

SHER TREMONTE LLP

March 17, 2020

BY ECF

The Honorable Kiyoo A. Matsumoto
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v.* [REDACTED], No. [REDACTED]

Dear Judge Matsumoto:

We represent [REDACTED] in connection with his petition for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). We write to supplement our petition and to respectfully request that the Court grant our petition and immediately release Mr. [REDACTED] in light of the anticipated and increasingly dire impact of the COVID-19 pandemic. Although we appreciate the government's recent representation that the Bureau of Prisons (BOP) is reconsidering its opposition to the petition in light of Mr. [REDACTED]'s worsening health, not only has its reconsideration exceeded the 30-day period provided by statute, *see* 18 U.S.C. § 3582(c)(1), but further delay should not be tolerated given the extraordinary exigencies of the current public health crisis.

Background

As the Court knows, Mr. [REDACTED] is 72 years-old and in poor health. He has served more than 12 years of his sentence. During his time in custody, Mr. [REDACTED] has been treated for prostate cancer, an abdominal aneurysm, atherosclerosis, hepatitis C, and heart disease, and has several chronic and debilitating conditions, including anemia, diabetes, hypertension, glaucoma, and memory loss. As noted in our November 2019 submission, it appears that Mr. [REDACTED]'s prostate cancer may have recurred, as he has had excessive blood in his urine and elevated levels of Prostate-Specific Antigen (PSA). *See* ECF No. 195, November 26, 2019 Letter of Justine A. Harris.

Based on these conditions, we moved for compassionate release pursuant to § 603 of the First Step Act. As described in our previous submissions, while Mr. [REDACTED]'s debilitating age-related health problems satisfy the standard of "extraordinary and compelling" circumstances in application note 1(B) to § 1B1.13 of the United States Sentencing Guidelines ("U.S.S.G."), the Court is no longer bound by either the United States Sentencing Guidelines' limitations or the BOP policy statement, given that both were promulgated before passage of the First Step Act. *United States v. Brown*, 2019 WL 4942051 (S.D. Iowa Oct. 8, 2019) (in the absence of a

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controlling policy statement from the Commission, district judges are now free to consider “the *vast variety of circumstances* that may constitute ‘extraordinary and compelling’”) (emphasis added) (collecting cases).¹

The Coronavirus Pandemic, and the Particular Risks it Poses to Mr. ██████, is Yet A Further Basis to Grant the Petition

Mr. ██████’s condition is now even more precarious: he faces the threat of coronavirus within the prison’s walls. Given his age and underlying health conditions, Mr. ██████ will be particularly vulnerable² “when, not if” coronavirus comes to the FCI Fairton,³ an “incubator” for the disease⁴ with “petri-dish-like conditions.”⁵ According to public health

¹ See also *United States v. Kepa Maumau*, 2:08-cr-00758-TC-11 (D. Utah) (collecting cases); *United States v. Early*, No. 02-CR-10125-002 (EKD), 2019 WL 4576281, at *1 (W.D. Va. Sept. 20, 2019) (determining that “[b]ecause [defendant] is under 70 years of age, the court must therefore consider the factors set forth in § 3553(a) to determine if ‘extraordinary and compelling reasons’ warrant a sentence reduction” as required under Section 603 of the First Step Act and without reference to the Sentencing Commission’s definition in Section 1B1.13 of the United States Sentencing Guidelines); *United States v. Fox*, No. 14-CR-03 (DBH), 2019 WL 3046086, at *3 (D. Me. July 11, 2019) (“I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.”); *United States v. Cantu*, 05-CR-458, 2019 WL 2498923, at *5 (S.D. Tex. June 17, 2019) (because there is no applicable policy statement, “the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C) warrant granting relief”); *United States v. Beck*, 2019 WL 2716505, at *5-6 (M.D.N.C. June 28, 2019) (finding that there is “no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act” because U.S.S.G. § 1B1.13 applies only to motions for compassionate release filed by the BOP director, and therefore U.S.S.G. § 1B1.13 “does not constrain the Court’s independent assessment of whether ‘extraordinary and compelling reasons’ warrant a sentence reduction”).

² Roni Caryn Rabin, *Coronavirus Threatens Americans With Underlying Conditions*, NEW YORK TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/health/coronavirus-midlife-conditions.html> (“The new coronavirus is a serious threat to the elderly” and to “those with chronic health conditions . . . Heart disease, cancer, diabetes – all of these can exacerbate a coronavirus infection, studies show, increasing the odds of severe disease and death.”)

³ Rich Schapiro, *Coronavirus Could ‘Wreak Havoc’ on U.S. Jails, Experts Warn*, NBC NEWS (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586> (“We’re in a very perilous stage right now,” said Dr. Homer Venters, the former chief medical officer of the New York City jail system. “It’s just a matter of time before we see cases inside jails and prisons.”)

⁴ Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’*, NPR (Mar. 13, 2020), <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>.

⁵ P. Leila Barghouty, *U.S. Prisons Are Not Ready for Coronavirus*, THE OUTLINE (Mar. 6, 2020), <https://theoutline.com/post/8770/prison-coronavirus-covid-19-outbreak?zd=1&zi=oixu2i52>; see also Kaiser Health News, *Could Coronavirus Cause a National Prison Lockdown?*, U.S. NEWS & WORLD REPORT (Mar. 13, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-03-13/could-coronavirus-cause-a-national-prison-lockdown> (“Though small by comparison, the federal system sheds light on issues many state, county and local officials are grappling with now. Because the facilities are typically dense and crowded, they could become prime breeding grounds for the highly contagious coronavirus.”); Chris Strohm, *Prisons’ Coronavirus Risk Puts Justice Department Under Pressure*, BLOOMBERG (Mar. 12, 2020) (noting concerns that coronavirus outbreak “could spark riots”); Courtney Bubl , *Federal Prison Employees and Others Question BOP’s Readiness for Coronavirus*, GOV. EXEC. (MAR. 11, 2020), <https://www.govexec.com/management/2020/03/federal-prison->

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experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”⁶ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.⁷ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.⁸

The nearly 1,000 prisoners at FCI Fairton, where Mr. ██████ is housed, face especially high risk. The majority of the inmates are housed in small two-man cells and share showers and common areas, including the food service dining area, with larger groups.

Releasing Mr. ██████ not only helps protect him from infection, it will help alleviate the burdens on the already overtaxed BOP medical system. Indeed, the standard of medical care at Fairton has previously been criticized as inadequate even with respect to routine medical treatment.⁹ Like the MDC, Fairton faced its own heating crisis during the brutal drop in temperatures last winter.¹⁰ Moreover, it is unclear whether Mr. ██████ will even be able to take basic proactive preventative measures, like regular hand-washing and use of hand-sanitizer (even assuming such products are available), given that he already has trouble remembering to take his medication as prescribed.

[employees-and-others-question-bops-readiness-coronavirus/163692/](https://www.rollcall.com/2020/03/06/federal-prisons-dont-have-coronavirus-test-kits-for-inmates/) (“History has shown time and time again that the Federal Bureau of Prisons has never been a proactive agency, but instead a reactive agency.”); Joshua Eaton, *Federal Prisons Don’t Have Coronavirus Test Kits for Inmates*, ROLL CALL (Mar. 6, 2020), <https://www.rollcall.com/2020/03/06/federal-prisons-dont-have-coronavirus-test-kits-for-inmates/> (“Federal prisons, whose inmates may be a high-risk population for a coronavirus outbreak, do not have kits to test for the disease available.”).

⁶ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

⁷ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

⁸ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

⁹ *CIC Inspection Report FCI Fairton*, DISTRICT OF COLUMBIA CORRECTIONS INFORMATION COUNCIL (Feb. 28, 2014), <https://cic.dc.gov/sites/default/files/dc/sites/cic/publication/attachments/CIC%20Inspection%20Report%20FCI%20Fairton%202-28-14.pdf>

¹⁰ Laura Benshoff, *N.J. Senator Alleges Heating Issues in South Jersey Prison During Extreme Weather*, WHYY (Feb. 14, 2019), <https://whyy.org/articles/nj-senator-alleges-heating-issues-in-south-jersey-prison-during-extreme-weather/> (When temperatures in Fairton dipped into single digits in February 2019, FCI Fairton experienced issues with heating its facilities and failed to distribute blankets to inmates. New Jersey U.S. Senator Corey Booker criticized the prison’s “dangerous conditions.”).

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In short, Mr. ██████ is particularly vulnerable to infection, and, if the virus does infect him, it is more likely to be fatal. *See United States v. Jesus Antonio Mondaca, Sr.*, 89 Crim. 000655 at 6 (S.D. Ca. March 3, 2020) (DMS) (compassionate release petition granted, where, among other reasons, elderly defendants had “become increasingly vulnerable to victimization within the correctional facility”). The danger of the situation that Mr. ██████ and other inmates like him face raises constitutional concerns of cruel and unusual punishment, given that they are at greater risk of contracting lethal infections such as the novel coronavirus due to factors such as age or pre-existing medical conditions. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976) (“[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.”) (citation and internal quotation marks omitted). Indeed, calls for releasing prisoners at risk from coronavirus have come from all quarters. Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons.”¹¹ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.¹² Closer to home, Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemency to elderly and sick prisoners,¹³ as has Manhattan District Attorney Cyrus Vance.¹⁴ District Attorney Gonzalez has acknowledged that, “Once the virus spreads to our prisons, older incarcerated people and those with preexisting health problems will be in the virus’s crosshairs and the prisons will not have the capacity to care for them.”¹⁵

¹¹ Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

¹² Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

¹³ Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, The Daily Appeal (March 12, 2020), <https://theappeal.org/sentenced-to-covid-19-2/>.

¹⁴ James D. Walsh, *Will Rikers Island Free Inmates Because of the Coronavirus?*, *Intelligencer* (Mar. 17 2020), <https://nymag.com/intelligencer/2020/03/will-rikers-island-free-inmates-because-of-coronavirus.html> (“In a joint statement issued on Tuesday, Gonzalez and Manhattan District Attorney Cy Vance, along with 29 other prosecutors across the country, endorsed temporary release.”).

¹⁵ *Id.*

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Your Honor has the power to grant immediate relief to Mr. [REDACTED] now, and thereby perhaps save his life. The statute contemplates that the BOP will make the necessary decision within 30 days, *see* 18 U.S.C. § 3582(c)(1), but it has had the medical records necessary to make its final decision since November 2019. Given the urgent moral and humanitarian issues at stake, we respectfully urge the Court to grant the requested relief immediately.

Respectfully submitted,

/s/

Justine A. Harris

cc: AUSA Jonathan Siegel