

No. _____

In the Supreme Court of the United States

EDDIE TORIE BARR,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the policy statement, found at § 1B1.10, cmt. n. 1 (A) of the United States Sentencing Guidelines, which defines what constitutes the “applicable guideline range” for the purpose of considering eligibility for post conviction sentence reduction pursuant to 18 U.S.C. § 3582(c (2)), violate the constitutional principles of separation of powers and non-delegation of legislative authority?

CITATION

United States v. Eddie Torie Barr, No. 15-2216 (1st Cir. September 15, 2017) (Slip Opinion), A true copy, attached, at Appendix A. ("App. ____").

JURISDICTION

The Court of Appeals had jurisdiction of this case under 18 U.S.C. § 1291. On September 15, 2017 it affirmed the judgment of the district court in all respects. Judgment entered on the same date.

PETITION FOR WRIT OF CERTIORARI

Eddie Torie Barr (petitioner, defendant, Mr. Barr) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 15, 2017 because it raises an important federal question of constitutional law which has not been directly addressed by this Court.

STATEMENT OF THE CASE

On January 27, 2012 the petitioner, Mr. Barr, pled guilty in the United States District Court of Rhode Island to an information alleging three counts of possession with intent to distribute cocaine base, also known as “crack” cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). On May 7, 2012 Mr. Barr was sentenced to 92 months in prison on each of the three

counts, to run concurrently, followed by three years of supervised release. He was also assessed a special assessment of \$300. (McConnell, D.J.).

On June 2, 2015 Mr. Barr filed a *pro se* motion to reduce his sentence based on 18 U.S.C. § 3582(c)(2) and Amendment 782 to the United States Sentencing Guidelines which lowered the punishment provided for most drug amounts, including crack cocaine, by two offense levels. On June 9 the court denied the motion on the grounds that the defendant was not sentenced based on the drug table but as a career offender. On July 27, 2015 the defendant filed a renewed *pro se* motion under § 3582(c)(2) which was allowed by the court on August 12, 2015. The next day, August 13, the government filed a motion for reconsideration, asserting that the First Circuit's decision in United States v. Hogan, 722 F.3d 55 (1st Cir. 2013) precluded the relief granted to Mr. Barr. On September 24, 2015 the court vacated the previous order and "reluctantly" granted the government's motion for reconsideration, thereby denying defendant's motion for a sentence reduction. The defendant filed a timely notice of appeal which was received by the district court on October 9, 2015.

Petitioner argued that the policy statement, found at § 1B1.10, cmt. n. 1 (A) of the United States Sentencing Guidelines, App. B, *infra*, which defines what constitutes the "applicable guideline range" for the purpose of considering eligibility for post conviction sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), violates the constitutional principles of separation of powers and non-delegation of legislative authority. The circuit panel disagreed, holding that the circuits which had then addressed the issue had found the policy statement to be "an exercise of validly delegated authority" (quoting United States v. Taylor, 743 F.3d 876, 879 (D.C.Cir. 2014), and that "Congress has ... sufficiently instructed the Commission as to both the contours of its

authority to reduce a term of imprisonment recommended in the Guidelines and the means by which it may do so” and “thus has provided an “intelligible principle” to guide the Commission” (quoting United States v. Erskine, 717 F.3d 131, 139 (2d Cir. 2013)(internal parentheses omitted).¹

ARGUMENT

I. THE POLICY STATEMENT, § 1B1.10, CMT. N. 1 (A) OF THE UNITED STATES SENTENCING GUIDELINES, WHICH DEFINES WHAT CONSTITUTES THE “APPLICABLE GUIDELINE RANGE” FOR THE PURPOSE OF CONSIDERING ELIGIBILITY FOR POST CONVICTION SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(C (2), VIOLATES THE CONSTITUTIONAL PRINCIPLES OF SEPARATION OF POWERS AND NON-DELEGATION OF LEGISLATIVE AUTHORITY.

A. Background: The Separation of Powers and Non-Delegation Doctrines.

Under the Constitution all legislative powers abide with the Congress. U.S. Const. art. 1. “Basic policy decisions governing society are to be made by the legislature.” Mistretta v. United States, 488 U.S. 361, 415, 109 S.Ct. 647 (1989)(Scalia, J., dissenting). “A pure delegation of legislative power” without an “intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform” would be “a forbidden delegation of legislative power.” *Id.* 488 U.S. at 372 (citation omitted). Thus, “a pure delegation of legislative power” is perforce a violation of the separation of powers doctrine. *Id.* at 420. To avoid such violation the delegated authority must be guided by an “intelligible principle”. *Id.* at 372.

¹ The court actually based its affirmation on plain error, concluding that was the applicable standard of review and that petitioner could not show “plainness” because the other circuit decisions cited above had both found proper delegation. App. A. The petitioner had urged *de novo* review because issues of statutory and guidelines interpretation were involved, *see e.g. United States v. Chuong Von Duong*, 665 F.3d 364, 366 (1st Cir. 2012), but neglected to argue plain error should not apply because he had had no opportunity to object to the district court’s final rejection of his motion as it was done without a hearing. *See United States v. Sepulveda-Contreras*, 466 F.3d 166, 170-71 (1st Cir. 2006)(plain error not applicable where special conditions of supervised release imposed only in written judgment after hearing).

B. 18 U.S.C. § 3782 (c) (2) is a Pure Delegation of Legislative Power Which Violates the Separation of Powers Doctrine.

Unlike other directives contained in the Sentencing Reform Act to guide the newly created Sentencing Commission in proposing the original sentencing guidelines in 1987, the power to provide “general policy statements” for, *inter alia*, appropriate “sentence modification provisions” was not elaborated upon. Dillon v. United States, ___ U.S. ___, 130 S.Ct. 2683, 2701 (2011)(Stevens, J., dissenting). In fact, the original role of policy statements “was merely to inform the judge’s exercise of discretion within an otherwise mandatory Guidelines regime.” *Id.* (citation omitted). Only the guidelines had binding effect. “Guidelines would bind; policy statements would advise.” *Id.*

The Commission was authorized to determine “in what circumstances and by what amounts the sentences of prisoners serving terms of imprisonment for the offense may be reduced” if a guideline revision reduces the guideline range for a given offense. 28 U.S.C. § 984(u). Congress did not in any way instruct the Commission on how to establish any criteria for determining when such reductions would be applicable or the extent thereof. Thus there was no “intelligible principle” attached to this particular delegation of legislative authority to reasonably guide, let alone cabin, its application. There is no requirement to submit policy statements or commentary for Congressional review. See 28 U.S.C. § 994(p). Commentary in the guidelines which violates the Constitution is not authoritative or binding. Stinson v. United States, 508 U.S. 36, 38 (1993). The arbitrary limitation of what constitutes the “applicable guideline sentence” in Application Note 1.(A) is a non-delegable act of legislation and therefore a violation of the Constitutional separation of powers. It should be invalidated by this Court.

Conclusion

For the reasons stated above, the petitioner, Eddie Torie Barr, respectfully prays that his petition for certiorari be granted.

Respectfully submitted,

EDDIE TORIE BARR,

By his attorney,

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Certificate of Service

I hereby certify that on December 14, 2017 a paper copy of this document has been served on all parties by mailing it to Donald C. Lockhart, Esquire, Assistant United States Attorney, 50 Kennedy Plaza, 8th Floor, Providence, Rhode Island 02903 and to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001:

Dated: December 14, 2017

Raymond E. Gillespie