

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA

v.

JOHN N. KAPOOR,

Defendant.

Criminal No.: 16-CR-10343-ADB

**DEFENDANT JOHN KAPOOR'S MOTION TO
CONTINUE SELF-SURRENDER DATE**

Defendant John Kapoor is scheduled to report to the custody of the Bureau of Prisons (“BOP”) on November 30, 2020. As this Court is well aware, the COVID-19 pandemic remains unresolved in the United States, and the number of infections and deaths has—unfortunately—continued to grow. Given the ongoing health risk posed by COVID-19, particularly to older adults with pre-existing health conditions, Dr. Kapoor respectfully requests a continuance of his self-surrender date to February 2, 2021. The government has agreed to two month continuances of the surrender date on prior occasions, but opposes this motion.

BACKGROUND

The Court initially ordered each Defendant, including Dr. Kapoor, to self-surrender approximately six weeks after their sentencings. The Court subsequently extended Defendants’ self-surrender dates to take account of the additional time needed to issue final judgments. *See* Dkt. Nos. 1223; 1271. In April, in light of the COVID-19 pandemic, the government assented to a two-month extension of the self-surrender dates for Dr. Kapoor’s co-defendants. Defendants Gurry, Simon, Rowan, and Lee then filed assented-to motions requesting such extensions, which the Court granted. *See* Dkt. Nos. 1335, 1338, 1339, 1341. The government opposed Dr. Kapoor’s

request for a comparable extension, Dkt. No. 1355, but the Court granted it anyway, Dkt. No. 1359. In July, given the ongoing pandemic, Defendants filed a joint motion, this time with the government's full assent, for another two-month extension of their surrender dates. Dkt. No. 1380. The Court granted the motion, setting each Defendant's surrender date to September 22, 2020. Dkt. No. 1382. In September, Defendants Simon, Rowan, and Kapoor filed another motion, again with the government's assent, to extend their surrender dates by an additional two months. Dkt. No. 1395. The Court granted this motion, setting Defendants' surrender dates to November 30, 2020. Dkt. No. 1397.¹

ARGUMENT

“The COVID-19 pandemic poses a serious danger to society at large” and an even “higher risk to incarcerated individuals who are unable to practice public health precautions that are otherwise available to the general public, such as social distancing practices.” *United States v. Brown*, No. 14-CR-60161, 2020 WL 5116781, at *2 (S.D. Fla. Aug. 31, 2020). “There is currently no reliable treatment for COVID-19, so the best approach is to avoid infection,” a strategy that is “harder to implement in jails and prisons, which have generally been hit the hardest by COVID-19.” *Zymak v. Adducci*, No. 20-11786, 2020 WL 5017534, at *1 (E.D. Mich. Aug. 25, 2020). Older adults and those with underlying medical conditions “face a significant risk of being hospitalized and also a risk of dying.” *United States v. Pena*, No. CR 16-10236-MLW, 2020 WL 2798259, at *7 (D. Mass. May 29, 2020).² Dr. Kapoor's advanced age—he is now 77 years old—

¹ In a separate ruling, the Court also continued Defendant Gurry and Lee's surrender to November 30. Dkt. No. 1400.

² See also Centers for Disease Control, “People Who Are At Increased Risk for Severe Illness” (June 25, 2020), <https://perma.cc/6RWU-TKHQ>.

and known medical conditions place him in the highest risk category for severe illness were he to contract the virus.³

1. Globally, COVID-19 is known to have infected more than 46.6 million people and caused at least 1.2 million deaths as of November 2, 2020,⁴ and the true figures are almost certainly higher. The United States accounts for a large fraction of the known cases and deaths, as the virus has infected more than 9.1 million Americans and caused at least 229,932 deaths.⁵ This represents more than a 600% increase since Dr. Kapoor first moved to extend his self surrender because of the pandemic in late April 2020. The pandemic has not abated: On October 23, the United States recorded “the highest daily number of coronavirus cases since the pandemic began” putting “the nation on the precipice of what could be its worst stretch to date in the pandemic.”⁶ And just a week later, on October 30, the United States reached yet another record as it recorded 99,000 COVID-19 cases in a single day.⁷ Even the President, several Senators, and high-ranking executive officers, have been infected in the past month.⁸ And cities across the United States are setting new lockdown restrictions to address these spikes in coronavirus cases; Boston, for example, has recently ordered all public schools to close to curb the spread of the virus.⁹

³ As noted in Dr. Kapoor’s Presentence Report (“PSR”), Dr. Kapoor was born at his home in India and his mother could not recall whether he was born in 1942 or 1943. Dr. Kapoor uses August 29, 1943 as his birthday for legal purposes, but it is possible that Dr. Kapoor is a full year older. *See* PSR at 34 n.18.

⁴ *Coronavirus Map: Tracking the Global Outbreak*, The N.Y. Times (Nov. 2, 2020), <https://perma.cc/69TQ-3N2E> (updated regularly).

⁵ Centers for Disease Control, “CDC COVID Data Tracker” (Nov. 2, 2020), <https://perma.cc/P9RV-H2GU> (updated regularly).

⁶ William Wan and Jacqueline Dupree, “U.S. Hits Highest Daily Number of Coronavirus Cases Since Pandemic Began,” The Wash. Post (Oct. 23, 2020), <https://perma.cc/4C5A-WQH3>.

⁷ Giulia McDonnell Nieto del Rio et al., “The U.S. Breaks Its Record, Tallying Over 99,000 New Cases In a Day,” The N.Y. Times (Oct. 31, 2020), <https://perma.cc/6SFT-G8QW>.

2. Prisons amplify the risk of infection and are “recognized as environments that are particularly at risk for spreading COVID-19.” *United States v. Bischoff*, 460 F. Supp. 3d 122, 126 (D.N.H. 2020); *see also Savino v. Souza*, 459 F. Supp. 3d 317, 328 (D. Mass. 2020) (relying on CDC guidance to explain that “congregate environments,” which do not allow for social distancing, “heighten[] the potential for COVID-19 to spread once introduced.”). Prisoners have “little ability to isolate themselves from the threat posed by the coronavirus” and are “not readily able to secure safety products on their own to protect themselves, such as masks and hand sanitizers.” *United States v. Stavrakis*, No. CR ELH-19-00160, 2020 WL 4350009, at *3 (D. Md. July 29, 2020). For these reasons, “[p]risons, jails, and detention centers are especially vulnerable to outbreaks of COVID-19.” *Coreas v. Bounds*, 451 F. Supp. 3d 407, 413 (D. Md. 2020). It has become abundantly clear that “COVID-19 can spread like wildfire in a BOP facility.” *United States v. Cardona-Pinto*, No. CR PX-19-125, 2020 WL 5982890, at *1 (D. Md. Oct. 8, 2020).

3. Due to the particular risks of infection posed by correctional facilities, Attorney General William Barr urged BOP to decrease prison populations by facilitating the release of vulnerable inmates—such as elderly inmates with underlying health conditions—to home confinement.¹⁰ In assessing which inmates should be released, Attorney General Barr directed BOP to consider “the totality of circumstances” regarding each inmate, including the “danger

⁸ *See* Peter Baker and Maggie Haberman, “Trump Tests Positive for the Coronavirus,” *The N.Y. Times* (Oct. 2, 2020), <https://perma.cc/NY5Q-HQ6Z>; Claudia Grisales and Audrey Carlsen, “How the Coronavirus Has Affected Individual Members of Congress,” *NPR* (Oct. 22, 2020), <https://perma.cc/6NFA-W44B>.

⁹ Kate Taylor, “As Schools Across the U.S. Move to Reopen Doors, Boston Does An About Face,” *The N.Y. Times* (Oct. 22, 2020), <https://perma.cc/NP4J-A73J>.

¹⁰ *See* Mem. from Attorney Gen. William Barr for Dir. of Bureau of Prisons re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), <https://perma.cc/YEU7-LJ9R>.

posed by the inmate to the community” and “[t]he age and vulnerability of the inmate to COVID-19, in accordance with the [CDC] guidelines.” *United States v. Perkins*, No. 14-CR-104-LM-1, 2020 WL 4783558, at *8 (D.N.H. Aug. 18, 2020) (quoting Attorney General Barr’s memorandum). BOP is still operating under the direction of Attorney General Barr’s memorandum and is additionally trying to “decrease incoming movement” into the correctional facilities to curb the spread of COVID-19.¹¹ And, to facilitate a “reduction in the prison population,” which “in and of itself would help authorities take steps to prevent an outbreak of the virus in the confines of the facility,” courts are also revising pre-trial detention orders to allow the temporarily release of defendants—even where there are no COVID-19 risk factors. *See United States v. Le*, 457 F. Supp. 3d 6, 8 (D. Mass. 2020).

4. Still, such measures have not come close to resolving pandemic exposure in prisons, including for inmates who are at greatest risk. Inspections of correctional facilities have revealed a “shortage of medical staff,” delays in the implementation of social distancing efforts, ineffective COVID-19 screening procedures, failures to “test or isolate” inmates who reported COVID-19 symptoms, and limited utilization of the use of home confinement in order to decrease the prison populations.¹² Inmates and security staff have called BOP’s response to COVID-19 “a complete disaster” and stated that “the virus has spread so efficiently through federal facilities because of inconsistent protocols.”¹³ And recent reports show that Attorney General Barr’s

¹¹ Bureau of Prisons, “COVID-19 Action Plan: Phase Five” (Mar. 31, 2020), <https://perma.cc/YRR4-UNMK>.

¹² *See* Dep’t of Justice, Office of the Inspector General, “Remote Inspection of Federal Correctional Complex Lompoc,” at 2 (July 2020), <https://perma.cc/UAR3-YX5Z>.

¹³ Kim Bellware, *Prisoners and Guards Agree About Federal Coronavirus Response: “We Do Not Feel Safe,”* The Wash. Post (Aug. 24, 2020), <https://perma.cc/5474-6CDX>.

guidance has been largely disregarded, as “federal prison wardens denied or ignored more than 98 percent of compassionate release requests, including many from medically vulnerable prisoners.”¹⁴

5. Members of Congress have also acknowledged “that efforts to contain the virus within BOP facilities are failing” and criticized BOP’s “insufficient response to the pandemic.”¹⁵ And legislation has been proposed to “require the release of certain individuals in the custody of the United States because of their risk of exposure during a national emergency,” focusing on individuals over 50 years of age, and those with underlying health issues.¹⁶ Meanwhile, COVID-19 continues to spread in detention facilities, at “alarmingly high” rates.¹⁷ According to BOP, at least 1,692 federal inmates and 896 staff members have tested positive for COVID-19, of which 129 inmates and 2 staff members have died.¹⁸ And more than 2,600 inmate tests are still pending.¹⁹

6. The facility where Dr. Kapoor has been designated—FPC Duluth in Minnesota—has not been spared. As of the date of this filing, at least 27 out of the 164 inmates that have been tested for COVID-19, tested positive.²⁰ These numbers also likely “underrepresent the true number of COVID-19 infections,” *United States v. Duford*, No. 18-CR-042-LM, 2020 WL 3542266, at *2 (D.N.H. June 30, 2020), as a significant fraction of Duluth’s 292 total inmates have

¹⁴ Keri Blakinger and Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, The Marshall Project (Oct. 7, 2020), <https://perma.cc/MCJ3-W2SK>.

¹⁵ Ltr. From Senators Richard Durbin and Elizabeth Warren to Attorney General William Barr and Director of the BOP Michael Carvajal (Oct. 2, 2020), *available at* <https://perma.cc/NTU6-FBRJ>.

¹⁶ *See* Emergency Community Supervision Act, H.R. 6400, 116th Congress (Mar. 26, 2020).

¹⁷ Monik C. Jiménez et al., *Epidemiology of COVID-19 Among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons*, JAMA Research Letter 3(8) (Aug. 21, 2020).

¹⁸ Bureau of Prisons, COVID-19, <https://perma.cc/A5VT-9XR5> (Oct. 30, 2020) (updated regularly).

¹⁹ *Id.*

²⁰ *Id.*

not been tested for COVID-19 according to BOP data.²¹ And, to the extent that other inmates at FPC Duluth are asymptomatic, the CDC has “cautioned for some time that even asymptomatic individuals may be infected with COVID-19 and spread the virus” as “asymptomatic spreaders have been called the ‘Achilles’ heel’ of prevention strategies.” *Savino*, 459 F. Supp. 3d at 325. Furthermore, Minnesota—where FCI Duluth is located—is one of a handful of states where, in addition to an overall uptick in the number of infections, COVID-19 deaths have more than doubled.²²

7. There is no dispute that the pandemic “created unforeseen and extreme risk to the health of inmates generally, and particularly to those who are 65 and older.” *Pena*, 2020 WL 2798259, at *7. Being in his late 70s is more than reason enough to conclude that Dr. Kapoor faces an acute risk of serious consequences as a result of a COVID-19 infection. *Id.* at *4 (holding that the defendant was “at significant risk of suffering severely if infected by the COVID-19 virus by virtue of being age 70 alone”). In addition, Dr. Kapoor suffers from a host of underlying health conditions that also increase his risk of serious infection. *See* PSR at 39–40, ¶¶ 185–87 (documenting Dr. Kapoor’s history of hypertension, difficulty breathing and chest pain, and the existence of an abnormal EKG in the past year). Advanced age and hypertension in particular are widely recognized as risk factors for COVID-19. *See* Ex. A (Letter from Dr. Kapoor’s personal doctor); *see also, e.g., United States v. Bray*, 2020 WL 2494898, at *3 (E.D. Mich. May 14, 2020); *Refunjol v. Adducci*, 461 F. Supp. 3d 675, 681–82 (S.D. Ohio 2020); *United States v. Zukerman*, 451 F. Supp. 3d 329, 331 (S.D.N.Y. 2020); *United States v. Hull*, No. 3:17-cr-132 (SRU), 2020 WL 2475639, at *2–3 (D. Conn. May 13, 2020).

²¹ *Id.*; *see also* Bureau of Prisons, FPC Duluth, <https://perma.cc/9S3E-2HUN>.

²² Chris Canipe and Laura Shumaker, *Where U.S. Coronavirus Cases Are Rising and Falling*, Reuters (updated Oct. 26, 2020), <https://perma.cc/ZWU8-JB3Z>.

8. “[I]t is not possible for a medically vulnerable inmate . . . to isolate himself in this institutional setting as recommended by the CDC.” *United States v. Ramos*, 450 F. Supp. 3d 63, 65 (D. Mass. 2020). Thus, courts have repeatedly found “a combination of health and age factors that put a prisoner at a substantially higher risk due to COVID-19 along with a documented risk of the disease in the facility where the prisoner is incarcerated” to be sufficient to justify a defendant’s release from detention. *Bischoff*, 460 F. Supp. 3d at 125 (citing *United States v. Ramirez*, No. CR 17-10328-WGY, 2020 WL 2404858, at *9 (D. Mass. May 12, 2020)); *see also United States v. Perkins*, No. 14-CR-104-LM-1, 2020 WL 4783558, at *9 (D.N.H. Aug. 18, 2020) (recommending to BOP that defendant is temporarily released “during the course of the COVID-19 pandemic” due to “the severe risk to [defendant’s] health posed by COVID-19 and his low risk for dangerousness”); *United States v. Trinh*, No. 2:17-CR-287 JCM (VCF), 2020 WL 3129024, at *3 (D. Nev. June 12, 2020) (recommending that BOP temporarily release defendant where health issues put defendant at high risk).

9. Dr. Kapoor is also not a flight risk, as this Court has recognized on four separate occasions. *See* 5/2/19 Tr. 11:18–12:2; 1/23/20 Tr. 62:21–63:1; Dkt. No. 1252 at 4.; Dkt. No. 1359. Dr. Kapoor has done nothing to jeopardize the trust this Court has placed in him, and has complied with every Court directive and condition of his release.

10. Dr. Kapoor has previously requested two-month continuances of his surrender date. He has taken this piecemeal approach in order to allow the Court to evaluate the evolving threat of the COVID-19 pandemic. A similar two-month continuance is warranted now given the increasing rates of COVID-19 infections and deaths and experts’ well-recognized expectations for “cooler weather conditions in the winter to trigger a more intense transmission of the Covid-19

infection.”²³ See also *United States v. Smith*, No. 17-CR-0650-PWG, 2020 WL 5893737, at *2 (D. Md. Oct. 5, 2020) (“[T]he approaching colder weather and flu season create the possibility of dire conditions developing.”).

CONCLUSION

Defendant John Kapoor respectfully requests that the Court continue his self-surrender date to February 2, 2021, at which time the Court and the parties can re-assess the situation.

²³ Sam Meredith, *Winter Is Coming: Health Experts Are Worried About An Uptick of Coronavirus Cases in the Southern Hemisphere*, CNBC (June 1, 2020), <https://perma.cc/EC4D-3X7C>; see also Katie Hunt, *Pandemic’s Perfect Storm: Uptick in Cases This Winter May Be More Serious Than the Initial Outbreak*, CNN (July 14, 2020), <https://perma.cc/6RPP-24PU> (“[T]he coronavirus pandemic could create the perfect winter storm, and scientists say countries need to prepare for a potential uptick in cases that could be more serious than the initial outbreak.”).

Dated: November 2, 2020

Respectfully submitted,

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LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(a)(2), I hereby certify that I have conferred with counsel for the government and that the government opposes this motion.

/s/ Kosta S. Stojilkovic
Kosta S. Stojilkovic
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be served on counsel for all parties of record through the ECF system.

/s/ Kosta S. Stojilkovic
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