

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

17 Cr. 61 (LAP)

ANDREW DAVENPORT,

Defendant.

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**DEFENDANT ANDREW DAVENPORT’S MOTION TO MODIFY SENTENCE**

Andrew Davenport, by and through counsel, respectfully moves the Court pursuant to 18 U.S.C. § 3582(c)(1)(A) to modify Mr. Davenport’s term of imprisonment to time served and to impose a special condition that Mr. Davenport serve a period of home confinement on supervised release. Such a modification will effectively allow him to finish the remaining portion of his prison sentence on home confinement, which will in turn allow him to protect himself from the spread of the novel coronavirus 2019 (“COVID-19”) by sheltering in place at his residence in light of his serious underlying (and pre-existing) health problems, which place him in the COVID-19 high-risk category.

In support hereof, Mr. Davenport’s attorneys state as follows:

1. Mr. Davenport was sentenced by this Court on October 30, 2018 to a term of imprisonment of one year and one day, to be followed by a two-year term of supervised release. (*See* Judgment (Doc. 224) at 3, 5.) Mr. Davenport was sentenced in connection with his conviction for non-violent offenses, principally involving honest services wire fraud.

2. Mr. Davenport self-surrendered on January 21, 2020 to the satellite camp located within FCI Schuylkill (the “Schuylkill Camp”) in Minersville, Pennsylvania.

3. Mr. Davenport’s inmate register number at the Schuylkill Camp is 75637-066. His current release date is November 26, 2020.

4. In recent weeks, COVID-19 has spread throughout the United States, infecting thousands of Americans and inflicting many with severe respiratory illness; many Americans have perished.<sup>1</sup>

5. On March 11, 2020, the World Health Organization described the COVID-19 outbreak as a global pandemic.<sup>2</sup>

6. According to the Centers for Disease Control (CDC), people who suffer from, *inter alia*, high blood pressure and diabetes “are at higher risk of getting very sick from this illness.”<sup>3</sup>

7. Mr. Davenport suffers from a number of serious medical problems, including heart disease *and* uncontrolled Type II diabetes. (See Exhibit A: Letter of Dr. Ronald S. Luber dated March 19, 2020 (“Dr. Luber Letter”).) Thus, Mr. Davenport is in the high-risk category of individuals who face grave health consequences or death from exposure to COVID-19. Indeed, we submit that Mr. Davenport is likely at the very highest risk in light of the fact that he suffers from not just one high-risk condition, but *two* such conditions. These conditions did not develop during Mr. Davenport’s incarceration; he has suffered from these conditions for a long time and they were brought to the Court’s attention at the time of sentencing. (See *generally* Sentencing Memorandum (Doc. 197) at 2-5.)

8. According to Dr. Luber (Mr. Davenport’s primary physician), with regard to his diabetes, Mr. Davenport “is required to take approximately five separate medications each day and must undergo near constant monitoring of his blood sugar.” (Dr. Luber Letter at 1.)

9. With regard to his coronary disease, Dr. Luber states that “it is significant to note that [Mr. Davenport] has a family history of coronary disease that resulted in premature cardiac death for his paternal grandfather at 57, his father at 63, and his two brothers, at 48 and 52.” (*Id.*) Dr. Luber reports that “[Mr. Davenport] takes approximately three medications each day to try and address his congestive heart disease” but that “it is not unreasonable to make a medically sound assumption that [Mr. Davenport] also faces serious risk of premature death due to sudden cardiac failure.” (*Id.*)

10. Mr. Davenport has informed counsel that his sleeping arrangements at the Schuylkill Camp are in a small dormitory-style facility with approximately 30 other inmates and

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<sup>1</sup> See *generally* CDC: COVID-19 Situation Summary, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>

<sup>2</sup> See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>3</sup> See CDC: COVID-19: What if You are High Risk, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>

that bathroom and shower facilities are shared by all of the inmates in the unit. The inmates share three sinks. As with all prison environments, inmates are held in close quarters.

11. As a result, it is simply impossible for inmates to effectively follow the CDC's published advice that individuals socially distance themselves from other individuals at the Schuylkill Camp. Significantly, the closely quartered prison environment does not permit inmates from separating from other inmates by at least six feet. Nor are other CDC recommendations possible, such as avoiding crowded areas, limiting close contact, frequent hand washing, and staying indoors at home. (See Dr. Luber Letter at 2.)<sup>4</sup>

12. Although the Bureau of Prisons (BOP) announced a plan to address the COVID-19 pandemic,<sup>5</sup> we submit that *no* action plan will be able to mitigate the effects of the virus once it infiltrates prison facilities. Media reports indicate that even jail officials and prosecutors are beginning to recognize that the country's prison population is at significant risk.<sup>6</sup>

13. Courts are beginning to recognize the risk as well. On March 18, 2020, in *United States v. Stephens*, 15-cr-95 (AJN) (S.D.N.Y. Mar. 18, 2020), Judge Alison J. Nathan granted the defendant's emergency motion for reconsideration of denial of bail and ordered the defendant released with conditions. See *id.*, Doc. 2798. Judge Nathan noted that, since the initial bail hearing, "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent" and that while "there is not yet a known outbreak among the jail and

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<sup>4</sup> See also CDC: COVID-19: How to Protect Yourself, available at <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>

<sup>5</sup> See Federal Bureau of Prisons COVID-19 Action Plan, available at [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp)

<sup>6</sup> See, e.g., The Washington Post: *Prosecutors, defense attorneys press to release inmates, drop charges and thin jail population in response to the coronavirus* (Mar. 19, 2020) available at [https://www.washingtonpost.com/local/legal-issues/prosecutors-press-to-release-inmates-drop-charges-and-thin-prison-population-in-response-to-the-coronavirus/2020/03/19/13005ee6-6948-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/local/legal-issues/prosecutors-press-to-release-inmates-drop-charges-and-thin-prison-population-in-response-to-the-coronavirus/2020/03/19/13005ee6-6948-11ea-b313-df458622c2cc_story.html); The New Yorker: *How Prisons and Jails Can Respond to the Coronavirus* (Mar. 14, 2020) available at <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>; The New York Law Journal: *District Attorneys Call for 'Cite and Release' for Offenses That Pose No 'Physical Threat'* (Mar. 17, 2020) available at <https://www.law.com/newyorklawjournal/2020/03/17/district-attorneys-call-for-cite-and-release-for-offenses-that-pose-no-physical-threat/?slreturn=20200219171303>; Fox News: *U.S. Starts to release inmates due to coronavirus outbreak* (Mar. 20, 2020), available at <https://www.foxnews.com/health/us-starts-release-inmates-coronavirus>; Law360: *Boston DA To Seek Prisoner Releases During Pandemic* (Mar. 19, 2020), available at <https://www.law360.com/articles/1255026/boston-da-to-see-prisoner-releases-during-pandemic>

prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.” *Id.* at 2 (citing Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007)). Judge Nathan further noted that “[t]he magnitude of this risk has grown exponentially since the [prior hearing] before this Court; at the end of the day on March 6, New York State had 44 confirmed cases of COVID-19, but that by the end of the day on March 18, that number had climbed to 2,382.” *Id.* at 2-3 (citations omitted). In her order, Judge Nathan also cited a recent bail determination in the Eastern District of New York, *United States v. Raihan*, 20-cr-68 (BMC) (E.D.N.Y. Mar. 12, 2020), where Judge Brian M. Cogan ordered a defendant released on bail in part because “[t]he more people we crowd into [the MCC], the more we’re increasing the risk to the community.” *Id.*, Doc. 20 at 10.

14. Our legislators also now recognize the significant health risks that inmates face as a result of COVID-19. Yesterday, March 19, 2020, U.S. Senator Kamala D. Harris wrote to the director of the BOP to note that “[e]merging research has demonstrated how dangerous coronavirus is for the elderly and those with underlying conditions and compromised immune systems.” (See Exhibit B: Letter from Kamala D. Harris to BOP Director Michael Carvajal dated Mar. 19, 2020.) In her letter, Senator Harris observes that, rather than releasing high-risk inmates, BOP is doubling down on penal measures despite the high stakes, “responding to the threat of coronavirus with extreme measures that both maintain current levels of incarceration and penalize the incarcerated community—including by suspending social and legal visitation, suspending inmate facility transfers, and potentially locking down institutions.” (*Id.* at 2.) (citing BOP COVID-19 protocols). Congresspersons Jerold Nadler and Karen Bass have separately written to Attorney General William P. Barr to note that “it is incontrovertible that, if [DOJ] does not act aggressively to address the COVID-19 threat, federal jails and prisons could quickly become epicenters of the COVID-19 pandemic.” (See Exhibit C: Letter from Rep. Jerold Nadler and Rep. Karen Bass to Attorney General Barr dated Mar. 19, 2020 (the “Nadler/Bass Letter”).)

15. In his letter, Dr. Luber states his belief that, based on information known so far about how COVID-19 spreads, it is a matter of when—*not if*—COVID-19 makes its way into prison populations in light of the admittance of new inmates and the fact that prison staff rotates in and out of the facility. (See Dr. Luber Letter at 2.)

16. Dr. Luber’s concerns about the spread of COVID-19 in jails and prisons are unfortunately already coming to fruition. Yesterday, March 19, 2020, the NYC Department of Corrections confirmed that multiple corrections officers and a captain at the Rikers Island jail complex have tested positive.<sup>7</sup> Notably, in response, Mayor DeBlasio stated that “inmates with underlying health conditions could be eligible” for early release and that the City had already “identified 40 inmates who could be released, pending the approval of other criminal justice authorities.”<sup>8</sup>

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<sup>7</sup> NY Times, *Three more corrections officers test positive, officials say* (Mar. 19, 2020) available at <https://www.nytimes.com/2020/03/19/nyregion/coronavirus-new-york-update.html#link-615906d8>

<sup>8</sup> *Id.*

17. Dr. Luber warns in no uncertain terms that “[i]n light of his pre-existing health problems, [Mr. Davenport] will be at immediate critical health risk when COVID-19 arrives at the Schuylkill prison.” (*Id.* at 2.) Dr. Luber goes on to state that Mr. Davenport’s “health problems cannot be treated easily inside a prison environment even **without** the challenge of COVID-19,” and that “if [Mr. Davenport] becomes infected with COVID-19 he will rapidly become critically ill and will be at high risk of expiring from the disease.” (*Id.*) (emphasis in original).

18. Earlier this week Mr. Davenport reported to counsel that he raised concerns about his (and other inmates’) exposure to COVID-19 to the medical unit at the Schuylkill Camp. In response, a member of the medical staff simply asked Mr. Davenport if he was currently sick. When Mr. Davenport stated that he was not sick—but very concerned about becoming sick—he was immediately ordered to return to his unit.

19. 18 U.S.C. § 3582(c)(1)(A) permits a defendant to file a motion with the Court following an adverse determination of an inmate’s request that the BOP file a motion to modify the inmate’s sentence, or 30 days from BOP’s receipt of a request that it file such a motion. On March 17, 2020, counsel transmitted Mr. Davenport’s request to the warden of FCI Schuylkill via facsimile and received electronic confirmation that the facility received the document. Although BOP has yet to rule on the request (and 30 days has yet to pass), in light of the time-sensitive nature of this application we are filing this motion now so that the Court has an opportunity to review the matter as quickly as possible. Should the Court defer ruling on this application until after the BOP’s determination (and any required administrative appeals), or after 30 days from BOP’s receipt of Mr. Davenport’s request, we respectfully request that the Court order BOP to release Mr. Davenport pending a ruling on this motion.

20. Under 18 U.S.C. § 3582(c)(1)(A)(i), the Court may modify a term of imprisonment upon a finding that there are “extraordinary and compelling reasons” to merit a reduction. We respectfully submit that Mr. Davenport’s pre-existing heart disease and uncontrolled Type II diabetes (and other health problems), when combined with the unprecedented public health crisis posed by the COVID-19 pandemic, provide extraordinary and compelling reasons to modify Mr. Davenport’s sentence to permit his immediate release to home confinement.

21. This Court imposed a prison term in this case of one year and one day, despite an advisory guidelines range of 97-121 months’ imprisonment. At sentencing the Court stated that it was “cognizant of Mr. Davenport’s health situation” and in light of those concerns would recommend “that Mr. Davenport spend his time at the highest level medical facility that is available at BOP.” (Exhibit D: Sentencing Transcript at 85.) This Court certainly could not have anticipated the emergence and devastating effect of COVID-19 at the time it imposed sentence. But, now, there is a grave risk that, should the virus infiltrate the Schuylkill Camp, it may amount to a swift death sentence for Mr. Davenport in light of his severely compromised health. As Dr. Luber succinctly puts it: “prison is the very *last place* [Mr. Davenport] should be at this time and he should be released a[s] soon as possible so that he can isolate himself at home.” (Dr. Luber Letter at 1) (emphasis added).

22. As Representatives Nadler and Bass publicly stated yesterday, March 19, 2020: “DOJ and BOP must do all they can to release as many people as possible who are currently behind bars and at risk of getting sick.” (Nadler/Bass Letter at 2.) We submit that, should BOP fail to act in this regard, this Court should swiftly step in and protect Mr. Davenport’s health.

23. We have conferred with counsel for the United States and it is our understanding that the government opposes this application.

WHEREFORE, it is respectfully requested that the Court modify Mr. Davenport’s term of imprisonment to time served and impose a special condition that Mr. Davenport serve a period of home confinement while on supervised release that will effectively allow him to finish the remaining portion of his prison sentence on home confinement, where he will be in a position to protect himself from exposure to COVID-19.

Respectfully submitted,

Dated: March 20, 2020

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**CERTIFICATE OF SERVICE**

I certify that on March 20, 2020, I electronically filed the foregoing Motion to Modify Sentence with the Clerk of Court using CM/ECF and thereby forwarded the document by electronic mail to:

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By: /s/Brian P. Ketcham  
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