

FEDERAL PUBLIC DEFENDER

District of Arizona
850 W. Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2743
1-800-758-7053
(FAX) 602-382-2800

February 9, 2007

Regulations Unit
Office of General Counsel
Bureau of Prisons
320 First Street, NW
Washington, D.C. 20534

*Re: Proposed Rule
Reduction in Sentence for Medical Reasons
28 CFR Parts 571 and 572*

To Whom It May Concern:

The proposed rule changes published on December 21, 2006, narrow the grounds for reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) to medical reasons alone, requiring either a terminal illness with a life expectancy less than a year, or a debilitating medical condition which "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs."

The Federal Public and Community Defenders are concerned that the Bureau of Prisons is taking a much too restrictive view of its authority to file motions for sentence reductions under 18 U.S.C. § 3582(c). Further, Congress appears to have delegated the function of defining the § 3582(c) authority to the Sentencing Commission. Any Bureau of Prisons' suggestions regarding § 3582(c) should be directed to the Sentencing Commission pursuant to 28 U.S.C. § 994(o) for comment and participation by all of the potential actors in the federal sentencing system. The Bureau of Prisons should advocate a very broad view of potential § 3582(c) beneficiaries because the Judiciary provides a failsafe for the sentence, guided by the factors set out in 18 U.S.C. § 3553(a). A too narrow view fails to give the sentencing judge the intended option to consider release or reduction, thereby foreclosing the judicial discretion anticipated by the statute and raising serious constitutional questions based on the separation of powers required by the Fifth Amendment.

A. The Plain Meaning Of The Statute Is Broad And Unrestricted Regarding The Predicate Facts For A Sentence Reduction Motion.

The structure of the statute calls for the District Court to be the ultimate judge of whether extraordinary and compelling reasons warrant a sentence reduction:

Modification of an Imposed Term of Imprisonment. — The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553 (a) to the extent that they are applicable, if it finds that—

(I) extraordinary and compelling reasons warrant such a reduction; . . .

18 U.S.C. § 3582(c). The first step in determining the meaning of this statute is the language of the statute itself. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). In this case, the “ordinary” and “natural” meaning of the phrase “extraordinary and compelling” is in no way restricted to medical emergency, but can include the universe of post-sentence circumstances that might warrant mitigation of the sentence. *See Local v. Ashcroft*, 543 U.S. 1, 9 (2004) (referring to ordinary and natural meaning of the terms). The term “extraordinary” also has a well-developed and unrestricted meaning under sentencing law; the authority to depart from a guideline range is frequently articulated in terms of “extraordinary” circumstances. This is due to the Sentencing Guidelines choice to “ordinarily” not authorize departures for the various personal characteristics set forth in Chapter 5H. *See, e.g.*, U.S.S.G. §§ 5H1.1, 2, 3, 4, 5, 6, 11 (Age, Education and Vocational Skills, Mental and Emotional Condition, Physical Condition, Employment Record, Family Ties and Responsibilities, Military, Civic, Charitable, or Public Service, not “ordinarily” relevant to whether departure is warranted). Further, under 18 U.S.C. § 4205(g), the authority to reduce sentence after imprisonment was not restricted and included “extraordinary change in an inmate’s personal or family situation.” 28 C.F.R. § 572.40 (1980).

The proposed rule is far more limited than warranted by the broad range of possibilities that could warrant a sentence reduction by the district court. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation “alone” is not sufficient).

The limitation to end of life or near vegetative state is also inappropriate. There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness. *Compare* 28 C.F.R. § 572.40 (1980) (including “if an inmate becomes severely ill,” not terminally ill).

B. The Bureau Of Prisons Should Direct Its Concerns To The United States Sentencing Commission, Soliciting Comment From The Other Participants In The Federal Sentencing System, Rather Than Unilaterally Promulgating A Rule Regarding A Subject That Has Not Been Delegated To The Bureau Of Prisons.

Nothing in the statute delegates to the Bureau of Prisons rulemaking authority to limit the types of circumstances considered “extraordinary and compelling.” This task has been expressly and affirmatively delegated by Congress to the Sentencing Commission:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in § 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

U.S.C. § 994(t). The Supreme Court recently stated explicitly that the legitimacy of agency action depends on the statutory delegation of authority, which in turn depends on actual delegation language: “To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.” *Gonzalez v. Oregon*, 126 S. Ct. 904, 916 (2006). In the seminal case on the Sentencing Reform Act, the Supreme Court directly held that Congress explicitly delegated to the Sentencing Commission responsibility for administering the Sentencing Reform Act, which includes § 994(t). *Mistretta v. United States*, 488 U.S. 361 (1989). The delegation also clearly contemplates a series of examples that go far beyond the extremely narrow constraints of the proposed rule.

In the face of years of Sentencing Commission inaction on § 994(t), the Bureau’s desire for a set of rules is completely understandable. Recently, however, the Sentencing Commission adopted a policy statement, U.S.S.G. § 1B1.13, effective November 1, 2006, providing a structure for release motions pursuant to § 3582(c). Further, the Commission has made additional action on this issue a priority for the current amendment cycle, requesting and receiving additional comment pursuant

to a May 15, 2006 request. *See* 71 Fed. Reg. 28062. More recently, the Commission again solicited additional public comment during the current amendment cycle in an effort to respond to the mandate of 28 U.S.C. § 994(t) and develop criteria and examples for extraordinary and compelling circumstance reductions pursuant to 18 U.S.C. § 3582(c). 72 Fed Reg. 4372. That comment period ends March 30, 2007.

The mechanism for expression of the Bureau of Prisons' position is provided by the Sentence Reform Act: the Bureau of Prisons is specifically mentioned as one of the key organizations that

shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe “extraordinary and compelling” beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

C. Given The Ultimate Role Of The Judiciary, The Power To Move For Sentence Reductions Should Be Liberally Implemented.

The structure of the statute provides a critical gatekeeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of “extraordinary and compelling reasons,” the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Regulations Unit
Office of General Counsel
Bureau of Prisons
February 19, 2007
Page 5

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, the separation of powers are violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a).

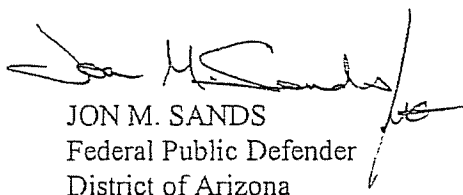
In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

D. Conclusion

The Bureau of Prisons should be commended for its desire to provide substance to the statutory language of § 3582(c). However, the language and purpose of the statute, as well as the American reverence for human liberty, militate in favor of a much broader construction of the statute. The Bureau of Prisons should reformulate its implementation of the statute to provide much broader bases for filing motions and should expressly favor liberal implementation of the statute, but should do so in the context of a suggested amendment to the sentencing guidelines, which would be subject to the procedural mechanisms of the Sentencing Reform Act.

Thank you for your consideration of our comments.

Sincerely,


JON M. SANDS
Federal Public Defender
District of Arizona

JMS:mg