watts got it wrong: innocence is not a matter of degree; it is an all or nothing proposition. Or, as the Court in Nelson observed: "once ... the presumption of ... innocence [i]s restored," a state "may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for [sanctions to apply]." And just as it does not matter the mode of sanction. The reasoning of Nelson is just as applicable to deprivation of liberty as it is to a financial sanction. If the state may not take a dollar, it certainly may not take a day. If an acquittal precludes a defendant from being financially penalized for certain conduct, then how can an acquittal still allow a defendant to lose his liberty for such conduct? While the Watts decision was correct that an acquittal is not an affirmative finding of actual innocence, the problem is that the court in Watts overlooked the fact that an acquittal does restore the presumption of innocence--something the Court has now clarified and amplified in Nelson. The reasoning of Nelson thus compels the conclusion that Watts has been effectively overruled. Acquitted conduct cannot be used to penalize (or increase a penalty) because an acquittal, by any means, restores the presumption of innocence. And no one may be penalized for being innocent. This has far reaching application as the reasoning of Nelson applies not only to acquitted conduct, but to dismissed and even uncharged conduct. This, in turn greatly circumscribes, but does not eliminate, the use of relevant conduct

at sentencing in terms of what constitutional may be considered by sentencing courts. The principle of Nelson is this: Only facts arising out of a final conviction -- which may not also be construed as elements of acquitted, dismissed, or uncharged crimes--may be considered at sentencing. And this not inconsistent with 18 U.S.C. §3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." That statute, like all statutes, must be read within the context of the Constitution. Thus, facts that may violate due process--as announced in Nelson may not be included in that otherwise broad universe of facts that may be considered for purposes of imposing an appropriate sentence. As the Court has recognized for well over a century, "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." **Coffin v United States 156 U.S. 432, 453 (1895).** Relevant conduct, as a result of Watts, has performed an end run around that most elementary presumption, which has resulted in enhanced sentences that violate due process. Nelson hopefully has announced that that era is over. Just as in case at bar and noted above the sentence is illegal because the court considered wrappings and uncharged conduct that Appellant is presumed inno-

cent of and imposed punishment for being innocent. Imposing punishment for uncharged conduct is akin to or actually is sentencing to more than that authorized by law and as such is truly a jurisdictional defect and thus an illegal sentence. No appeal waiver should be enforced when the district court improperly calculates the offense level and Guidelines by considering the substance wrappings and uncharged conduct as relevant conduct. In this matter on March 14, 2015 police conducted a vehicle stop and seized 2.81 grams of cocaine base, 1.19 grams of methamphetamine and 0.78 grams of marijuana. Based on the marijuana equivalency table and with the three levels for acceptance of responsibility and timely notice of intent to plea Petitioner would have faced an offense level of 11 and a defined range of 27-33 months imprisonment. Instead with the wrappings and uncharged conduct considerations he faced an offense level of 19 with a defined range of 63-78 months imprisonment. The wrappings and uncharged conduct included 14.89 grams of methamphetamine, 14.77 grams of cocaine base and 37.93 grams of marijuana. In December of 2016 more than one month after sentencing the Government provided Petitioner with lab sheets that indicated that indeed the wrappings had been included as part of the drug quantity. An appeal waiver in this matter should not be enforced when although the Court sentenced within the Guidelines, he did not sentence within the correct Guidelines range.

DOES THE LAW IN EFFECT DURING ORIGINAL SENTENCING OR THE LAW IN EFFECT DURING A SENTENCE MODIFICATION/RESENTENCING UNDER 18 U.S.C. §3582(c)(2) CONTROL THE MAXIMUM PUNISHMENT FOR A SUPERVISED RELEASE VIOLATION?

In 2006 Petitioner was convicted for the offense of Possession With Intent to Distribute Five Grams or More of Cocaine Base in the United States District Court for the Eastern District of Missouri-Southeastern Division. At the time of Sentencing the offense carried a penalty of not less than five years nor more than forty years imprisonment. In 2010 the Fair Sentencing Act (FSA) brought about changes to offenses involving cocaine base. Specifically, it changed the threshold that would trigger a five year mandatory minimum sentence from five grams to twenty-eight grams that would also call for a maximum sentence of forty years. Thus an offense involving five grams or more of cocaine base no longer carried a minimum mandatory penalty and maxed out at twenty years imprisonment. Under 18 U.S.C. §3559(a)(3) an offense with a maximum punishment of twenty years was classified as a Class C felony. and under 18 U.S.C. §3583(e)(3) the maximum punishment for a supervised release violation for the underlying offense was two years. **United States v Bone 378 F. 3d 806 (8th Cir. 2004)**(24 months maximum allowable time for violation revocation). During the original Sentencing the Court imposed a sentence of 240 months imprisonment and 8 years supervised release. Effective November 1, 2011 the district court pur-

suant to 18 U.S.C. §3582(c)(2) modified or resentenced Petitioner to 144 months imprisonment. As stated above during the modification/resentencing proceeding the underlying offense Possession With Intent To Distribute Five Grams or more of Cocaine Base carried a penalty of twenty years max with no minimum mandatory. The court of appeals relied on **United States v Johnson 786 F. 3d 241 (2d Cir. 2015)** and **United States v Turlington 696 F. 3d 425 (3rd Cir. 2012)** to conclude that the revocation sentence did not exceed the statutory maximum because the underlying offense was a Class A felony at the time of original conviction. The cases relied on determined that the FSA did not cause a change. However, the modification/resentencing was based on the FSA's change in the law which changed the penalties for such an offense including the removal of a minimum and maximum sentence of 5-40 years. **United States v Derry 824 F. 3d 299 (2d Cir. 2016),** we hold that when a defendant is serving a term of imprisonment that has been modified pursuant to §3582(c (2), his sentence is "based on" the guideline range applied at his most recent sentence modification, rather than the range applied at his original sentencing. To determine whether and to what extent a reduction is warranted, a district court must calculate the "amended guideline range that would have been applicable to the defendant if the amendment to the guidelines listed in [1 B1.10(d) had been in effect at the time the defendant was sentenced." §1B1.10(b)(1). In so doing, the court is directed to "substitute only the amendments ... for the corresponding guide-

line provisions that were applied when the defendant was sentenced and [to] leave all other guideline application decisions unaffected." §3582(c)(2) "does not authorize a [plenary] sentencing or resentencing proceeding," but rather "empowers district judges to correct sentences that depend on frameworks that later prove unjustified" by reducing a sentence in circumstances specified by the Commission. The operative term is the term of imprisonment or sentence that the defendant is serving. Accordingly, the relevant inquiry under §3582(c)(2) is not when the formal process of "sentencing" occurred, but what term of imprisonment the defendant is serving and what guideline range serves as the basis for that sentence. When a district court modifies a term of imprisonment with a new one based on the amended guideline range, and amends the judgment to reflect the sentence that comes into effect. See 18 U.S.C. §3582(b)-(c). In other words, as a matter of fact, the old sentence no longer exists, and the only term of imprisonment to which the defendant has been "sentenced" is "based on" the guideline range applied in the modification proceeding. A defendant who receives a sentence modification undoubtedly has been sentenced to a new term of imprisonment. **United States v Banks 770 F. 3d 346, 348 (5th Cir. 2014)(per curiam)**, under §3582, a defendant's sentence is 'based on' the guidelines range for the sentence he is currently serving, not the guidelines **range** used in his original sentencing. **United States v Gallo 2018 US App LEXIS 4514**, when a district court

considers a §3582(c)(2) motion, it must "recalculate the sentence under the amended guidelines, first determining a new base level by substituting the amended guideline range for the originally applied guideline range, and then using that new base level to determine what ultimate sentence it would have imposed. **United States v Bravo 203 F. 3d 778, 780 (11th Cir. 2000)**("in determining whether, and to what extent a reduction in the defendant's term of imprisonment under 18 U.S.C. §3582(c)(2) and this policy statement U.S.S.G. §1B1.10(b)(1), 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."). Then, the court must decide, in light of the 3553(a) factors, whether to exercise its discretion to impose the newly calculated sentence under the amended Guidelines or retain the original sentence. Bravo, 203 F. 3d @ 781. **United States v Harris 574 F. 3d 971 (8th Cir. 2009)**, we have previously explained that "proceedings under 18 U.S.C. § 3582(c)(2) and [§1B1.10(a)(3)] do not constitute a full resentencing of the defendant" and are "not a do-over of an original sentencing proceeding. **United States v Amer 110 F. 3d 873, 884 (2d Cir. 1997)**, the entire sentence, including the period of supervised release, is the punishment for the original crime, and it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of his release. A supervised release revocation sanction is not

an additional punishment for the underlying conviction, but rather part of the original sentence. Johnson v United States 529 U.S. 694, 700-01 (2000). United States v Pettus 303 F. 3d 480, 487 (2d Cir. 2002), noting that although the initial period of incarceration and the supervised release term are authorized by separate statutes, they constitute a "single sentence for a single offense" such that "the revocation of supervised release is not properly considered a new punishment." It is the beief of Petitioner based on relevant cited caselaw that nothing could reclassify the class of felony for the underlying offense except a change in the punishment for that offense. This case presents a distinct and novel issue that deserves this Court's opinion as the circuits seem split. The Eighth Circuit in case at bar holds that the underlying offense was a class A felony based on the original conviction but other circuits hold that when a person is resentenced or sentence is modified under §3582(c)(2), then that sentence becomes the controlling sentence and the guidelines that come with the amendment. Under that approach Petitioner's offense of Possession With Intent to Distribute 5 Grams or More of Cocaine Base carries a maximum 20 year term of imprisonment, thus it is a class C felony and the maximum punishment upon supervised release violation is two years.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: April 5, 2018

George E. Brown
FCC-Forrest City Low
P.O. Box 9000
Forrest City, AR 72336