

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case Number: 12-cr-00000-ABC

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. ANDREW XXX,

Defendant.

**DEFENDANT ANDREW XXX's MOTION FOR
RECOMMENDATION TO BUREAU OF PRISONS TO TRANSFER
MR. XXX TO HOME CONFINEMENT**

Introduction

On January 30, 2015, this Court sentenced Mr. XXX to 120 months' imprisonment in the Bureau of Prisons - the mandatory minimum sentence allowed for given his offense of conviction. This Court will likely recall its sentiments expressed at Mr. XXX's sentencing hearing that, but for the mandatory minimum sentence proscribed by law, a lower sentence would have been imposed. See Sentencing Hearing Transcript, p. 59.

Over five years have passed since that date. As evidenced by the Bureau of Prison's Inmate Locator, Mr. XXX's projected release date is December 23, 2020 – less than nine months from today's date. He is currently housed at the FMC – Fort Worth as his release plan is to live with his sister in the Fort Worth area, which will allow him to be

close to, and have the support of, not only his sisters and their families but also his daughter.

As set forth in 18 U.S.C. § 3624(c)(1), as Mr. XXX has less than twelve months left on his sentence, the Bureau of Prisons is mandated to facilitate his reintegration into the community by determining the extent to which he should spend the last year of his sentence in a Residential Reentry Center or under home confinement. However, as of the date of this filing, the BOP has failed to do so. This failure would be to Mr. XXX's detriment in normal times, but now the failure is of much greater magnitude. Now, the BOP's failure to fulfill its statutory obligation is not only impacting Mr. XXX's ability to transition back into the community, but it is also risking Mr. XXX's physical health and well-being.

Mr. XXX, through counsel, respectfully requests that this Court recommend to the Bureau of Prisons that Mr. XXX serve the remainder of his sentence in home confinement. See 18 U.S.C. §§ 3624(c), 3621(b)(4); see also H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2).

Argument

On March 13, 2020, President Trump declared a state of emergency due to the novel coronavirus (COVID-19) outbreak. This virus is spread by human-to-human contact, which is why 42 of the 50 states have ordered residents to "shelter in place"¹

¹ <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

and practice social distancing (standing at least six feet away from other individuals in public).

Individuals who are incarcerated are at great risk of contracting the virus – quite simply, the conditions of confinement make social distancing next to impossible. The Bureau of Prisons has itself acknowledged that the risks of the rapid transmission of contagion in the tight quarters of prisons and jails present significant challenges in keeping both staff and inmates safe and healthy.² Dr. Homer Venters, president of the nonprofit Community Oriented Correctional Health Services, described prison facilities as “almost perfectly designed and run in a way to promote the spread of this virus throughout these institutions,” and further observed, “The danger here is that we’re not only really going to see the explosion of cases among people who are detained and the people who work there, this is going to drive the entire epidemic curve for this nation up just when we’re trying to flatten it.”³

As of the writing of this letter, the Bureau of Prisons has confirmed that 408 individuals (283 inmates, 125 staff) have tested positive at 37 different BOP facilities and 8 Residential Re-entry Centers.⁴ Less than two weeks ago there were only 18 confirmed cases.⁵ Eight inmates have died.⁶ This is no longer an academic or imminent concern – it is real, and will only continue to worsen. There are simply too many people

² See Fed. Bureau of Prisons, Program Statement 6190.04: Infectious Disease Management (2014).

³ See <https://www.govexec.com/oversight/2020/04/federal-prisons-pose-imminent-danger-spreading-covid-19-union-says/164390/>

⁴ <https://www.bop.gov/coronavirus/> (last visited April 9, 2020, at 16:30 PDT).

⁵ On Friday, March 27, 2020, there were 18 confirmed cases (10 inmates, 8 staff).

⁶ <https://www.bop.gov/coronavirus/> (last visited April 9, 2020, at 16:30 PDT).

in prisons, and the reality that incarcerated individuals live together, eat together, sleep in close proximity to one another, and co-exist together in such close quarters makes prison facilities, for lack of a better term, petri dishes.⁷ Cook County Jail in Chicago, Illinois represents a chilling example of what is feared: on March 23, 2020, two inmates tested positive and were isolated; in a little over two weeks, there are now more than 350 confirmed cases at the jail.⁸

A number of public health experts have confirmed that lowering the population of prisons is the simplest and most effective way to disrupt the transmission of COVID-19, and avoid a humanitarian crisis, in prisons and jails.⁹ As such, I am urging you to recommend to the BOP that it release Mr. XXX to home confinement immediately.

⁷ See Timothy Williams et al., *'Jails are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, NY Times (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

⁸ See <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>

⁹ See, e.g., Letter from Dr. Sandro Galea, Dean, Boston University School of Public Health, et al., to President Trump (Mar. 27, 2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf> (co-signed by numerous public health officials from leading medical and public health institutions); Letter from Patricia Davidson, Dean, Johns Hopkins School of Nursing, et al., to Hon. Larry Hogan, Governor of Maryland (Mar. 25, 2020), <https://bioethics.jhu.edu/wpcontent/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf> (co-signed by over 200 faculty members of Johns Hopkins Bloomberg School of Public Health, School of Nursing, and School of Medicine); Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance, World Health Organization (Mar. 15, 2020), http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1.

It is the undersigned's understanding that Mr. XXX's case manager at FMC Fort Worth, Mr. Gilliam, started the process for Mr. XXX to be transferred to a community corrections placement in February 2020. However, nearly two months later, there has been no word on when, or whether, Mr. XXX will be transferred to a Residential Reentry Center.

Recognizing that the conditions of confinement in a Residential Reentry Center are similar to that of imprisonment in terms of inability to socially distance oneself – indeed, eight of the facilities at which the BOP has confirmed cases of COVID-19 are Residential Reentry Centers¹⁰, we are requesting that you recommend to the BOP that it transfer Mr. XXX to home confinement. It is the undersigned's understanding that, on April 9, 2020, Mr. XXX's case manager had Mr. XXX complete paperwork related to transferring Mr. XXX to home confinement. However, as of this filing Mr. XXX remains in custody and, as time is of the essence – Cook County has shown us what can happen in a short period of time, we cannot delay this request. Indeed, the need for urgency has only increased as, on April 9, 2020, FMC Ft. Worth – the facility at which Mr. XXX is housed – reported its first confirmed case of COVID-19.¹¹

The CARES Act specified that

[d]uring the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director deems appropriate.

¹⁰ See, *infra*, at n.6.

¹¹ *Id.*

See H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2). On April 3, 2020, Attorney General Barr made such a finding, directing the BOP Director to “give priority in implementing the new standards to the most vulnerable inmates at the most affected facilities.”¹²

What facilities are the most impacted will change as the outbreak grows bigger. As of April 3, 2020, AG Barr identified FCI Oakdale, FCI Danbury, and FCI Elkton as those most impacted. Since then, FCI Lompoc – not even mentioned on April 3, 2020 - has nearly the same number of confirmed cases at Oakdale and Danbury, and FCI Butner Medium I has surpassed all of the other facilities.¹³

Similarly, those who may be considered “vulnerable inmates” is also an expanding group. On April 7, 2020, it was reported by, *inter alia*, the New York Times that COVID-19 is “infecting and killing black people in the United States at disproportionately high rates.”¹⁴ Indeed, at the daily White House COVID-19 briefing on April 7, 2020, Dr. Anthony Fauci discussed how this pandemic had shed a light on the systemic and disproportionate inequities suffered by African Americans as it related to health care access, noting that, while it was not the case that African Americans got infected with COVID-19 more often, the prevalence of underlying medical conditions

¹² See <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>

¹³ See, *infra*, at n.6.

¹⁴ See <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

such as diabetes, hypertension, obesity, and asthma in the African American community led to higher intensive-care admissions and death rates.¹⁵

Further, while it was initially thought that COVID-19 impacted elderly individuals at a higher rate, statistics show that this is not the case. As of April 8, 2020, New York City reported that people ranging from ages 18 to 44 accounted for 39 percent of positive tests.¹⁶ And lest we forget, inmate populations are not comparable when it comes to age since prisoners' physiological age averages 10 to 15 years older than their chronological age.¹⁷ Mr. XXX, a 33-year-old African American male who is currently incarcerated (and who has been incarcerated since 2012), is a "vulnerable inmate."

Pursuant to the CARES Act, the BOP now has the authority to transfer Mr. XXX to home confinement to serve the remaining 9 months of his sentence. Mr. XXX has a reentry plan in place. Since his successful completion of the BRAVE program at FCI Victorville at the outset of his term of incarceration, he has been housed at only low- or

¹⁵ See <https://www.businessinsider.com/fauci-covid-19-shows-unacceptable-disparities-for-african-americans-2020-4>.

¹⁶ See <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary-04082020-2.pdf>

¹⁷ See Brie A. Williams et al., *Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care*, 102 Am. J. Public Health 1475-81 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/>; see also Brie Williams et al., *Detained and Distressed: Persistent Distressing Symptoms in a Population of Older Jail Inmates*, 64 J. Am. Geriatrics Soc. 2349-55 (2016), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/jgs.14310> ("For example, older jail inmates with an average age of 60 in this study reported poor or fair health [and] chronic lung disease . . . at rates similar to those reported by community-based lower income older adults with an average age of 72.").

minimum-security facilities. His offense of conviction is a low-level, non-violent drug offense. He does not pose a threat to the community.

As aptly stated by the Federal Public and Community Defenders in their April 1, 2020, letter to Attorney General Barr urging him to use the authority vested in him by the CARES Act, “There is no constitutional or statutory authority for DOJ to play roulette with people’s lives because of their offense of conviction. Imprisonment is meant to punish by restricting liberty, not by exposure to illness.”¹⁸

18 U.S.C. §§3624(c) and 3621(b)(4) authorize this Court to recommend where a defendant should be incarcerated. This includes whether a defendant should be confined in a halfway house or in home confinement during the last year he or she is in custody. Although the court usually exercises this power at the time of sentencing, nothing prevents it from doing so at any time the inmate is still serving his sentence. See also, *United States v. Ceballos*, 671 F.3d 852, 856 n.2 (9th Cir. 2011). We respectfully urge you to do so now, and recommend to the BOP that it immediately transfer Mr. XXX to home confinement to serve the remaining nine months of his sentence.

Conclusion

For the reasons stated herein, it is respectfully requested that this Court exercise its authority under 18 U.S.C. §§3624(c) and 3621(b)(4) and recommend to the Bureau

¹⁸ See https://www.fd.org/sites/default/files/covid19/other_resources/defender_letter_ag_barr_re_covid-19_4-1-20.pdf.

of Prisons that Mr. XXX be immediately transferred to home confinement to serve the remainder of his sentence. We further request that this Court recommend that Mr. XXX complete his 14-day quarantine in the residence to which he is being transferred as allowed for pursuant to AG Barr's April 3, 2020, memo.

Respectfully submitted this 10th day of April, 2020.

/s/ Darlene Bagley Comstedt
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2020, I filed the foregoing **DEFENDANT ANDREW XXX'S MOTION FOR RECOMMENDATION TO BUREAU OF PRISONS TO TRANSFER MR. XXX TO HOME CONFINEMENT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

/s/ Darlene Bagley Comstedt
Darlene Bagley Comstedt