NEW YORK COUNCIL OF DEFENSE LAWYERS

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Hon. Reena Raggi
United States Circuit Judge
United States Court of Appeals,
Second Circuit
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Re: Proposed Amendment to Fed. R. Crim. P. 35

Dear Judge Raggi:

This letter is submitted on behalf of the New York Council of Defense Lawyers (the "NYCDL"). We write to you in your capacity as Chairperson of the Advisory Committee on the Federal Rules of Criminal Procedure, to propose an amendment to Federal Rule of Criminal Procedure 35. A copy of the proposed amendment is enclosed. The proposed amendments to Rule 35 are black-lined.

The NYCDL is a professional association comprised of approximately 250 experienced attorneys whose principal area of practice is the defense of white collar criminal cases in federal court. Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender.

The NYCDL's members thus have gained familiarity with the Federal Rules of Criminal Procedure both as prosecutors and as defense lawyers.

A. The Terms of the Proposed Amendments

The proposed amendment would allow a defendant to make a motion to reduce his sentence after serving two thirds of his sentence. Such a motion would be limited to those cases in which the defendant could prove, by clear and convincing evidence, that the post-sentence discovery of scientific evidence justifies his release; his substantial rehabilitation justifies his release; or the defendant's changed medical condition justifies his release. In addition, before granting any motion to reduce a defendant's sentence, the Court would be required to solicit the opinion of any victim who submitted a victim impact statement in connection with the defendant's original sentencing.

B. The Merits of the Proposed Amendments

The grounds on which the motion could be made are circumscribed, and clear and convincing evidence will be required. This proposed amendment will not result in an "open floodgate" of meritless applications that would substantially burden the District Courts. Given the manner in which the amendments are drafted, there will be relatively few applications for relief.

Nor will the proposed amendments result in a "get out of jail free" card for defendants that would effectively negate their original sentences. At the present time, through the accrual of "good time," a federal inmate typically serves approximately 85% of his or her sentence, and is eligible for release to a "halfway house" with approximately six months remaining on his or her original term of incarceration (or 10% of the term if the original sentence is less than 60 months). Thus, at the present time, an inmate serves approximately 80% of his or her sentence "behind bars." For example, on a 10 year sentence (120 months) an inmate now serves 96 months "behind bars" before being released to a halfway house, where he or she may reside for a period of up to six months.

In rare cases, the proposed amendments will permit a federal inmate to serve as little as 67% of his or her original sentence "behind bars." Under the proposed amendment to Rule 35, an inmate who receives a 120 month sentence will be eligible to make a motion for a sentencing reduction only after he or she has served 80 months of his sentence. Thus, even if his or her motion is granted without delay, the inmate will only save himself or herself 16 months "behind bars" -- although the inmate will also be spared the time in the halfway house that is presently required by the Bureau of Prisons.

In short, the proposed amendments provide a limited form of relief in a defined group of appropriate cases.

C. Why the Amendments Are Needed

It is apparent to everyone that federal incarceration has become an epidemic, and is, in some cases, unnecessary. As Attorney General Holder himself has noted, "widespread incarceration at the federal, state and local levels is both ineffective and unsustainable." Hon. Eric Holder, Address at the Annual Meeting of the American Bar Association's House of

Delegates, August 12, 2013. It is appropriate to find ways to reduce our prison population, because the burden of incarceration sometimes outweighs its benefit. To quote former Attorney General Janet Reno, "there are a great many people who are in prison for very good reasons. But many are behind bars for sentences that are too long …." Hon. Janet Reno, Forward, Federal Prosecution for the 21st Century, Published by the Brennan Center for Justice, 2014.

The Department's tacit support in some cases for the general approach advanced by this rule proposal is supported by a draft bill that we understand it submitted to the Senate Judiciary Committee that would permit a "second look" for defendants convicted of committing homicides when they were juveniles. For the moment, we have not been able to find a copy of it in the public domain.

Congress has also recognized the need to release prisoners held longer than necessary. For example, it has specifically authorized the release of certain elderly prisoners who have served a substantial portion of their sentence when they present no danger to others. *See* 18 U.S.C. § 3582(c)(1)(A); U.S.S.G. § 1B1.13.

The proposed rule amendments will help to ease the problems of lengthy and unnecessary incarceration in some cases, by permitting defendants to obtain release from prison somewhat earlier than they can under the current sentencing regime. We respectfully submit that this is an appropriate reason to amend Rule 35.

The first proposed basis for the early termination of a defendant's sentence is newly discovered scientific evidence that calls into question the validity of the conviction. We certainly believe that a serious question as to the validity of a conviction is an appropriate reason to terminate an inmate's sentence early. Relief of this sort has become more difficult to obtain through the writ of habeas corpus because of the judicial and statutory limitations on the use of the writ, and we submit that this provision will make it easier for the Court to consider meritorious applications for early release from inmates who have a substantial argument that recently discovered evidence tends to exonerate them.

The second proposed basis for the early termination of a defendant's sentence is a showing of substantial rehabilitation. As the Court knows, under the old sentencing regime, defendants were eligible for parole after serving a part of their sentences. While the proposed amendments are far less likely to result in early release than parole, they will serve a similar function by permitting some defendants – those who can demonstrate by clear and convincing evidence that they have rehabilitated themselves – to exit the prison system after serving a substantial portion of their sentences. We submit that early release on this basis is appropriate, given the goals of sentencing, which include the rehabilitation of defendants. See United States Sentencing Guidelines Manual, Chapter 1, Section 1, Sub-section 2 "The Statutory Mission" as stated in 1987 ("the basic purposes of criminal punishment [include]: … rehabilitation.").

The last proposed basis for the early termination of a defendant's sentence is a showing that the defendant's medical condition has deteriorated, and that it is unlikely he will commit further crimes. At the present time, the criteria for "compassionate release" on medical grounds under the Bureau of Prisons' regulations are so stringent that it is very difficult to obtain compassionate release. We believe the cost of incarcerating ill inmates who are often elderly is unnecessary where clear and convincing evidence shows that the defendant is unlikely to commit

further crimes. We submit there is a real benefit to the defendant, the defendant's family, and society, in releasing such defendants.

We do not believe the number of applications for release under these proposed amendments will present a burden on the courts. Currently, prisoners seeking release on these bases can make a request for "compassionate release" from the Bureau of Prisons. The best available historical data reflect that, from 2006 to 2011, only 211 such requests were approved by a Warden or Regional Director, and only 273 were denied and then appealed by the prisoner. *See* U.S. Dep't of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program 34-38 (April 2013). While additional requests may have been denied and not appealed in that five-year period, these numbers do not remotely present a "floodgates" problem.

We recognize that crime victims play an important role in sentencing proceedings. Therefore, the proposed amendment to Rule 35 explicitly provides that the Court must solicit and consider the opinion of any victim who submitted a victim impact statement at the time of the defendant's original sentencing before granting any motion for a sentencing reduction. By including this provision, we believe that adequate provision has been made to ensure that victims are heard in connection with any application to reduce a defendant's sentence.

Finally, the proposed amendments permit a court to reduce a defendant's sentence to a level below the minimum required by statute. We do not believe that this provision presents any significant jurisdictional issue for the Committee, because any change in the Rule would ultimately be approved by Congress after judicial review and recommendation, whether by explicit approval or by the rulemaking procedure established by Congress (i.e. Congressional acquiescence). See 28 U.S.C. §2072, 2074. So this provision of the Rule would ultimately be approved by Congress if adopted by the Committee and the Courts. Accordingly, there should be no bar to expanding, in the limited way proposed here, the grounds on which the Courts may reduce a defendant's sentence pursuant to Rule 35.

Please let us know if you have any questions. We look forward to hearing from Advisory Committee concerning this proposal.

Very truly yours,

Alexandra Shapiro

PROPOSED MODIFICATIONS TO RULE 35

RULE 35. CORRECTING OR REDUCING A SENTENCE

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical or other clear error.

(b) Reducing a sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the Court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

(d) Sentencing Reduction on the Application of a Defendant.

(1) In General. A defendant may make a motion to reduce his sentence after he has served two thirds of the total term of incarceration imposed on him by the District Court, if he can demonstrate by clear and convincing evidence any of the following grounds for a reduction in his sentence:

(A) Scientific Evidence. Scientific evidence discovered after the defendant began his term of incarceration creates a substantial question about the validity of the defendant's conviction;

(B) Substantial Rehabilitation. The defendant has substantially rehabilitated himself while incarcerated;

(c) The Defendant's Medical Condition. The defendant's medical condition has deteriorated to a degree that justifies his release, even if the defendant does not qualify for a "compassionate" release pursuant to the applicable Bureau of Prisons regulations. To qualify for this reduction, the defendant must demonstrate that the deterioration in his medical condition and his criminal history make it unlikely that he will commit further crimes.

(2) Role of Crime Victims. Before granting any reduction in sentence pursuant to this subsection, the Court must solicit and consider the opinion of any victim of the defendant's crime who submitted a statement in connection with the sentencing at which the defendant was sentenced to the term of incarceration which the defendant moves to reduce.

(3) Below Statutory Minimum. When acting under Rule 35(d), the court may reduce the sentence to a level below the minimum sentence established by statute.