



SOCIETY OF FORMER SPECIAL AGENTS OF THE FBI, INC.

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September 1, 2021

Rachael A. Honig
Acting U.S. Attorney for the District of New Jersey
U.S. Attorney's Office
970 Broad Street
Newark, NJ 07102

RE: United State of America v. Francisco Herrera-Genao
Cr. No. 07-454

Dear Ms. Honig,

On behalf of the Society of Former Special Agents of the FBI (hereinafter "Society"), the professional association representing over 8,500 retired and active-duty Special Agents, I am writing to thank you for appealing, on July 16, 2021, the District Court's opinion and order entered on June 16, 2021, which granted Francisco Herrera-Genao's Motion for Compassionate Release under the First Step Act. The Society's interest in this matter stems from the death of Agent Barry Bush on April 5, 2007, while responding to an armed bank robbery committed and orchestrated by Herrera-Genao. Although neither Herrera-Genao nor his accomplices fired the bullet which killed Agent Bush, their actions in committing four prior armed and violent bank robberies in which shots were fired, set in motion the tragic events which resulted in Agent Bush's death by friendly fire while responding to the robbery.

Mr. Herrera-Genao was convicted at jury trial in December 2008 and sentenced in May 2009 to a term of incarceration of 117 years. The justification for this lengthy sentence after conviction for conspiracy, armed bank robbery, and weapons charges was the violent nature of each robbery. He put innocent lives at risk and, although he was not charged with Agent Bush's death, Herrera-Genao's actions clearly contributed to the heightened state of awareness by responding officers and their knowledge that, not only was Herrera-Genao and his accomplices armed, but were willing to engage and fire upon responding officers. Agent Bush was 52 years old, married, and the father of two at the time that he was killed. His death was devastating to his family, friends, and colleagues.

The Court's reduction of Herrera-Genao's 117-year sentence by 81% to only 22 years is excessive and, in its opinion, the Court failed to consider Herrera-Genao's indirect role in Agent Bush's death. Agent Bush is not mentioned by name in the Court's opinion and the Court's brief references to his death are disappointing. For example, the Court states on page 2 of its Opinion, "While arresting another co-conspirator, a veteran FBI Agent was accidentally shot and killed by another Agent." One paragraph later, the Court writes, "Defendant and his co-conspirators were not charged with the FBI Agent's death."

The Court granted Herrera-Genao's Motion for Compassionate Release based on his age at the time of the crime, rehabilitation, and elimination of the stacking requirement. The Society will briefly address each factor and explain why it believes the court erred.

Herrera-Genao was 22 years old on April 5, 2007. The Court found that a 22-year-old person has an adolescent brain and this immaturity led to a limited ability for Herrera-Genao to understand or control his actions. This astounding finding is belied by the realization that young men and women can join the military at age 18, serve in combat, and end active-duty service by age 22. Although the Court wrote that "youth is not an excuse for criminal conduct," it still found that Herrera-Genao's "youth" matters in sentencing and so granted compassionate release on this factor along with two other factors.

The Court held hearings to determine Herrera-Genao's rehabilitation in prison, relying on his testimony and that of his sister. The Court writes, "Defendant expresses remorse for his offenses," and describes a letter he wrote to a victim teller apologizing for hurting her and asking for forgiveness. The Society is unaware of any steps taken by Herrera-Genao to contact Agent Bush's wife or children to apologize for his indirect role in his death, and to ask for their forgiveness. Despite his admirable actions in prison to become a community leader, counsel other prisoners, avoid confrontation, and take educational courses, he has shown no remorse or accepted any responsibility or acknowledged his role in Agent Bush's death. We can imagine him thinking, "I didn't shoot him, so it's not my fault." The Court quotes testimony from Herrera-Genao's younger sister, "...Defendant is someone 'who wants to live more than ever and has dreams for his future.'" Agent Bush also had dreams for his future on the day Herrera-Genao armed himself intending to rob a bank and possibly shoot innocent third parties or responding officers.

Regarding elimination of the stacking requirement and the applicability of any retroactive effect, the Society understands via a Stay filed on August 10, 2021, that the appeal is stayed pending the Third Circuit's decision in United States v. Andrews. Nonetheless, the Court acknowledged in its June 16th Opinion that, if Herrera-Genao were convicted of the same crimes today, he would face a mandatory minimum sentence of 42 years.

The Court should not have granted Herrera-Genao's Motion for Compassionate Release and, clearly, should not have reduced his sentence by more than 80% to 22 years. This chipping away at valid sentences is corrosive to the judicial system and devastating to survivors. We respectfully ask that your office keep the Society apprised of further updates, filings, or information in this matter.

The Society appreciates your efforts and commitment to justice in this case.

Sincerely,



President
Society of Former Special Agents of the FBI