

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

- against -

██████████,

Petitioner.

-----X

NOTICE OF
EMERGENCY
MOTION

2:13-cr-00285 (ADS)

PLEASE TAKE NOTICE that upon the attached application, supporting affidavit, and other exhibits, petitioner ██████████, through undersigned counsel, will move this Court, Hon. Arthur D. Spatt, U.S.D.J., at the United States Courthouse located at 100 Federal Plaza, Central Islip, New York 11722, on the 7th day of April, 2020, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to 18 U.S.C. §3582(c)(1)(A)(i), 18 U.S.C. §3624(c)(2), or 18 U.S.C. §3622(a)(3) & (6), granting petitioner's motion for reduction of sentence, home confinement, or medical furlough as a result of his high-risk for life-threatening complications from the COVID-19 outbreak, which has already begun to spread rapidly through Danbury FCI, where he is currently incarcerated.

This motion is being brought as an emergency motion because petitioner's medical condition is dire, appears to be declining, and each day that passes could cost petitioner his life.

Dated: Garden City, New York
April 6, 2020



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TO: AUSA ██████████
(Via ECF)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

- against -

██████████,

Defendant

-----X

MEMORANDUM
OF LAW IN SUPPORT
OF EMERGENCY
MOTION

2:13-cr-00285 (ADS)

MEMORANDUM OF LAW

I submit this motion on behalf of my client, ██████████, to request an emergency order for his immediate release pursuant to 18 U.S.C. §3582(c)(1)(A)(i), 18 U.S.C. §3624(c)(2), or 18 U.S.C. §3622(a)(3) & (6), granting, in the alternative, either a reduction of sentence, home confinement, or medical furlough as a result of his high-risk for life-threatening complications from the COVID-19 outbreak, which is spreading rapidly through Danbury FCI, where he is currently incarcerated.

Factual and Legal Background

██████████ is 63 years old and in failing health (*see* C. ██████████ Affidavit, attached as Exh. A; Pre-Sentence Report, attached as Exh. B; Violation of Supervised Release Report, attached as Exh. C; 2017 Correspondence with BOP referencing medical issues, attached as Exhibit D). He is currently at Danbury FCI, serving a 20-month sentence imposed by this Court for a Violation of Conditions of Release stemming from a relapse with drug use and a guilty plea to state drug charges (*see* Exh. C). He currently has approximately nine months remaining on his sentence, with a scheduled release date of January 29, 2021.

██████████ suffers from advanced Crohn's Disease, which has required multiple surgeries and lengthy hospital stays, and has nearly claimed his life (*id.*). In addition to Crohn's, he also

suffers from Hepatitis C, and is currently being tested for Diabetes because of new concerning symptoms (*see* Exh. A). Among these, ██████████ currently has open sores on his legs, which will not heal and are badly infected, requiring antibiotic medications, pain relievers, and bandaging. His legs are swollen and purple, and he is currently unable to walk, and confined to a wheelchair. Over the past few days, he has also experienced severe diarrhea, weakness and dizziness, and an inability to hold down food or liquids (*id.*; *see also* ██████████ emails, attached as Exh. E). His age, preexisting medical ailments, and current medical condition all place him at extremely high risk for life-threatening complications in the event of a COVID-19 infection. *See* Crohn's and Colitis Foundation Issues Guidance on COVID-19 for Patients with IBD (Mar. 13, 2020) www.healio.com/gastroenterology/inflammatory-bowel-disease/news/online/%7B85da5aba-0867-42b%-a32c-2c80c690f0b9%7D/crohns-and-colitis-foundation-issues-guidance-on-covid-19-for-patients-with-ibd (stating that “individuals at high risk for COVID-19 should stay home and avoid public gatherings” and identifying high-risk factors as: “adults over 60, especially men”, “individuals with weakened immune systems, which includes those with IBD”, and “individuals with underlying health conditions like ... diabetes [and] chronic liver disease”); *see also* Ren Mao, et. al., *Implications of COVID-19 for Patients with Pre-Existing Digestive Diseases*, *The Lancet, Gastroenterology and Hepatology* (March 11, 2020), [https://doi.org/10.1016.S2468-123\(20\)30076-5](https://doi.org/10.1016.S2468-123(20)30076-5) (finding poorer clinical outcomes for COVID-19 patients with multiple comorbidities; “severe cases more likely” in patients with hepatitis; and noting “great concern” for heightened susceptibility of patients with inflammatory bowel disease and Crohn’s).

According to the BOP website, as of this morning, there are currently 28 confirmed cases of COVID-19 at Danbury FCI – 21 inmates and 7 staff (www.bop.gov/coronavirus/) -- with these numbers growing exponentially every day. Indeed, just over the weekend, the number of cases at

Danbury has more than quintupled, and concerningly, ██████████ Case Manager, Murray, has been out sick since at least April 2, and ██████████ has reported that one of the medical staff – who provided care to him for his infections and other conditions – is believed to be among those who have tested positive. It is well documented and widely recognized that prison inmates are at a heightened risk of contracting COVID-19, should an outbreak develop at their facility, because of the close quarters, shared spaces, crowding, delays in medical evaluation and treatment, lack of access to hand sanitizers, and rationed access to soap, water, and clean laundry. *See, e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910> (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”); *see also* Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020). The magnitude of this risk continues to grow as the number of cases in the tri-state area rises exponentially with each passing day. *See* Andrew Cuomo (@NYGovCuomo).

Notably, in an emergency order and memorandum to the Bureau of Prisons dated April 3, 2020, Attorney General Barr specifically identified Danbury FCI as one of three facilities “experiencing significant levels of infection,” and expanded the class of inmates who are eligible for home release -- removing the eligibility condition of less than 10% remaining on their sentences -- based on his “finding that emergency conditions are materially affecting the functioning of the Bureau of Prisons.” *See* 4/3/2020 Barr Order and Memorandum, available at www.justice.gov/file/1266661/download. Specifically, Barr directed that the Bureau of Prisons “immediately review all inmates who have COVID-19 risk factors” and directed that all inmates

deemed “suitable candidates for home confinement” – irrespective of whether they were previously eligible – be “immediately process[ed] for transfer and then immediately transferr[ed] following a 14-day quarantine,” which could be maintained in an appropriate case “in the residence to which the inmate is being transferred.” *Id.*

On April 1, 2020, I filed emergency applications on [REDACTED] behalf – by fax, email, and first-class mail -- with the Warden of Danbury FCI, as authorized by 28 CFR 571.61 and 28 CFR 570.37, requesting compassionate release pursuant to 18 U.S.C. 3582(c) and/or temporary release pursuant to 18 U.S.C. 3622(a)(3) and (6) for medical or other emergency furlough. I submitted copies of these applications to AUSA [REDACTED], with whom I had also corresponded regarding my request for [REDACTED] release (*see* Applications, attached as Exh. F and G). Since that time, my office has attempted to contact Danbury FCI repeatedly to confirm their receipt and review of these emergency motions. On April 2, 2020, we were told by Danbury FCI that we needed to speak to [REDACTED] Case Manager, Murray, and we left her several messages that were not returned. On April 3, we called again, and were told that Murray was “out,” that we should call back on Monday, and that no one else could handle the request or provide us with information. Following the intervening weekend, we called again first thing this morning. We were advised that Murray was still “out” and that it was unknown when she would return. We were told that, in her absence, we could speak to Unit Manager Smith. We then tried to reach Unit Manager Smith unsuccessfully. Upon calling again to inquire, we were advised that he, too, was “out” today, and that it was unknown how long he had been out, or when he would return. We were also advised by the desk operator that she “d[id]n’t know” if anyone else was covering for him, or who else we could contact to check on the status of our emergency applications.

Accordingly, under these circumstances, I now file this emergency motion with this Court. I have advised AUSA [REDACTED] that I would be filing this emergency motion, and while I was unable to speak to him today to ascertain his position on this motion, I did speak to him prior to filing the applications with the Bureau of Prisons, and, at that time, AUSA [REDACTED] expressed that he might be amenable to considering possible remedies for [REDACTED], provided that the applications were first made with the Bureau of Prisons.

ARGUMENT

[REDACTED] MOTION FOR EMERGENCY RELEASE SHOULD BE GRANTED

A. Any Requirement of Exhaustion of Administrative Remedies with the Bureau of Prisons Should be Waived.

Under these unusual circumstances -- where it is unknown if any staff is even available at Danbury FCI or any procedure in place to review [REDACTED] emergency applications -- and in the context of the current crisis and emergency, any further delay to await a determination by the Warden may very well prove too lengthy for [REDACTED], whose life is seriously endangered with each passing hour in custody. Thus, I request that the administrative exhaustion requirements and 30-day waiting period to allow action by the BOP, typically imposed as a prerequisite to the present motion, be waived by this Court.

It is well settled that, “even where exhaustion is seemingly mandated by statute ... the requirement is not absolute.” *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) (citing *McCarthy v. Madigan*, 503 U.S. 140, 146-47 [1992]). The requirement may be excused where it would be “futile”; where “the administrative process would be incapable of granting adequate relief”; or where “pursuing agency review would subject [petitioner] to undue prejudice.” *Washington v. Barr*, 925 F.3d at 119. Here, all three exceptions are satisfied, as any further delay is very likely to result in catastrophic health consequences – and even death -- to [REDACTED], thus rendering exhaustion futile, the administrative process inadequate to offer relief, and undue prejudice. *See Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (likelihood of “severe medical setback” constituted irreparable injury justifying waiver of

exhaustion requirements); *Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) (reasoning that waiver may be appropriate if “delay attending exhaustion would subject claimants to deteriorating health”); *New York v. Sullivan*, 906 F.2d 910, 918 (2d Cir. 1990) (waiver appropriate where exhaustion would risk petitioner’s “deteriorating health, and possibly even ... death”).

Indeed, based on these principles, exhaustion requirements have recently been waived by New York District Courts reviewing similar applications for high-risk inmates seeking compassionate or other release from prison during the COVID-19 pandemic. *See, e.g., United States v. Wilson Perez*, No. 17 Cr. 513-3 (S.D.N.Y. April 1, 2020) (granting petitioner’s motion for compassionate relief, and waiving exhaustion requirements on the grounds that “even a few weeks’ delay carries the risk of catastrophic health consequences for Perez” and, in given “the exigency of a rapidly advancing pandemic, would result in undue prejudice and render exhaustion of the full BOP administrative process both futile and inadequate”).

Accordingly, based on these facts, this Court should waive any exhaustion requirements and expeditiously order ██████████ emergency release under any one of the available legal avenues detailed below.

B. ██████████ Should be Granted Compassionate Release.

██████████ is eligible for compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A)(i), either in the form of a reduction of the sentence of imprisonment (*id.*), or in the form of early release to home confinement as authorized by 18 U.S.C. §3624(c)(2) (as modified by the Attorney General’s Emergency Order of April 3, 2020). The current COVID-19 outbreak, which is spreading throughout the prison system, coupled with ██████████ advanced age and chronic medical ailments, constitute “particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing” (28 CFR §571.61); and these factors, along with the short time remaining on the sentence ██████████ is serving for a non-violent offense, and his financial ability to provide for his own housing and medical treatment in the event of his release, strongly support that his application be granted expeditiously.

Section 3582(c)(1)(A) provides that a court may reduce a defendant’s sentence if it finds that “extraordinary and compelling circumstances warrant such a reduction” and that “such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. §3582(c)(1)(A)(i). The court must also consider the “factors set forth in section 3553(a) to the extent they are applicable.” *Id.* Tasked with identifying the circumstances that are sufficiently extraordinary and compelling to justify a sentence reduction (28 U.S.C. §994[t]), the Sentencing Commission’s policy statement and commentary states, in pertinent part, that such circumstances include where the defendant “is suffering from a serious physical or medical condition ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.” U.S.S.G. §1B1.13(1)(A) & cmt. n.1(A). Here, consideration of these factors compels that ██████████ be granted compassionate release.

First, there is no question that the COVID-19 pandemic is extraordinary and unprecedented. It presents a clear and present danger to all of society, and, as discussed above, a heightened risk of infection for incarcerated defendants, and a heightened risk of complications for those people like ██████████ who are over 60, and who have serious pre-existing medical ailments, such as Crohn’s disease, Hepatitis, current infections, and possibly Diabetes. These issues are exacerbated by the current conditions at Danbury FCI, which has been specifically highlighted by Attorney General Barr, where the virus is spiraling rapidly out of control among both inmates and staff, and where it appears the facilities resources and staff have already been seriously depleted. Even assuming that he does not contract the virus, ██████████ is *already* suffering from “serious physical or medical condition(s) ... from which he ... is not expected to recover,” including advanced Crohn’s and Hepatitis, and he is currently confined to a wheelchair. His ability to provide self-care for his Crohn’s Disease and infected sores is *already* “substantially diminished” in the present environment of the facility. It is beyond cavil that, while incarcerated, ██████████ has no means whatsoever to prevent his exposure to potentially infected inmates and staff as would be required to protect himself from a COVID infection; and, should

he become infected, he would be wholly unable to care for himself and, very likely, unable to obtain adequate and necessary medical care.

Second, application of the relevant §3553(a) factors also strongly supports the granting of this application. ██████ has already served approximately half of his 20-month prison sentence in federal custody, which is a substantial term that already “reflect[s] the seriousness of the offense, promote[s] respect for the law, and provide[s] just punishment for the offense” (§3553[a][2][A]). And while his violation of conditions of release stemmed from a relapse of his drug addiction resulting in state charges, his offense was non-violent and he expressed tremendous remorse and accepted responsibility for his actions, pleading guilty in both state court to the substantive offenses, and in this court to the violation of conditions of release (§3553[a][1]). Under these circumstances, and in view of his current medical condition, ██████ does not present any meaningful danger to the community if released for the remaining nine months of his term (§3553[a][2][C]). Moreover, section 3553(a) also requires the court to consider the “history and characteristics of the defendant” and the “need to provide the defendant with needed ... medical care.” 18 U.S.C. §3553(a)(2)(D). Viewed through the prism of the “raging and virulent pandemic that has entered federal prisons ... and that poses a special risk to ██████ health” (*United States v. Hernandez*, 18 Cr. 834-04 at *7 [S.D.N.Y. Apr. 2, 2020]), this factor strongly militates in favor of his compassionate release.

Indeed, in considering “the kinds of sentences available” (§3553[a][3]), and as a result of Attorney General Barr’s Order, this Court now has home confinement as an available option for ██████. ██████, notwithstanding the fact that he still has more than 10% of his total sentence remaining (*see* 18 U.S.C. §3624[c][2] and Barr April 3, 2020 Emergency Order, *supra*). And in considering the “need to avoid unwarranted sentence disparities” among similarly situated defendants (§3553[a][6]), it is notable that numerous courts have now ordered compassionate release of post-conviction inmates with high-risk factors from COVID-19 infections – even in cases where the inmates’ underlying crimes were violent in nature, and their risk factors far less extreme. *See, e.g., United States v. Hernandez*, 18

Cr. 834-04 (S.D.N.Y. Apr. 2, 2020) (ordering release of Bloods gang member sentence for violent acts with asthma); *see also United States v. Muniz*, No. 4:09 Cr 0199-1, 2020 WL 1540325, at *1-2 (S.D. Tex. Mar. 30, 2020); *United States v. Campagna*, No. 16 Cr. 78-01, 2020 WL 1489829 at *3 (SDNY Mar. 27, 2020); *United States v. Perez*, No. 17 Cr. 513, Dkt. 98 at 2, 6-7).

Finally, pursuant to 28 CFR 571.61(a)(2), which ordinarily governs the BOP's decisions on compassionate release, this remedy is also a feasible option in ██████████ case because he has the financial ability to support himself and bear the expense of his medical treatment upon release. Specifically, ██████████ owns a house located at 361 Twin Lane South, Wantagh, New York. His sister, ██████████ – who is very close with him -- is power of attorney for ██████████, and has in her possession over \$100,000 of ██████████ money from a trust fund that is administered through Bank of America. ██████████ has several doctors in Nassau County, where he received ongoing treatment when he was last residing there. Thus, this criterion, too, supports the granting of this application for compassionate release.

C. Alternatively, ██████████ Should Be Granted Temporary Release on Medical or Emergency Furlough

██████████ is also eligible for temporary release pursuant to 18 U.S.C. §3622(a)(3) and (6) (*ie.*, emergency furlough). As detailed below, the current COVID-19 outbreak, which is spreading throughout the prison system, coupled with ██████████ advanced age and chronic medical ailments, provide compelling cause for his temporary release and are consistent with the public interest. Additionally, under the circumstances, there is reasonable cause to believe that ██████████ will honor the trust to be imposed in him during the period of his release.

Pursuant to 28 U.S.C. §3622, “[t]he Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the

Sentencing Commission ... if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him” *id.* Such release is authorized for up to 30 days for various enumerated reasons, including allowing the prisoner to “obtain medical treatment not otherwise available” (18 U.S.C. §3622[a][3]) or to “engag[e] in any other significant activity consistent with the public interest.” (18 U.S.C. §3622[a][6]). Pursuant to 28 CFR §570.31 and §570.36, an inmate in ██████████ situation, who has a year or less remaining until his projected release date, is eligible for emergency furlough, provided that he has not been convicted of a serious crime against a person; his presence in the community will not attract undue public attention, create unusual concern, or diminish the seriousness of the offense; and he has not been granted a furlough in the past 90 days. *See* 28 CFR §570.36 (b)(1),(2),(3) (providing eligibility requirements, and noting that furlough is not typically granted, though not explicitly prohibited, for inmates not satisfying these criteria).

Here, ██████████ satisfies all of these criteria, and should be immediately granted emergency furlough during this crisis. Specifically, ██████████ is currently incarcerated at Danbury FCI, serving a 20-month sentence for a violation of supervised release conditions, stemming from his guilty plea in state court to a drug offense. He has less than a year remaining on his sentence, with a scheduled release date of January 29, 2021. His offense did not involve any serious crime against a person, and his presence in his community, where he owns his own home -- following more than 7 months of incarceration for this violation – will not attract any public attention, create unusual concern, or in any way diminish the seriousness of his offense.

Moreover, emergency furlough is required under the circumstances to allow ██████████ to “obtain medical treatment not otherwise available” (18 U.S.C. §3622[a][3]) or to “engag[e] in any other significant activity consistent with the public interest”(18 U.S.C. §3622[a][6]) – namely, to

allow him to safely quarantine in his home, avoid contact with potentially infected people, and afford him access to immediate and specialized medical care to treat his present ailments and in the event of likely complications stemming from a COVID-19 infection.

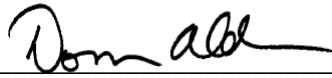
Given the quickly evolving, unprecedented, and extraordinarily dangerous situation COVID-19 presents for a man in ██████████ condition, his likely close contact with a person who has tested positive within the facility, and the lack of adequate conditions in the facility to effectively isolate and protect him from infection -- while also providing him access to necessary medical care that he urgently needs to treat his infections and other conditions -- it is clear that a 30 day emergency furlough is necessary and appropriate to allow him to “obtain medical treatment not otherwise available” and /or to “engag[e] in any other significant activity consistent with the public interest” (18 U.S.C. §3622[a][3],[6]).

Moreover, pursuant to 28 CFR §570.34, emergency furlough is also a feasible option in ██████████ case because he has the financial ability to support himself and bear the expense of his medical treatment upon release. Specifically, as previously mentioned, ██████████ owns a house located at 361 Twin Lane South, Wantagh, New York. His sister, ██████████ -- who is very close with him -- is power of attorney for ██████████, and has in her possession over \$100,000 of ██████████ money from a trust fund that is administered through Bank of America. ██████████ has several doctors in Nassau County, where he received ongoing treatment when he was last residing there. Thus, ██████████ is able and willing to bear all the expenses of the furlough, “including transportation, food, lodging, and incidentals,” as required pursuant to section 570.24.

CONCLUSION

WHEREFORE, for the reasons stated above, this Court should grant [REDACTED] emergency motion for compassionate release; or alternatively, for temporary release for Medical Furlough. Furthermore, in view of the emergency nature of this situation, and the extreme risk to [REDACTED] health and life, I respectfully request this application should be reviewed and decided in an expedited manner.

Dated: Garden City, New York
April 6, 2020



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