

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
FILED

4/2/2020

JULIA C. DUDLEY, CLERK

BY: s/ A. Little
DEPUTY CLERK

UNITED STATES OF AMERICA

CASE NO. 6:17-cr-00003

v.

ORDER

BARRY EDWARDS,

JUDGE NORMAN K. MOON

Defendant.

This matter is before the Court on Defendant Barry Edwards' Motion for Compassionate Release Pursuant to the First Step Act, filed on February 21, 2020, Dkt. 121, and Supplemental Authority in Support of his Motion for Compassionate Release Pursuant to the First Step Act, filed on March 19, 2020, Dkt. 130.

Defendant seeks compassionate release on the basis that he developed terminal brain cancer and that doctors have told him he has between three and six months to live. In the supplemental filing, Defendant asserts that the COVID-19 pandemic presents a particular risk to his health and safety in prison, and further supports his Motion for Compassionate Release. On March 24, 2020, this Court ordered the Government to file a response to Defendant's Motion for Compassionate Release and Supplement by March 27, 2020. Dkt. 131. The Government states that it "recognizes Edwards' serious illness," but asserts that it "is not in a position based on the current record and with the fact that Edwards underwent successful treatment, to support his motion for release at this stage." Dkt. 132 at 2. For the following reasons, the Court will **GRANT** the Motion for Compassionate Release.

Background

On May 9, 2018, Defendant Barry Edwards (“Defendant”) entered into an amended plea agreement, pleading guilty to filing a false tax return, in violation of 26 U.S.C. § 7206(1), and conspiracy to structure currency transactions, in violation of, *inter alia*, 18 U.S.C. § 371. Dkt. 68, 69, 107. Defendant’s wife, Joanne Edwards, was also charged with and pleaded guilty to the same offenses. Dkt. 109.

These charges arose from, among other things, Defendant and his wife Joanne Edwards’ use of For His Glory Mission and Helping Hands Mission in Lynchburg, which they established, and which purported to be missions of the Church of Yahweh, a non-denominational church headquartered in Florida. Dkt. 42 ¶¶ 1–2. From 2006 to 2014, the Edwards received income from various sources, including from selling nutritional supplements. Dkt. 42 ¶ 3. The Edwards asked that their checks for such income be made out to the Missions, and the Edwards deposited those checks into the Missions’ bank accounts. Dkt. 42 ¶¶ 3–4. However, during this same time period, the Edwards withdrew cash from the Missions’ bank accounts and used those funds to pay their family’s personal expenses. Dkt. 42 ¶ 5. Moreover, the Edwards failed to file any tax returns for the Missions; they failed to file individual tax returns from 2005 to 2012; and they filed materially false tax returns for 2013, 2014 and 2015, all of which omitted income earned by the Edwards. Dkt. 42 ¶¶ 8–11.

In the presentence report, the probation officer calculated that Defendant’s total offense level was 19, and that he had a total criminal history score of zero, resulting in a criminal history category of I. Defendant’s advisory guideline range was 30 to 37 months’ imprisonment. Dkt. 101 at 9, 11, 15. The Court adopted the presentence report without change. Dkt. 108; Dkt. 112 at 2.

On July 24, 2018, the Court sentenced Defendant within (but at the top of) the guideline range: 36 months’ imprisonment on each of Counts Five and Six, to be served concurrently.

Dkt. 107 at 1–2.¹ Upon release from imprisonment, Defendant will serve three years of supervised release. Dkt. 107 at 3. Defendant reported to prison and to date he has served half of his 36-month sentence. Dkt. 121 at 3; Dkt. 132 at 7. The Federal Bureau of Prisons’ website projects that his release date will be on April 2, 2021. *See* Dkt. 130 at 1 n.1.

Motion for Compassionate Release

On February 21, 2020, Defendant filed a Motion for Compassionate Release Pursuant to the First Step Act, Dkt. 121, seeking immediate release largely on account of a terminal illness, namely his brain cancer. On March 19, 2020, Defendant filed a Supplemental Authority notice to the Court, contending that the novel coronavirus COVID-19 presented a particularized risk to him at Federal Medical Center (“FMC”) Butner, further demonstrating entitlement to immediate release. Dkt. 130.

The main grounds for Defendant’s Motion for Compassionate Release were as follows. Defendant suffered a seizure on July 19, 2019 and was sent to an outside hospital, CJW Medical Center—Johnston Willis Campus. Dkt. 121 at 2; Dkt. 123 at 12 (Ex. E). Defendant had been attempting to see a physician for worsening neck pain for about four months before his seizure. Dkt. 121 at 1–2 & accompanying exhibits. Physicians found a six-centimeter mass in his brain, which was initially thought to be benign. *Id.*

On August 5, 2019, Defendant underwent surgery, but the neurosurgeon was only able to remove 85 percent of the tumor from Defendant’s brain. *Id.* The mass was diagnosed as “high-grade glioblastoma multiforme,” a malignant Grade IV brain tumor; further genetic testing later

¹ On May 9, 2018, this Court had sentenced Ms. Edwards to 18 months’ incarceration. Dkt. 109. The Federal Bureau of Prisons website shows that Ms. Edwards was released from custody on January 3, 2020.

revealed it to be an oligodendroglioma, a malignant Grade III brain tumor.² *Id.*; *see also* Dkt. 121 at 2. Defendant attests that one doctor informed Defendant he had only three months to live, while a second doctor told him he had three to six months—although Defendant did not refer to those doctors by name. Dkt. 121 at 2; Dkt. 123 at 16. Defendant’s oncologist at CJW Medical Center explained to him that the disease would be very difficult to cure and discussed with Defendant the possibility for compassionate release. Dkt. 121 at 2; Dkt. 123 at 17.

On August 13, 2019, Defendant filed a request for compassionate release with the Federal Bureau of Prisons (“BOP”), on the grounds that he was suffering from a terminal illness on account of his malignant brain tumor. Dkt. 123 at 15–16. On September 17, 2019, BOP denied Defendant’s request. Dkt. 123 at 12–13. BOP found that Plaintiff “demonstrated some cognitive deficits post-surgery and now requires assistance with his instrumental activities of daily living ... such as dialing the telephone, using the computer, and managing his commissary account and medication.” Dkt. 123 at 12–13. BOP also found Defendant “remains independent with ... bathing, dressing, grooming, feeding, toileting, ambulating, and transferring.” *Id.* at 13. BOP recognized Defendant’s condition was “incurable and ultimately life-limiting,” but believed that with recommended radiation and chemotherapy, Defendant had a median survival range of five to nine years. *Id.* Because Defendant’s “life expectancy is not considered to be 18 months or less” in BOP’s view, it denied his request for compassionate release. *Id.*

² The Government’s brief assumes Defendant has a malignant Grade IV brain tumor rather than a malignant Grade III brain tumor. *See, e.g.*, Dkt. 132 at 4 (writing that, “[a]lthough he has glioblastoma Grade IV, surgical resection removed 85% of his tumor, and there is no evidence of metastases”). Given the evidence in the record and the Government’s position, the Court does not find any potential difference in the grade of Defendant’s malignant brain tumor materially impacts the Court’s inquiry.

Analysis

Before Congress passed the First Step Act, only BOP could move the Court for compassionate release of an incarcerated defendant for “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c)(1)(A)(i). Because of the First Step Act’s amendment to that provision, a defendant now can file a motion for compassionate release on their own behalf, if “the defendant first ask[ed] the BOP to do so and exhaust[ed] administrative appeals following denial of the request.” *United States v. Mattingly*, No. 6:15-cr-5, 2020 WL 974874, at *2 (W.D. Va. Feb. 28, 2020). A defendant who seeks compassionate release under § 3582(c)(1)(A)(i) has the burden of establishing that such relief is warranted. *See, e.g., United States v. Mangarella*, No. 3:06-cr-151, 2020 WL 1291835, at *2 (W.D.N.C. Mar. 16, 2020); *Mattingly*, 2020 WL 974874, at *3.

1. Exhaustion of Administrative Remedies

There is no dispute that Edwards exhausted his administrative remedies, as § 3582(c)(1)(A) requires. On August 3, 2019, he submitted to the Warden at FCC Petersburg an Initiation Request for Compassionate Release Based on Medical Circumstances, citing his brain cancer as grounds for compassionate release. Dkt 121 at 5–6; Dkt. 123 at 16. On September 17, 2019, the BOP denied the request. Dkt. 121 at 6; Dkt. 123 at 12. The Government does not argue that Defendant failed to exhaust his administrative remedies. Dkt. 132.

2. Extraordinary and Compelling Reasons

A court generally “may not modify a term of imprisonment once it has been imposed.” § 3582(c). One exception, relevant here, is that the court “may reduce the term of imprisonment” if the court “finds that extraordinary and compelling reasons warrant such a reduction,” after the Court considers “the factors set forth in section 3553(a) to the extent that they are applicable,” and if “such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.” § 3582(c)(1)(A). The Sentencing Guidelines Manual explains that “extraordinary

and compelling reasons exist” when “the defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required.” U.S.S.G. § 1B1.13 app. note 1(A)(i). The Manual lists, among others, “metastatic solid-tumor cancer” as an example of such a terminal illness. *Id.* The policy statement also requires that the defendant not pose a danger to the safety of the community. U.S.S.G. § 1B1.13(2). For the reasons set forth below, the Court finds that Defendant has shown extraordinary and compelling circumstances warrant a reduction in his term of imprisonment.

A. Terminal Illness

The Court finds that Defendant is suffering from a “terminal illness” within the meaning of U.S.S.G. § 1B1.13 app. note 1(A)(i). There is no dispute that: Defendant has brain cancer; the cancerous tumor was diagnosed as glioblastoma Grade IV, later as oligodendroglioma Grade III; and that doctors were only able to remove 85% of the tumor in surgery. *See* Dkt. 121 at 2; Dkt. 132 at 1. Defendant’s cancer diagnosis has an “end of life trajectory”—indeed, BOP recognized that Defendant’s brain cancer is “incurable and ultimately life limiting.” Dkt. 123 at 13; *see also* Dkt. 132 at 2 (acknowledging “Edwards’ serious illness”).

B. Life Expectancy Prognosis

The Government argues that Defendant’s brain cancer does not constitute an extraordinary and compelling reason for compassionate release, in part, because the evidence does not offer a “clear life expectancy prognosis” for Defendant. Dkt. 132 at 2. But, as the Government concedes, the Sentencing Guidelines Manual clearly states that “[a] specific prognosis of life expectancy ... is not required.” U.S.S.G. § 1B1.13 app. note 1(A)(i). *See also* Dkt. 132 at 4.

In any event, the Court finds the record evidence about Defendant’s life expectancy points to a substantially reduced life-span for Defendant (a fifty-four-year-old) on account of his brain

tumor. See Dkt. 123 at 17 (physician note that patient told disease is “very difficult to cure” and discussed “possibility of compassionate release”); Dkt. 121 at 2, Dkt. 123 at 16 (Defendant attesting one doctor told him he had three months to live, another told him up to six months); Dkt. 123 at 12–13 (BOP recognizing Defendant’s disease is “incurable and ultimately life limiting,” but stating that oligodendroglioma, Grade III is associated with a median survival range of five to nine years).

C. Chemotherapy & Whether Defendant is Immunosuppressed

Next, the Government argues that it cannot “at this stage” support Defendant’s motion for compassionate release, in part because Defendant “underwent successful treatment” for his brain cancer. Dkt. 132 at 2. The Government also argues that the “medical records show chemotherapy has concluded,” and that “the evidence is inconclusive he is currently immunosuppressed from his treatments.” *Id.* at 4.

The record shows Defendant was on chemotherapy in at least October and November 2019. Dkt. 123 at 17 (prescribing oral chemotherapy drug for six weeks initially, then monthly); Dkt. 132-2 at 3 (prescription for oral chemotherapy drug through mid-November). Moreover, while the record demonstrates that Defendant’s “chemotherapy has stopped for now,” Dkt. 133 at 2, and that he is “being closely monitored” for treatment of his brain tumor, Dkt. 132-1 at 2, the record also shows that Defendant is scheduled for chemotherapy again in early May 2020, Dkt. 133 at 2; Dkt. 133-2 at 1 (showing a May 6, 2020 chemotherapy appointment). Chemotherapy has not concluded. Defendant’s cancer and chemotherapy put Defendant at risk of a compromised immune system. See Dkt. 133 at 2 & n.7.

There is further evidence establishing that Defendant has a suppressed immune system. For months, Defendant has taken a steroid for pain management and continues to do so today.

E.g., Dkt. 133 at 3; Dkt. 132-1 at 2; Dkt. 132-2 at 3. Defendant asserts without contradiction that this steroid suppresses the patient’s immune system. Dkt. 133 at 3 & n.10.

D. Novel Coronavirus COVID-19

Defendant writes that the novel coronavirus COVID-19 “pos[es] a significant health risk to the population at large,” and that such risk is “especially concerning for those in close quarters in prisons.” Dkt. 130 at 1. Defendant cites his brain cancer, chemotherapy, and steroid prescription as factors compromising his immune system. Dkt. 133 at 2–3. Defendant argues that his medical conditions and compromised immune system make him especially vulnerable to COVID-19 while he is in custody, which further supports his motion for compassionate release. Dkt. 130; Dkt. 133 at 2–4.

While the Government “does not minimize the concern” of COVID-19, it argues that Defendant has not “present[ed] any evidence that he is particularly susceptible to contracting COVID-19 or that he is at high-risk if he does contract it.” Dkt. 132 at 5. The Government argues that it is “monitoring the pandemic on a daily, if not hourly, basis,” and is taking “aggressive action to mitigate risk to inmates.” *Id.* The Court disagrees with the Government’s position; and finds that Defendant has amply demonstrated that he is “particularly susceptible to contracting COVID-19,” and that “he is at high-risk if he does contract it.”

The President of the United States, and the Governors of Virginia and North Carolina (where Defendant is incarcerated at FMC Butner), have declared states of emergency in response to the COVID-19 pandemic. For its part, BOP is taking various steps pursuant to its COVID-19 Action Plan to counter the spread of the virus in federal prisons. *See* Dkt. 132 at 5–7 (describing measures, including the screening of inmates and staff, suspension of visits and inmate

movements). Indeed, only yesterday, BOP announced an escalation of its response—a 14-day lock-down of inmates in every institution.³

Defendant has both made a particularized showing that he is susceptible to contracting COVID-19, and that he is at high risk if he contracts it. For the reasons set forth above, the Court finds that Defendant’s brain cancer, chemotherapy, and steroid prescription are compromising and will further compromise his immune system. Dkt. 133 at 2–3. The CDC advises that “those at high-risk for severe illness from COVID-19” include “people who are immunocompromised,” including those undergoing “cancer treatment,” as well as “prolonged use of corticosteroids and other immune weakening medications.”⁴

The National Institutes of Health, National Cancer Institute, also advises that those with cancer “are at higher risk of developing more serious complications from contagious illnesses such as COVID-19.”⁵ It further advises that cancer treatments “such as chemotherapy can weaken your immune system and may increase your risk of any infection, including with SARS-CoV-2, the virus that causes COVID-19,” and that during chemotherapy, “there will be times in your treatment cycle when you are at increased risk of infection.” *Id.* Defendant has also shown a particularized risk of catching COVID-19 at FMC Butner. Several days ago, there were no reported cases of COVID-19 at that facility; on March 29, there was one reported case of a staff member having the virus, Dkt. 133 at 3; as of March 31, there were two confirmed cases of inmates with the virus and two confirmed cases of staff-members. Today, there are nine inmates testing positive, but just one

³ https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf.

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

⁵ <https://www.cancer.gov/contact/emergency-preparedness/coronavirus>.

staff-member.⁶ It appears highly likely that the number of cases at FMC Butner will be greater still tomorrow, and the next day.

To be sure, Defendant presented a strong case for compassionate release on account of his incurable brain cancer even before the outbreak of the COVID-19 pandemic. But Defendant's request was further substantiated with a particularized showing that he is susceptible to contracting COVID-19, and that he is at high risk if he contracts it. The Court finds that Defendant has demonstrated an extraordinary and compelling reason for his compassionate release. *See, e.g., United States v. Gonzalez*, No. 2:18-cr-232, 2020 WL 1536155, at *2–3 (E.D. Wash. Mar. 31, 2020) (finding extraordinary and compelling circumstances where non-violent offender had been diagnosed with “multiple chronic illnesses,” including emphysema, which would have rendered the prisoner “most susceptible to the devastating effects of COVID-19”); *United States v. Muniz*, No. 4:09-cr-199, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020) (same, for non-violent offender “diagnosed with serious medical conditions that ... make him particularly vulnerable to severe illness from COVID-19”).

The Court further emphasizes the fact-specific basis for its ruling. Notwithstanding the understandable concerns many will have about the spread of COVID-19 in institutional settings, the compassionate relief mechanism will not afford relief to many inmates. Defendants have to meet a high bar to warrant compassionate release. *See* 18 U.S.C. § 3582(c)(1)(A). But relief will be available in those cases where “extraordinary and compelling reasons” warrant release.

3. Risk of Danger to the Safety of the Community

The Court is further persuaded that Defendant does not pose “a danger to the safety of any other person or to the community.” U.S.S.G. § 1B1.13(2). Defendant was sentenced to prison for

⁶ <https://www.bop.gov/coronavirus/>.

non-violent crimes: filing a false tax return and unlawfully structuring transactions. Defendant had no prior criminal history when he was sentenced. And he has not been disciplined while he has been incarcerated. Dkt. 123 at 19. The Government acknowledges that Probation “does not oppose [his] release.” Dkt. 132 at 2. And there is no suggestion in the briefing on Defendant’s Motion for Compassionate Release that Defendant poses a danger to the safety of the community or of any other person. Nor is there any suggestion in the briefing that Defendant is at risk of committing similar financial crimes in the future. However, any concern in that regard would be further ameliorated by Defendant’s three-year supervised release term following his release from custody. Dkt. 107 at 3.

The Court is cognizant of the concerns that COVID-19 presents to inmates being released, prison staff, and members of the public. The Court will therefore direct that Defendant be released by BOP in accordance with Attorney General Barr’s Memorandum to BOP of March 26, 2020, which provides that any inmate to be discharged from a BOP facility be subject to a “mandatory 14-day quarantine period.” Dkt. 133-1 at 2.

The Court notes that Probation has investigated and approved Defendant’s release plan, whereby Defendant will live with his daughter, who will be assisting him to receive treatment for his cancer. Dkt. 121 at 13; Dkt. 123 at 18. The Court will direct the Probation Officer to provide a copy of this Order, and information from CDC about COVID-19 and ways to protect oneself and others from spread of the virus, to Defendant’s daughter before his release.⁷

* * *

The Court has considered the relevant § 3553(a) factors and finds they support Defendant’s request for compassionate release. Defendant will not pose a threat to the community. Defendant’s

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html>

offenses—filing a false tax return and unlawfully structuring financial transactions—were serious crimes, for which this Court imposed 36 months’ imprisonment, and then three years’ supervised release. To date, Defendant has served over half that sentence of incarceration.

Since Defendant’s incarceration, he has been diagnosed with and had surgery for incurable and life-limiting brain cancer. Also since Defendant’s incarceration, the COVID-19 pandemic has emerged, causing an increasing number of casualties in the United States and abroad—and which presents a significant risk to those such as Defendant with compromised immune systems. Here, Defendant has made a particularized showing that he is susceptible to contracting COVID-19, and that he is at high risk if he contracts it.

Had the Court known when it sentenced Defendant in 2018 that the final 18 months of his term in a federal prison would expose him to a heightened and substantial health risk presented by the COVID-19 pandemic on account of Defendant’s compromised immune system, the Court would not have sentenced him to the latter 18 months. The Court further finds that the length of Defendant’s incarceration to date adequately expresses the seriousness of the offenses, promotes respect for the law, deters criminal conduct, and protects the public under § 3553(a). The Court also finds significant the fact that Defendant’s offense was a nonviolent one, and that the Court is convinced Defendant will not pose a threat to the community.

Therefore, pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court **FINDS** that extraordinary and compelling circumstances warrant a reduction in Defendant’s sentence; that Defendant does not pose a danger to any other person or the community; that the § 3553(a) factors support a reduction in sentence; and that the reduction is consistent with applicable Sentencing Commission Policy Statements, *see* U.S.S.G. § 1B1.13.

The Court therefore **GRANTS** Defendant’s Motion for Compassionate Release, Dkt. 121, 130, and **ORDERS** the Defendant be released, subject to his completion of a 14-day quarantine

period as set forth in Attorney General Barr's March 26, 2020 memorandum to BOP. All other aspects of Defendant's sentence shall remain the same, Dkt. 107, including that Defendant shall upon release commence his three-year term of supervised release.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED this 2nd day of April, 2020.



NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE