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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

UNITED STATES OF AMERICA,	**CR 02-30045-AA**
Plaintiff,	**EMERGENCY MOTION TO REDUCE SENTENCE AND PROVIDE OTHER EQUITABLE RELIEF PURSUANT TO 28 U.S.C. § 2255**
vs.	
PHILLIP WAYNE SMITH,	
Defendant.	*EXPEDITED CONSIDERATION REQUESTED*

Pursuant to 28 U.S.C. § 2255, the defendant, Phillip Wayne Smith, through counsel, Ruben L. Iñiguez, respectfully moves this Court for an order modifying his sentence to time-served and,

pending a ruling on the merits, for an order of conditional release and immediate transfer to this District for an appearance before this Court forthwith. This emergency relief is requested because Mr. Smith has acute myelogenous leukemia (AML), a terminal illness, and, according to his attending physician at the Markey Cancer Center in Lexington, Kentucky, he has only a few weeks left to live. Although the U.S. Bureau of Prisons (BOP) recognizes that Mr. Smith qualifies for release under 18 U.S.C. § 3582(c)(1)(A)(I), the "compassionate release committee" at the Federal Medical Center in Lexington (FMC) has twice refused to refer his case to this Court, most recently on February 2, 2012. The BOP's conduct in obstructing this Court's review raises serious questions regarding the separation of powers and the Eighth Amendment's protection against cruel and unusual punishment. The Court should order immediate conditional release and transportation to the District of Oregon pending final disposition of this motion in order to avoid irreparable and imminent harm on questions upon which Mr. Smith has a substantial basis for success.

FACTUAL BACKGROUND

On November 13, 2002, Mr. Smith pleaded guilty to one count of possession with intent to distribute a controlled substance, methamphetamine. *See* Presentence Report, attached to Declaration of Counsel (filed separately under seal) as Exhibit A. More than nine years ago, on February 7, 2003, the Court sentenced Mr. Smith to 156 months imprisonment and three years supervised release. *See* Judgment, attached to Declaration as Exhibit B.[1] To date, Mr. Smith has

[1] Mr. Smith possessed less than one-half ounce (*i.e.*, 12.3 grams) of methamphetamine. *See* Exhibit A at ¶5. Although his guideline range ordinarily would have been 51- 63 months, it more than tripled to 151-188 months because his prior record qualified him for sentencing as a Career Offender. *Id.* at ¶¶22-56.

served a total of 3,533 days (117 months) in prison, having been in federal custody since June 17, 2002. See Exhibit A at Face Sheet (Release/Custody Status). The BOP currently projects his release date as July 30, 2014. *See* Inmate Locator, attached as Exhibit C to Declaration. Accordingly, without accounting for pre-release halfway house placement, Mr. Smith's sentence is scheduled to expire of its own accord in approximately 29 months.

In August 2011, Mr. Smith was diagnosed with Acute Myelogenous Leukemia (AML), a terminal illness.[2] Mr. Smith was transferred to FMC Lexington and provided treatment at the University of Kentucky's Markey Cancer Center. Despite the efforts of his attending physicians – Dr. Dianna Howard and Dr. Francisco Rios – Mr. Smith's prognosis is grave. He was recently informed that he has only a few weeks left to live.

LEGAL ANALYSIS

I. The Court Should Exercise Its Authority To Review Its Sentence Based On The Frustration Of Its Reasonable Expectation That The Sentence Would Be Executed In Accordance With The Constitutionally-Based Separation Of Powers.

At the time the Court imposed sentence on Mr. Smith, it could be confident that, in the event that "extraordinary and compelling reasons" developed during the course of his sentence, the Court would have the opportunity to "reduce the term of imprisonment" "after considering the factors set

[2] According to the Mayo Clinic's website, acute myelogenous leukemia or AML is a cancer of the blood and bone marrow – the spongy tissue inside bones where blood cells are made. The word "acute" denotes the disease's rapid progression. It's called myelogenous leukemia because it affects a group of white blood cells called the myeloid cells, which normally develop into the various types of mature blood cells, such as red blood cells, white blood cells and platelets. http://www.mayoclinic.com/health/acute-myelogenous-leukemia/DS00548

forth in section 3553(a) to the extent they are applicable." 18 U.S.C. § 3582(c)(1)(A)(I).[3] Congress expressly delegated to the Sentencing Commission the task of defining the conditions for § 3582(c) sentence modification: "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 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." 28 U.S.C. § 994(t). The Sentencing Commission executed this delegated power stating, in part, that the Court has the authority to reduce the sentence for "extraordinary and compelling reasons" where "[t]he defendant is suffering from a terminal illness." U.S.S.G. § 1B1.13, comment. (n. 1(A)(I)). Thus, under Congress's sentencing scheme, which underlay this Court's exercise of sentencing authority, the Court would have been alerted to the terminal illness when it was diagnosed and would have been given the opportunity to reduce the sentence in light of all the § 3553(a) factors (including the principle of imposing a sentence that is "not greater than necessary" to accomplish the goals of sentencing).

The reason this Court has been denied this opportunity is simple: the BOP refuses to follow the congressional direction to follow the Sentencing Commission's construction of the statute. Instead, the BOP implements its own interpretation and refuses to notify the sentencing judge unless it believes the motion should be granted. This defiance of the proper Executive Branch role in executing a sentence violates the constitutionally-based separation of powers in two ways.

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[3] Section 3582(c)(1)(A)(I) provides that "in any case . . . the court, upon motion of the Director of the Bureau of Prisons, may reduce the [defendant's] term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction."

First, agency action "might violate important constitutional principles of separation of powers and checks and balances" where Congress's "specific and detailed" delegation is not followed. *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1823 (2009) (citing *Mistretta v. United States*, 488 U.S. 361, 374 (1989)). In *Mistretta*, which specifically addressed the Sentencing Reform Act of which Section 3582(c) is a part, the Supreme Court specifically noted the need to clearly delineate the boundaries of delegated authority. 488 U.S. at 372-73. The BOP has nonetheless explicitly refused to follow the Sentencing Commission's policy statement regarding the meaning of the statute, stating that the Sentencing Commission's proposed rule would not change its prior practice of only filing § 3582(c) motions when the person is almost dead. *See Reduction in Sentence for Medical Reasons*, 71 Fed. Reg. 76619-01 (Dec. 21, 2006). Under the BOP's interpretation of the statute, motions are hardly ever filed; between 2000 and 2008, of the average of 21.3 motions filed every year, in about 24% of those motions, the prisoner died before the district court even had a chance to rule on the motion. Judy Garret, Deputy Dir., Office of Information, Policy & Public Affairs, Federal Bureau of Prisons (May 2008), *available at* http://or.fd.org/ReferenceFiles/3582cStats.pdf. The GAO noted this month that as "of December 2011, BOP has not revised its written policy to explicitly include all of the circumstances noted in the [Sentencing Commission] guidance." General Accountability Office, *Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time*, February 2012, at 25. The statute has only one meaning regardless of the context in which the statute is implemented. *Clark v. Martinez*, 543 U.S. 371, 380 (2005)("we must interpret the statute consistently, whether we encounter its application in a criminal context")(quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004)). This Court should grant

the instant motion because it could not have anticipated that the sentence it originally imposed would be executed in violation of the separation of powers.

Second, the BOP's interpretation of Section 3582(c) violates the separation of powers by usurping the judicial role in sentencing. Rather than serving as a gate-keeper, giving the Court notice when "extraordinary and compelling reasons" exist, the BOP only files a motion when it thinks it should be granted. For example, in this case, the BOP apparently recognized the existence of "extraordinary and compelling" circumstances, but rather than file a motion with the Court, it referred the matter to a "compassionate release committee." The arrogation of the decision whether to grant a motion violates the plain meaning of the statute and deprives the Court of the opportunity to exercise its judicial function. In the legislative history, Congress clearly viewed § 3582(c) as a mechanism to fill the "substantial void in the sentencing system" left by the repeal of discretionary review under old Rule 35(b). *Comprehensive Crime Control Act of 1983, Hearing on S. 829 before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. at 491 (1983). This history reinforces the plain meaning of the statute – especially the explicit reference to § 3553(a) – that the power to reduce the sentence is a judicial power and that the BOP's role is only ministerial (*i.e.*, to bring cases that meet the threshold qualification to the Court's attention for a ruling on the merits).

The Court should grant the § 2255 motion based on the violation of the Constitution in the implementation of the sentence. The Court should reduce the sentence to time served and commence supervised release on conditions that address Mr. Smith's medical and other needs.

II. Mr. Smith's Sentence As Administered Is Unconstitutional Under The Eighth Amendment.

The Supreme Court has repeatedly held that liberty interests are violated where "the range of conditions of confinement are qualitatively different from the punishment characteristically suffered by a person convicted of a crime" and thus, exceed the sentence imposed. *Vitek v. Jones,* 445 U.S. 480, 493-94 (1980) (citing cases). Mr. Smith's sentence as administered is unconstitutional and should be vacated, set aside, or reduced.

Recently, in finding that the imposition of the death sentence upon a mentally retarded person was cruel and unusual punishment, the Supreme Court stated:

> The Eighth Amendment succinctly prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States*, 217 U.S. 349 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 367. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 997-998 (1991) (Kennedy, J., concurring in part and concurring in judgment); *see also id.*, at 1009-1011 (White, J., dissenting). Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666-667 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667.

Atkins v. Virginia, 122 S.Ct. 2242, 2246 -2247 (2002). The Court further noted: "[w]e have read the text of the [Eighth] amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive. *Id.* at 2247 n.7.

In the same term, the Supreme Court held that the unwanton infliction of pain violated the Eighth Amendment:

> "'[T]he unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Whitley v. Albers*, 475 U.S. 312, 319(1986) (some internal quotation marks omitted). We have said that "[a]mong 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). In making this determination in the context of prison conditions, we must ascertain whether the officials involved acted with "deliberate indifference" to the inmates' health or safety. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious. *Farmer v. Brennan*, 511 U.S. 825, 842 , (1994).

Hope v. Pelzer, 122 S.Ct. 2508, 2514 (2002). The failure to provide necessary medical attention also violates the Eighth Amendment, although not asserted here. "The government has an obligation under the Eighth Amendment to provide medical care for those whom it punishes by incarceration." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Amendment thus imposes duties on prison officials to provide humane conditions of confinement and ensure that inmates receive adequate food, clothing, shelter, and medical care. *Hudson v. Palmer,* 468 U.S. 517, 526-27. (1984). "Denial of medical attention to prisoners constitutes an [E]ighth [A]mendment violation if the denial amounts to *deliberate indifference* to serious medical needs of the prisoners." *Toussaint v. McCarthy,* 801 F.2d 1080, 1111 (9th Cir1986); *Estelle v. Gambol,* 429 U.S. 97 (1976). It is not enough that some of a prisoner's medical needs are addressed; the Constitution also requires treatment for all serious medical conditions. *Lopez v. Davis*, 203 F.3d 1122, 1131-33 (9th Cir. 2000); *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). The Eighth Amendment also protects prisoners from prison officials' deliberate

indifference to their mental health needs, including appropriate treatment for PTSD. *Doty v. Cty. Of Lassen*, 37 F.3d 540 (9th Cir. 1994) *United States v. Kidder,* 869 F.2d 1328, 1331 (9th Cir. 1989).

In this case, the sentence as administered fits the criteria set forth by analogy to *Atkins*, *Hope*, and *Estelle* because it is both cruel and unusual and excessive. Mr. Smith's situation is so grave that it is literally a death sentence. Certainly, when this Court originally imposed sentence, it could not possibly have foreseen that nine years later, at the age of 43, Mr. Smith would be stricken with a terminal illness, and have only a few weeks to live. Nor would the Court have predicted that the BOP would be unwilling to assess the situation humanely and exercise its authority to request "compassionate release" for Mr. Smith. Because Mr. Smith's sentence as administered is unconstitutional by the standards set forth above, he respectfully urges this Court to reduce, vacate, or correct his sentence under Section 2255.

III. This Court Has Broad Equitable Authority To Order Relief Including Conditional Release While This Motion Is Pending.

Consistent with habeas corpus's roots in equity, the relevant statute authorizes the Court to "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b); *see Boumediene v. Bush*, 523 U.S. 723, 780 (2008)("Habeas 'is at its core an equitable remedy.'")(quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). The Court's authority includes the power to "order [a] petitioner's release pending consideration of his habeas corpus claim." *Hensley v. Municipal Court*, 411 U.S. 345, 352 (1973)(citing *In re Shuttlesworth*, 369 U.S. 35 (1962)); *accord Marino v. Vasquez*, 812 F.2d 499, 507 (9th Cir. 1987). The Court's power to order release "derives from the power to issue the writ itself." *Marino*, 812 F.2d at 507.

The Court's release authority extends to federal defendants seeking relief under 28 U. S.C. § 2255. Ninth Circuit Rule 23-1; *United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994)). Although conditional release in this context is generally limited to special circumstances and high probability of success, special circumstances include "a serious deterioration of health while incarcerated." *Id.* (quoting *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989)).

In the present case, the Court should order interim equitable relief consonant with Mr. Smith's medical needs. Mr. Smith has suffered an extremely serious and imminent deterioration of his health and, while he has been pursuing administrative remedies, further delay will result in irreparable harm to him. *See McCarthy v. Madigan*, 503 U.S. 140, 146-47 (1992)(failure to exhaust administrative remedies excused where delay would result in irreparable injury); *Barq v. Daniels*, 428 F. Supp.2d 1147, 1150 (D. Or. 2006)(same). His family wants to be able to be with him during this difficult time, and he wants to have their support and presence. The Court should order Mr. Smith's return to Oregon and release on appropriate conditions supervised by the Court. Chief Pretrial Services Officer Brian Crist has been advised regarding the situation and, as in previous similar situations, will provide recommended conditions of release and supervision as requested by the Court.

CONCLUSION

The extreme circumstances of this case call for this Court's immediate emergency intervention. In order to vindicate fundamental constitutional rights, the Court should order that Mr. Smith's sentence be reduced forthwith to time-served or, in the alternative, order immediate release

on conditions consonant with his medical needs. Due to the emergency nature of this motion, Mr. Smith respectfully requests expedited consideration.

RESPECTFULLY SUBMITTED this 23rd day of February 2012.

/s/ Ruben L. Iñiguez
Ruben L. Iñiguez
Attorney for Petitioner