

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA :

v. :

APPEAL NO. [REDACTED]

[REDACTED],

Appellant :

**EMERGENCY MOTION APPEALING DENIAL OF
REQUEST TO POSTPONE SELF-SURRENDER DATE**

Pursuant to Federal Rule of Appellate Procedure 9(b) and Local Appellate Rule 9.1(b), appellant [REDACTED] respectfully moves this Court to reverse the district court's order of [REDACTED], 2020 denying his request to amend the conditions of his release by extending his self-surrender date. This case should be remanded with instructions to postpone the self-surrender date for a period of ninety days.

The Court should reverse the district court's order in light of the COVID-19 pandemic as explained in detail below. Reversal would preserve the status quo. It is undisputed that, under 18 U.S.C. § 3143(a)(1), [REDACTED] has established by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community if granted continued release pending execution of sentence. In fact, the government consented to a thirty-day extension of the self-surrender date in the district court.

Factual and Procedural History

1. ██████████ is a 36-year-old man with no criminal history who lives in the attic of his parents' home in ██████████, Pennsylvania. *See* Presentence Investigation Report (PSR), at p.3, ¶¶ 36-39, 51.¹ Professional evaluation in these proceedings has concluded that he suffers from Asperger's Disorder/Autism Spectrum Disorder, although those conditions were never clinically diagnosed or treated. Despite a childhood and adulthood of social alienation, ██████████ continued his education through a masters degree from ██████████. *Id.* at ¶ 66.

2. ██████████'s social isolation and deep-seated feelings of worthlessness led to the development of numerous addictions. He smoked marijuana daily from his teen years until mid-2018. PSR at ¶ 64. He sporadically used methamphetamine. *Id.* Of most consequence here, as a teen he discovered child pornography. *Id.* at ¶ 58. Rather than amassing a large collection of such material, as is typical in child-pornography cases, ██████████ has been watching the same twelve videos since he was 15 years old—viewing them approximately eight times per year. *Id.* at ¶¶ 58-59. He would sometimes view other child

¹ The Presentence Investigation Report has been separately filed under seal.

pornography and immediately delete it, and forensic examination of his computer revealed seven thumbnail images and “artifacts” of 30 videos. *Id.* at ¶¶ 12-14. All of this makes him feel “below human.” *Id.* at ¶ 61.

3. In ██████████, ██████████ was charged with one count of possession of child pornography and two counts of distribution, based on law enforcement’s downloading of two video files from a folder on ██████████’s computer that he made available on a file-sharing network. PSR at ¶¶ 1, 8, 11. He immediately confessed to agents executing a search warrant on his parents’ home, and pleaded guilty in ██████████. *Id.* at ¶¶ 12-14, 18. On ██████████, 2020, the district court sentenced ██████████ to 78 months’ imprisonment to be followed by 15 years of supervised release.

4. ██████████ has been released on conditions since his initial appearance. The conditions are strict: house arrest and no computer use whatsoever, among others. DDE 8, 39. It is undisputed that ██████████ is not a flight risk or a danger to the community.

Release was continued by the district court through execution of sentence, owing in part to the fact that ██████████’s mother fell ill and has now died. DDE 52. ██████████ is currently under order to self-surrender on ██████████, 2020 at FCI Allenwood Low, in northeastern Pennsylvania, for service of his sentence.

██████████ was briefly detained in November 2019 to adjudicate allegations that he had used drugs and tampered with his ankle monitor. DDE 36. ██████████ admitted his drug use, but denied tampering. It is undisputed that ██████████ never impermissibly left his parents' home. After an evidentiary hearing, the government's detention motion was denied and ██████████ was returned to pre-sentence release. DDE 39.

5. On ██████████, 2020, ██████████ moved in the district court for a 30-day extension of his self-surrender date, owing to the public-health emergency occasioned by the COVID-19 pandemic. DDE 58. The government initially opposed the motion, but later consented. The motion was nevertheless denied without comment on ██████████, 2020, and a copy of the district court's order is attached. DDE 62. This appeal follows.

Jurisdiction and Standard of Review

6. The Court has jurisdiction pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291, and exercises plenary review while giving respectful consideration to the reasons articulated by the district court in support of its order. *See United States v. Strong*, 775 F.2d 504, 505 (3d Cir. 1985). Here, no respectful consideration is due as the district court gave no reasons for its decision.

Statutory Standard for Release Pending Execution of Sentence

7. Release of a criminal defendant pending execution of sentence is governed by 18 U.S.C. § 3143(a). That statute provides varying standards for making release determinations, depending on the nature of the offense of conviction and whether the U.S. Sentencing Guidelines recommend a sentence of imprisonment.

Here, the release standard is set forth in § 3143(a)(2), which normally requires detention unless the defendant is not likely to flee or pose a danger, and there is either a substantial likelihood that a motion for acquittal or new trial will be granted or the government is not seeking imprisonment.² However, upon a clear showing of “exceptional reasons why such person’s detention would not be appropriate,” release on conditions may be ordered so long as the defendant is not a flight risk or a danger to the community. 18 U.S.C. § 3145(c).

8. There is no doubt that the COVID-19 pandemic is an exceptional reason permitting release under § 3145(c). “Exceptional” in this context means “clearly out of the ordinary, uncommon, or rare.” *United States v. Little*, 485 F.3d

² Section 3143(a)(2) applies because ██████████’s convictions are pursuant to 18 U.S.C. §§ 2252(a)(2) and (a)(4)(b), which are defined as “crimes of violence” under 18 U.S.C. §§ 3156(a)(4)(C) and 3142(f)(1)(A).

1210, 1211 (8th Cir. 2007). *Accord United States v. Garcia*, 340 F.3d 1013, 1018-19 (9th Cir. 2003); *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991).

As of this writing, the global COVID-19 pandemic has resulted in 465,915 confirmed cases and 21,031 deaths in 199 countries;³ a National Emergency Proclamation by the President of the United States;⁴ a statewide non-life-sustaining business closure and a stay-at-home order for ten counties (including ██████████'s county of residence) by the Governor of Pennsylvania;⁵ and the temporary closure of the James A. Byrne United States Courthouse, the principal seat of this Court.⁶ That is “clearly out of the ordinary, uncommon, or rare.” *Little*, 485 F.3d at 1211.

³ World Health Organization Coronavirus Disease (COVID-19) Situation Dashboard, at <https://experience.arcgis.com/experience/685d0ace521648f8a5beeeee1b9125cd>.

⁴ *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

⁵ *Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of all Businesses that are not Life Sustaining*, at <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order>; *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, at <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>.

⁶ *In re Temporary Closing of the James A. Byrne U.S. Courthouse in Philadelphia* (Standing Order Mar. 25, 2020).

Numerous courts have held the pandemic to be obvious and compelling grounds for postponement of self-surrender to commence a federal sentence of imprisonment. *See, e.g., United States v Garlock*, No. 18-cr-00418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (*sua sponte* extending time to self-surrender, explaining “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); *United States v. Matthaei*, No. 19-cv-00243, 2020 WL 1443227, at *1 (D. Idaho Mar. 16, 2020) (extending self-surrender date by 90 days in light of COVID-19).

The Self-Surrender Date Should be Postponed
for Ninety Days in Light of the COVID-19 Pandemic

9. It is absolutely critical to understand from the outset that this appeal is *not* about releasing an inmate from prison due to the risk of contracting the COVID-19 disease. Every inmate already in prison presents an existing risk of transmitting the SARS-CoV-2 virus to other inmates and prison staff, and suffers an existing risk of receiving the virus from other inmates and staff. Courts deciding whether to release an inmate attempt to quantify those risks, estimate the potential consequences to the inmate based on age and medical condition, and then weigh all of that against the compelling interest of continuing to detain someone

who is already in prison either because he or she is serving a sentence or has been deemed a danger or flight risk pretrial.

10. That is an exceedingly difficult calculation. Happily, the Court does not have to attempt it here. This appeal presents a far easier question: Does it make sense to order a person currently sheltering in place by added force of court order to leave the attic of his parents' home, travel across the state of Pennsylvania in defiance of gubernatorial order, and introduce himself into the federal prison population *now*, as opposed to ninety days from now when the risks of the pandemic may have abated?

The answer is obvious. There is no social or penological benefit to ■■■■ ■■■■ beginning his sentence on ■■■■, 2020 as opposed to three months from now. He is not a danger or flight risk, and the computer restriction guarantees he could not reoffend even if he wanted to—which assuredly he does not. All of that is why he is currently on release. Society will get its full measure of retribution, deterrence, and incapacitation from the sentence imposed regardless of the exact date it commences. Unlike a refusal to release an inmate from prison, which maintains the status quo, insisting that ■■■■ begin his sentence now disrupts the status quo and increases the risk for everyone.

The district court's order is thus all risk and no reward. That is a dangerous proposition, with potentially deadly consequences not just for ██████████ but for other inmates and prison staff. It cannot be countenanced, regardless of how the Court might quantify the risk.

11. The risk is high, in any event.

a. First, with respect to ██████████. He is a relatively healthy 36-year-old man. But it is a myth that COVID-19 poses serious risk only to the elderly and medically compromised. According to a Centers for Disease Control and Prevention analysis of the first 2,449 confirmed COVID-19 cases involving Americans of known age, those in ██████████'s age cohort (20-44 years) represented 29% of diagnoses, 20% of hospitalizations, and 12% of ICU admissions. The non-elderly, defined as 20-64 years, represented 20% of deaths.⁷

That represents the risk in the general population—██████████'s risk would be far higher in prison at this moment. COVID-19 has breached Bureau of Prisons facilities, with 10 confirmed cases among inmates and eight among staff as of this

⁷ *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12-March 16, 2020*, at https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w.

writing.⁸ It is bound to spread quickly in the cramped quarters of prison, exacerbated by BOP inmate transfers. Although BOP claims to have greatly curtailed such transfers weeks ago,⁹ they apparently continue at FCC Allenwood. According to U.S. Representative Fred Keller (R-PA), who represents the district in which Allenwood is located, as recently as March 23, 2020 BOP conducted its weekly transfer of inmates to FCC Allenwood, in this instance 32 inmates from Oklahoma City.¹⁰ Upon arrival and screening, two inmates exhibited COVID-19 symptoms, and one was transferred to Geisinger Danville Hospital for testing, with results pending. Representative Keller was candid in his appraisal:

These set of facts are disturbing and unacceptable. Clearly, BOP cannot guarantee the safety of BOP inmates, employees, their families, or the broader community. As such, continuing to move inmates throughout the BOP system while COVID-19 continues to spread is a mistake and must be immediately stopped.¹¹

⁸ See <https://www.bop.gov/coronavirus>.

⁹ *BOP COVID-19 Modified Operations Plan*, at https://www.bop.gov/coronavirus/covid19_status.jsp.

¹⁰ Letter from Hon. Fred Keller to Michael Carvajal, Director, U.S. Bureau of Prisons (Mar. 24, 2020), at <https://keller.house.gov/sites/keller.house.gov/files/03.24.20%20Letter%20to%20BOP%20Inmate%20Transfer.pdf>.

¹¹ *Id.*

Conditions of confinement in prisons, and at FCI Allenwood Low in particular, create an optimal environment for the transmission of infectious disease. People who work in the prison leave and return daily; people deliver supplies to the facility daily; and inmates were having social, legal and medical visits regularly after the initial spread of the virus before the BOP's decision to stop visits for 30 days on March 13, 2020.¹² The CDC has explained that inmates are at special risk of infection because they “live, work, eat, study, and recreate within congregate environments,” their ability “to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations,” and they “may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation.”¹³

██████████ would be powerless to take the preventative self-care measures directed by the CDC to remain safe from COVID-19 infection. He would not be

¹² *Federal Bureau of Prisons Covid-19 Modified Operations Plan*, at https://www.bop.gov/coronavirus/covid19_status.jsp.

¹³ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Mar. 23, 2020), at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening>.

able to self-quarantine or engage in “social distancing,” for instance. He would be housed in a community dormitory environment that beds many inmates in close proximity with limited and shared facilities. There are community spaces where inmates and prison staff gather, including common rooms, laundry facilities, a barber shop, medical areas, and dining halls. These high-density areas are precisely the kind of spaces that have caused the alarmingly high-spread rates of COVID-19. Hand sanitizer, an effective disinfectant recommended by the CDC to reduce transmission rates, is apparently contraband in prison because of its alcohol content, and even if permitted presumably even less available than it is in the community at large.¹⁴

b. The risk to other inmates and prison staff from the introduction of ██████████ ██████████ at this time is substantial, as well. BOP touts its screening mechanism for new prisoners, but it appears to be antiquated and largely ineffectual. According to BOP’s COVID-19 Modified Operations Plan, incoming inmates are screened for “exposure risk factors” and symptoms. Only those with *both* are isolated and tested for COVID-19, and even then only “per local health authority protocols.”

¹⁴ Keri Blakinger and Beth Schwarzapfel, *How Can Prisons Contain Coronavirus When Purell is Contraband?*, ABA Journal (Mar. 13, 2020), at <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus>.

Those with exposure risk factors but no symptoms are quarantined. It is unknown how symptoms are handled in the absence of exposure risk factors. And those with neither exposure risk factors nor symptoms are released directly into the prison population. BOP provides enhanced screening for *staff* in geographical areas with “sustained community transmission,” but not for incoming inmates.¹⁵

Quite a lot turns on the robustness of the exposure risk factor screening and local health authority protocols, then, but neither appears very meaningful at this stage of the pandemic. The government has represented that only those with “documented” risk of exposure are quarantined; self-reported exposure risk appears to be insufficient. It is unclear what the exposure risk factors even are, but they reportedly center on travel history and appear to have been last updated in a month-old guidance memorandum distributed by BOP’s medical director.¹⁶ We can presume very few incoming inmates have recently been to China, Italy, Iran, or other world hotspots—even if that were still relevant—and fewer still will arrive at the prison gate with documentation of their trip. Even questions about exposure to

¹⁵ *Federal Bureau of Prisons Covid-19 Modified Operations Plan*, at https://www.bop.gov/coronavirus/covid19_status.jsp.

¹⁶ *BOP’s COVID-19 Response*, at <https://www.bop.gov/coronavirus/overview.jsp>.

diagnosed or symptomatic people would fail to catch the primary danger of community transmission among those who are asymptomatic.

The “local health authority protocols” caveat is similarly opaque, but may refer to the availability of testing kits and protective medical equipment in a particular prison’s community. Both are lacking everywhere, with rural communities such as northeastern Pennsylvania at special risk of shortage.

* * *

We are on the leading edge of an unprecedented global public health challenge. Nobody—neither counsel, BOP, nor this Court—can confidently predict the outcome or quantify the risk of disease and death to anyone in particular, including ██████████ and the inmates and staff of FCI Allenwood Low. In these circumstances, the only sensible approach is caution. And here, caution clearly dictates a simple and cost-free result: the status quo should be preserved, and ██████████’s self-surrender should be postponed.

WHEREFORE, for the foregoing reasons, the Court should reverse the district court's order of [REDACTED], 2020 denying [REDACTED]'s request to amend the conditions of his release by extending his self-surrender date. This case should be remanded with instructions to postpone the self-surrender date for a period of ninety days.

Respectfully submitted,

[REDACTED]

CERTIFICATE OF SERVICE

I, [REDACTED]

[REDACTED], hereby certify that I have electronically filed and served a copy of *Emergency Motion Appealing Denial of Request to Postpone Self-Surrender Date* upon Filing User of record through the Third Circuit Court of Appeals' Electronic Case Filing (CM/ECF) system, and upon [REDACTED] by e-mail.

[REDACTED]

DATE: March 27, 2020