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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

UNITED STATES OF AMERICA,

CR. No. 02-30045-AA

Plaintiff,

**SUPPLEMENT TO EMERGENCY
MOTION TO REDUCE SENTENCE AND
FOR OTHER EQUITABLE RELIEF**

vs.

PHILLIP WAYNE SMITH,

Defendant.

Introduction

Documents from the Bureau of Prisons (BOP) confirm the factual basis for Mr. Smith's constitutional and statutory claims that the agency is unlawfully executing the statute that provides

this Court with authority to determine whether, after consideration of the relevant factors under 18 U.S.C. § 3553(a), the Court should reduce his sentence under 18 U.S.C. § 3582(c)(1)(A). Contrary to the BOP's claims, the Court has abundant authority under 28 U.S.C. § 2255 and other jurisdictional statutes to vindicate the Court's role in the sentencing scheme established by the Sentencing Reform Act and to protect Mr. Smith's statutory and constitutional rights. During the pendency of the motion, the Court has the power to grant interim relief to assure that Mr. Smith does not suffer irreparable harm during the pendency of this matter.

Legal Analysis

A. The BOP Effectively Admits It Is Usurping This Court's Judicial Authority By Arrogating To Itself The Decision Whether To Grant A Motion To Reduce Sentence.

In his initial motion, Mr. Smith asserted that the BOP was violating the relevant statute and Constitution in two ways: (1) by applying its construction of the statute rather than the Sentencing Commission's broader definition; and (2) by refusing to file a motion unless it concluded such a motion should be granted. On the latter point, Mr. Smith relied on his counsel's declaration. That evidence can now be supplemented with documents that conclusively prove that the BOP is substituting its gatekeeper role for the judicial role of determining the merits of the motion.

On February 9, 2012, the chairperson of the "Bioethics Committee" provided Mr. Smith with a document entitled "Response To Request For Reduction In Sentence Consideration." *See* Exhibit E, attached to Supplemental Declaration of Counsel (filed separately under seal). In the preliminary paragraph, the BOP lists factors that are unquestionably covered by a § 3553(a) analysis and irrelevant to medical expertise, including "your criminal background . . . and the safety of the community should you be released early." *Id.* In denying the request, the BOP states, "while your

medical condition is very poor your criminal history outweighs your medical condition.” *Id.* On this basis, the BOP purports to decide the precise question that Congress assigned only to this Court: whether the motion should be granted. *See* Exhibit E (“[T]he Bioethics Committee finds you are not appropriate for Reduction in Sentence (Compassionate Release) because your criminal history supersedes your medical condition.”).

In its March 1, 2012, letter to this Court, the BOP again states that it has made a decision on the merits, instead of adopting the gatekeeper function of advising to Court of the potential for relief based on extraordinary and compelling reasons:

Mr. Smith’s case was discussed by the Bioethics Committee on February 2, 2012. The Committee felt he met the medical criteria for compassionate release, but in the end recommended denial of Mr. Smith’s request for compassionate release based upon his extensive criminal history. The Warden of FMC Lexington concurred with this denial.

Exhibit G, attached to Supplemental Declaration of Counsel, at 2.

Mr. Smith has established both elements of the BOP’s unlawful blocking of this Court’s judicial authority to rule on § 3582(c) motions: the BOP does not apply the Sentencing Commission definition of the statute, nor does it file motions unless first deciding the Court should grant the motion. Although the BOP claims this is merely an exercise of its discretion, an agency by definition abuses its discretion when it makes errors of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)); *Nw. Env’tl Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2007) (an agency’s mistaken belief that legislative language was mandatory supported invalidation of a rule as arbitrary, capricious, an abuse of discretion, and contrary to law). As previously briefed, the BOP’s actions are inconsistent with the

statute and violate the constitutionally-based separation of powers. Especially in the context of the human liberty at stake, this Court has the authority to take remedial action.

B. This Court Has Jurisdiction To Address The Agency’s Usurpation Of The Judicial Role And Its Use Of An Incorrect Interpretation Of The Statute.

The Executive Branch’s obstruction of this Court’s § 3582(c)(1)(A) authority raises fundamental constitutional questions that only this Court should address. Under the third clause of § 2255(b), Congress conferred on this Court, in the passive voice, catch-all authority to address and provide a remedy if “there has been such a denial or infringement of constitutional rights of a prisoner as to render the judgment vulnerable to collateral attack” The Court also has the power to consider corrective action by officers and employees of the United States in their official capacity under 28 U.S.C. § 1331, and to redress deprivation of rights guaranteed by both the Constitution and federal statutes under 28 U.S.C. § 1343(4). The authority to act is also ancillary to the original judgment based on the Court’s criminal jurisdiction under 18 U.S.C. § 3231. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80 (1994) (recognizing as separate but related purposes of ancillary jurisdiction (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent (such as here the § 3553(a) factors applicable to Mr. Smith) and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees (with special emphasis on this Court’s need to vindicate its sentence reduction authority)); *accord In re Valdez Fisheries Dev. Ass’n*, 439 F.3d 545, 549 (9th Cir. 2006). The BOP’s claim that the Court lacks jurisdiction finds no support in precedent, statute, or – given that it is this Court’s authority that is being impeded – logic.

C. The BOP's Claim That This Court Has No Authority To Act Is Not Supported By The Cases It Cites.

The BOP relies on uncontroversial and irrelevant cases in which prisoners attempted to obtain re-sentencing based on Guideline amendments that were not retroactive. *See* Government's Response (GR) at 2-3. The BOP then incorrectly claims that an unpublished Ninth Circuit case stands for the proposition that a court "may not grant an inmate's request for compassionate release in the absence of a motion filed by the BOP." GR at 3-4 (citing *United States v. Powell*, 69 Fed.Appx. 368 (9th Cir. 2003)).¹ In fact, *Powell* involved a *pro se* petitioner whose claim was included in his fifth successive petition, which was denied on those procedural grounds. There was no claim that the BOP was unlawfully construing the statute and violating the constitutional separation of powers. As the BOP eventually admits by claiming the constitutional violations "circumvents" the motion requirement, there is no authority supporting the claim that this Court lacks the power to address the BOP's encroachment on judicial authority.

Even more remarkably, the BOP asserts that a statute repealed for non-parole cases in 1987, 18 U.S.C. § 4205(g), precludes federal courts from "reviewing the decision of the BOP to not move for a reduction in sentence." GR at 4. Mr. Smith was sentenced under the Sentencing Reform Act, which repealed § 4205(g) for prospective cases, created § 3582(c), and authorized the Sentencing Commission to define the meaning of "extraordinary and compelling reasons." The Court sentenced Mr. Smith after 1987, so § 4205(g) is irrelevant. Even the cases under the old law provide no insight

¹ The BOP's citation of this unpublished memorandum violates the Ninth Circuit's directive in *Powell* itself that it "may not be cited to or by the courts of this circuit." Because the *Powell* memorandum was not issued on or after January 1, 2007, the Ninth Circuit's prohibition on citing this unpublished memorandum has not been altered. *See* Ninth Circuit Rule 36-3 and FRAP 32.1.

for this case because, in those cases, there was no allegation that the BOP was unlawfully executing the laws. If the BOP under the parole system had stated that a racial minority would not be eligible for § 4205(g) release, does the agency seriously contend that a federal court would be helpless to hear the prisoner's constitutional and statutory claims?

The BOP's reliance on the § 4205(g) regulation demonstrates the unlawfulness of its statutory interpretation of § 3582(c). GR at 6. Prior to the Sentencing Reform Act, Congress had not delegated the authority to further define the term "extraordinary and compelling reasons." In the Act, Congress explicitly directed that the Sentencing Commission "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." 28 U.S.C. § 994(t). The delegation to the Commission forecloses BOP authority over the exact same subject matter. The Commission's description and criteria includes no mention of "particularly" in describing extraordinary and compelling circumstances, as does the regulation upon which the BOP now places so much reliance. The express delegation to the Commission, and the Guidelines instruction on § 3582(c), are the only constitutionally and statutorily valid standards. The regulation, which fails to include any of the Commission's description, criteria, and examples, and adds only the incomprehensibly vague qualifier of "particularly" to the statutory standard, is neither within the delegation of congressional power to the Commission, nor consistent with the properly promulgated Commission standard.

D. This Court Has Authority To Grant Interim Relief, Even Prior To A Jurisdictional Determination, In The Form Of Ordering Transportation To Oregon, Consonant With Medical Needs.

The BOP fundamentally errs in claiming that this Court has no business asserting any authority over this matter. Even prior to a determination of jurisdiction, the Court has the power to exercise supervisory authority over the subject matter, including taking steps to avoid irreparable harm. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 290-01 (1947); *In re President and Drs. of Georgetown Coll.*, 331 F.2d 1000, 1004-05 (D.C. Cir. 1964). The Court would only be foreclosed from addressing the merits if the federal claim were frivolous or foreclosed by prior decisions of the Supreme Court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). As previously briefed, the Court has broad equitable power to grant interim relief.

In Mr. Smith's initial filing, he sought alternative "interim relief consonant with [his] medical needs." Emergency Motion at 10. In its recent letter to the Court, the BOP claims that no relief should be granted because it would interrupt the prison treatment. Exhibit G at 3. Since becoming aware of Mr. Smith's medical issue, the defense has been taking steps to assure continuity of medical care in the District of Oregon by providing available information to the U.S. Probation Office. If Mr. Smith were approaching the end of his sentence, the Probation Office would be taking its normal steps to adjust to the wide range of treatment needs of re-entering federal prisoners. The same steps are available now and should be expedited given the dire prognoses provided by Mr. Smith's doctors. While appreciating the BOP's concern for his treatment, Mr. Smith is confident that the Court, in exercising its authority over this matter, can take medical concerns into account in granting relief.

Conclusion

For each of the foregoing reasons, and those stated in the Emergency Motion, Mr. Smith respectfully requests that the Court grant his motion to reduce sentence and, in the alternative, grant interim equitable relief in the form of ordered transportation to, and supervision in, the District of Oregon pending final resolution of this matter.

Dated this 5th day of March, 2012.

/s/ Ruben L. Iñiguez

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