No. ___

In the Supreme Court of the United States

KIMBERLY DAWN PALMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals abdicated its responsibility for the correctness of the judgment in the court below through the review of the merits of the judgment by summarily dismissing the appeal of a case in which the defendant has sought review of the merits and the government has asserted the nonjurisdictional limitations on the right to appeal by the defendant?

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Kimberly Dawn Palmer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL, STATUTORY PROVISIONS INVOLVED

The pertinent constitutional, statutory provisions and rules – U.S. Const., Amend. V; F.R.App.P. 3(a), 4(b) – are set forth in the appendix. App., *infra*, A4-A6.

STATEMENT

Mrs. Palmer was one of five people in Burke County, North Carolina, charged with participation in a methamphetamine conspiracy between 2003 and 2006. (J.A. 10). Specifically, it was alleged that the drug was a Schedule II controlled substance consisting of 500 grams or more of a mixture containing detectable amounts of methamphetamine and methamphetamine ice. Id. A Class A felony with a minimum sentence of ten years and maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A). There was no allegation of jurisdiction for federal regulation of subject matter of the indictment.

Mrs. Palmer was ordered detained and denied reasonable bail for a period of between 45 and 90 days and ordered to participate in the government's Jail Based Inpatient Treatment Program, if she wanted the opportunity for reasonable bail. (J.A. 12-15). About six weeks later, the magistrate set reasonable bail for Mrs. Palmer's release. (J.A. 4, 40-41).

Mrs. Palmer acquiesced to the government's plea offer including a stipulation to a mixture of methamphetamine of between 500 grams and 1.5

kilograms, credit for timely acceptance of responsibility, and waiver of the right of appeal and post-conviction relief. (J.A. 16-20).

Mrs. Palmer was brought before a federal magistrate judge for a Rule 11 plea hearing where she answered the magistrate's questions about her, her confession to the crime, and the plea agreement. (J.A. 35-54). Even though she had limited education, (J.A. 38), a substance abuse problem, and domestic violence problem, (J.A. 41, 52), the magistrate judge concluded that the plea was knowingly and voluntarily made. (J.A. 53). The magistrate did not detain Mrs. Palmer under 18 U.S.C. § 3143(a)(2) because he was directed not to make those findings. (J.A. 69). Shortly after the plea hearing, Mrs. Palmer tested positive for suspected methamphetamine in her system and a summons was issued to address this alleged violation of her conditions of release. (J.A. 60-62).

Mrs. Palmer was arrested on the summons eight years later in Texas. (J.A. 57-59). She was brought before the federal magistrate judge in North Carolina, who denied her reasonable bail pursuant to 18 U.S.C. § 3143(a)(2), the same provision the magistrate judge was directed not to invoke eight years earlier. (J.A.80).

The government's probation office pre-sentence investigation report stated that Mrs. Palmer started selling the drug in 2004 when her husband, the one who abused and controlled her, lost his job. (J.A. 166). Her primary source was a Mexican from Hendersonville, who also supplied the lead defendant Robert Blake Keller, who sold small amounts to Mrs. Palmer. Id. She sold to Richard Yancey, Tim Sweat, Patrick Johnson, her brother Tommy Lane, Melissa Teagues Isaacs, and Michael Bruce Isaacs. Id. None of these people were co-defendants in the conspiracy indictment, except for Mr. Keller. (J.A. 10). Mrs. Palmer and her customers were "identified as a loosely organized group of methamphetamine users who also bought and sold the product … [and] Co-defendants and/or unindicted co-conspirators would occasionally manufacture…" (J.A. 164). This is a local public health user/buyer situation and not a business.

The recommended offense level was 36, criminal history category II, and guideline range of between 210 and 262 months of imprisonment. (J.A. 174). Mrs. Palmer objected to the two-point gun enhancement under 2D1.1(b)(1) and the lack of a two-point reduction for acceptance of responsibility under 3E1.1. (J.A. 176-178). The plea agreement bargain included credit for acceptance of responsibility. (J.A. 17).

After six months of close quarter warehousing in a local jail not designed for long term incarceration, Mrs. Palmer was brought before the trial court for sentencing. (J.A. 82). The trial court rejected the objection to the gun enhancement because of the "close proximity" of the guns to drugs and paraphernalia. (J.A. 91). This notwithstanding the fact that no gun was found on her or testimony putting a gun on her. (J.A. 164-165). More than mere proximity is required. *United States v. McKenzie-Gude*, 671 F.3d 452 (4th Cir. 2011)(substantial testimonial evidence that the gun the defendant illegally possessed and plead guilty to possessing was part of a plan to commit other gun and explosive device felonies); *United States v. Henry*, 819 F.3d 856 (6th Cir. 2016)(CI and undercover agent purchased from defendant a rifle and percocet pills); *United States v. Bates* 614 F.3d 490 (8th Cir. 2010)(gun and crack found on defendant); *United States v. Jenkins*, 566 F.3d 160 (4th Cir. 2009)(gun and crack found on defendant).

The trial court rejected the objection to the lack of any reduction for acceptance of responsibility because, "Absconding before sentencing is really by definition a failure to accept responsibility." (J.A. 94).

Defense counsel noted in his sentencing memorandum a change in the guidelines drug table that reduced the base offense level from 32 down to 30. (J.A. 94). The trial court noted this change and accepted the modification of offense level calculation, reducing it by two points. (J.A. 95). This made the adjusted offense level 34, criminal history category II, and guideline range of between 168 and 210 months imprisonment. Id.

In the War on Drugs, the citizen enemy/victim is a 40-year-old, who completed 10th grade, married at age 15, had three children, and suffered from domestic violence and substance abuse. (J.A. 97). The domestic violence and substance abuse continued and worsened while she was a fugitive from social justice in Mexico, and her first major step away from this was her turning herself into the authorities in Texas. (J.A. 97-98). The trial court sentenced Mrs. Palmer to 168 months imprisonment, at the bottom of the guideline range and willfully chose not to sentence below the guideline because the mitigating role guidelines at the time did not support a reduction in the guidelines. (J.A. 103). The guideline sentence was unreasonable because it failed to give due respect to Mrs. Palmer's liberty interests and give her what she is due.

About a week later, on December 22, 2014, judgment was entered. (J.A. 110).

A little less than one year later, Mrs. Palmer moved for an extension of time to file a motion under 28 U.S.C. § 2255. (J.A. 117). The trial court denied the motion, because no motion had been filed and the motion allegedly failed to state the potential grounds for relief. (J.A. 120-121).

About eight months later, Mrs. Palmer filed a § 2255 motion concerning § 3B1.2, the mitigating role adjustment under recent Amendment

794 of the Guidelines. (J.A. 122). The trial court promptly dismissed the motion, because Mrs. Palmer should have sought relief under 18 U.S.C. § 3582, rather than 28 U.S.C. § 2255. (J.A. 128-131).

Mrs. Palmer moved for an extension of time to file under § 3582 and six days later filed the motion for reduction in sentence under § 3582. (J.A. 134-139). About a month later the trial court granted the extension and dismissed the motion, because Mrs. Palmer "regularly bought and sold methamphetamine and was responsible for at least 500 grams of methamphetamine." (J.A. 141-143). The trial court did not indicate whether Mrs. Palmer was substantially less culpable than the average participant in the conspiracy. We submit that merely engaging in regular transactions in the conspiracy to get a regular use of the drug is not in itself sufficient to automatically disqualify a person for a mitigating role adjustment. U.S.S.G., § 3B1.2, Application Notes.

About six months later, Mrs. Palmer appealed the judgment in her case pursuant to 18 U.S.C. § 3742 and the trial court erroneously dismissed the appeal, because of the mistaken belief that the time limit for appeal was jurisdictional. (J.A. 151-153). Mrs. Palmer appealed that erroneous decision, (J.A. 155) and the court remanded with instructions to docket the appeal of the judgment under § 3742 and return the case to the court for further consideration. (J.A. 160).

Mrs. Palmer filed her brief and the government filed a motion to dismiss for failure to file within the time limit for appeals. The brief raised three issues: (1) lack of subject matter jurisdiction, (2) breach of the plea agreement, and (3) misapplication of the amendment to the guidelines governing mitigating role adjustments.

On May 25, 2017, the court granted the motion and dismissed the appeal, saying the court must dismiss because the government has asserted the limitation on the right to appeal.

REASONS FOR GRANTING THE PETITION

The court of appeals has abdicated its responsibility as an independent gatekeeper of the boundaries defined by the Constitution for the exercise of jurisdiction over a citizen of the State of North Carolina. *United States v. Cotton*, 535 U.S. 625, 630 (2002). "[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." Id. *Class v. United States*, __ U.S. __, no. 16-424 (2018)("guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal.").

There are some defects that neither party can waive and jurisdiction is one such defect. Adjudication on the merits is especially important in this case where the government is a party to the case and suspicion of favoritism and shared common purpose of expanding power of the federal government at the expense of the State of North Carolina substantial.

The approach taken by the court of appeals would undermine the Court's concern over manufactured or collusive challenges to the constitutionality of statutes. For example, the Court in *United States v. Johnson*, 319 U.S. 302, 304-5 (1943), dismissed for want of a case or controversy a cooperative lawsuit brought by a tenant against a landlord to challenge the constitutionality of the Emergency Price Control Act of 1942. Applying the decision in the instant case, the court of appeals would treat this as a nonjurisdictional challenge to the constitutionality of the statute and dismiss the appeal without adjudicating the merits of the question of jurisdiction under the facts of the case.

Same is true in *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971), where by agreement of the parties, there was unanimity of position on the constitutionality of the State of North Carolina Anti-Busing Act.

In the instant case, and for use in other cases, the government avoids the issue by asserting the nonjurisdictional defense of timeliness and the court of appeals accepts this exercise of discretion without addressing the merits of the cause for delay and the merits of the judgment entered in the trial court, forever foreclosing review on the merits.

he Defendant-Appellant Kimberly Dawn Palmer through counsel opposes the government's motion to dismiss this appeal because the Court has subject matter jurisdiction to correct the assignment of errors, these assignments of error are not subject to the plea agreement, and any delay in filing the notice of appeal is excusable.

As noted recently in *Class v. United States,* 583 U.S. __ (2018), no. 16-424, February 21, 2018, a guilty plea by itself, even when accompanied by a waiver in a plea agreement, does not bar direct appeal of a conviction where the claim implicates "the very power of the State" to prosecute the defendant. Mrs. Palmer's first assignment of error raises this type of claim. The second assignment of error is based on the breach of the plea agreement, which is subject to review and not subject to waiver. The third assignment of error is not subject to waiver by plea agreement or guilty plea because it is a claim that she was entitled to a modification of her sentence due to a retroactive change to the guidelines concerning points for role in the offense.

As noted recently in *United States v. Hyman*, __ F.3d __, (4^{th} Cir., Mar. 9, 2018), 2018.C04.0000553<http://www.veresuslaw.com>, failure to comply with the requirement under App.R. 3(a)(1) of a timely filing of a notice of appeal in accordance with App.R. 4(b) does not deprive the Court of subject matter jurisdiction.

The Court addressed equitable tolling in the context of an appeal under App.R. 4(b) in *United States v. Shank*, 395 F.3d 466 (4^{th} Cir. 2005), and found that it did not apply to the defendant in that case. Shank tried to lay blame on the Leviathan. The Court blamed the defendant.

The Court in *In re: Goddard*, 170 F.3d 435 (4^{th} Cir. 1999), recognized the distinction between a successive claim under § 2255 and that which is not a successive filing such as in the instant case. As the government notes, the 2255 filed by Mrs. Palmer was dismissed without prejudice. In other words, the district court did not address the merits of the claim, saying that it should be filed as a §3582(c)(2) claim to reduce a sentence based on a retroactive amendment to the Sentencing Guidelines. Mrs. Palmer followed that advice and raised the claim by that means. The district court rejected the claim and Mrs. Palmer appealed about five months later.

Mrs. Palmer is a 40-year-old, who completed 10^{th} grade, married at age 15, had three children, and suffered from domestic violence and substance abuse. (J.A. 97). She is constrained by her status as a prisoner as she attempts to seek relief for an unjust conviction and sentence. Her prior filings were rejected without prejudice because they were not filed under the proper statutory basis for relief. The district court also got it wrong, and this Court corrected that error and had the matter properly docketed and returned to this Court for review.

Mrs. Palmer's opening brief explains three fundamental problems with her conviction and sentence. This Court should deny the motion to dismiss on equitable tolling grounds and hear Mrs. Palmer's appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2018

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4729

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KIMBERLY DAWN PALMER,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, District Judge. (1:06-cr-00043-MR-DLH-4)

Submitted: May 21, 2018 Decided: May 25, 2018

Before DIAZ and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Aaron E. Michel, Charlotte, North Carolina, for Appellant. Amy Elizabeth Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kimberly Dawn Palmer appeals the 168-month sentence imposed following her guilty plea to conspiracy to manufacture and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841, 846 (2012). The Government has moved to dismiss the appeal as untimely. For the reasons that follow, we grant the motion and dismiss the appeal.*

In criminal cases, the defendant must file the notice of appeal within 14 days after the entry of judgment. Fed. R. App. P. 4(b)(1)(A). With or without a motion, upon a showing of excusable neglect or good cause, the district court may grant an extension of up to 30 days to file a notice of appeal. Fed. R. App. P. 4(b)(4); *United States v. Reyes*, 759 F.2d 351, 353 (4th Cir. 1985). Although the appeal period in a criminal case is not a jurisdictional provision, but rather a claim-processing rule, *see United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009), "[w]hen the Government promptly invokes the rule in response to a late-filed criminal appeal, we must dismiss," *United States v. Oliver*, 878 F.3d 120, 123 (4th Cir. 2017).

The district court entered judgment on December 22, 2014. Palmer filed her notice of appeal on May 8, 2017. Because Palmer failed to file a timely notice of appeal,

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* The district court initially treated Palmer's notice of appeal from her criminal judgment as a motion and denied relief. On appeal from that decision, we ordered a limited remand to docket Palmer's May 2017 pleading as a notice of appeal from the December 2014 criminal judgment. United States v. Palmer, 704 F. App'x 267 (4th Cir. 2017). It is from this posture that the instant appeal was filed.

her appeal is untimely. And because the Government has promptly invoked Rule 4(b)'s time limitation, we grant the Government's motion and dismiss Palmer's appeal.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

U.S. Const., Article III, Sections 1 & 2

Section 1
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
Section 2
1: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
2: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; … nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…

Federal Rules of Appellate Procedure, Rules 3(a) & 4(b)

Rule 3. Appeal as of Right—How Taken
(a) Filing the Notice of Appeal.
(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).
(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.
(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.
(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

Rule 4. Appeal as of Right—When Taken
. . .
(b) Appeal in a Criminal Case.
(1) *Time for Filing a Notice of Appeal.*
(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
(i) the entry of either the judgment or the order being appealed; or
(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.
(3) *Effect of a Motion on a Notice of Appeal.*
(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order

disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
(i) for judgment of acquittal under Rule 29;
(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or
(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:
(i) the entry of the order disposing of the last such remaining motion; or
(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).
(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.
(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.