

97-30892

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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97-30892

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**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee**

v.

**CRAIG TITUS,**

**Defendant-Appellant**

**Appeal from the United States District Court for the  
Western District of Louisiana**

**CRIMINAL NUMBER: 94-60058-01**

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**BRIEF ON BEHALF OF APPELLEE,  
THE UNITED STATES OF AMERICA**

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**MICHAEL D. SKINNER  
United States Attorney  
Western District of Louisiana**

**JOSETTE L. CASSIERE  
Assistant United States Attorney  
300 Fannin Street, Suite 3201  
Shreveport, Louisiana 71101-3068  
(318) 676-3600**

**Attorneys for Plaintiff-Appellee**

U. S. COURT OF APPEALS  
**FILED**

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**CHARLES R. FULBRUGE III  
CLERK**

## STATEMENT REGARDING ORAL ARGUMENT

Appellant has not requested oral argument and the government concurs with that assessment. Defendant has raised only one issue basing his entire argument on the assertion that 18 U.S.C. § 3583 has been repealed. However, because 18 U.S.C. § 3583 was not repealed during any of the relevant period of time defendant's issue on appeal should be readily resolved without the benefit of oral argument.

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## STATEMENT OF JURISDICTION

Defendant appeals from a final judgment revoking defendant's supervised release and imposing a sentence of imprisonment. The judgment was entered August 19, 1997 (Vol. 1, p. 218) and defendant filed a timely notice of appeal on August 19, 1997. (Vol. 1, p. 223) The Fifth Circuit Court of Appeals exercises jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

## ISSUE ON APPEAL

Whether 18 U.S.C. § 3583, pursuant to which the court revoked defendant's supervised release and resented defendant to two years imprisonment, had been repealed and was not in effect between October 3, 1996 and January 21, 1997, the period during which defendant tested positive for anabolic steroids in violation of his conditions of supervised release.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition in the District Court

Defendant was indicted on December 13, 1994, for conspiracy to possess with intent to distribute and for possession with intent to distribute approximately 950 tablets of 3,4 methylenedioxy-methamphetamine, also known as ecstasy, in violation of 21 U.S.C. §§ 846 and 841. (Vol. 1, pp. 1 and 2) Defendant pled guilty to Count I pursuant to a written plea agreement. (Vol. 1, pp. 50-63) Defendant was sentenced within the guideline range to eight months imprisonment to be followed by a three year term of supervised release. The judgment was entered October 6, 1995. (Vol. 1, pp. 67-76) Defendant began serving his supervised release term on July 11, 1996. (Vol. 1, p. 112)

On September 16, 1996, judgment was entered modifying defendant's sentence with the request that he serve eight months in a halfway house. (Vol. 1, pp. 96-108) As a special condition of supervision the court ordered that defendant serve eight months of home confinement and that he “undergo substance abuse urinalysis and treatment as directed by the U.S. Probation Office.” (Vol. 1, p. 99)

The government filed a motion pursuant to Fed.R.Crim.P. 35 requesting that defendant's sentence be further reduced as a result of his continued cooperation and assistance in the investigation of a large scale systematic theft of steroids from

the Department of the Navy. (Vol. 1, p. 109) That motion was denied on October 2, 1996. (Vol. 1, p. 111)

On March 24, 1997, the U.S. Probation Office petitioned for revocation of defendant's supervised release. (Vol. 1, p. 112) The petition stated six violations of special condition Number 5 occurring between October 3, 1996 and January 21, 1997. After a revocation hearing, the court found that defendant had violated special condition Number 5 and committed defendant to the custody of the United States Bureau of Prisons for a term of two years. (Vol. 1, p. 186) The court then permitted defendant an opportunity for medical examination and biopsy of scar tissue in opposition to the revocation determination. (Vol. 1, p. 192)

On August 13, 1997, there was a hearing at which the court reviewed medical records of defendant and a report from Dr. Christopher Lee. (Vol. 1, pp. 202-203) The court maintained revocation of defendant's supervised release and the judgment was filed on August 13, 1997 and entered on August 19, 1997. (Vol. 1, pp. 218-220) Defendant filed a timely notice of appeal on August 19, 1997. (Vol. 1, pp. 223-224)



**B. Statement of Facts**

The facts surrounding defendant's offense of conviction are irrelevant to this appeal except insofar as they resulted in a sentence which included a three-year term of supervised release. Defendant was released from prison and began serving his supervised release on July 11, 1996. (Vol. 3, p. 21)

Defendant began testing positive for anabolic steroids on October 3, 1996 and continued to test positive for various anabolic steroids through January 21, 1997. Six separate urine tests, during this period, were positive for anabolic steroids. (Vol. 1, p. 112) Defendant claimed that he had taken steroids prior to October, 1995 and that these positive results a year later occurred because he had lost a considerable amount of weight, 25 pounds, causing a release of steroids stored in his fat and resulting in a positive urinalysis. (Vol. 1, pp. 129-145)

At a revocation hearing on May 1, 1997, the court received evidence concerning defendant's positive urinalysis. (Vol. 1, pp. 148-169) On May 29, 1997, the probation officer filed an amendment to defendant's revocation petition adding two additional instances of positive tests for anabolic steroids occurring on December 13, 1996 and February 19, 1997. (Vol. 1, p. 171) The court granted the motion to amend. (Vol. 1, p. 172)

A revocation hearing was held on July 25, 1997. The court heard testimony from both government and defense expert witnesses. (Vols. 3 and 4) The court ordered defendant's supervised release revoked. (Vol. 4, pp. 140-147) On July 28, 1997, the court gave defendant the opportunity to submit to a medical examination by a doctor selected and agreed to by both the government and defendant and approved by the court. (Vol. 1, pp. 190-191)

On August 13, 1997 at a hearing in district court the judge reviewed the medical records of defendant and letter of Dr. Christopher Lee, the examining physician, and maintained defendant's revocation of supervised release and sentence to two years imprisonment. (Vol. 1, pp. 202-206) This appeal followed.

## SUMMARY OF THE ARGUMENT

Defendant argues that the district court lacked authority to revoke his supervised release and sentence him to a two-year term of imprisonment because 18 U.S.C. § 3583 pursuant to which the revocation and resentencing occurred had been repealed during the time period in which the violations to his conditions of supervised release had occurred. He does not cite to the date or public law pursuant to which Congress is said to have repealed 18 U.S.C. § 3583.

The government can find no indication whatsoever that 18 U.S.C. § 3583 was repealed or in any pertinent way modified or amended during the relevant time periods. The judge had reservations about whether the amendments effective September 13, 1994 pursuant to the Violent Crime Control and Law Enforcement Act of 1994 applied. However, she determined that even if they applied she could still sentence defendant to a two-year term of imprisonment instead of a drug abuse program because defendant had been on release and participating in drug abuse programs yet had continued to use steroids.

The district judge correctly revoked defendant's supervised release pursuant to a fully effective 18 U.S.C. § 3583 and that revocation and sentence should be affirmed.

## ARGUMENT

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR WHEN IT REVOKED DEFENDANT'S SUPERVISED RELEASE PURSUANT TO 18 U.S.C. § 3583 FOR VIOLATIONS OF THE CONDITIONS OF DEFENDANT'S SUPERVISED RELEASE OCCURRING BETWEEN OCTOBER, 1996 AND FEBRUARY, 1997.

Defendant argues that the proper standard of review for this issue is plain error. However, since it involves the application of a statute which defendant argues has been repealed review should be *de novo*. *United States v. Sandle*, 123 F.3d 809, 810 (5th Cir. 1997); *United States v. Teran*, 98 F.3d 831, 836 (5th Cir. 1996). Because defendant claims that the sentence was imposed in violation of law review of that issue would likewise be *de novo*. *United States v. Mathena*, 23 F.3d 87, 89 (5th Cir. 1994). Defendant argues that 18 U.S.C. § 3583 was not effective on any of the dates that the violations occurred nor at the time the sentence was imposed.

The government is unable to determine that the statute has been repealed during any time relevant to this appeal. The statute has been amended several times, however. Defendant has cited no authority for this assertion and the government can do nothing more than look in the book and find the statute. Every volume of 18 U.S.C. effective during the relevant time period contains Section 3583 and as far back as 1991, prior to defendant's original conviction, anabolic steroids have been included as controlled dangerous substances included in Schedule III. Possession of anabolic

steroids would violate a condition of defendant's term of supervised release. 21 U.S.C. §§ 802(41) and 812(c) Schedule III(e). Pursuant to 18 U.S.C. § 3583(d) and (g) the use of anabolic steroids as revealed in a positive urine drug test mandates revocation of defendant's period of supervised release and requires that he be sentenced to a term of imprisonment unless the court finds that participation in a drug abuse program would warrant an exception to Section 3583(g)'s mandatory revocation.

The district court recognized that defendant's offense of conviction had occurred before the Violent Crime Control and Law Enforcement Act of 1994 became effective on September 13, 1994. However, the amendments enacted by that Act were in effect at the time defendant was indicted, convicted and sentenced.

The court found that even if the provisions of the 1994 Act applied to defendant she would not apply the exception to the mandatory revocation allowed for a failed drug test under 18 U.S.C. § 3583(d). The court explained that defendant had a history of being in a halfway house, having participated in a drug treatment and prevention program and had a history of continued drug use. (Vol. 4, pp. 140-147)

The court found a Class C violation and determined that pursuant to U.S.S.G. § 7B1.4 the imprisonment range was three to nine months. However, the

court determined she was not bound to this policy statement recommendation and would require defendant to serve the maximum period of two years imprisonment.

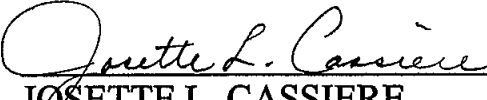
There was no plain error or any error in the application of 18 U.S.C. § 3583 to the facts of defendant's case. The defendant's revocation of probation and sentence should be affirmed.

CONCLUSION

For the above and foregoing reasons defendant's revocation of supervised release and subsequent sentence to a two-year term of imprisonment should be affirmed.

Respectfully submitted,

MICHAEL D. SKINNER  
UNITED STATES ATTORNEY

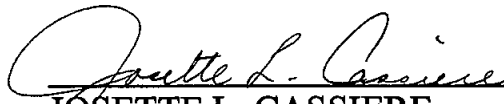
BY:   
\_\_\_\_\_  
JOSETTE L. CASSIERE  
Assistant U.S. Attorney  
300 Fannin Street, Suite 3201  
Shreveport, Louisiana 71101-3068  
(318) 676-3600

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the above and  
foregoing brief were mailed to:

Mr. Jason Wayne Robideaux  
Attorney at Law  
701 Robley Dr., Ste. 202  
Lafayette, LA 70503

Shreveport, Louisiana, this 27th day of March, 1998.

  
\_\_\_\_\_  
JOSETTE L. CASSIERE  
Assistant United States Attorney  
300 Famin St., Ste. 3201  
Shreveport, LA. 71101-3068  
(318) 676-3600