

ARE YOU DISRESPECTING ME?

An uncomfortable number of Supreme Court justices last Wednesday questioned whether the US Sentencing Commission overstepped its authority when it amended USSG 1B1.13(b)(6) to hold that changes in mandatory minimum laws – even when not retroactive – and concerns about actual innocence could be part of a court's consideration when weighing an 18 USC 3582(c)(1)(A) compassionate release motion.

Trying to predict the outcome of an appellate case based on the oral argument is a fool's errand. Still, the nearly three hours of argument on what should be or should not be extraordinary and compelling reasons judges must consider in granting 3582(c) sentence reductions provided little reason for optimism.

The issue was whether extraordinary and compelling reasons may include factors like trial errors or nonretroactive changes in the law. Lawyers for Daniel Rutherford and John Carter, two inmates seeking such sentence reductions, argued that the Commission was within its legal authority to say that courts could consider whether the First Step Act's nonretroactive changes to gun and drug mandatory minimums would have resulted in lesser sentences in their cases.

In a third case, *Fernandez v US*, a district court had granted Joe Fernandez compassionate release in part because the judge felt "disquiet" about the conviction due to questions about whether the witness who had fingered Joe had lied to save his own skin. The 2nd Circuit Court of Appeals rejected the compassionate release, arguing that Joe's innocence claim should have been brought up in a 28 USC 2255 habeas challenge instead.

A 3582(c)(1) sentence reduction, known a little inaccurately as "compassionate release," lets courts reduce criminal sentences in certain cases. Before 2018, the Bureau of Prisons had to file a motion as a prerequisite for such consideration, but the First Step Act eliminated that requirement. The Sentencing Commission is charged by 28 USC 994(t) with the responsibility for defining what constitutes an extraordinary and compelling reason, and has expanded such to include medical conditions, family circumstances and age. The compassionate release guideline amendment in November 2023 adopted a broader view of compassionate release factors that included changes in the law that would have made a prisoner's sentence much shorter if it had been in force when he got sentenced.

During Wednesday's arguments, the only Justice expressing sympathy for Rutherford and Fernandez was Ketanji Brown Jackson. She maintained that the 2255 and compassionate release considerations were not mutually exclusive. Instead, Jackson said compassionate release was intended to work as a safety valve.

"The question is, 'safety valve for what?'" Justice Elana Kagan countered. "Not every safety valve is a safety valve for everything."

Justice Sonia Sotomayor said a district judge's doubts about a jury verdict shouldn't be used as a factor in compassionate release claims. Justice Neil Gorsuch contended that the judge's own feelings, even if reasonable, should have nothing to do with the defendant's circumstances for compassionate release. "I thought, in our legal system, the jury's verdict on the facts is not something a court can impeach unless it's clearly erroneous," Gorsuch said. He suggested that the Commission had been "disrespectful" by substituting its own position on retroactivity for Congress's.

In the Fernandez case, the Court appeared uneasy with allowing judges to consider factors that also fall under the federal habeas statute. Kagan said that habeas claims face harsh limitations and questioned whether inmates might use compassionate release as an end-run around those prohibitions.

Justice Samuel Alito observed, “The First Step Act was obviously heavily negotiated... and retroactivity is, of course, always a key element in the negotiations. Congress specifically says this is not going to be retroactive to those cases where sentences have already been imposed. And then the [Sentencing] Commission, though, then comes in and says we’re now going to give a second look for district judges to revisit those sentences...”

Justice Amy Coney Barrett asked whether a judge’s disagreement with the mandatory minimums could be enough justification for a compassionate release grant. Frederick replied that even if a judge thinks a sentence is too harsh or if it would have been lower after the sentencing reforms, the Sentencing Commission’s guidelines require other factors, like a prisoner’s age, health and family situation, to be part of the overall picture.

Chief Justice John Roberts worried that the Sentencing Commission was opening the floodgates to applications for compassionate release. Currently, the 3rd, 5th, 6th, 7th, 8th and D.C. circuits have ruled that the Commission’s interpretation exceeds its authority and is wrong, while the 1st, 4th, 9th and 10th circuits have allowed courts to consider the disparity between pre- and post-First Step Act sentences.

Writing in his Sentencing Law and Policy blog, Ohio State University law professor Doug Berman – who filed an amicus brief supporting Rutherford, Carter and Fernandez – was pessimistic about the outcome of the cases:

“But the Justices seem poised to concoct some new legal limits on equitable sentence reduction motions, though it remains unclear exactly how they will decide to legislate from the bench in this context. There was some interesting discussion during the Fernandez case about which of various possible restrictions relating to 2255 that the government wanted the Justices to enact. And in Rutherford/Carter, the Justices expressed in various ways which sentencing statutes they thought might create implicit limits on the bases for sentencing reductions. Just how the Justices decide to act as lawmakers and policymakers in this setting will be interesting to see.”

Bloomberg Law observed, “The court’s decisions in the cases could have a chilling, or stimulating, effect on compassionate release petitions. The Sentencing Commission reports they have increased dramatically since passage of the First Step Act and the pandemic, with more than 3,000 filed across the country last year.”

Fernandez v US, Case No 24-556 (Supreme Court oral argument Nov 12)

Rutherford v US, Case No 24-820 (Supreme Court oral argument Nov 12)

Carter v US, Case No 24-860 ((Supreme Court oral argument Nov 12)

Law360, *Justices Hint Early Release Factors ‘Countermand’ Congress* (Nov 12)

WITN-TV, *Supreme Court to weigh limits on compassionate release* (Nov 12)

Courthouse News Service, *Supreme Court disquieted by increased judicial discretion over compassionate release* (Nov 12)

Sentencing Law and Policy, *Justices seem eager to concoct limits on grounds for sentence reductions, but what new policy will they devise?* (Nov 12)

Bloomberg Law, *Justices Eye Scope of Compassionate Release 'Safety Valve'* (Nov 12)