

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

CYNTHIA BALLENGER, and
CHRISTOPHER PRICE,

Defendants.

Case No. 1:21-cr-00719 (JEB)

**DEFENDANTS' MOTION FOR INDICATIVE RULING TO REVISE THE
SENTENCES OF CYNTHIA BALLENGER (PRICE) AND CHRISTOPHER
PRICE**

NOW COMES Defendants Cynthia Ballenger (Price) and Christopher Price, through undersigned counsel, and pursuant to 18 U.S.C. § 3582(c)(2), hereby moves this Court to reduce his Sentencing Guideline Offense Level calculation by two levels and to revise his sentence because of a lowered U.S. Sentencing Guideline that recently became effective – U.S.S.G. Amendment 821, which the Sentencing Commission has deemed applicable retroactively to sentences previously imposed – allowing this Court to issue a revised, recalculated sentence, effective on or after February 1, 2024. The revisions offer the opportunity to consider the sentencing factors and situation based on the current circumstances of the Prices, including the dire medical circumstances related to the late stage advancement of the prostate cancer for Christopher Price and other medical issues. The Prices have shared a draft

of this motion with the government. The government states it needs further time to review the motion.

I. Certain Procedural Background

The Prices filed their prior motion for release pending appeal on November 12, 2023 [ECF 152] including based on “substantial question” grounds under 18 U.S.C. § 3143(b). The government did not respond to the motion.

In that the November 12th motion the Price stated:

Defendant-Appellants reserve that there may be other grounds for a motion under Rule 38 or other authority connect to the cancer and care for cancer of Christopher Price. Defendant-Appellants note the Courts hearing set for December 1, 2023 and request that the Defense provide reports from the doctors on that matter.

At the time the Prices filed the motion for release pending appeal on “substantial question” grounds, the Prices had not received reports from the health care professionals. Moreover, the Court had asked for the medical reports to be closer to December 1, 2023.

Defense Counsel provided reports from the health care professionals through a notice of supplemental information on November 26, 2023. *See* ECF 154, 154-1, 154-2, 154-3, 154-4. The Prices further provided an additional notice of supplemental information public reports concerning the role of stress on cancer and the importance of the role of a spouse as caregiver. *See* ECF 156.

Effectively, through colloquy with the court on December 1, 2023, the Prices requested relief and release pending appeal for exceptional reasons under 18 U.S.C. § 3145 (c) or related authority and Article III, based on the medical situation, medical stress, the role of Cynthia Price as primary patient navigator and caregiver, the time frames of sentences, and the unusually harsh impact on the Prices.

The government respond to the potential applicability and scope of “exceptional reasons” authority and potential relationship to certain factors. [ECF 157]. The Prices provided a reply. [ECF 158]. A hearing on all motions occurred on December 18, 2023. The court reserved and has not ruled on any of the motions. The court moved the reporting date for both defendants to no earlier than March 1, 2024. The court requested that defense counsel seek updated reports from the health care professionals taking care of Christopher Price and set a status hearing for February 29, 2024. The Prices have provided the updates from the health care professionals on February 27, 2024 and February 28, 2024. *See* ECF 163, 163-1, 163-2, 163-3, 163-4, 163-5, 163-6 and 164.

The United States Parole Office issued letters to Christopher Price and Cynthia Ballenger (Price) indicating their reporting dates are both on March 5, 2024 with Christopher Price set to report to Federal Corrections Institution (FCI) Loretto and Cynthia Ballenger (Price) to Report to FCI Hazelton.

The defense has filed notices of appeal for both Cynthia Ballenger (Price) [ECF 148] and Christopher Price [ECF 149] on October 26, 2023. The cases were consolidated for purposes of appeal under 23-3198, *United States v Ballenger*. The

appellate case for Chris Price is *United States v Price*, 23-3199. The Prices filed their consolidated appellants brief addressing both issues related to both conviction and sentencing on February 7, 2024.

II. Request for Delay in Reporting Dates to Provide for Legal Process

The Prices maintain their motions for release pending appeal under 18 U.S.C. § 3143(b) based on substantial questions (filed November 12, 2023) and the motion for release pending appeal under exceptional reasons under 18 U.S.C. § 3145(c) or related authority and Article III. As has been noted before, if the court does not grant such a motion the Prices will file for a motion for release pending appeal under Federal Rule of Appellate Procedure 9(b). The Price's understanding is there must be a ruling from the district court before the Prices can file in the court of appeals. The Prices seek time to make sure such an appellate motion is ruled on before the Prices go to prison.

In addition, if the Court does not grant the motion, it would be useful for the Court to make the separate findings that the court finds defendants properly satisfy, to narrow the discussion in the court of appeals. For example, the Court can find the Prices are not likely to free or pose a danger to the safety of any other person or the community if released under section 3142(b) as set out in 18 U.S.C. § 3143(b)(1)(A) and that the appeal is not for the purposes of delay. Of course, the Prices argue the Court should make the full finding under 18 U.S.C. § 3143(b)(1).

Similarly, the Court may find there are exceptional reasons under 18 U.S.C. § 3143(c) but find other reasons the provision provides no relief as argued by the Government. In this situation, the Prices are prepared to argue against the government's legal interpretation in the court of appeals. A finding supporting the Prices on the "exceptional reasons" portions would reduce the number of issues to discuss in the Court of Appeals.

Again, the Prices seek an opportunity for the legal issues connected to this motion to run full process and resolution before being required to report to prison.

III. Analysis of 18 U.S.C. § 3582 (c)(2) and the Sentencing Commission's New Guideline

In general, a court may not modify a sentence of incarceration once it has been imposed, unless expressly permitted by Rule 35 of the Federal Rules of Criminal Procedure or by statute. 18 U.S.C. § 3582 (c)(1)(B). The statute does provide certain circumstances including under 18 U.S.C. § 3582 (c)(2) which states:

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

On August 24, 2023, the U.S. Sentencing Commission (“USSC”) proposed an Amendment to the Sentencing Guidelines providing for a two-level offense level reduction in Sentencing Guideline calculations for defendants who have no prior criminal history points (the “Amendment”). The Commission gave the Amendment an effective date of November 1, 2023, and further stated that it would automatically become effective on that date unless Congress took action to reject the proposal. Congress did not take any action to reject the USSC’s Amendment, and it therefore has now become effective, rendering the instant motion ripe for filing.

In relevant part, “Part B, Subpart 1 of Amendment 821 creates a new Chapter Four guideline at §4C1.1 (Adjustment for Certain Zero-Point Offenders) providing a decrease of two levels from the offense level determined under Chapters Two and Three for defendants who did not receive any criminal history points under Chapter Four, Part A.” And as Amendment 825, adding a new Application Note 7 to U.S.S.G. § 1B1.10, clarifies in a “Reasons for Amendment” section:

The Commission has determined that the targeted changes to the criminal history rules made in Parts A and B, Subpart 1 of Amendment 821 should be applied retroactively.... In relation to Part A, the Commission determined that the policy reasons underlying the prospective application of the amendment apply with equal force to individuals who are already sentenced.

The Sentencing Commission did include a caveat for any court applying this new Amendment retroactively, however: “The court shall not order a reduced term

of imprisonment based on Part A or Part B, Subpart 1 of Amendment 821 unless the effective date of the court's order is February 1, 2024, or later." Here the later date is satisfied.

The new guidelines have a further addition that should guide the Court's sentencing analysis. There is a new application note for §5C1.1, note 10. This note states that for persons who receive an adjustment under §4C1.1 and their guideline range is in zone A or B of the sentencing table a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3) of §5C1.1, is generally appropriate. With these amendments to the guidelines and the other points herein the Court should impose a range that should be in Zone A and not provide a sentence of imprisonment for either.

IV. Application of 18 U.S.C. § 3582 (c)(2) to the Prices

As previously noted, in Ballenger and Price Final Presentence Report, the Probation Office calculated their criminal history score as zero. [Cynthia Ballenger (Price) ECF 123 PSR ¶ 49] [Christopher Price ECF 121, PSR ¶ 53]. At sentencing, this Court also adopted the two PSR findings. Thus, the Prices properly should now be deemed eligible for a two-level offense level reduction in his Sentencing Guidelines, which can be applied retroactively. Pursuant to 18 U.S.C. § 3582(c)(2), when a sentencing range is subsequently been lowered by the Sentencing Commission, this Court "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.” Accordingly, this Court’s reconsideration in the present context can appropriately be fulsome and consider the new circumstances.

The Prices maintain their positions on appeal regarding conviction and sentencing. Among other issues, the Prices maintain that the court did not make appropriate findings to apply an obstruction enhancement for Cynthia Price and did not address objections to the PSRs. Here, the Prices argue the current the medical condition of Christopher Price and the patient-navigator and primary care giver status of Cynthia Price in the current context. The Prices have already each paid the \$570 restitution and assessment in the original sentences. That part of the sentence would be unchanged. Focusing on the medical and patient navigator/caregiver issues alone, the Prices seek to turn the original prison time into home detention. The proposed revised sentences would be 45-days home detention followed by 9 months of probation for Christopher Price. The revised sentence for Cynthia Price would be 4 months home detention followed by 9 months of probation.

Such a sentence is in line with a sentence “other than a sentence of imprisonment” now recommended by the guidelines. Such a properly sentence satisfies the section §3553 (a) factors. 18 U.S.C. § 3553(a) requires the district court to impose a sentence that is “sufficient, but not greater than necessary ... (A) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the

defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2). The Court also must consider, among other factors, “the nature and circumstances of the offense,” “the history and characteristics of the defendant,” and the “need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *Id.* § 3553(a)(1), (6).

The Prices maintain all arguments presented in their sentencing memoranda, the prior sentencing hearing and appeal. Here the Prices argue the changed medical and caregiver circumstances. The court has properly provided mechanisms to establish a record regarding these circumstances and the Prices have provided this record as discussed above.

The primary change in circumstance applies, first, to the factor “to provide the defendant with needed medical care... in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D). The current care team which includes Cynthia Price is the most effective manner of care and is crucial to proper care. Prison would be inferior and a disruption. The court must also consider “the history and characteristics of the defendant” under § 3553(a)(1). Such history and characteristics have also changed for both Christopher Price and Cynthia Price. Not by anyone’s wish, the couple has taken on dire and burdensome new roles that are all consuming. Christopher’s characteristics have changed medically, mentally, and emotionally. Cynthia Price is not asking for release for her benefit or separate from the love and caring of her husband and family during this stressful path. Cynthia characteristic is her

commitment to her husband “in sickness and in health.” She has not changed but the meaning of her role has.

The meaning of “just punishment” under § 3553(a)(2)(A) has also changed. Prison time in these circumstances, as opposed to home detention, would be cruel and unjust.

The Prices argue there has never been any issue of protecting the public from further crimes of the defendant or specific deterrence to further criminal conduct under § 3553(a)(2)(C) and (D). Regardless, the record and the circumstance reinforce the points. The Prices have a zero-points assigned for criminal record under the PSR and have been completely and totally compliant with court supervision since August 2021. That is over 2 and ½ years of compliance. No one has properly alleged that either was anything other than polite and peaceful with anyone on January 6, 2021. Nor has anyone alleged that either disobeyed an order of a police officer. These points also add up to there is no risk to the public safety and no specific deterrence issue.

Respect for the law under § 3553(a)(2)(C) by others will likely diminish if the Prices are sent to prison under these circumstances, which will be viewed as unjust under the circumstances.

Finally, the court may consider under § 3553(a)(3) that home detention is an available penalty.

In the current case of his Stage IV prostate cancer, Chris Price life-shortening, medical issues. Christopher Price continues to have substantial medical issues from the automobile accident of November 2023. Chris is under a medical level of stress and mental anxiety for various reasons. Poor medical coordination, insufficient care, poor mental well-being and excess stress likely shortens his life and removes hope. Chris has been and is doing his best, along with health providers and his wife, to properly manage this. Chris is also properly attending to physical therapy and consideration of other options related to the strain and pain from the November 2023 automobile accident.

The current health care providers and his wife, Cynthia Price, are familiar with the specific circumstances of Christopher Price with respect to diagnostics, therapies and care. Clinical Social Worker Jodi Gerber has specifically noted that Chris has gotten forgetful under the stress and needs the assistance of his wife in patient navigation. [ECF 163-5]. These professionals and his wife are an operating care team covering these issues and have been for some time.

The prison system is not in a situation to address this level of care and coordination that Chris is currently receiving. While a lapse in care would be short term, such lapse is still significant for mental health, stress, continued side effects, physical therapy, diet, diagnostics and the start of new treatment. Time in prison would also interrupt the current plan for discussions with the doctors as set out. The prison system has not been brought up to speed on these issues. It would take effort and coordination to bring the prison system up to speed to provide the

requisite care and support. Day to day, the condition of Chris Price is not and will not be predictable with respect to side effects, mental health stress and physical therapy needs.

Cynthia Price is the primary patient navigator, caregiver, and mental and emotional support for Chris during the dire and exceptionally stressful path facing the Prices. As it is, just this week Cynthia is attended or is scheduled to attend or listen in on meetings with professionals concerning evaluation and diagnosis and plans. Chris needs the help in understanding details, evaluating important care decisions, and keeping track of the increasing medical issues. The care issues and the side effects from potential treatment are substantial. Likely side effects have been listed and current side effects from the last radiation therapy are ongoing. Chris also has pain and functional limitations to his shoulder, neck and spine which require assistance and help at home for many functions. This patient navigation, care and support, cannot be replicated by any other than Cynthia Price. The stress of separating the couple at this juncture is cruel and counterproductive. There is no reason to waste taxpayer money on prison.

The stress is medical, emotional, and financial. The Prices have been reliant on both incomes. Chris Price's ability to do the job at printing will get compromised. Cynthia is and will be an important source of income. In addition to her job, Cynthia knows some of the printing business Chris is in. She is uniquely able to pitch in, at least for some things, when Chris has a problem and cannot work. The Prices have mentioned they are also concerned about the guidance to

their son Joey, particularly during this stressful time. Only Cynthia can provide this.

The uncertainty of the next period for the Prices regarding the medical, physical and emotional state of Chris Price and the family cannot be overstated. It makes no sense to have Cynthia in prison, only to then realize she must be home for very substantial reasons that can arise from many medical condition issues Chris faces.

V. Limitation on District Court Jurisdiction

The Court lacks jurisdiction to grant the Prices motion while the Prices' appeals remains pending. "The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Federal Rule of Criminal Procedure 37(a) allows a court to exercise its discretion to address the merits of a motion even if the court lacks jurisdiction to grant the motion. "[I]f a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending," Rule 37(a) gives the court three options: the court may "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Crim. P. 37(a). Thus, the Court must first decide whether to defer ruling on the motion or to address the merits. If the Court

proceeds to the merits, it may deny the motion outright, or it may issue an indicative ruling stating that it would grant the motion or that the motion raises a substantial issue. If a court issues an indicative ruling under Rule 37(a), the movant must promptly notify the court of the appeals which may then remand to allow the district court to consider the motion. *See* Fed. R. App. P. 12.1(a).

VI. The Prices Reserve Regarding A Potential Motion Under the Compassionate Release Provision

The Prices reserve regarding a motion to change the prior sentence time pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). Sometimes known as “compassionate release,” under this provision of the First Step Act, a district court may exercise its discretion to reduce a sentence if it finds that there are “extraordinary and compelling reasons” warranting a sentence reduction. 18 U.S.C. § 3582(c)(1)(A). Defense counsel is further reviewing these issues and there may be a future motion under this provision.

CONCLUSION

Pursuant to 18 U.S.C. § 3582(c)(2), and based upon the Sentencing Commission’s Amendments 821 and 825, and their 2-level offense level decrease retroactively applicable to defendants, such as the Prices, who had zero criminal history points at the time of their sentencings, this Court should grant and indicative ruling to this motion to reduce the Prices Sentencing Guideline range and then grant a downward variance if further necessary. Consistent with new medical information regarding Christopher Price and the patient navigator and

caregiver role of Cynthia Price the court should indicate it would revise the current sentences to substitute home detention for prison time which would also mean changing the 9 months of supervised release into 9 months of probation after the relevant periods of home detention for each.

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Respectfully submitted,

/s/ Nandan Kenkeremath

Nandan Kenkeremath
DC Bar 384732
USDC DC 384732
2707 Fairview Court
Alexandria, Virginia 22311
703-407-9407

Counsel for Defendants