

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	Criminal Action No.:
	:	1: 09 Cr. 902 (SHS)
	:	
Plaintiff,	:	
v.	:	
	:	
HASSAN NEMAZEE,	:	
	:	
Defendant.	:	
	:	
	:	

**DEFENDANT HASSAN NEMAZEE’S RESPONSE TO THE GOVERNMENT’S
REPORT DATED MARCH 8, 2019 AND
MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS
MOTION TO IMPLEMENT HOME CONFINEMENT**

Dated: New York, New York
March 8, 2019

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DEFENDANT'S RESPONSE

1. Introduction

Defendant Hassan Nemazee submits this response to the Government's March 8, 2019 report ("Report"). In essence, the Report says that, 77 days after Mr. Nemazee's request to be moved to home confinement, the BOP is still thinking about it. While the Report states that the "Government anticipates that a decision will likely issue in the near future," the timing is completely vague and undefined. Does "near future" mean August, as BOP initially informed Mr. Nemazee? There is no way for the Court to know how much longer this issue could drag on and remain unresolved. This is precisely the kind of bureaucratic delay that prompted Congress to give inmates the right to go to a court after 30 days. 18 U.S.C. §3582(c)(1)(A). That 30 day period has elapsed twice over and BOP has still not acted. At argument, this Court asked BOP to make a decision before the matter becomes moot. Argument Transcript ("Tr."), 37:18 to 38:21. The Court further set a "mootness point" of mid-April. Tr. 38:3. The Government Report does nothing to address this deadline. Thus the Court should rule on Mr. Nemazee's motion now. Further delay for Mr. Nemazee is simply unjust and contrary to the law. The Court should order his immediate release to home confinement under to its own statutory authority.

2. The BOP's Release Of Other Prisoners To Home Confinement Invalidates Nearly All of the Government's Arguments.

As outlined in our March 6, 2019 letter to this Court, the BOP has already begun releasing prisoners to home confinement pursuant to 603(a) of the First Step Act. Since the March 6 letter, BOP apparently intends to release more prisoners. The Report acknowledges these "ad hoc" releases for a "small number" of prisoners. These releases invalidate the government's arguments that (1) the BOP needs to put certain policies or procedures in place before releasing prisoners to home confinement and (2) the Attorney General must take some

action before the BOP can begin to implement the reentry “pilot” program. Neither of those things occurred, and yet the BOP has already begun releasing prisoners under the very same provisions of the First Step Act that apply to Mr. Nemazee.

Additionally, the first prisoner who was released from Otisville to home confinement, Mr. Jacobowitz, is 8 years younger than Mr. Nemazee, has served less time and has a release date that is nine months after Mr. Nemazee’s release date. This latter fact, which is easily determined by the BOP inmate locator web site, invalidates the government’s argument that home confinement now for Mr. Nemazee might exceed the statutorily mandated time that a prisoner may spend in home confinement under 18 U.S.C. §3624(c)(2). Clearly the BOP is ready to administer the pilot program right now, has issued internal guidance, is releasing other prisoners, and is waiving any restriction that exists on the maximum amount of time a prisoner may spend in home confinement. These actions by BOP, first reported to the Court by Mr. Nemazee not by the Government, belie most of the BOP arguments presented to the Court. BOP has not acted on Mr. Nemazee’s request within the time that the law gives it, even as extended by this Court. The Court should now order BOP to do for Mr. Nemazee what it has done for others, without further delay.

3. This Court Has The Authority To Order Home Confinement.

The Government argued that 18 U.S.C. §3582(c)(1) as amended by Section 603(b) of the First Step Act is limited to “compassionate release” as that term was used prior to the First Step Act. This position has no support in the actual language of the statute, which makes no mention of compassionate release. Even if such a limitation existed, it is clear from the legislative history of the First Step Act that Congress considered the amended provisions of 34 U.S.C. §60541(g)(5) as an expansion of compassionate release for older, non-violent prisoners. The

Senate Judiciary Committee described this amendment as “[extending] the compassionate elderly release provision from the *Second Chance Act* that allows the prisoner to request for his or her compassionate release if he or she meets the requirements set out in the law.” *See* S. DOC. NO. S.3649, at 1 (2018), attached hereto as Exhibit A. At least one member of Congress has described the intent of the First Step Act in a manner completely consistent with Mr. Nemazee’s arguments. *See* March 7, 2019 Letter from Congresswoman Betty McCollum, attached hereto as Exhibit B. While the statutory language is clear and supports Mr. Nemazee’s position, indications of Congressional intent in the form of committee reports and statements by members of Congress are instructive and should be considered by the Court in applying a brand new statute.

Moreover, Congress placed both of these amendments, to Section 3582(c)(1) and to Section 60541(g)(5), in the same section of the First Step Act, the former in Section 603(b) and the latter in Section 603(a), suggesting that they are related. Whether characterized as part of “compassionate release” or not, if the BOP does not act favorably on a prisoner’s request for home confinement, Congress intended for the courts to have the power to exercise their discretion to grant or deny the request. Since BOP has not acted within the 30 days prescribed by the law, now well over 77 days, this Court should apply the factors set forth in Section 60541(g)(5) and exercise the discretion which Congress gave it to order Mr. Nemazee to home confinement immediately.

BOP already has a well-established protocol for home confinement into which Mr. Nemazee can be placed at any time. *See* 28 C.F.R. § 570.20; Federal Bureau of Prisons Policy Statement 7320.01. There is no reason to delay Mr. Nemazee’s release to home confinement a day longer while, according to the Report, BOP evaluates Mr. Nemazee’s application. There is

nothing to evaluate. Mr. Nemazee is 69 years old, has served 70% of his sentence and his conviction does not exclude him from release. The Government concedes that Mr. Nemazee is “eligible” under 34 U.S.C. §60541(g). He is more deserving of release than at least one prisoner already released by BOP.

4. Mr. Nemazee Is Not A Recidivism Risk.

One of the factors to be considered is the risk of recidivism. *See* 34 U.S.C. §60541(g)(5)(vii). This risk was the subject of a specific inquiry of the Court at argument. Tr. 42:10 to 43:11. As to the assessment of this risk, the Court is actually in a better position to evaluate the risk than administrators at BOP. The Court previously addressed recidivism at the sentencing hearing in this case. There the Court commented that “Mr. Nemazee is not about to commit another crime of this nature. I don’t think there’s a need to protect the public from him either, I guess for the same reason. I don’t think he’s about to commit a crime of this nature again.” July 15, 2010 Transcript, 18:23 - 19:1, attached hereto as Exhibit C. “As I’ve said, I don’t think individual deterrence really factors in here. You’re not going to do this again.” *Id.* 35:2 – 4. The Court gave Mr. Nemazee a below guideline sentence “because of Mr. Nemazee’s positive characteristics and charitable work as well as his involvement in American political life.” The Court also denied a Government motion for a remand, and Mr. Nemazee reported to his designated prison on time and without incident. This is not a case where there is a risk of recidivism. Mr. Nemazee will behave himself in home confinement in the same exemplary manner as he has behaved in BOP custody.

5. The Scope Of Judicial Discretion

The amendments to Section 60541(g)(5) effectuated by Section 603(a) of the First Step Act give the Attorney General the discretion to release an eligible elderly prisoner to home confinement upon request of the prisoner. 34 U.S.C. §60541(g)(1)(B). That request has been made and not acted upon here. In order to implement the new Congressional home confinement policy, Section 60541(g)(1)(C) gives the Attorney General the further discretion to waive the 6 month limitation in 18 U.S.C. §3624(c)(2). If a home confinement request is not acted upon, the prisoner may seek judicial relief under 18 U.S.C. §3582(c)(1) as amended by Section 603(b) of the First Step Act. In order for this judicial relief to be meaningful and accomplish what Congress intended (see Exhibit B hereto), the Court must have the same discretion as the Attorney General and the BOP to evaluate the request, apply the tests and make any waiver necessary to grant the relief. This Court should exercise that discretion to order Mr. Nemazee to home confinement without further delay.

CONCLUSION

This Court should issue an order today directing BOP to release Mr. Nemazee immediately to home confinement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document will be served on this date by first class mail and electronic delivery via ECF as indicated below on the following counsel:

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