

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

03-CR-103-E

UNITED STATES OF AMERICA,

NOTICE OF UNOPPOSED MOTION

v.

SHELLEY A. CAVANAUGH,

***EXPEDITED CONSIDERATION
ON JANUARY 7, 2005 REQUESTED***

Defendant.

UNOPPOSED MOTION BY:

Timothy W. Hoover, Assistant Federal Defender,
Attorney for Defendant.

DATE, TIME & PLACE:

Before the Honorable John T. Elfvin, Senior United
States District Judge, United States Courthouse, 68
Court Street, Buffalo, New York, on January 7,
2005, at 1:00 p.m.

SUPPORTING PAPERS:

Motion of Timothy W. Hoover (with attached
Exhibit A and Exhibit B).

RELIEF REQUESTED:

Stay of surrender date to the Bureau of Prisons
because of the termination (effective yesterday) of
the Intensive Confinement Center program to which
Ms. Cavanaugh was designated.

**WAS CONSENT OF OPPOSING
COUNSEL SOUGHT?:**

Yes.

**WAS CONSENT OF OPPOSING
COUNSEL GRANTED?:**

Yes. The government consents to a stay of Ms.
Cavanaugh's surrender.

PROPOSED ORDER PROVIDED?

Yes – a proposed order will be handed up to the
Court on January 7, 2005, and emailed to
elfvin@nywd.uscourts.gov.

DATED:

Buffalo, New York, January 6, 2005.

/s/Timothy W. Hoover

Timothy W. Hoover

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

03-CR-103-E

UNITED STATES OF AMERICA,

v.

SHELLEY A. CAVANAUGH,

Defendant.

**DEFENDANT'S MOTION FOR THE
ISSUANCE OF AN ORDER STAYING
MS. CAVANAUGH'S SURRENDER TO
THE BUREAU OF PRISONS**

***EXPEDITED CONSIDERATION ON
JANUARY 7, 2005 REQUESTED***

I. INTRODUCTION

Defendant Shelley Cavanaugh ("Ms. Cavanaugh" or "Defendant") moves the Court to stay her surrender date at the Bureau of Prisons (currently scheduled for January 10, 2005). A stay of surrender pending further proceedings before the Court is necessary because the Bureau of Prisons has eliminated its Intensive Confinement Center program, which Ms. Cavanaugh was scheduled to begin on January 10, 2005, thus frustrating the Court's intent in sentencing Ms. Cavanaugh, seriously prejudicing her, and requiring additional post-sentence practice before the Court.

A stay of surrender is required so that Ms. Cavanaugh can request appropriate relief from the Court and challenge the BOP's new policy, so that she will not serve her sentence in a general non-ICC program all the way across the country, and so that the Court can reconsider the appropriate sentence in this case given the Bureau of Prisons' actions. Expedited consideration is required given the pendency of the surrender date on Monday January 10, 2005.

Importantly, the government consents to expedited consideration of the motion, and consents to the stay of the surrender date pending further proceedings before the Court.

The matter is scheduled for the Court's consideration on January 7, 2004 at 1:00 p.m.

II. BACKGROUND AND RELIEF REQUESTED

A. Sentencing proceedings and recommended designation to ICC at Bryan

At sentencing on October 29, 2004, the Court imposed a 30 month sentence, with supervised release, no fine, and a \$100 special assessment. The Court permitted voluntary surrender. Defense counsel requested that the Court recommend to the BOP that Ms. Cavanaugh be designated to the ICC. The Court indicated that it was not familiar with the ICC, but indicated that it would allow defense counsel to make a request in writing for the Court to make such a designation. *See generally* Minute Entry (Oct. 29, 2004) (Docket #N/A).

Such a request, by written motion, was filed on November 1, 2004. Motion (November 1, 2004) (Docket #45).

The Court heard oral argument on the motion on November 5, 2004 and granted the motion, amending its sentence to include a recommendation that Ms. Cavanaugh be designated to the ICC at Bryan. Minute Entry (Docket #N/A) (Nov. 5, 2004). The Court again permitted voluntary surrender. *Id.*

The Judgment was entered on November 9, 2004 (Docket #47) (Exhibit A), and included the Court's recommendation to the BOP that Ms. Cavanaugh be designated to the ICC at Bryan, stating that she was sentenced to "30 months to be served at the Intensive Confinement Center at Bryan, Texas." Judgment at 2 (Nov. 9, 2004) (Docket #47). The Judgment also indicated that "[t]he defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: . . . as notified by the United States Marshal." *Id.*

B. Ms. Cavanaugh is designated to ICC at Bryan and given a surrender date of January 10, 2005 to enter the ICC

The BOP undertook the designation process and *fulfilled the Court's recommendation*. By letter from the United States Marshals Service dated December 17, 2004 (Exhibit B), Ms. Cavanaugh was designated to the ICC at Bryan. The letter indicated that "[t]he United States Bureau of Prisons has designated you to the Intensive Confinement Center, Bryan Federal Prison Camp, . . . Bryan, Texas per Court Order 03-CR-00103-001 dated October 29, 2004 and signed by John T. Elfvin, Senior United States District Judge." Letter (Dec. 17, 2004) (Exhibit B). The letter also explained that Ms. Cavanaugh "will voluntarily surrender [her]self to the above-named institution on Monday, January 10, 2005 no later than 2 P.M." *Id.*

C. On Wednesday January 5, 2005, the BOP, by an email memorandum from the Director of the BOP, terminates the ICC program

The Director of the Bureau of Prisons sent an email memorandum to each BOP institution on Wednesday January 5, 2005. The memorandum indicated that no more inmates would be received for ICC programs at facilities at Lompoc, California, Lewisburg, Pennsylvania, and Bryan after January 7, 2005. The persons currently in the ICC program would finish the program, but the ICC program was thereafter terminated. Defendants designated to the ICC after January 7, 2005 would not enter the ICC program. In fact, the last ICC class at Bryan has already begun. Persons designated to the ICC to begin serving their sentences after January 7, 2005 would be placed in the general population at the facility they had been designated to. As far as we can tell, the stated reason for the wholesale elimination of the ICC program was cost-effectiveness. This change in policy was not mandated by any act of Congress, and was not subjected to the normal notice and comment procedures of the Administrative Procedures Act.

That the ICC was being terminated at Bryan was confirmed by Ms. Cavanaugh's counsel on Thursday January 6, 2005 at 4:29 p.m. EST. The undersigned spoke at that time with Deborah Pace of the ICC at Bryan. She confirmed that the ICC program had been terminated there, that any inmate not currently in the ICC program (such as Ms. Cavanaugh) would not be placed in it, and that any such inmate would simply be placed in the general population at Bryan. Ms. Pace confirmed that the ICC program was being discontinued nationwide at Lompoc, Lewisburg and Bryan.

Thus, yesterday, without notice to Ms. Cavanaugh, notice in the Federal Register, or any notice of any kind, the BOP has shut down the ICC at Bryan to new classes, meaning that Ms. Cavanaugh *will not* be placed in the ICC program, will not receive the benefits of the program that the Court has recognized, and the Court's original designation will have been frustrated. Moreover, if she is required to surrender at Bryan, Ms. Cavanaugh will be required to serve her sentence at a facility that is on the other side of the country from her family and her home in Buffalo – a decision that, given the absence of the ICC program, is at odds with the policy of the BOP of placing inmates as close to their homes/family as possible. Additionally, if she is required to surrender at Bryan, she will begin serving her sentence without the opportunity to ask this Court for pertinent forms of relief requested below, including correction of the sentence, request for redesignation, and an opportunity to challenge the BOP's termination of the ICC as a violation of 18 U.S.C. § 4046 and/or the Administrative Procedures Act.

D. Relief requested: stay of surrender pending further proceedings

- 1. A stay is necessary to allow Ms. Cavanaugh to move to correct her sentence, have her designation modified, and to challenge the BOP policy change as a statutory violation and a violation of the Administrative Procedures Act; those requests for relief are not only colorable, but meritorious**

The Court should stay Ms. Cavanaugh's surrender date until further order of the Court, to give Ms. Cavanaugh an opportunity to pursue any of five different forms of relief from the Court.

The relief that will be pursued, in addition to other grounds for relief,¹ are: a) motion for the Court to correct the sentence because of the frustration of the Court's recommendation; b) motion for the Court to make a different designation recommendation, including to the Residential Drug Abuse Program; c) motion for the Court to direct the BOP to redesignate Ms. Cavanaugh to a facility closer to her home; d) motion challenging the BOP's termination of the ICC program as violating 18 U.S.C. § 4046 and to direct the BOP to rescind its cancellation of the ICC; and, e) motion challenging the BOP's termination of the ICC program as violating the Administrative Procedures Act and to direct the BOP to rescind its cancellation of the ICC. Each of these grounds for further motion practice before the Court is meritorious and will allow the Court: 1) to reconsider the proper sentence in this case; 2) to reconsider its designation recommendation; and, 3) to consider the propriety of the BOP's decision to terminate the ICC.

Given that each ground is meritorious,² and relief, if granted, would result in a proper and

¹ The grounds set forth here are not exhaustive, as it is likely that the BOP's change in policy violates principles of Due Process, the Ex Post Facto Clause, and the principle of equitable estoppel.

² The first three grounds for relief should prove successful on the merits, but they are meritorious for another reason. We expect that the government will not oppose a revised recommendation to the BOP from the Court, or an order from

correct sentence for Ms. Cavanaugh, a stay is necessary to allow the Court to fully consider each of the issues to be raised by Ms. Cavanaugh in motion practice.

2. The Court has the power to stay Ms. Cavanaugh's surrender date

It is beyond cavil that the Court has the power to stay and extend surrender dates for defendants it has sentenced. *See, e.g., United States v. Iacaboni*, 251 F. Supp.2d 1015, 1045 (D. Mass. 2003) ("The petitioner's surrender date is hereby extended to May 23, 2003."), *aff'd in part, rev'd in part on other grounds*, 363 F.3d 1 (1st Cir. 2004). Stays of surrender for sentence have been granted by courts in this circuit, and in others, in cases where a sudden change in BOP policy gave rise to challenges to the policy change and requests for correction of sentence or resentencing. *See, e.g., Order, United States v. Arthur*, No. 03-1046 (2d Cir.) (Feb. 5, 2003); *Order, Ferguson v. Manco*, No. 03-2083 (2d Cir.) (Mar. 12, 2003); *Order, Ferguson v. Manco*, No. 03-2083 (2d Cir.) (Feb. 20, 2003).

3. The Court also has the power to entertain the motions Ms. Cavanaugh intends to file, which confirms that a stay should be granted

As to the ability to entertain the motions that will be filed by Ms. Cavanaugh if the Court grants a stay, the Court has recognized, in other cases, that it has the power to consider motions for amendment of sentence at any time. *See, e.g., Transcript, United States v. Brown*, No. 04-CR-103-E (W.D.N.Y.) (Docket #38) (proceedings on Oct. 1, 2004) ("I have a slogan on my desk,

the Court that the BOP redesignate Ms. Cavanaugh. And, as to correction of sentence, the government, at the November 5, 2004 court proceeding, indicated that it did not object to the alternate relief Ms. Cavanaugh requested (by Motion at Docket #46) for correction of sentence and a sentence of time served. Indeed, the Court imposed a sentence with a recommendation to the ICC because it believed such a sentence was appropriate for Ms. Cavanaugh. The Court's intent has now been frustrated and the appropriateness of the sentence shattered given that the ICC program has been terminated.

any attorney can make any motion at any time."); Transcript, *United States v. Brown*, No. 04-CR-103-E (W.D.N.Y.) (Docket #37) (proceedings on Sep. 24, 2004) (in response to question by defense counsel as to when defense counsel could later apply to have a sentence made concurrent, the Court replied "[a]ny time.").

III. THE NECESSITY OF EXPEDITED CONSIDERATION, AND THE NECESSITY OF AND BASIS FOR A STAY

A. Necessity of expedited consideration

Expedited consideration is necessary because the surrender date is scheduled for Monday January 10, 2005 at 2:00 p.m. Central Standard Time. Therefore, considering the motion at any time other than on January 7, 2005 will not allow the effectuation of the relief requested – i.e., a stay – or the motion practice to follow regarding sentence and designation, because Ms. Cavanaugh will report to the BOP to begin her sentence on January 10, 2005.

B. Necessity of a stay and pertinent factors; the request for a stay is unopposed

If the stay is not granted, the Court may not be able to reconsider the appropriate sentence and its designation recommendation in this case – which it has the power to do under Fed. R. Crim. P. 35. A stay preserves the status quo until the Court can resolve the motions that Ms. Cavanaugh will file to correct her sentence. In short, if a stay is not granted, Ms. Cavanaugh will suffer irreparable injury. Such injury will not be alleviated by a later correction of sentence or direction that the ICC be implemented and Ms. Cavanaugh be designated to it, if she has already served months of imprisonment before such a resolution is reached.

At the same time, there is no prejudice to either Ms. Cavanaugh or the government by the granting of a stay, as she continues on pre-surrender supervision by the Probation Office, is

gainfully employed in Buffalo, lives here, remains drug-free, and is in full compliance with all of the conditions of her release. There is no party opposing the stay, as outlined below. What is more, the public interest is in no way harmed by the granting of a stay, given Ms. Cavanaugh's compliance with her release conditions, her gainful employment, and her continuing contributions to this community.

Further, the BOP *will honor and must honor* a stay issued by the Court, as determining the method/process and date of voluntary surrender is within the sole province of the Court – which is, of course, why the Court granted voluntary surrender to Ms. Cavanaugh in the first place.

The government consents to expedited consideration of the motion on January 7, 2005 at 1:00 p.m., when Ms. Cavanaugh, the undersigned and the prosecutor will appear before the Court. Further, as explained below, the government does not oppose the granting of a stay of surrender.

IV. THE GOVERNMENT CONSENTS TO THE STAY OF MS. CAVANAUGH'S SURRENDER PENDING FURTHER PROCEEDINGS

Assistant United States Attorney Frederick J. Platek is counsel for the government in this case. He has informed the undersigned that the government consents to both expedited consideration of the motion, and the issuance by the Court of a stay of Ms. Cavanaugh's surrender date, pending further proceedings in this Court.

V. CONCLUSION

After giving the matter expedited consideration on January 7, 2005 at 1:00 p.m., the Court should issue an order staying Ms. Cavanaugh's surrender date pending further proceedings before the Court related to correction of her sentence. We have provided and will provide a written proposed order to the Court.

DATED: Buffalo, New York, January 6, 2005.

Respectfully submitted,

/s/Timothy W. Hoover

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Colleen Rahill-Beuler
Senior United States Probation Officer

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CERTIFICATE OF SERVICE

The undersigned certifies that he is an employee of the Federal Public Defender's Office for the Western District of New York, 300 Pearl Street, Buffalo, New York, and is of such age to serve papers.

On **January 6, 2005**, he served a copy of the attached by electronic service via CM/ECF:

ADDRESSEE: Frederick J. Platek
Assistant United States Attorney
Western District of New York
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frederick.platek@usdoj.gov

On **January 6, 2005**, he served a copy of the attached by: () First Class United States Mail; () hand delivery; (X) electronic mail; or, () facsimile:

ADDRESSEE: Colleen-Rahill-Beuler
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/s/Timothy W. Hoover

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TIMOTHY W. HOOVER
Assistant Federal Defender
Of Counsel

Filed _____, 2003.

By _____, Deputy.

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