U.S. Department of Justice
United States Attorney
District of New Jersey

402 East State Street
Trenton, New Jersey 08608

609-989-2020

May 8, 2020

The Honorable Freda L. Wolfson
Chief United States District Judge
United States Courthouse
402 E. State Street
Trenton, New Jersey 08608

Re: United States v. Mendel Epstein
Crim. No. 14-287-1 (FLW)

Dear Judge Wolfson:

The United States submits this letter brief in response to Mendel Epstein's renewed application for compassionate release under the First Step Act and 18 U.S.C. § 3582(c)(1)(A). As set forth below, Epstein's application should be denied as his asserted reasons are neither extraordinary nor compelling. Release at this point would be inappropriate based on the offense of conviction, Epstein's managed medical condition, and the amount of time remaining on his sentence.

I. Background.

A. Criminal Conduct.

As the Court is well aware, defendant Epstein was the leader of a criminal organization that arranged and carried out the kidnapping, beating and torture of men within the Orthodox Jewish community to forcibly extract from them a Jewish divorce document known as a "get." Defendant Epstein first would negotiate with wives within the Orthodox Jewish community to receive tens of thousands of dollars to carry out the beatings. Once the deal was struck, defendant Epstein and others recruited young members of the community in which he was a Rabbi, who he referred to as "tough guys," and dispatched them to kidnap and beat the victims until they agreed to grant their wives a get. In his own words, defendant Epstein arranged or participated in no fewer

than five such kidnappings or attempted kidnappings. Defendant Epstein ultimately was convicted by a jury of conspiring to commit kidnapping, in violation of 18 U.S.C. § 1201(c). [ECF 352].

On December 15, 2015, this Court sentenced Defendant to a term of imprisonment of 120 months. This significant downward variance from the advisory Guidelines Range was based in part on the factors defendant raises here: the unique nature of the offence, his otherwise good conduct, the lessened need for specific deterrence, and the Defendant's age and ill health. [ECF 394]. Defendant was also sentenced to 5 years of supervised release following his imprisonment, and he was ordered to pay a special assessment of $100. [ECF 394].

At his request, the Court recommended that Defendant serve his sentence at the Federal Correctional Institution, Otisville ("FCI Otisville"). [ECF 394]. Thus far, Epstein has served approximately 50 months of his 120-month sentence, with a with an anticipated release date of October 29, 2024. [Schreffler Aff. ¶ 17].

B. Request for Compassionate Release.

On March 27, 2020, Defendant submitted a request to the Warden at FCI Otisville to file a F-8 form in order to petition for compassionate release. On April 3, 2020, counsel followed up with a letter to the Warden, submitting supporting exhibits, including certifications from two physicians who have reviewed Defendant's medical records. On April 7, 2020, Defendant filed a Motion for Compassionate Release, which was opposed by the Government based upon failure to exhaust his administrative appeals or wait 30 days after presenting his request to the warden before seeking judicial relief. The Court denied that motion without prejudice, finding that the exhaustion requirements are mandatory and "not susceptible to any judicially created exceptions." *United States v. Epstein*, 14-cr-287 (FLW), 2020 WL 1808616, at *2 (D.N.J. Apr. 9, 2020) (Wolfson, C.J.); *see also United States v. Raia*, -- F.3d --, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020) (strictly enforcing § 3582(c) exhaustion requirements).

While his initial application was pending, Defendant contracted COVID-19. On April 14, 2020, Defendant complained of a cough and shortness of breath. [Linley Aff. ¶ 2]. He was transferred to FCI Otisville's Isolation Unit and given individualized medical treatment. [Linley Aff. ¶ 3] When his condition did not improve, he was sent to the hospital the morning of April 16, 2020. [Linley Aff. ¶ 3]. While in the hospital, Defendant initially was treated with supplemental oxygen, and was never placed on a ventilator. [Linley Aff. ¶ 4]. Defendant was discharged from the hospital on April 22, 2020. [Linley Aff. ¶ 5]. At that time, he was again placed in FCI Otisville's Isolation Unit, where he was monitored and treated, and his condition rapidly improved. [Linley

Aff. ¶ 6]. Defendant has exhibited no signs of fever or other symptoms since his release from the hospital. [Linley Aff. ¶ 5]. His oxygen saturation levels and other vital signs are within normal parameters. [Linley Aff. ¶ 5].

On May 4, 2020, Epstein re-filed his motion under 18 U.S.C. § 3582(c)(1)(A) for a sentence reduction resulting in his immediate release from the custody of the Bureau of Prisons (BOP), relying on the threat posed by the COVID-19 pandemic. Defendant claims that his age and medical conditions, including his recent contraction of COVID-19, put him at particular risk of re-infection from the virus.

II. Discussion.

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act on December 21, 2018, provides in pertinent part:

> (c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—
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> (1) in any case—
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> (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 . . . .

Further, 28 U.S.C. § 994(t) provides: "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." Accordingly, the relevant policy statement of the Commission is

binding on the Court. *See Dillon v. United States*, 560 U.S. 817, 827 (2010) (where 18 U.S.C. § 3582(c)(2) permits a sentencing reduction based on a retroactive guideline amendment, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," the Commission's pertinent policy statements are binding on the court).[1]

The Sentencing Guidelines policy statement appears at § 1B1.13, and provides that the Court may grant release if "extraordinary and compelling circumstances" exist, "after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," and the Court determines that "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)."

Critically, in application note 1 to the policy statement, the Commission identifies the "extraordinary and compelling reasons" that may justify compassionate release. The note provides as follows:

> 1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2) [regarding absence of danger to the community], extraordinary and compelling reasons exist under any of the circumstances set forth below:
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> (A) Medical Condition of the Defendant.—
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> (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 (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
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> (ii) The defendant is—

[1] Prior to the passage of the First Step Act, while the Commission policy statement was binding on the Court's consideration of a motion under § 3582(c)(1)(A), such a motion could only be presented by BOP. The First Step Act added authority for an inmate himself to file a motion seeking relief, after exhausting administrative remedies, or after the passage of 30 days after presenting a request to the warden, whichever is earlier.

Under the law, the inmate does not have a right to a hearing. Rule 43(b)(4) of the Federal Rules of Criminal Procedure states that a defendant need not be present where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *See Dillon*, 560 U.S. at 827-28 (observing that, under Rule 43(b)(4), a defendant need not be present at a proceeding under Section 3582(c)(2) regarding the imposition of a sentencing modification).

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

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.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

In general, the defendant has the burden to show circumstances meeting the test for compassionate release. *United States v. Heromin*, 2019 WL 2411311, at *2 (M.D. Fla. June 7, 2019); *United States v. Stowe*, 2019 WL 4673725, at *2 (S.D. Tex. Sept. 25, 2019). As the terminology in the statute makes clear, compassionate release is "rare" and "extraordinary." *United States v. Willis*, 2019 WL 2403192, at *3 (D.N.M. June 7, 2019) (citations omitted).

At the present time, it is apparent that, but for the COVID-19 pandemic, Epstein would present no basis for compassionate release. His medical ailments are well-controlled and do not present any impediment to his ability to provide self-care in the

institution. [See Linley Aff. Ex. A]. The only question, then, is whether the risk of COVID-19 changes that assessment. The government acknowledges that the risk of COVID-19 presents "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," as stated in note 1(A), as, due to his comorbidities, the defendant may be less able to protect himself against an unfavorable outcome from the disease.[2] However, the defendant is not entitled to relief. This Court must consider all pertinent circumstances, including the 3553(a) factors.

Defendant's previous contraction of COVID-19, and FCI Otisville's ability to successfully treat him weighs heavily against his application. Contrary to Defendant's assertion, research suggests at least a proportion of people who have had COVID-19 will be protected from another infection. See, https://www.science.org.au/covid19/re-infection-sars-cov-2.

Defendant's medical conditions are appropriately managed at the FCI Otisville, which is also engaged in strenuous efforts to protect inmates against the spread of COVID-19, and would also act to treat Defendant should he re-contract COVID-19. [Linley Aff. ¶ 6-8]. Indeed, the fact that the medical staff at FCI Otisville was able to successfully treat Epstein for COVID-19, despite his medical conditions, is the best possible evidence that they are well-suited to treat him again even if it is possible that he could be re-infected. In the meantime, the disease is sadly rampant in New Jersey, and notably in Lakewood, where Defendant seeks to return. As of May 7, 2020, there are 1,949 residents of Lakewood diagnosed with the disease, and 103 people have died.[3]

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[2] The government makes this concession in this case because, at this time the research on immunity to COVID-19 remains unsettled. *See* https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html ("The immune response, including duration of immunity, to SARS-CoV-2 infection is not yet understood. Patients with MERS-CoV are unlikely to be re-infected shortly after they recover, but it is not yet known whether similar immune protection will be observed for patients with COVID-19.") Nevertheless research suggests at least a proportion of people who have had COVID-19 will be protected from another infection. *See,* https://www.science.org.au/covid19/re-infection-sars-cov-2.

Accordingly, this Court need not consider the suggestion that the defendant's condition falls under the "catch-all" provision of note 1(D), as the government acknowledges that he meets the threshold test of a medical condition defined in note 1(A). This legal issue, regarding whether at present a Court has authority on its own to identify "extraordinary and compelling circumstances" apart from those described in the guideline policy statement, has recently divided courts in other compassionate release contexts. Given the government's position that the defendant's condition passes the eligibility threshold as defined by the guideline, the issue need not be reached.

[3] https://www.insidernj.com/insider-nj-county-covid-19-data-center/#OceanCounty

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Moreover, Defendant should be required to serve the sentence that this Court imposed for his criminal conduct. Epstein was the leader of a criminal organization that arranged and carried out numerous violent kidnappings. He bragged of these kidnappings and the violent assaults that resulted in painful injuries to the victims in recorded conversations. He used his exalted status in the Orthodox community to recruit young and impressionable men under the guise that this criminal conduct was sanctioned by their religion, which ultimately landed them in prison. Epstein was sentenced to 120 months' incarceration for this conduct just four years ago, when the defendant was 70, and suffering from many of the same conditions he presents today. [ECF 394].

Defendant fails to demonstrate how release, approximately 4 years into a 10-year sentence for a serious violent crime, reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense. *See* 18 U.S.C. § 3553(a)(2)(A). A consideration of the factors above shows that release at this point is inappropriate based on the offense of conviction, Epstein's managed medical condition, and the amount of time remaining on Defendant's sentence.

To date, courts have generally granted compassionate release based on the threat of COVID-19 where the inmate is serving a short sentence or has served most of a lengthier one. *See, e.g.*, *United States v. Norris*, 2020 WL 2110640 (E.D.N.C. Apr. 30, 2020) (defendant has infectious disease, is on kidney dialysis, and has had pneumonia; less than 15 months remaining on sentence); *United States v. Dunlap*, 2020 WL 2062311 (M.D.N.C. Apr. 29, 2020) (relief granted for 77-year old defendant with hypertension, severe thyroid problems, arthritis, acute nerve pain, muscle wasting and atrophy, and a bladder disorder after 2/3 of 324-month fraud sentence); *United States v. Gileno*, 2020 WL 1916773, at *5 (D. Conn. Apr. 20, 2020) (62-year-old has asthma and other ailments, serving one-year sentence); *United States v. Rodriguez*, 2020 WL 1627331, at *7 (E.D. Pa. Apr. 1, 2020) (release granted where defendant is vulnerable due to Type 2 diabetes mellitus with diabetic neuropathy, essential hypertension, obesity, and "abnormal liver enzymes in a pattern most consistent with non-alcoholic fatty liver disease," and has only one year left on 20-year sentence).

Court have generally denied release in circumstances where the inmate has served only a portion of a long sentence, even where the inmate suffers from significant ailments, and/or is held at a facility where a notable outbreak has occurred. *See, e.g.*, *United States v. Gamble*, 2020 WL 1955338 (D. Conn. Apr. 23, 2020) (inmate with diabetes); *United States v. Shah*, 2020 WL 1934930 (E.D. Mich. Apr. 22, 2020) (defendant suffers from diabetes and hypertension); *United States v. Fry*, 2020 WL 1923218 (D. Minn. Apr. 21, 2020) (denied for 66-year-old man who is obese and has heart disease and high blood pressure); *United States v. Desage*, 2020 WL 1904584 (D. Nev. Apr. 17, 2020) (relief denied for inmate at the outset of 36-month sentence, given

his criminal record; while he is diabetic, he will be isolated and BOP is endeavoring to keep inmates safe); *United States v. Livingston*, 2020 WL 1905202 (E.D.N.Y. Apr. 17, 2020) (inmate is pre-diabetic, but denied in light of his criminal record); *United States v. Wright*, 2020 WL 1922371, at *3 (S.D.N.Y. Apr. 20, 2020) (McMahon, C.J.) (denied for 35-year-old who has diabetes; it appears "the BOP has been successful at limiting the spread of the virus within the MCC. That result is possibly explained by the fact that, despite the close proximity of inmates, the BOP is able to impose restrictions on visitors and restrictions on internal movements that are more difficult to impose outside prison walls. There is no reason to believe at this juncture that Wright would be at any less of a risk from contracting COVID-19 if he were to be released.").

Conclusion

In sum, upon consideration of all pertinent factors, Defendant's motion for compassionate release should be denied. Defendant's asserted reasons are neither extraordinary nor compelling, and release at this point would be inappropriate based on the offense of conviction, Epstein's managed medical condition, and the amount of time remaining on his sentence.[4]

Respectfully submitted,
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R. Joseph Gribko
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cc: Robert G. Stahl, Esq.

[4] If the Court elects to grant a sentence reduction, the government asks that the Court impose a substantial term of home confinement as a condition of supervised release. The Court may "impose a term of . . . supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." § 3582(c)(1)(A). In imposing a term of supervised release, the Court may impose a period of home confinement as a condition of supervised release, provided that the court finds that home confinement is a "substitute for imprisonment." USSG § 5F1.2; see 18 U.S.C. § 3583(d).