U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 11, 2019

BY ECF

The Honorable Sidney H. Stein
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Room 1010
New York, New York 10007

Re: United States v. Hassan Nemazee,
S1 09 Cr. 902 (SHS)

Dear Judge Stein:

The Government respectfully requests permission to file this letter in response to the defendant Hassan Nemazee's memorandum, filed on Sunday, March 10, 2019 ("Nemazee Mem."). In our March 8, 2019 status update, we reported that (1) earlier that day the Bureau of Prisons ("BOP") issued interim guidance to facilities for the implementation of the re-authorized pilot program for home confinement of certain eligible elderly and terminally ill inmates, 34 U.S.C. § 60541(g) (the "Pilot Program"); (2) BOP is currently evaluating Nemazee's request for home confinement under the eligible elderly offender provision of the Pilot Program; and (3) the Government anticipates a decision on that application in the near future. *See also* Transcript of February 22, 2019 oral argument ("Tr.") at 37-38, 45 (ordering a status report on BOP's schedule for implementing the program).

In response, Nemazee has filed a memorandum asking the Court to immediately issue an order modifying Nemazee's sentence to a term of home confinement (Mem. at 2, 6) and re-arguing and expanding on his initial motion. (*Id.* at 3-4). In doing so, Nemazee has not only exceeded the scope of the Court's order and the Government's status letter, he has also mischaracterized the law. For those reasons, the Government respectfully requests permission to file this short reply.

I. The Court Should Permit the BOP to Consider Nemazee's Application for Home Confinement

There is no merit to Nemazee's urging the Court to intervene immediately, even if, *arguendo*, Nemazee had standing to challenge the implementation and application of the Pilot Program. As the Government reported to the Court on Friday, BOP already transferred a small number of inmates to home confinement under the Pilot Program on an *ad hoc* basis prior to the issuance of interim guidance on the Pilot Program's implementation. That fact shows that BOP

not only can act in a reasonably short timeframe, but already has done so in other cases. That the BOP has recently issued interim guidance to prison facilities provides further support that it can and will act on Nemazee's application. There is ample basis to expect BOP will reach a decision shortly, and well in advance of the Court's proposed mootness timeframe of mid-April (Tr. 38), much less August. (Mem. at 2). Nemazee's application is under active review, and the Court should permit BOP to apply its own authorities.

II. Section 3582(c) Does Not Provide for Judicial Review of the Pilot Program

As set forth in the Government's February 6, 2019 memorandum and during oral argument on February 22, 2019, 18 U.S.C. § 3582(c) does not authorize judicial review of the Pilot Program. In reargued his motion, Nemazee advance new, and flawed arguments in support of his request.

First, Nemazee mischaracterizes the relief he seeks under 18 U.S.C. § 3582(c)(1)(A). That provision gives the Court the authority to "modify" a sentence. *See* 18 U.S.C. § 3582(c) ("The court *may not modify* a term of imprisonment once it has been imposed except that . . ."); (c)(1)(A) (upon making certain required findings, the court "*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) . . ."); (c)(1)(B) ("the court may *modify an imposed term of imprisonment* to the extent otherwise expressly permitted . . .") (all emphasis supplied). Section 3582(c) does not convey authority to order the BOP how to implement the sentence. Nemazee's motion, in effect, asks the Court to modify Nemazee's sentence to a term of time served, plus an additional term of supervised release with a home confinement condition in order to replicate how BOP would implement Nemazee's sentence if he were found to be an eligible elderly offender under the Pilot Program.[1] This illustrates that the square peg of Nemazee's desired relief does not fit within the round hole of § 3582(c).

Second, Nemazee mischaracterizes the First Step Act and its legislative history. As an initial matter, the Court should reject Nemazee's attempt to contradict the plain statutory language based on a 2-page Senate Judiciary Committee bill summary and a March 7, 2019 letter from an individual member of Congress. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-59 (2012) ("Petitioners also contend that legislative history supports their broad reading . . . But 'reliance on legislative history is unnecessary in light of the statute's unambiguous language.'") (quoting *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010)); *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.") (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950)); *see also United States v. Woods* ("[P]ost enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)); *Barber v. Thomas*, 560 U.S. 474,

[1] Nemazee must still successfully participate in community-based treatment in order to complete his residential drug abuse program ("RDAP") and retain his eligibility for the one-year reduction of his sentence reflected in his current projected release date of February 6, 2020. *See* 18 U.S.C. § 3621(e)(2)(B).

486 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law.") (citing *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (emphasis in original).

Moreover, Nemazee misuses the legislative history upon which he attempts to rely. He argues that a Senate committee summary of the proposed legislation supports his argument that the First Step Act's amendment to § 3582(c)(1)(A) also authorizes the Court to modify his sentence based on the reauthorization of the Pilot Program. (Mem. at 4). This summary is of little use for a number of reasons. First, it is not a Senate Committee Report, and there is no indication it was authored or endorsed by the elected members of the Judiciary Committee (as opposed to committee staffers), or that it was known to, or relied on by, the Senate or the House when voting. *Cf. Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) (describing "the most authoritative and reliable materials of legislative history" as: "the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy").

Second, the summary that Nemazee cites differs another summary prepared by the Congressional Research Service, which is the summary to which the Senate Judiciary Committee website points. *See* Committee on the Judiciary: Legislation: S. 3635 Second Chance Reauthorization Act of 2018, *available at* https://www.judiciary.senate.gov/legislation?PageNum_rs=7; *see also* S.3635 – 115th Congress (2017-2018), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/3635. The CRS bill summary merely provides that the proposed legislation would "reauthorize and modify eligibility for an elderly offender early release pilot program." *Id.* The existence of other summaries of the legislation, and the fact that the Judiciary Committee website points to the CRS summary, further undermines the reliability of the committee summary as a reflection of how Congress understood the First Chance Act.

Third, and most importantly, neither the committee summary nor the CRS summary refers to judicial oversight of the Pilot Program. The committee summary's brief reference to allowing "the prisoner to request for his or her compassionate release," does *not* say that the prisoner can make a motion to the court. Rather, under the Pilot Program as re-authorized and expanded, inmates can expressly request placement in home confinement to *the Attorney General*. *See* 34 U.S.C. § 60541(g)(1)(B) ("upon written request from either the Bureau of Prisons or an eligible elderly offender. . . ."); First Step Act § 603(a)(1)(C)(ii). In other words, the committee summary simply refers to the inmate's ability to administratively request home confinement; it does not indicate that inmates can file motions in court.

To the contrary, the plain language of the First Step Act, 34 U.S.C. § 60541(g), of 18 U.S.C. § 3582(c) unambiguously show that the amendment to § 3582(c)(1)(A) is narrower than Nemazee urges. The First Step Act expressly and repeatedly commits the formulation and implementation of the Pilot Program to the discretion of the Attorney General. *See* 34 U.S.C. § 60541(g)(1)(B) ("some or all" eligible offenders may be placed in home confinement); (g)(1)(C) (Attorney General the sole person identified as authorized to waive the requirements of 18 U.S.C. § 3624 to implement the Pilot Program); (g)(3) (Attorney General to designate through which BOP facilities the Pilot Program will be conducted), (g)(5)(A)(vi) (BOP must determine

whether release to home detention will result in a "substantial net reduction of costs to the Federal Government"), (g)(5)(A)(vii) (BOP must determine whether the offender is at "substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention").[2] In addition, the First Step Act clearly distinguished between the re-authorization and expansion of the Pilot Program in §§ 504 and 603(a) of the Act, on the one hand ("Federal Reentry Improvements" and "Federal Prisoner Reentry Initiative Reauthorization," respectively), and the provision of § 603(b) of the Act ("Increasing The Use And Transparency Of Compassionate Release") giving inmates standing to ask the Court to grant compassionate release under § 3582(c)(1)(A) and U.S.S.G. § 1B1.13. The First Step Act also made no change to § 3582(c)(1)'s requirement that any sentencing modification must be consistent with relevant Sentencing Commission policy statements—here, U.S.S.G. § 1B1.13, which Nemazee concededly does not meet.

Indeed, if adopted, Nemazee's argument would greatly expand the Court's role in sentence implementation. His view of § 3582(c) would apply, not only to the Pilot Program, but to all manner of sentencing implementation provisions, from the use of home confinement more broadly (not simply elderly inmate home confinement), to community confinement, to residential drug abuse programs, and more. *See, e.g.*, Mem. Ex. B at 2 ("The right to go to court . . . was intended to apply to *any* inmate request for release under existing laws *or* under the First Step Act.") (emphasis supplied). There is simply no basis in the statutory text or in the meager and unilluminating legislative history to conclude that Congress intended a modest procedural amendment to allow inmates to move for compassionate release under § 3582(c)(1) to have such a broad result.

Nemazee seems to concede the absence of statutory basis for his request when he concludes his memorandum with a plea for the Court to disregard the language Congress enacted in order to give effect to the Nemazee's view of Congressional purpose. "In order for this judicial relief to be meaningful and accomplish what Congress intended" – citing to the view of a single member of Congress, expressed in a letter dated a few days ago – "the Court must have the same discretion as the Attorney General and the BOP to evaluate the request, apply the tests and make any waiver necessary to grant the relief." (Mem. at 6). The Court should reject Nemazee's invitation to abandon the statutory text.

III. Conclusion

Accordingly, the Government respectfully requests permission to file this response to Nemazee's March 10, 2019 memorandum. For the foregoing reasons, the Government respectfully submits that § 3582(c) does not authorize the Court to modify the sentence imposed on Nemazee, an inmate who concededly does not meet the compassionate release standards of § 3582(c)(1)(A) and U.S.S.G. § 1B1.13. The Government also respectfully submits that the Court should, in any event, allow BOP sufficient opportunity to consider Nemazee's administrative request for home confinement under the Pilot Program. The Government will

---

[2] This is a separate determination than whether the offender is serving a sentence for, or has been convicted in the past of, or to have a history of committing violence, sex offenses, or other disqualifying crimes. § 60541(g)(5)(A)(ii), (iii), & (iv).

promptly update the Court and counsel for the defendant of any significant development in that process.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

by: */s/ Michael D. Lockard*
Michael D. Lockard
Assistant United States Attorney
(212) 637-2193

cc: Lawrence McMichael, Esq. (by ECF and email)