SPEECH

(RE)VIEWS FROM THE BENCH: A JUDICIAL PERSPECTIVE ON SECOND-LOOK SENTENCING IN THE FEDERAL SYSTEM

Chief Judge Colleen McMahon*

On October 21, 2020, Chief Judge Colleen McMahon delivered the keynote address for the third day of the National Association of Criminal Defense Lawyers ("NACDL") and the American Criminal Law Review's *("ACLR") 2020 Presidential Summit and Symposium, Prison Brake: Rethinking the Sentencing Status Quo. Her Remarks—which focused on offender resentencing since the passage of the First Step Act and in the wake of the COVID-19 global pandemic—have been reproduced here in their entirety. They have been lightly edited to include some explanatory footnotes and citations to specific cases and statutes mentioned. NACDL and ACLR thank Chief Judge McMahon for her willingness to participate in the program, and for her insightful comments.*

Remarks

Thank you, Norm.[1] It is a pleasure to be with you today, although I do wish it could be in person rather than virtual. But your organizers have put together a fascinating program on a very important topic, and I am delighted that I have been asked to weigh in with some random thoughts about current issues in sentencing.

It is a timely request. Federal judges have spent a lot of time during the last year and a half, and especially during the last six months, dealing with a novel aspect of sentencing law—novel to us, at least. We find ourselves being asked to modify sentences that we imposed years ago. The original impetus was, of course, the passage of the First Step Act;[2] but the unexpected addition of the pandemic to the mix has really ratcheted up the amount of time we are spending in what effectively amounts to "resentencing." You ended the day yesterday with presentations on the First Step Act and on "second looks" from the academic and practitioner points of view. I want to pick up where your presenters left off.

Taking a second look at sentences is not something federal judges are accustomed to doing. The law, as you know, has long forbidden us from second

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1. Norman Reimer, Executive Director of NACDL.

2. Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person ("First Step") Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified in scattered sections of 18 and 34 U.S.C.).

guessing ourselves. Indeed, it was merciless. Even today, a court may not—*may not*—modify the terms of a sentence, once imposed, except in extremely limited circumstances.

And until the passage of the First Step Act in 2018, 18 U.S.C. § 3582(c) provided that a court could not modify a sentence once imposed either on its own motion or on the motion of a prisoner. It could only do so if the Bureau of Prisons ("BOP") decided that it wanted to get rid of someone in its custody, and petitioned the court to modify his sentence on compassionate release grounds.

Make no mistake, that was the reality of the old statutory scheme. The BOP has long defined "extraordinary and compelling"[3] circumstances quite narrowly. It means principally terminal illness, or an age-related functional or cognitive impairment, from which the prisoner is not expected to recover, and that substantially diminishes his ability to provide self-care.[4] You can sum all of that up under the rubric: "It is a pain in the ass for us at the BOP to take care of this guy and he is costing us a fortune and he can no longer take care of himself, so let's get him out of our hair."

It is true that the BOP has identified several other types of "extraordinary and compelling" circumstances. For example, a circumstance in which the prisoner became the only available caregiver for a spouse, registered partner, or minor child could be "extraordinary and compelling."[5] And then there was a circular catch-all—"extraordinary and compelling" circumstances means any other circumstance that the Director of the BOP considers extraordinary and compelling.[6]

But as you heard yesterday from Mary Price,[7] there were no such catch-all circumstances. "This prisoner has become too much to handle" was the reason invoked in nearly every one of the BOP's few compassionate release motions. And they were very few. In 2018—the last year before the passage of the First Step Act—the BOP filed only thirty-four compassionate release sentence reduction motions in the whole country.[8] Think about that: there are ninety-six federal district courts, so essentially one motion for every three districts. I have been a federal judge for twenty-two years and I have never received such a motion from the BOP.

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3. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018); 18 U.S.C. § 3582(c)(1)(A) ("[T]he court, upon motion of the Director of the Bureau of Prisons . . . may reduce the 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." (emphasis added)).

4. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT'G COMM'N 2018).

5. *See, e.g.*, FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., P5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(g) 7–12 (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

6. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(D) (U.S. SENT'G COMM'N 2018).

7. Mary Price, General Counsel of the Families Against Mandatory Minimums Foundation ("FAMM").

8. *See* Press Release, U.S. Dep't of Just., Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and.

I am sure that some of the BOP's reluctance to move was grounded in its assessment that the prisoner's crime was too great—which, as several of your speakers pointed out yesterday, was not identified as something that should factor into the BOP's decision to make such a motion. But having dealt with this agency extensively, I am going to suggest that much of the reason was administrative inertia—especially since releasing prisoners is not exactly in the wheelhouse of the BOP's reason for being.

For as long as that was the statutory scheme, I did not spend a lot of time thinking about taking a second look at my sentences. There were two really good reasons for that.

Reason Number One I have just explained to you. I couldn't do anything about it. I don't have time to worry about things I cannot change. As long as the BOP did not move for compassionate release for any of my defendants, there was no point in ruminating about the possibility of reducing anyone's sentence.

Now that the First Step Act has changed the landscape somewhat, by allowing prisoners to make motions for compassionate release directly to the court, there is at least something for a judge to think about. There is an exhaustion requirement, of course, but the BOP has only thirty days to act on a prisoner's request to have the BOP make such a motion for him, at which point he is deemed to have exhausted his administrative remedies. And I assure you that, in my dealings with the BOP, it can't get anything done in thirty days—certainly not a compassionate release review. So the exhaustion requirement, while real and in my opinion nonwaivable, is also pretty pro forma. It will rarely prevent a prisoner from addressing a request directly to the court. And we are seeing such requests—many of them from individuals who haven't the slightest chance at seeing a sentence reduction—but some from people whose situations are worth a new look.

What the impact of prisoner motions will be is an unclear and evolving thing. The ultimate issue is, of course, what, if any, constraints there are on a judge's discretion to, in effect, resentence a prisoner already sentenced—which is to say, what kinds of things will qualify as "extraordinary and compelling" circumstances. And as your panelists noted yesterday afternoon, we are just at the beginning of the process of working that out.

The First Step Act itself sets up two constraints on our ruminations.

First, it requires judges who get these motions to take account of U.S. Sentencing Guidelines ("Guidelines") policy statements concerning compassionate release. Well, as you were told yesterday by Davina,[9] the Sentencing Commission effectively does not exist, because it doesn't have a quorum and so cannot do business (for those of us judges who are skeptical about the entire Guidelines scheme, this is not necessarily a bad development, but that is the subject of another speech entirely). So, its most recent policy statements are tethered to the

9. Davina Chen, criminal defense attorney and Sentencing Resource Counsel at the Law Office of Davina T. Chen.

old 2007 BOP guidelines, and defer to the BOP, as though the BOP were still making the motions.[10] They are not terribly useful in a world where the BOP is no longer the gatekeeper. What we judges want to know is whether, now that prisoners can address motions directly to us, we are permitted to go beyond the Guidelines policy statements when deciding what is "extraordinary and compelling."

The coincidental coupling of the First Step Act amendment with COVID has resulted in a lot of litigation on precisely that subject. And the Second Circuit has very recently concluded, in a case called *United States v. Brooker*[11] (so now we have *Booker*[12] and *Brooker*), that the BOP guidelines about what constitute extraordinary and compelling circumstances "cannot constrain district courts' discretion to consider whether *any* reasons are extraordinary and compelling"—and in particular cannot restrict us to the old Guidelines policy statements, because those statements are inconsistent with portions of the text of the First Step Act.[13]

Brooker—which as far as I know is the first court of appeals decision on this subject—is written by an academic, the great Professor and Judge Guido Calabresi, and so reads very broadly, like a law review article. It certainly can be read as granting permission to release the inner Jack Weinstein[14] that lurks, to a greater or lesser degree, in the soul of every district judge. Judge Weinstein's mantra is, "You are an Article III judge, you can do whatever you like;" and that would be a lovely thing if that were true, though I don't happen to think it is entirely true (he and I have debated the subject in public).

But until the Supreme Court gets its hands on the *Brooker* decision, which I am pretty sure it will, we judges in the Second Circuit will certainly have an opportunity to roam far and wide in considering what might be considered extraordinary and compelling.

That said, I do not believe that *Brooker* gives district judges a completely free hand in resentencing convicted defendants.

For one thing, there is a second statutory constraint, which is that rehabilitation alone does not qualify as extraordinary and compelling.[15] Now we all know that the most persuasive and compelling arguments in favor of shortening sentences, especially outside of the old/sick context, involve the rehabilitation of prisoners. The photos that John Gleeson[16] showed you yesterday of his clients were not of defendants who might have merited a motion from the BOP on traditional

10. *See* U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 46 n.135 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

11. United States v. Brooker, 976 F.3d 228 (2d Cir. 2020).

12. United States v. Booker, 543 U.S. 220 (2005).

13. *Brooker*, 976 F.3d at 236 (emphasis added).

14. Judge Jack Weinstein, former Senior U.S. District Judge for the Eastern District of New York.

15. 28 U.S.C. § 994(t) ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.").

16. Judge John Gleeson, former U.S. District Judge and partner at Debevoise & Plimpton LLP in New York.

compassionate release grounds. They were of men in the prime of their lives who had been rehabilitated while serving many years in prison.

Now, I note that Congress said "rehabilitation . . . alone," rather than just "rehabilitation," so it seems pretty clear, at least to me, that we are not *barred* from taking rehabilitation into account, as long as it can be coupled with some other factor or factors that could serve as the basis for a second look at a very long sentence. Which is a really wonderful development, because rehabilitation *is* supposed to be one of the goals of sentencing under Section 3553,[17] so it never made any sense not to give people credit for actually doing it, for actually rehabilitating themselves. In fact, if I were fashioning a second-look statute, it would turn largely on rehabilitation. I would likely do what Congress did not; if I were a legislator, I would probably allow rehabilitation alone to suffice for a sentence reduction.

But I don't get to make the law, and the statute says that rehabilitation alone can never be extraordinary and compelling. So, if I am impressed with a prisoner's rehabilitation and I want to try to reduce his or her sentence, what additional factors can push that prisoner across the finish line? And *are* there any aside from the traditional factors of age and infirmity?

As I consider that question, it occurs to me that there are a number of preliminary questions that have to be answered.

The first question that will have to be answered is whether things that were, or could have been, taken into account when an individual was sentenced the first time around are fair game for "extraordinary and compelling" status. An argument can be made (and no doubt will be made) that things that were available for consideration when a sentence was originally imposed cannot qualify as "extraordinary and compelling" circumstances—especially if they *were* actually taken into consideration. Let me offer one example: the age of a defendant is something that judges are allowed to take into account under the Guidelines, and I quite often take the age of the defendant when the crime was committed into account when I sentence someone. So how can that be an "extraordinary and compelling" circumstance years later, if I have already relied on it in fashioning the sentence I originally imposed?

The second question that occurs to me is: can things that judges were specifically forbidden to consider when they first sentenced a defendant qualify as "extraordinary and compelling" circumstances on a First Step motion? This is an important question because in deciding whether to grant such a motion we judges are supposed to do so with an eye on the Section 3553 sentencing factors—and one of those factors is the applicable Guidelines, together with their policy statements.[18] And for good or ill, there are provisions in the Guidelines that prohibit judges from considering certain things in order to lower a sentence. Drug or alcohol dependence. Educational or vocational skills (or lack of same). Family ties and

17. 18 U.S.C. § 3553(a).
18. *Id.* § 3553(a)(4).

responsibilities. Socio-economic status. Personal financial difficulties and economic pressure. Lack of guidance as a youth. How can one of these "forbidden factors" possibly qualify as an "extraordinary and compelling" circumstance for First Step Act purposes? Difficult question. Yet to be decided. In fact, as far as I know, never addressed, by any court.

And how about a First Step Act motion that would, if granted, reduce a sentence below a congressionally-mandated mandatory minimum? Now let's not kid around: it is mandatory minimum sentences that judges are most likely to want to reduce, because so many of the ones we were forced to impose seemed utterly unjust in the first place. The most unjust sentence I ever imposed was the twenty-five-year mandatory minimum sentence I had to give to the defendants known as the Newburgh Four[19]—had to give, because the Government deliberately structured its sting operation to make that mandatory minimum applicable. I railed at the injustice of imposing a twenty-five-year sentence in that case. But the fact that I considered it to be unjust did not make it any less mandatory. And since mandatory minimums are—well, mandatory—and are baked into the structure of federal sentencing and of many state sentencing schemes, it would seem, as Norman Reimer said yesterday, that trying to get people out on second looks runs into a brick wall when it comes up against mandatory minimums.

But is that still true?

To my great surprise, the First Step Act does not specifically provide that courts cannot reduce a sentence below a mandatory minimum. Doesn't say you can, but doesn't say you can't.

If Congress had thought about this, I think it probably would have carved out an exception to preserve mandatory minimums, because Congress is very zealous about its power to constrain judicial discretion and has shown no interest in reducing or eliminating mandatory minimum sentences. But the First Step Act does not say that a judge cannot reduce a sentence below the statutory mandatory minimum. And so far the general consensus (albeit without much in the way of discussion) seems to be that, since nothing specifically prohibits us from reducing a sentence below a statutory mandatory minimum if we find extraordinary and compelling reasons for doing so, we have discretion to be below a mandatory minimum. Discretion that we did not have at the time the original sentence was imposed. Several judges have already done it; that was the fact pattern in the *Brooker* case. No case I have read has actually analyzed that specific issue; courts simply appear to assume that we can do it. And a few courts have specifically mentioned the fact that the original mandatory minimum sentence was excessive as part of their "extraordinary and compelling" analysis.

I cannot believe this issue will not be raised by the Government in opposition to a First Step Act case in the very near future. I think it will most likely be raised in a case in which the moving defendant has not served very much of his or her

19. United States v. Cromitie, 781 F. Supp. 2d 211 (2011).

mandatory minimum sentence. That is not the fact pattern of the cases I have read —in all of which the defendant had served a substantial portion of that mandatory minimum sentence. And I have my doubts that the Supreme Court—or Congress —would take kindly to an argument that a mandatory minimum sentence can be reduced under the First Step Act because it was unjustly excessive at the time of its imposition.

So, there are a lot of really fundamental questions that remain to be answered.

We do know of one thing that has qualified as an "extraordinary and compelling" circumstance. COVID presented the perfect exceptional and compelling circumstance—potentially a life or death issue when it arises, even though, for most prisoners, it will never arise; an issue that can impact the severity of a sentence even when a prisoner is not sickened by it, both because of the fear factor and because of the isolation that the BOP is imposing on prisoners in an understandable effort to keep the virus from entering or spreading through federal correctional institutions; and an issue that implicates the ability of the Department of Justice, in the person of the BOP, to keep prisoners safe, as they are constitutionally entitled to be.

But COVID is also *uniquely* extraordinary and compelling. It is (or so we hope) a once-in-a-lifetime event. And right now, it is pretty much all that is being argued. I am more interested in what you lawyers will argue are exceptional and compelling circumstances when you have no COVID on which to rely.

I heard John Gleeson mention two yesterday.

One is the age of the defendant at the time he committed the crime. Now, I have already pointed out that age is not categorically barred as a factor that can be taken into account in sentencing (although the policy statement in the Guidelines is geared toward the old, not the young). Neuroscience is a developing field and it tells us that the brains of the young are pliable and not yet fully developed.

But only a small fraction of young people with their pliable and not-fully-formed brains commit serious crimes that result in long sentences. Most of those young people are poor and grew up without much in the way of structure or adult guidance. Since socio-economic status and lack of guidance as a youth *cannot* be taken into account in fashioning a sentence under the Guidelines as they currently exist, a substantial part of the reason for cutting younger criminals a break disappears, thereby reducing the possibility that age at the time of the commission of the crime will qualify as an "extraordinary and compelling" circumstance. I actually think it is questionable that age at the time the crime was committed will be found to be an "extraordinary and compelling" circumstance, unless and until the Guidelines are amended to reflect what we all know to be true—which is that poor young people who lack strong family structures are the ones whose pliable, not-fully-developed brains are most likely to get them into serious trouble at a young age, and it is their upbringing and their poverty that is extraordinary and compelling.

The other thing John mentioned—a subsequent change in the sentence for the same crime committed at a later date—is one that many judges might well find compelling. It does not seem fair that a person who commits Crime A today and can only get a five-year sentence for doing so should benefit while a person who committed the same crime twenty years ago and was sentenced to thirty years is still languishing in jail. I can readily see why judges would consider a change in the assessment of what constitutes proper punishment for a crime to be an "extraordinary and compelling" circumstance.

And I am interested to see what else those of you who are in the criminal defense bar will come up with.

I am also interested to see whether the Sentencing Commission, assuming it is ever back in business, will take some of these possibilities out of our hands. The Commission can work great mischief if it ever gets its act together.

Now, I am sure that academics and defense lawyers and sentencing reformers are very excited about *Brooker*, and the possibilities inherent in all the First Step Act litigation that John and his Debevoise team and others are conducting. And notwithstanding my general inclination to roll my eyes at having to do do-overs, I, and I suspect most judges, am not entirely displeased with this development.

But I think you should temper your excitement, because I don't think that you should expect to see a lot of sentences being modified pursuant to the First Step Act.

And why not, you say?

Well, I told you at the outset that there were two reasons I did not spend too much time thinking about resentencing my defendants. The second reason is that there are not very many cases in which I am likely to want to change someone's sentence. You may not want to hear that, but it happens to be true.

Sentencing is something that every judge takes very seriously. It is not a responsibility that you toss off without a lot of thought and soul-searching. It *used* to be a robotic exercise, when the Guidelines were actually shackles—but since *Booker*, which was decided fifteen years ago, it has not been a robotic exercise, and judges take great care to try to, if I may quote Gilbert and Sullivan, make the punishment fit the crime . . . and the criminal.[20] The nature and the circumstances of the offense is always, I suspect, going to be the principal factor that a judge considers in fashioning a sentence because the nature and circumstances of the offense dictate whether a particular sentence—a long term of imprisonment in particular—is a "just" punishment for the wrong that has been perpetrated, from the perspective of society, and of the victims of crimes—interests that are not germane to a criminal defense lawyer, whose job is to advocate for her client, but that are very germane to a sentencing judge, and that remain germane if you turn that judge into the equivalent of a parole board years down the line (which is what the First Step Act does). In circumstances where judges could exercise no judgment—handing out

20. W.S. GILBERT & ARTHUR SULLIVAN, THE MIKADO; OR, THE TOWN OF TITIPU (1885).

sentences under the Guidelines that were not suggestions but mandates, pre-*Booker* sentences, or mandatory minimum sentences—judges might well welcome taking on the job of a parole board. But the gift that *Booker* gave me, gave all judges, was the chance to exercise judgment at the time the sentence was originally imposed; and it has resulted in sentences that (mandatory minimums aside) I believe to have been more just at the time of imposition than were pre-*Booker* sentences, many of which were manifestly unjust at the time of imposition. After *Booker* we have seen a substantial number of below-Guidelines sentences, many of them variances rather than contorted downward departures. I know that is true in my case, and it reflects my considered judgment about what a just sentence ought to be. That being so, it really would take some very extraordinary and compelling new development for me to conclude that a rethinking of such a sentence was warranted. And as long as rehabilitation alone cannot be the basis of a finding of "extraordinary and compelling" circumstances, I cannot quite imagine what those extraordinary and compelling new developments would be.

Which suggests that the defense bar would do well to keep its focus on sentencing at the time of sentencing and not expect a do-over at a later date. *Booker*, not *Brooker*, is still the best vehicle for working justice. And I expect that it will be that way for quite some time.