

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	No. 1:14-cr-324-02
	:	
v.	:	Hon. John E. Jones III
	:	
TIMOTHY P. FOSTER	:	

MEMORANDUM AND ORDER
April 3, 2020

Presently Pending before the Court is Defendant Timothy P. Foster’s Supplemental Motion for Compassionate Release and Reduction of Sentence Under 18 U.S.C. § 3582 (c)(1)(A). (Doc. 187). For the reasons that follow, we shall grant the Defendant’s Motion.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

We have detailed the facts of this matter in prior orders and proceedings, and thus need not fully repeat ourselves here. (Docs. 164, 165, 183). We instead recount only those facts relevant to the instant Motion.

For many years, Defendant Timothy P. Foster has suffered from a chronic lung condition called Bronchiectasis. “Bronchiectasis is a disease of the lungs, in which mucus builds up in the airways which can cause infection and bleeding. This build up, and the resulting lengthening of the airways, make it harder and harder to

breathe over time. Bronchiectasis is a progressive disease, and there is no cure.” (Doc. 115 at 31-32).

Mindful of this diagnosis, we sentenced Defendant to 60 months incarceration, two years supervised release, and restitution of \$8,034,183.00 for making false statements in violation of 18 U.S.C. §1001 on November 16, 2016. (Doc. 133). That sentence resulted from Defendant’s participation in a large-scale scheme to defraud his employer, Rite Aid Corporation. (Doc. 164 at 19).

Defendant entered FCI Sheridan Satellite Camp by voluntary surrender on January 17, 2017. *Id.* at 30. Defendant was scheduled to be released on April 20, 2021. (Doc. 183 at 3). However, Defendant was recently approved for home confinement, which is set to begin on May 18, 2020, approximately 45 days from the date of this writing. (Doc. 189).

Defendant has previously petitioned both the Bureau of Prisons, (“BOP”), and this Court for early release. On May 10, 2018, Defendant sent an Application for Compassionate Release to the Warden of FCI Sheridan seeking early release due to his chronic lung condition, Bronchiectasis. (Doc. 175). We see no evidence of a reply from the Warden. In December 2018, the First Step Act modified the early release process and allowed inmates to bring their cases directly to the District Court after denial by the BOP. 18 U.S.C. § 3582(c)(1)(A).

After that change to the law, Defendant renewed his Application to the Warden on August 3, 2019, citing “extraordinary and compelling circumstances” related to his Bronchiectasis as meriting early release. (Doc. 181 at 8). On October 15, 2019, FCI Sheridan Warden Josias denied Defendant’s request for compassionate release, finding that Defendant’s condition did not substantially diminish Defendant’s “ability to function in a correctional facility and conventional treatment [could] provide substantial improvement to his physical health.” (*Id.*). The Warden further noted that Defendant’s Bronchiectasis was diagnosed and considered at the time of his sentencing. (*Id.* at 10).

On September 26, 2019, Defendant submitted an identical Application to this Court, seeking compassionate release. (Doc. 177). We denied Defendant’s Application on November 18, 2019, stating that “we. . .thoroughly considered the severity of Defendant’s condition at the time of sentencing in light of the other §3553(a) factors [and] we find that no new ‘extraordinary and compelling’ reasons exist to merit early release.” (Doc. 183 at 13).

Several months after we denied Defendant’s application, a novel coronavirus called COVID-19 exploded into the American consciousness. Defendant now renews his Application, arguing that his Bronchiectasis puts him at high risk for serious complications should he contract COVID-19 in the overcrowded and unsanitary prison facility.

As such, Defendant submitted a second *pro se* motion asking the Court for early release from FCI Sheridan so that he may serve the remainder of his sentence under home confinement. (Doc. 185). In response, we directed that an attorney be appointed on Defendant's behalf and ordered that attorney to file appropriate motions. (Doc. 186). On April 1, 2020, Defendant's attorney filed the instant Motion, as well as a brief in support. (Docs. 188, 189). The Government has indicated that they do not concur with Defendant's Motion. However, given the exigent nature of Defendant's plight, we shall consider the Motion without a Government response. The matter is therefore ripe for disposition.

II. STANDARD OF REVIEW

The First Step Act authorizes us to reduce an inmate's term of imprisonment under specific circumstances, including for compassionate release. Pub. L. No. 115-391, 132 Stat. 5194. Before the First Step Act was enacted in December 2018, a District Court could grant compassionate release *only* on the motion of the Director of the Bureau of Prisons. *See* Pub. L. No. 115-391, § 603(b); 18 U.S.C. § 3582(c)(1)(A). Inmates were precluded from making their own motions for compassionate release. The enactment of the First Step Act drastically changed that process, allowing prisoners *themselves* to file motions for compassionate

release, as long as they had first exhausted their administrative remedies with the BOP.¹

The standard of review for compassionate release is governed by 18 U.S.C. §3582(c)(1)(A). That section allows us to modify a term of imprisonment previously imposed when, “after considering the factors set forth in section 3553(a) to the extent that they are applicable, [we] find that...extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. §3582(c)(1)(A)(i).

According to the Sentencing Guidelines and available policy statements on compassionate release, the definition of “extraordinary and compelling reasons” requires, in relevant part, a federal inmate to show that he is “suffering from a serious physical or medical condition, a serious functional or cognitive impairment, or experiencing deteriorating physical or mental health because of the aging process, and that the impairment is one from which the inmate is not expected to recover and substantially diminishes the inmate’s ability to provide

¹ An inmate may file a motion to modify his term of imprisonment with the District Court when “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.” 18 U.S.C. §3582 (c)(1)(A). The Bureau of Prisons further dictates that, when the warden of a facility denies an inmate’s request, as was the case here, administrative procedures require that the inmate appeal the denial through the Administrative Remedy Procedure, (28 C.F.R. part 542, subpart B), to fully exhaust his remedies. We see no evidence on the record that Defendant has properly appealed his denial through these means. However, the Warden at FCI Sheridan did not respond to Defendant’s application within 30 days of receipt, and so Defendant’s Application is nevertheless properly before this court.

self-care within the environment of a correctional facility.” *See* U.S. Sentencing Guidelines Manual (USSG) § 1B1.13; *see also* BOP Program Statement 5050.50, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*; available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

The Sentencing Guidelines state that we are not necessarily precluded from considering factors that were known at the time of sentencing if those reasons have since become extraordinary and compelling: “an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.” USSG §1B1.13.

However, the extraordinary and compelling reason must be considered in conjunction with the §3553(a) factors traditionally considered at sentencing, including the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, the nature and circumstances of the offense, and to provide just punishment. 18 U.S.C. §3553(a); 18 U.S.C. §3582(c)(1)(A).

III. DISCUSSION

Due to a chronic lung illness, Defendant Timothy Foster already struggles to breathe on a daily basis. (Doc. 177 at 8-9). COVID-19 is perhaps most notorious for causing shortness of breath, and in dire situations, requiring the use of a ventilator to keep patients breathing.² As such, the approximately 45 days that stand between Defendant and his exit from an allegedly overcrowded and unsanitary facility could very well be the difference between life and death. Under such circumstances, we find that “extraordinary and compelling” reasons exist in the form of Defendant’s “serious physical or medical condition” that warrant his early release. USSG § 1B1.13.

a. Extraordinary and Compelling Reasons

We have watched the inexorable progression of COVID-19 around the globe, helpless to stop its incursion across our borders. As a result, we now live in a world largely unrecognizable from that which we occupied a mere few weeks ago. Our everyday lives have, quite literally, ground to a halt. Indeed, the World Health Organization (“WHO”) has classified COVID-19 as a global pandemic³

² *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last accessed April 3, 2020).

³ The World Health Organization (“WHO”) officially declared COVID-19 a global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media*

that has, as of the date of this writing, infected 932,166 people worldwide and killed more than 46,764.⁴ We watch these bleak numbers exponentially increase every day.

COVID-19 paints a particularly grim picture for individuals, like Defendant, who have underlying medical conditions. In most individuals, COVID-19 is a mild illness that causes fever, shortness of breath, fatigue, and cough.⁵ However, some cases can have critical, or even fatal, results.⁶ Those of greater age and those with underlying medical conditions, like the Defendant here, are much more likely to suffer such severe complications. *Id.* The Centers for Disease Prevention and Control (“CDC”) particularly warns of the risks of “severe illness” posed to those with “chronic lung disease.”⁷

briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORGANIZATION, (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ See *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed April 3, 2020).

⁵ *Q&A on Coronaviruses (COVID-19)*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last accessed April 3, 2020).

⁶ Anne Gulland, Paul Nuki, and Marnie Gill, *Coronavirus: What does COVID-19 do to your Body?*, THE GUARDIAN, <https://www.telegraph.co.uk/global-health/science-and-disease/covid-19-do-body-affect-coronavirus/> (Last accessed April 3, 2020).

⁷ *People who are at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed April 3, 2020).

Generally, these risks are thought to be far greater in prison settings. While there have been only roughly 20 reported cases of COVID-19 among inmates and staff of federal prisons, there is a great concern that the virus would spread rapidly amongst the prison population should it take hold.⁸ There are general allegations of ineffective quarantine measures in facilities that house inmates exhibiting COVID-19-like symptoms. (*Id.*) There are also concerns that federal prison medical facilities would be unable to cope with high levels of the virus within their walls. (*Id.*) Furthermore, there are multiple reports that social distancing is nearly impossible in many facilities, leaving at-risk inmates exposed to high levels of virus transmission. (*Id.*)

The Attorney General has specifically recognized the danger that federal prisons may pose to at-risk inmates like Defendant. He recently issued a Memorandum to the BOP which directed officials to “prioritize” granting home confinement for at-risk inmates who qualify, acknowledging that “for some eligible inmates, home confinement might be more effective in protecting their health” than remaining in prison. (Doc. 189-1 at 1). The BOP has recently determined that the Defendant will be released to home confinement early, on May 18, 2020. (Doc. 189). This is nearly a year earlier than previously scheduled (Doc.

⁸ *Federal Prisons Struggle to Combat Growing COVID-19 Fears*, U.S. NEWS AND WORLD REPORT, <https://www.usnews.com/news/health-news/articles/2020-03-27/federal-prisons-struggle-to-combat-growing-covid-19-fears> (last accessed April 3, 2020).

183 at 3). It is clear, then, that the BOP has considered the individualized factors outlined by the Attorney General and determined that Defendant's health would be better protected in home confinement than at FCI Sheridan.⁹ We see no reason to delay that protection.

The circumstances faced by our prison system during this highly contagious, potentially fatal global pandemic are unprecedented. It is no stretch to call this environment "extraordinary and compelling," and we well believe that, should we not reduce Defendant's sentence, Defendant has a high likelihood of contracting COVID-19 from which he would "not expected to recover." USSG § 1B1.13. No rationale is more compelling or extraordinary.

b. §3553(a) Factors

Having determined that an extraordinary and compelling reason exists to reduce the Defendant's sentence, we must also consider the §3553(a) factors traditionally employed at sentencing. §3582(c)(1)(A).

We find that these factors favor immediate release. Defendant is 70 years old and the instant offense was not a violent one (Doc. 189 at 1; 10). The Defendant's health and the extreme danger currently posed by the prison system to at-risk

⁹ We are further persuaded that Defendant's health is likely better protected in home confinement by the allegations he raises regarding the unsanitary conditions of FCI Sheridan that exacerbate Defendant's illness. *See* Doc. 177. We make no determinations here as to the veracity of these claims, but we note that, if they are true, they, combined with the lack of social distancing in prison facilities, would produce ghastly results for Defendant.

individuals like the Defendant also favor release. The Defendant has also served more than half of his sentence in a federal facility.

Most tellingly, perhaps, the BOP has determined that under the current circumstances imposed by COVID-19, the Defendant is an at-risk individual meriting home confinement. A mere 45 days stands between the Defendant and the relative safety of his home. But the world has changed drastically in the past 45 days, and the Defendant's remaining incarceration could well cause his demise. We therefore find that the conversion of the remainder of his sentence to home confinement is sufficient but not greater than necessary to serve the purposes of punishment iterated in §3553(a).

IV. CONCLUSION

The Defendant has a chronic lung disease that may very well equate a COVID-19 diagnosis with a death sentence. As we stated in our previous COVID-19 opinion, “[i]f we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize” Defendant's grim predicament. *Thakker v. Doll*, No. 1:20-CV00480 (M.D. Pa. Mar. 31, 2020) (Doc. 47 at 24). We therefore find that the unparalleled present global pandemic tips the scales in favor of Defendant's release and shall grant Defendant's Supplemental Motion for Compassionate Release and Reduction of Sentence Under 18 U.S.C. § 3582 (c)(1)(A). (Doc. 187).

AND NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Defendant's Supplemental Motion for Compassionate Release and Reduction of Sentence Under 18 U.S.C. § 3582 (c)(1)(A), (Doc. 187), is **GRANTED**.
2. Federal Correctional Institution Sheridan **SHALL IMMEDIATELY RELEASE** the Defendant **TODAY** to home confinement.
3. Defendant will **SELF-QUARANTINE** in his home for **FOURTEEN (14) DAYS** from the date of his release to home confinement.

s/ John E. Jones III
John E. Jones III
United States District Judge