

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE WASHINGTON CRANE, V.,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

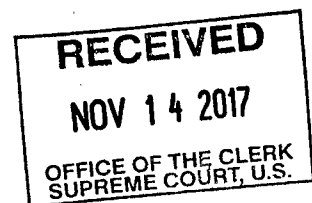
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
COURT OF APPEALS - No. 17-6612, JUDGMENT AUGUST 22, 2017,
ON APPEAL UNITED STATES DISTRICT COURT EASTERN DISTRICT VIRGINIA
NO.-1:13-CR-297-01.

PETITION FOR WRIT OF CERTIORARI

GEORGE WASHINGTON CRANE, V.
Federal Correctional Institution - Camp
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QUESTIONS PRESENTED

I. Question:

Pursuant to 18 U.S.C. 3582 (c) can a Movant file a successive motion for a retroactive United States Sentencing guideline. The legal axis is whether or not 18 U.S.C.(C) is jurisdictional or non-jurisdictional. The Circuits are split on the question.

The Eastern District of Virginia , USDC ruled that there is only "one bite at the apple". United States v George Washington Crane, V. 2017 U.S. Dist. LEXIS 137500 (E.D. Virginia).

The Ninth Circuit expressed the Question succinctly.

" The Circuit Courts are divided on the question whether a District Court lacks jurisdiction to entertain a second 18 U.S.C. 3582 (c)(2)... A rule derived from Congressional silence does not support an inference that Congress has clearly stated its intent to limit a District Courts jurisdiction to one 3582 (c)(2)." United States v Trujillo, 713 F.3d 1003 (9th.Cir. 2013).

Clearly, the Ninth Circuit holds that 18 U.S.C.3582 (c)(2), is not jurisdictional The Ninth Circuit is joined by:

The Third Circuit concluding that 3582 (c)(2) is not jurisdictional and accepting successive 3582 (c)(2) Motions. United States v Weatherspoon, 696 F.3d 416 (3rd. Cir. 2012).

The First Circuit , "repetitive 3582 (c)(2) under certain circumstances are akin to former version of Fed.R.Crim. P. , R.35; and successive motions were permitted. see e.g. Heflin v United States, 358 U.S. 415, 428, n.7, Ekberg v United States , 167 F.2d 380 (1st.Cir. 1948).

The 11th. Circuit "District Court has jurisdiction to hear 'defendants' second motion for a sentence reduction under 18 U.S.C.3582 (c)(2) based on the same amendment to the United States Sentencing Guidelines as 3582 (c)(2) contained no clearly expressed judicial limitation on: the availability to hear successive motions based on the same amendment." United States v Anderson, 772 F.3d. 662 (11th. Cir. 2014).

The Second Circuit implied that successive Motions under 18 U.S.C. 3582 (c)(2) are permissable. Simon v United States, 359 F.3d 139 (2d. Cir. 2004). See also, United States v Knee, 2015 U.S.Dist. LEXIS 43837 (S.D.N.Y.)

The Fifth Circuit was consistent with the sister Circuit. 1/

The Fourth Circuit has demonstrated in the Petitioner's case that 18 U.S.C.3582 (c)(2) is jurisdictional.

The Seventh Circuit holds that 18 U.S.C.3582 (c)(2) is jurisdictional. " Successive 3582 (c)(2) Motions based on the same guideline amendment are prohibited ."United States v Beard, 745 F.3d 288, 291-92 (7th. Cir. 2014), United States v Jenkins, 2015 U.S.Dist. LEXIS 168891 .

The Eighth Circuit holds 18 U.S.C. 3582 (c)(2) is jurisdictional. United States v Kinerd, 2016 U.S.Dist. LEXIS 10351 (equating this motion to 28 U.S.C. 2255 restrictions).

The Tenth Circuit held that 18 U.S.C. 3582 (c)(2) is jurisdictional . United States v Graham, 704 F.3d 1275 (10th.Cir. 2013)

United States v Spalding, 807 F.3d 1110 (5th.Cir. 2010).

The District of Columbia ruled that 18 U.S.C. 3582 (c)(2) is jurisdictional. Zogorski v United States, 2016 U.S. Dist. LExIS 159847.

The Sixth Circuit ruled that 18 U.S.C. 3582 (c)(2) is jurisdictional. United States v Tennille, 365 Fed. App'x 613, (6th. Cir. 2010).

The Question, is 18 U.S.C. 3582 (c)(2) jurisdiction ? The answer is no. Absent Congress 'clearly' stating that a threshold limitation on a statute's scope shall not be jurisdictional. See, Goldfarb v City Council of Baltimore, 791 F.3d 500, (4th. Cir. 2015)(this would contradict the 4th. Circuit position on 18 U.S.C.3582 (c)(2).)

II Question:

U.S.S.G at 1.10 provides for the application of a retroactive Guideline Amendment. In a case wherein the defendant's sentence is the result of a downward departure a similar proportional departure is authorized for the defendant by the court. This downward departure is to have been authorized via a 5K1.1 letter or motion by the government.

If the defendant receives a downward departure of substantial months as a result of cooperation, is the fact the government after in-camera discussions with the court fails to file the requisite document; is the defendant denied the departure authorized by the Guidelines ?

LIST OF PARTIES

1. The Honorable Liam O'Grady; U.S.D.C. Eastern District Virginia.
2. Keenan, Thacker, and Harris Fourth Circuit Judges.
3. Lawrence Joseph Leister, Assistant United States Attorney,
Virginia.

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Ekberg v United States , 167 F3d.380 (3d. Cir. 1948).	
Lifetechs Corp. v United States, 580 U.S. 137 S.Ct. , 197 L.Ed. 2d 33, 2017 U.S. LEXIS 14218.	5.
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NCRB v Enter Leasing Co.-Sucheat LLC, 722 F.3d 609 (3rd. Cir. 2009).	5.
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Sebelius v Aubidor Reg. Med. Ctr., 133 S.Ct. 817, 824, 184 L.Ed. 2d 627 (2013).	4.
Sipes v Trans World Airlines Inc., 455 U.S. 385, 394,102 S.Ct. 1127, 71 L.Ed.2d 234 (2002).	5.
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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

The Opinion of the United States Court of Appeals 4th. Cir. at Appendix at A-40. Judgment issued August 22, 2017.

The Opinion of the United States District Court Eastern District of Virginia , Alexandria Division. at 2017 U.S.Dist. LEXIS 137500.

JURISDICTION

The Judgment was issued by Fourth Circuit Court of Appeals on August 22, 2017. (A.-42).

No petition was filed for rehearing in the case.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article III.

Article III , Judicial Powers:

Sub.1 Supreme Court and inferior courts and judges and compensation.

The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress from time to time may establish.

Clause I. Jurisdiction:

The judicial power shall extend to all courts, in Law and Equity, arising under the Constitution, the laws of the United States.

United States Code 18 U.S.C. 3582

(c) Modification of an imposed term of imprisonment ...

the court may not modify a term of imprisonment 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 USC (994.10), upon motion by the defendant to the Director of the Bureau of Prison , or on its own motion, the court may reduce the term of imprisonment , after considering the factors set forth in section 3553 (a) [18 U.S.C. 3553 (a)] to the extent that

they are applicable if such a reduction consistent with applicable statement issued by the Sentencing Commission.

U.S.S.G.1.10 - availability of application a retroactive U.S.S.G. Guideline for defendant's who did cooperate.

STATEMENT OF FACTS

1. Motion for Reducation of Sentence by the Petitioner in ED Va re 18 USC 3582 . (A-1).
2. AUSA's Response in Opposition. (A.-11).
3. Petitioner's Reply to the AUSA's Response. (A.-16).
4. Order of The Hon. Liam O'Grady denying the Motion. (A._22).
5. Appeal to the Fourth Circuit Court of Appeals by the Petitioner. (A._24).
6. Fourth Circuit Judgment denying the Petitioner's Appeal. (A.-42).
7. Fourth Circuit Mandate. (A.-46).

STATEMENT OF THE CASE

The Petitioner was charged by a criminal complaint on May 21, 2013 with Conspiracy to Distribute Oxycodone Resulting in Death, in violation of Title 21 , US Code, Sections 841 (a) (1) and 846. The subsequent indictment was filed on July 11, 2013.

The charge contained a minimum twenty year sentence and the petitioner's multiple felony narcotics convictions made him eligible for a life sentence.

Subsequent to the Petitioner's cooperation a plea agreement was entered into with with a sentence of 180 months pursuant to Rule 11 (c)(1)(C). The plea was not accepted by the court.

On September 11, 2013 the petitioner entered a plea of guilty to a single count superseding information charging him with Conspiracy to Distribute Oxycodone, in violation of 21 USC 841 (a)(1), and 846.

After an in camera discussion without the petitioner a sentence was ordered of 141 months.

REASONS FOR GRANTING THE PETITION

i.18 USC 3582 (c)(2) IS NOT JURISDICTIONAL:

Every Court must derive its jurisdiction and judicial authority from the Constitution or laws of the United States. *Jecker v Montgomery*, 54 U.S. 498, 13 Hro 98, 14 L.Ed. 240 (1852).

Under Article III District Courts and courts of Appeals possess only jurisdiction granted by Congress. See: *Mason v Hitooul*, 108 F.2d 134 (1st. Cir. Mass.); *Blitz v Napolitano*, 700 F.3d 733 (4th.Cir. 2012).

A Federal Courts subject matter jurisdiction bound by U.S.Const. Article III, which extends only as far as Congress provides by statute. *Friends of the Earth v USEPA*, 357 US App. DC 63 (App. DC 2003), 333 F.3d. 184.

A plurality of the court concluded that 3582 "modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence." *Dillon v United States*, 560 U.S. 817, 826, 130 S.Ct. 2683, 277 L.Ed.2d 271 (2010).

The statute 3582 is not jurisdictional . In a recent line of cases the Supreme Court has cautioned that federal courts should be reluctant to classify a statutory requirement as

jurisdictional . See *Animal Sci. Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d. Cir. 2011) (citing *Arbaugh v Y&H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)). Only Congress may define a court's subject matter jurisdiction, "limits on the reach of federal statutes even non temporal ones, are only jurisdictional if Congress says so, when Congress does not rank a statutory limitation... as jurisdictional, courts should treat the restriction as non-jurisdictional in character." *Bowles v Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed. 2d 96 (2007) (quoting *Arbaugh v Y&H Corp.*, 546 U.S. 500 at 516).

After all, a rule deprived from congressional silence does not support an inference that Congress has "clearly stated" its intent to limit a district courts jurisdiction to one 3582 motion. See *Bowles*, 127 S.Ct. 2368, *Animal Sci. Products, Inc.*, 654 F.3d at 668 (applying the *Arbaugh* "clearly states test".

Arbaugh instructs that the court's construe statutory limitations as non-jurisdictional on the absence of clear directions from Congress. "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed ...but when Congress does not rank a statutory limitation on coverage as jurisdictional courts should treat the restriction as non-jurisdictional in character." *Arbaugh v Y&H Corp.* , 546 U.S. at 515-516. The label "jurisdictional" is properly reserved for designating the types of cases and individuals within a court's reach. *Kontrick v Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed. 2d

867 (2004). It is ordinarily not the correct classification for "claim-processing rules" such as temporal or, as here, numerical limitations on motions addressed to the same tribunal. See *id.* at 455-456; *Joshi v Ashcroft*, 389 F.2d 732, 734-735 (7th. Cir. 2004) (holding that a litigation on the number of motions to re-open or reconsider does not create a jurisdictional bar.)" [T]he emergent distinction ...is between those [limits] that govern the transition from one court (or other tribunal) to another, which are jurisdictional, other [limits], which are not. " *Joshi*, 389 F.3d at 734.

Further, to attach a jurisdictional note to 3582, which requires a term of imprisonment would all but leave Rule 33 for dead. It does because 3582 (c) really stretched beyond preventing sentence modification to preclude courts from taking any action with the knock-on effect of undoing a sentence, then district courts could never grant a Rule 33 motion undoing a criminal judgment if the defendant's sentence included a term of imprisonment. If 3231's grant of jurisdiction didn't live on beyond a final judgment a district court decision granting a post-trial judgment to vacate a judgment under Rule 33 would be almost always ultra vires. Apart from creating a harmonious whole, reading 3582 (c) as jurisdictional introduces a seriously discordant note into our law by suggesting Rule 33 just doesn't mean what it says.

7) Broadening the discussion beyond subsection (c) and Rule 33 to take in 3582's other subsections further supports

the conclusion that the statute is not jurisdictional.

The section as a whole answers questions related to the claim processing mechanics of imposing a sentence of imprisonment, not the jurisdiction of the court.

An even broader view still of Title 18 is helpfully entitled "Jurisdiction and Venue." That's where you'll find 3231 the general grant of criminal jurisdiction discussed above. Meanwhile, 3582 lives several doors down in Chapter 227, a chapter entitled "Sentences". (in Subchapter D, entitled "imprisonment"). Neither was this arrangement manufactured by some bureaucratic commission compiling the U.S. Code; Congress itself enacted it. See Pub. L. No. 98-473, 98 Stat. 1837, 1998 (1984); Pub. L. No. 80-772, 62 Stat. 683, 826 (1948). The Supreme Court has previously "found Congress's decision to locate a statute 'separate' from jurisdictional provisions suggestive contextual evidence that the statute in question was non-jurisdictional." *Hobby Lobby Stores, Inc. v Sebelius*, 723 F.2d 1114, 1158, (10th Cir. 2013) aff'd sub. nom., *Burwell v Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014). Title 3582 located in Title 18 suggest just that.

Further, there is no threshold limitation of the successive use of 18 U.S.C. 3582. "To ward off profiligate use of the term jurisdictional the Supreme Court 'adopted' a readily available brightline for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v Auburn Reg. Med. Ctr.*, 133 S.Ct. 817, 824, 184 L.Ed.2d 627

(2013).

There must be a threshold limitation. *NCRB v Enter Leasing Co.-Sucheat, LLC.* , 722 F.3d 609 (4th.Cir. 2013). MCRB quotes Arbaugh, determining whether Congress clearly expressed it's intended jurisdiction. NCRB , further, quotes, *Sipes v Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). The accepted principle is that a threshold must be established for jurisdiction.

"[W]hen Congress does not set a statutory limitation on a statute courts should treat the statute as non-jurisdictional in character. *Partington v Am. Int's Speciality Ins.Co.*, 443 F.3d 334, 338-39 (4th. Cir. 2006) (applying Arbaugh).

"Whenever possible , however, courts should favor an interpretation that gives meaning to each statutory provision.

Congress likes to incorporate the well settled meaning to each term it uses. *United Health Serv. U.S. ex rel Escobar*, 579 U.S. ____ , 136 S.Ct. ____ , 195 L.Ed.2d 348, 2016 US LEXIS 3920. See also *Lifetechs Corp.* , 580 U.S. ____ , 137 S.Ct.____, 197 L.Ed.2d 33, 2017 U.S. LEXIS 1428.

The meaning of a word should be drawn from the words around it. *Husky International v Daniel Ritz*, 578 U.S. ____ , 136 S.Ct. ____ , 194 L.Ed.2d 655, 2016 U.S. LEXIS 3048.

The meaning of 3582 cannot be made in a vacuum. If Congress desired to make this statute jurisdictional it should express itself more clearly. *Lins Torres v Lynch*, 579 U.S. ____ .

136 S.Ct. ____ , 194 L.Ed.2d 737, 2016 U.S. LEXIS 3351. When drafting a statute Congress gives each word independent meaning. id.

The Court can only find 18 U.S.C. 3582 is non-jurisdiction and successive motions pursuant to 18 USC 3582 (c)(2) are permissible under the statute.

II. Question - Does USSG 1B1.10 permit a downward departure for a retroactive USSG Amendment when the defendant fulfilled the 5K1 requirements and received the 5K1 departure. However, the government did not file the appropriate letter breaking promise and agreement.

The Petitioner received a downward departure of over 50% as a result of his cooperation. His attorney indicated the government would file the letter, In fact for over a year after the sentencing the attorney continued communication with the AUSA .(See A-47-63, including time records).

The Guideline indicates cooperation, mentions a 5K1 however is this a brightline rule or does it mean as stated cooperation fulfilling the requirements of a 5K1 guideline.

As discussed words have meaning and are joined by the words around it. Husky International, supra.

The Petitioner qualifies for the application of the retroactive USSG Amendment.

CONCLUSION

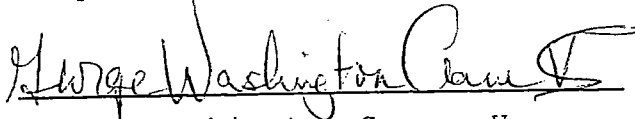
The question is 18 U.S.C. 3582 (c)(2) jurisdictional or non-jurisdictional is ripe for consideration by the United States Supreme Court. The inequality of a defendant in different geographical locations resulting in vastly unequal sentence is unconstitutional.

There is no question that Congress intended 18 USC 3582 (c)(2) to be non-jurisdictional or Congress would have stated so. Congress stated that 28 USC 2255 was jurisdictional, it said what it meant. Congress also expressed itself in 18 USC 3582 (c)(2).

The further , inequality of allowing an individual to receive a proportional reduction in a sentence for a retroactive guideline amendment and denying the same reduction to an individual who complies with the tenants of a 5K1 is also unconstitutional.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: 11/8/2017