

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

vs.

YAHOSHUA BEN-YHWH,

Defendant.

CR. NO. 15-00830 LEK

**AMENDED ORDER GRANTING IN PART
AND DENYING IN PART DEFENDANT'S EMERGENCY
MOTION TO MODIFY SENTENCE, FILED MARCH 23, 2020 [DKT. NO. 197]**

The Order Granting in Part and Denying in Part Defendant's Emergency Motion to Modify Sentence, filed March 23, 2020 filed on April 10, 2020 ("Order") (dkt. no. 205) is hereby WITHDRAWN, and this Amended Order Granting in Part and Denying in Part Defendant's Emergency Motion to Modify Sentence, filed March 23, 2020 is entered in its stead. Specifically, the Order is AMENDED to reflect that the Court hereby GRANTS IN PART Defendant Yahoshua Ben-Yhwh's ("Ben-Yhwh") Emergency Motion to Modify Sentence ("Motion"), filed 3/23/20 (dkt. no. 197)¹ to the extent that: Ben-Yhwh's sentence is reduced to TIME SERVED, effectively immediately; Ben-Yhwh shall be IMMEDIATELY RELEASED

¹ Ben-Yhwh filed a supplemental memorandum in support of the Emergency Motion on March 27, 2020. [Dkt. no. 199.]

from Bureau of Prisons ("BOP") custody; as a condition of supervised release, Ben-Yhwh shall be placed on home confinement for a period of home confinement equal to the remaining term of his original sentence of incarceration which shall be followed by four years of supervised release; upon release from custody, Ben-Yhwh shall remain in self-quarantine for a period of time not less than 14 days after release; Ben-Yhwh is to report by telephone to the United States Probation Office, District of Hawai`i (or the federal judicial district in which he intends to reside) within 48 hours of his release from custody; and Ben-Yhwh shall abide by all of the special and general conditions of supervised release as set forth more fully in the Amended Judgment. The Motion is DENIED in all other respects.

Ben-Yhwh moves to reduce his sentence pursuant to the compassionate release provision of 18 U.S.C. § 3582(c)(1)(A)(i); specifically "to modify [his] term of imprisonment to time served and to impose a special condition that [he] serve a period of home confinement on supervised release." Id. Plaintiff United States of America ("the Government") opposes the Emergency Motion. See Government's Response ("Response"), filed 4/6/20 (dkt. no. 203). The United States Probation Office ("USPO") recommends against it as well. See Letter to the Court from United States Probation Office, filed 3/27/20 (dkt. no. 200)). The Government and USPO raise the problem that Ben-Yhwh

has not first exhausted his administrative remedies as mandated by the controlling statute.²

For the reasons stated below, Ben-Yhwh's Emergency Motion is GRANTED only to the extent that his sentence is modified in that his remaining term of imprisonment is replaced by an equal period of home confinement, and is DENIED in that his sentence, including supervised release conditions, otherwise remains in place.

BACKGROUND

This matter from its onset has been a complicated and long ordeal because of Ben-Yhwh's psychiatric and medical conditions. A Criminal Complaint was filed on February 13, 2014 against Ben-Yhwh and others, and which charged possession with the intent to distribute cocaine. [Dkt. no. 1.] After being initially detained, Ben-Yhwh was ordered released with conditions on March 24, 2014. [Minutes, filed 3/24/14 (dkt. no. 24).] A Motion for Psychiatric Examination was made on June 1, 2014. [Dkt. no. 37.] Many conferences were held regarding Ben-Yhwh's competency. The parties agreed to commit Ben-Yhwh to the custody of the Federal Bureau of Prisons ("BOP") for a competency examination. [Stipulation and Order to Commit

² Ben-Yhwh filed a reply to USPO's letter on March 27, 2020, and a reply to the Government's Response on April 6, 2020. [Dkt. nos. 201, 204.]

Defendant to Metropolitan Detention Center in Los Angeles for Examination of Competency, filed 5/21/15 (dkt. no. 73).] While Ben-Yhwh was found competent to stand trial, his mental capacity continued to be questioned. [Minutes, filed 11/2/15 (dkt. no. 93) (status conference regarding competency); Stipulation and Order Approving Psychiatric Examination of Yahoshua Ben-Yhwh, filed 2/2/16 (dkt. no. 106).] A two-count Indictment was filed on November 18, 2015. [Dkt. no. 96.]

Ultimately, Ben-Yhwh entered a guilty plea on August 28, 2017 to Count 1, attempting to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. [Minutes, filed 8/28/17 (dkt. no. 142); Indictment at 2.] On February 28, 2019, the Court sentenced him to 60 months of incarceration, followed by four years of supervised release. [Minutes (dkt. no. 180).] This was a mandatory minimum sentence required by statute and with which the Court disagreed because a long period of incarceration was unwarranted and cruel due to the serious medical and psychiatric conditions suffered by Ben-Yhwh and his compliance with release conditions for over five years. Ben-Yhwh was permitted to surrender to BOP Medical Center for Federal Prisoners, Springfield, Missouri on August 5, 2019.

[Stipulation and Order Modifying Conditions of Pretrial Release, filed 7/3/19 (dkt. no. 195), 2.]

Ben-Yhwh is 73 years old and "suffers from a mental illness as well as other physical ailments including Parkinson's Disease, cardiac problems, asthma, high blood pressure, diabetes, high cholesterol, arthritis and glaucoma." [Emergency Motion, Decl. of Raymond Davidson, M.D., dated 3/23/20 (dkt. no. 197-3) ("Davidson Decl.") at ¶ 3.] In short, he is the "classic example" of the elderly patient who will "rapidly critically deteriorate" if infected by COVID-19 and is "at the extreme risk of expiring from the disease." [Id. at ¶ 6.] There is no dispute that COVID-19 has infected some of the BOP population - currently "there are 197 reported cases of COVID-19 within the BOP nationwide (138 inmates and 59 BOP personnel), amongst an inmate population of over 175,000" [Government's Opposition at 6 (citation omitted).]

The Government opposes Ben-Yhwh's Emergency Motion and argues that (1) "[t]o present such a request to this Court, he must first exhaust the prescribed administrative procedures"; [id. at 1;] and (2) although COVID-19 is a serious concern, BOP has undertaken substantial action to mitigate the risk of COVID-19, and the possibility of COVID-19 spreading to Ben-Yhwh's prison does not independently justify compassionate release.

DISCUSSION

Generally, courts have limited power to modify terms of imprisonment after a defendant has been sentenced. See generally 18 U.S.C. § 3582. As amended by the First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i) authorizes an exception to that general rule and permits modification of a sentence:

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction . . .

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

Thus, Ben-Yhwh is required to demonstrate both exhaustion of administrative remedies and that "extraordinary and compelling reasons" exist to warrant sentence reduction.

I. EXHAUSTION

Section 3582(c)(1)(A) imposes "a statutory exhaustion requirement" that "must be 'strictly enforced.'" United States v. Monzon, 99cr157 (DLC), 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020) (alteration omitted) (quoting Theodoropoulos v. I.N.S., 358 F.3d 162, 172 (2d Cir. 2004)). This requirement, however, may be waived:

However, as courts in this Circuit have held, the requirement of completing the administrative process may be waived "if one of the recognized exceptions to exhaustion applies." United States v. Perez, No. 17-CR-513-3, 2020 WL 1546422, at *2 (S.D.N.Y. Apr. 1, 2020); see also United States v. Colvin, No. 19-CR-179, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) ("[I]n light of the urgency of [d]efendant's request, the likelihood that she cannot exhaust her administrative appeals during her remaining eleven days of imprisonment, and the potential for serious health consequences, the [c]ourt waives the exhaustion requirement of Section 3582(c)(1)(A)."); United States v. Zukerman, No. 16-CR-194, 2020 WL 1659880, at *2 (S.D.N.Y. Apr. 3, 2020).

United States v. McCarthy, CRIM. CASE NO. 3:17-CR-0230 (JCH), 2020 WL 1698732, at *3 (D. Conn. Apr. 8, 2020) (alterations in McCarthy).

The exhaustion requirement is therefore not absolute, but there must be a justification for waiving it:

“Even where exhaustion is seemingly mandated by statute . . . , the requirement is not absolute.” Washington v. Barr, 925 F.3d 109, 118 (2d Cir. 2019). There are generally three bases for waiver of an exhaustion requirement. See Perez, 2020 WL 1546422, at *2 (discussing exceptions to statutory exhaustion in context of motion for compassionate release during COVID-19 pandemic).

“First, exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue.” Washington, 925 F.3d at 118. “[U]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile.” Id. at 120. Second, “exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief,” including situations where “the relief the agency might provide could, because of undue delay, become inadequate.” Id. at 119-20. Third, “exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice.” Id. at 119.

Id. (alterations in McCarthy).

Ben-Yhwh meets all three exceptions. In addition to being 73 years old, he has serious medical conditions which include Parkinson’s Disease, asthma, and diabetes. These conditions place him at a high risk of hospitalization requiring intensive care unit admission should he contract COVID-19:

The percentage of COVID-19 patients with at least one underlying health condition or risk factor was higher among those requiring intensive care unit (ICU) admission (358 of 457, 78%) and those requiring hospitalization without ICU admission

(732 of 1,037, 71%) than that among those who were not hospitalized (1,388 of 5,143, 27%). The most commonly reported conditions were diabetes mellitus, chronic lung disease, and cardiovascular disease. These preliminary findings suggest that in the United States, persons with underlying health conditions or other recognized risk factors for severe outcomes from respiratory infections appear to be at a higher risk for severe disease from COVID-19 than are persons without these conditions.

Morbidity and Mortality Weekly Report (MMWR), Center for Disease Control and Prevention, "Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 -United States, February 12-March 28, 2020" (April 3, 2020, 69(13); 382-386), https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm#T1_down.

Parkinson's disease was included in the category of "neurologic disorder" as an underlying health condition which was a risk factor for severe outcomes. Id. at Table 1. Moreover, "[e]arly data from COVID-NET suggest that COVID-19-associated hospitalizations in the United States are highest among older adults, and nearly 90% of persons hospitalized have one of more underlying medical conditions." Morbidity and Mortality Weekly Report (MMWR), Center for Disease Control and Prevention, "Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 - COVID-NET, 14 States, March 1-30, 2020" (April 8, 2020, 69),

https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_wi.

Based on the Center for Disease Control and Prevention reports, the Court takes judicial notice that there is a high probability that COVID-19 will cause older adults with one or more underlying serious medical conditions to be hospitalized and admitted to the intensive care unit ("ICU"). See Fed. R. Evid. 201(b)(2).

The Government correctly points out that Ben-Yhwh is incarcerated in a BOP medical facility (as opposed to a jail or prison) which currently has no reported cases of COVID-19, and that BOP is taking "substantial proactive national measures to mitigate and contain the spread of COVID-19 within its facilities." [Government's Opposition at 6-7.] Unlike others who have been released, it does not appear that Ben-Yhwh resides in the high-risk situation, for instance, where "120 inmates eat elbow-to-elbow at the same time, share one large bathroom with a handful of stalls and a handful of showers." United States v. Zukerman, 16 Cr. 194 (AT), 2020 WL 1659880, *1 (S.D.N.Y. Apr. 3, 2020) (citation and quotation marks omitted). Nevertheless, exhaustion would be futile here.

First, Ben-Yhwh's age, underlying health issues and the spread of COVID-19 demonstrate that further delay has a high probability to cause him to suffer catastrophic health

consequences, including death. See New York v. Sullivan, 906 F.2d 910, 918 (2d Cir. 1990) (holding that waiver was appropriate where “enforcement of the exhaustion requirement would cause the claimants irreparable injury” by risking “deteriorating health, and possibly even . . . death”). To be clear, the COVID-19 crisis is unique. It is not a matter of considering Ben-Yhwh’s risk of getting sick and receiving less than adequate medical care, it is the consideration that, even with BOP’s conscientiousness and care in mitigating the spread of COVID-19 in its facilities through cleaning and social distancing, should Ben-Yhwh contract COVID-19, he is likely to need ICU intervention and has a high likelihood of dying.

Second, the Court finds that the administrative process is incapable of granting adequate relief. Undue delay exists because even a few weeks of delay exposes Ben-Yhwh to contracting COVID-19 and thus rendering the relief - removing the risk of COVID-19 by extracting him from the prison setting - inadequate.

Finally, the Court finds that Ben-Yhwh would be unduly prejudiced by delay since contracting COVID-19 would likely result in catastrophic health consequences, including his death.

The Court concludes that requiring Ben-Yhwh to exhaust administrative remedies under the circumstances presented renders exhaustion of the BOP administrative process futile and

inadequate, and unduly prejudicial. As one court succinctly put it, “[a]llthough [his] original release date may be far off, the threat of COVID-19 is at his doorstep.” Zukerman, 2020 WL 1659880, at *4. Thus, waiver of the exhaustion requirement is justified.

II. Extraordinary and Compelling Reasons

A sentence reduction is only permitted where there are “extraordinary and compelling reasons,” and if “such a reduction is consistent with applicable policy statement issued by the Sentencing Commission.” § 3582(c)(1)(A)(i).

Congress never defined the term “extraordinary and compelling reasons,” except to state that “[r]ehabilitation . . . alone” does not suffice. 18 U.S.C. § 944(t) [sic]. Rather, Congress directed the Sentencing Commission to define the term. The Commission did so prior to the passage of the First Step Act, which amended section 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release and removed the BOP’s exclusive ‘gatekeeper’ role. See United States v. Rodriguez, No. 2:03-cr-00271, 2020 WL 1627331, at *2 (E.D. Pa. Apr. 1, 2020).

McCarthy, 2020 WL 1698732, at *4 (some alterations in McCarthy).

The Sentencing Commission does indeed provide, in pertinent part, the requisite guidance:

[T]he court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent . . . applicable, the court determines that-

(1)(A) extraordinary and compelling reasons warrant the reduction; . . .

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

United States Sentencing Commission Guidelines Manual

("U.S.S.G.") § 1B1.13. The Commission defined "extraordinary and compelling" with three specific qualifying reasons in the Application Notes to section 1B1.13. The one applicable here is:

(A) Medical Condition of the Defendant.

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy . . . is not required. . . .

(ii) The defendant is-

(I) 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, cmt. n.1.

The Court concludes that Ben-Yhwh has demonstrated extraordinary and compelling reasons justifying his release

under section 3582(c)(1(A) and section 1B1.13 of the Sentencing Guidelines. He is 73 years old and suffers from serious medical conditions (among them, Parkinson's Disease, asthma and diabetes) which are well-documented and serious, and substantially increase his risk of ICU admission and death if he contracts COVID-19. These factors combined with the COVID-19 crisis constitute an extraordinary and compelling reason to modify his sentence from his remaining term of incarceration to home detention. Other courts have also found that an extraordinary and compelling reason exists under similar situations:

The defendant's age and medical condition, taken in concert taken in concert with the COVID-19 public health crisis, constitute an extraordinary and compelling reason to reduce McCarthy's sentence. See United States v. Gonzalez, No. 18-CR-1536155, 2020 WL 1536155, at *3 [(E.D. Wash. Mar. 31, 2020)] (approving compassionate release where defendant "is in the most susceptible age category (over 60 years of age) and her COPD and emphysema make her particularly vulnerable"); United States v. Hernandez, No. 18-CR-834, 2020 WL 1684062, at *3 (S.D.N.Y. Apr. 2, 2020) (finding "extraordinary and compelling reasons" to reduce the defendant's sentence due to defendant's asthma and the "heightened medical risk presented to [the defendant] by the COVID-19 pandemic"); Rodriguez, 2020 WL 1627331, at *2 (granting compassionate release because for a diabetic inmate, "nothing could be more extraordinary and compelling than this pandemic"); United States v. Campagna, No. 16-CR-78-01, 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020) ("Defendant's compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and

compelling reason to modify to Defendant's sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the environment of the RCC."); Perez, 2020 WL 1546422, at *2 ("Perez meets th[e] requirement [of Application Note 1(D)] as well, because he has weeks left on his sentence, is in weakened health, and faces the threat of a potentially fatal virus. The benefits of keeping him in prison for the remainder of his sentence are minimal, and the potential consequences of doing so are extraordinarily grave."); see also United States v. Perez, No. 19-CR-297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (granting bail application, pursuant to section 3142(i), of 65-year-old defendant with COPD, in light of "unique confluence of serious health issues and other risk factors facing this defendant, . . . which place him at a substantially heightened risk of dangerous complications should [he] contract COVID-19").

McCarthy, 2020 WL 1698732 at *5 (some alterations in McCarthy).

III. Other Considerations

In addition to finding that an extraordinary and compelling reason exists, two other determinations must be made if the Court is to grant reduction of Ben-Yhwh's term of imprisonment and "impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment" - these are: "the defendant is not a danger to the safety of any other person or to the community," and consideration of "the factors set forth in 18 U.S.C. § 3553(a)." U.S.S.G. §1B1.13. Based on Ben-Yhwh's conduct during the five years of pretrial release supervision

and his compliance with his conditions, which included extensive travel to and from the mainland as well as maintaining his extensive mental health treatment and medication regime, the Court concludes that Ben-Yhwh is not a danger to the safety of others or to the community.

As to the section 3553(a) factors, which the Court set forth fully at the sentencing hearing when it considered what sentence to impose, these are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the 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;

. . . [and]

- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

18 U.S.C. § 3553(a). As to the first factor, Ben-Yhwh's offense conduct is very serious and harmful to our community.

Destructive and illegal substances such as cocaine have wreaked untold harm and tragedy in our community. Ben-Yhwh's history and characteristics are well-documented: he suffers from severe mental health issues and requires extensive mental health treatment and medication which must be carefully monitored. His physical deterioration from the ravages of his Parkinson's Disease during the five years that he was on supervised release was clearly apparent at his sentencing hearing. He needs medical supervision and assistance for self-care. Placing him on home detention where his family, particularly his wife who is a nurse and caregiver, will provide him with care and monitor his mental and physical health in the most effective manner to deliver the care he requires. The second factor, the need for the sentence imposed, must be viewed with an eye to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." Id. Ben-Yhwh has been incarcerated for eight months. During that time, according to his wife, his physical condition has deteriorated - "He has lost 30 lbs since he has been there partly due to not being able to always ambulated [sic] for meals." [Letter to Court from Lorrie Bayette, filed 3/28/20 (dkt. no. 202), at 1.] To prolong his incarceration further would be to impose a sentence "greater than necessary" to comply with the statutory purposes of punishment, and would be unnecessarily cruel. There

is a meaningful sentence disparity between Ben-Yhwh and others with similar criminal records who have been found guilty of similar offenses, but the Court exercises its discretion as to this factor because the overwhelming medical infirmities suffered by Ben-Yhwh clearly require that the distinction must be made to avoid a sentence that is not "greater than necessary."

CONCLUSION

For the foregoing reasons, Ben-Yhwh's Emergency Motion to Modify Sentence, filed March 23, 2020, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED to the extent that Ben-Yhwh's sentence is reduced to TIME SERVED, effectively immediately and as a condition of supervised release, Ben-Yhwh shall be placed on home confinement without electronic monitoring for a period of home confinement equal to the remaining term of his original sentence of incarceration which shall be followed by four years of supervised release. Ben-Yhwh shall abide by the special and general conditions of supervised release as set forth more fully in the Amended Judgment.

It is FURTHER ORDERED that Ben-Yhwh shall be immediately released from BOP custody to begin his term of home confinement, and that he shall remain in self-quarantine for a period of time of not less than 14 days after release. Ben-Yhwh is HEREBY ORDERED to report by telephone to the USPO, District

of Hawai`i (or the federal judicial district in which he intends to reside) within 48 hours of his release from BOP custody. The Motion is DENIED in all other respects.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, April 13, 2020.



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

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