

97-30892

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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APPEAL NO: 97-30892

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UNITED STATES OF AMERICA

Plaintiff - Appellee

versus

CRAIG TITUS

Defendant - Appellant

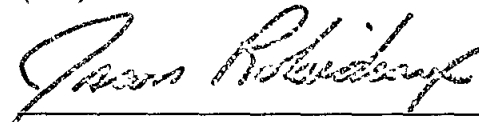
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ORIGINAL APPELLANT'S BRIEF ON BEHALF OF  
DEFENDANT/ APPELLANT CRAIG TITUS

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Respectfully submitted:

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JASON W. ROBIDEAUX (19390)

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

FEB 25 1998

CHARLES R. FULBRUGE III  
CLERK

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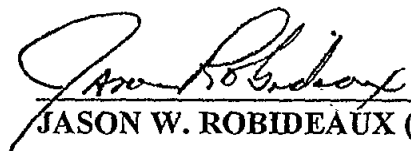
  
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JASON W. ROBIDEAUX (19390)

TABLE OF CONTENTS

	<u>PAGES</u>
CERTIFICATE OF INTERESTED PERSONS .....	-i-, -ii-
STATEMENT REGARDING ORAL ARGUMENT .....	-iii-
TABLE OF CITATIONS .....	-iv-
STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUE .....	1
STATEMENT OF CASE .....	2 - 3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT, INCLUDING STANDARDS OF REVIEW.....	5-7
CONCLUSION .....	7
CERTIFICATE OF SERVICE .....	8

**IN THE 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**

**VERSUS**

**CRAIG TITUS**

**Defendant - Appellant**

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**CERTIFICATE OF INTERESTED PERSONS**


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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

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JASON W. ROBIDEAUX (19390)  
Attorney of Record for Craig Titus

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UNITED STATES OF AMERICA  
Plaintiff - Appellee

VERSUS

CRAIG TITUS  
Defendant - Appellant

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STATEMENT REGARDING ORAL ARGUMENT

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NOW INTO COURT, through undersigned counsel, comes the Appellant, Craig Titus, who respectfully states that this matter does not involve unique questions of law or fact and can be decided without the necessity of oral argument. Thus, your appellant, Craig Titus, would waive oral argument.

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JASON W. ROBIDEAUX (19390)  
Attorney of Record for Craig Titus

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>U.S. v. Calverley</u> , 37 F.3d 160 (5 <sup>th</sup> Cir. 1994) .....	5
<u>United States v. Headrick</u> , 963 F.2d 777, 779(5 <sup>th</sup> Cir. 1992) (citing 18 U.S.C. Sec. 3742(e)) .....	3
<u>U.S. v. Flanagan</u> , 80 F.3d 143, 148, cert. denied, 116 S.Ct. 542, 133 L.Ed.2d 446 (1995) .....	4
<u>U.S. v. Giddings</u> , 37 F.3d 1091 (5 <sup>th</sup> Cir. 1994) .....	3
<u>United States v. McGuire</u> , 79 F.3d 1396 (5 <sup>th</sup> Cir. ) Reh’g en banc granted, 90 F.3d 107 (5 <sup>th</sup> Cir. 1996) .....	5
<u>U.S. v. Rodriguez</u> , 15 F.3d 408 (5 <sup>th</sup> Cir. 1994) .....	4
<u>U.S. v. Rodriguez</u> , 60 F.3d 193, 195 n.1 (5 <sup>th</sup> Cir. 1996) .....	4
<u>U.S. v. Ulloa</u> , 94 F.3d 949 (5 <sup>th</sup> Cir. 1996) .....	4
 <u>AUTHORITIES</u>	
Title 21, United States Code, Section 841(a)(1) .....	1
18 U.S.C. Sec. 3231 .....	1
18 U.S.C. Sec. 3742 .....	1
18 U.S.C. Sec. 3583 .....	1, 2, 3, 4
18 U.S.C. Sec. 3583(e) .....	1, 2
18 U.S.C. Sec. 3583(g)(1) and (3) .....	1, 2

## STATEMENT OF JURISDICTION

This appeal arises out of a felony criminal prosecution in the Western District of Louisiana, Lafayette Division instituted by indictment for an offense occurring in said District. The District Court had subject matter jurisdiction over the instant offense pursuant to 18 U.S.C. Sec. 3231.

This Honorable Court has jurisdiction over this timely appeal pursuant to 18 U.S.C. 3742. The District Court entered a Judgment on Revocation of Probation of Supervised Release on August 13, 1997 committing Appellant, Craig Titus, to the custody of the U.S. Bureau of Prisons to be imprisoned for two (2) years. A Notice of Appeal was thereafter filed with the District Court on August 19, 1997. This appeal is from the sentence of the Court, which is a final judgment that disposes of all claims with respect to all parties.

## STATEMENT OF THE ISSUE

1. Whether the District Court committed plain error when it found by a preponderance of the evidence that pursuant to 18 USC Section 3583(g)(1) and (3), that the defendant, Craig Titus, had possessed a controlled substance (steroids via drug test) in violation of the conditions set forth in his supervised release and therefore revoked defendant's term of supervised release and required defendant to serve the maximum term of two (2) years imprisonment pursuant to 18 USC Section 3583(e), when at the time of the dirty urine tests (illegal possession) the statute 18 USC Section 3583 had been repealed in its entirety.



## STATEMENT OF THE CASE

### **(i) Course of proceedings and disposition in court below**

On December 13, 1994 appellant, Craig Titus, was indicted on two (2) counts of: conspiracy to distribute ecstasy, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and possess with intent to distribute ecstasy, a Schedule I controlled substance. On April 17, 1995 appellant, Craig Titus, pled guilty to distribution of ecstasy and was sentenced on October 3, 1995 to be imprisoned for a term of eight (8) months. On September 13, 1996, the sentence was amended to eight (8) months in home confinement, with a special condition that the defendant undergo substance abuse treatment and perform three hundred (300) hours of community service. On September 18, 1996 the Government filed a Rule 35 Motion for reduction of sentence. The Rule 35 motion was denied by the District Court on October 2, 1996

[Transcript p. 10, lines 11-23; p. 11, lines 11-20] Defendant had been tested for controlled dangerous substances since reporting to the Halfway House, "Working Alternatives" in November 1995. [Transcript p. 69, lines 20-25; p. 70, lines 106] However, at the revocation hearing it was established that the government didn't begin testing him for steroids until October 3, 1996, one day after the District Court denied the U.S. Attorney's Rule 35 Motion.

[Transcript p. 4 , lines 22-25; page 5 lines 1-3] The appellant, Craig Titus, tested positive for steroids on the following dates: October 3, 1996, November 16, 1996, November 21, 1996, December 13, 1996, December 18, 1996, January 5, 1997 and January 21, 1997. [Record Excerpt #146] On March 24, 1997 a petition for warrant or summons for offender under supervision was sent to the District Court by the U.S. Probation Office as to Craig Titus with a proposed order. [Record Excerpt #147] On the same day the District Court ordered that a summons issue and that a Revocation Hearing be scheduled for May 1, 1997. The revocation hearing was rescheduled two (2) times and eventually was held on July 25, 1997. [Record Excerpt p. 147 lines 2-8] The District Court found that Craig Titus had violated supervised release imposed on October 3, 1995. Defendant was committed to the custody of the U.S. Bureau of Prisons to serve a term of two (2) years.

Specifically, the District Court found by a preponderance of the evidence that pursuant to 18 USC Section 3583(g)(1) and (3), that the defendant, Craig Titus, had possessed a controlled substance (steroids via drug test) in violation of the conditions set forth in his supervised release and therefore revoked defendant's term of supervised release and required defendant to serve the maximum term of two (2) years imprisonment pursuant to 18 USC Section 3583(e).

## SUMMARY OF ARGUMENT

1. The District Court committed plain error when it imposed a sentence on Appellant, Craig Titus, pursuant to 18 USC Section 3583(e) and (g) for the reason that the applicable statute (18 USC Sec. 3583) was repealed by the United States Congress at the time Appellant committed the “independent crimes” (positive urine tests) in the months of October 1996 through January 1997.

This Court will “uphold a sentence unless it 1) was imposed in violation of law, 2) resulted from an incorrect application of the guidelines, 3) was outside the guideline range and is unreasonable, or 4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.” United States v. Headrick, 963 F.2d 777, 779 (5<sup>th</sup> Cir. 1992) (citing 18 U.S.C. Sec. 3742(e)) and U.S. v. Giddings, 37 F.3d 1091 (5<sup>th</sup> Cir. 1994).

In the instant case the sentence was imposed in violation of law in that the statute relied upon for the basis of the sentence was not in existence at the time the violations occurred, nor was the statute in existence at the time the sentence was imposed.

Although the statute (18 USC Section 3583) was in existence at the time of appellant's original guilty plea and sentence that fact would not allow the District Court to revive a repealed statute for sentencing purposes. While a law can have retroactive effect if it changes the legal consequences of acts already completed before the laws' effective date there can be no "prospective" application of the law which would allow a defendant to be convicted and sentenced under a statute that only existed *prior* to the defendant's illegal acts. The sentence of appellant was imposed for positive urine tests for which there was no applicable statute. [Transcript p. 146, lines 10-18] However, there did exist an applicable sentencing guideline which recommend a revocation range of three (3) to nine (9) months.

### **ARGUMENT AND STANDARDS OF REVIEW**

#### **Argument On Issue Number One:**

The District Court committed plain error when it based Appellant's sentence upon 18 USC Section 3583. The error is plain because the sentencing statute was repealed during those months that Appellant tested positive for steroids. Appellant admits that this plain error was not raised at the District Court level. However, there was no waiver of such error before the trial court, the error effects substantial rights of the Appellant, in that, he received an illegal two (2) year

sentence rather than a substantially lesser three (3) to nine (9) month sentence as recommend by the Sentencing Guidelines and such an illegal sentence seriously affects the fairness, integrity and public reputation of judicial proceedings. U.S. v. Ulloa, 94 F.3d 949 (5<sup>th</sup> Cir. 1996); United States v. Rodriguez, 15 F.3d 408 (5<sup>th</sup> Cir. 1994).

**Standard of Review for Argument Number One:**

This Court will review a sentencing court's application of the sentencing guidelines for clear error. United States v. Rodriguez, 60 F.3d 193, 195 n.1 (5<sup>th</sup> Cir.1996) and U.S. v. Flanagan, 80 F.3d 143, 148, *cert. denied*, 116 S.Ct. 542, 133 L.Ed.2d 446 (1995). However, when an issue is raised for the first time on appeal, this Court reviews only for plain error. United States v. Calverley, 37 F.3d 160 (5<sup>th</sup> Cir. 1994). Calverley, describes the four criteria for finding such error: (1) there must be an error, i.e., a deviation from a legal rule, absent a valid *waiver*; (2) the error must be plain, i.e., clear or obvious, and "clear under current law at the time of trial"; (3) the error must affect substantial rights, i.e., it must be prejudicial and affect the outcome of the proceedings; and (4) upon finding these elements, the Court has discretion to correct such forfeited errors if

they “seriously affect the fairness, integrity, or public reputation of judicial proceedings”. United States v. McGuire, 79 F.3d 1396 (5<sup>th</sup> Cir.) *Reh’g en banc granted*, 90 F.3d 107 (5<sup>th</sup> Cir. 1996).

### CONCLUSION

In the instant case all four (4) “plain error” elements of McGuire are met and this Court should reverse the sentence of Appellant, Craig Titus, and order that he be sentenced in accordance with the applicable Sentencing Guidelines.

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JASON W. ROBIDEAUX (19390)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that a copy of the above and foregoing has this date been sent to all counsel of record by depositing same in the United States Mail, properly addressed and postage prepaid.

Lafayette, Louisiana this 23<sup>rd</sup> day of February, 1998.

  
\_\_\_\_\_  
JASON W. ROBIDEAUX

## CERTIFICATE OF COMPLIANCE

Pursuant to 5<sup>th</sup> Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5<sup>th</sup> Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5<sup>th</sup> Cir. R. 32.2.7(b)(3), the brief contains 234 lines of text in monospaced typeface.
2. The brief has been prepared :
  - A. In proportionally spaced typeface using:  
Software Name and Version: WordPerfect 8.0 in Times New Roman  
Typeface and 14 Font size.
3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or copy of the word or line printout.
4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5<sup>th</sup> Cir. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

  
SIGNATURE OF FILING PARTY



CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the above and foregoing has this date been sent to all counsel of record by depositing same in the United States Mail, properly addressed and postage prepaid as follows:

Judge Rebecca F. Doherty  
200 Federal Building  
705 Jefferson Street  
Lafayette, LA 70501

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Shreveport, LA 71101-3068

Lafayette, Louisiana, this 23<sup>rd</sup> day of February, 1998.

  
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JASON W. ROBIDEAUX