

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
Newark Division

UNITED STATES OF AMERICA	)	Case No. 2:15-cr-404
	)	
v.	)	Hon. Susan D. Wigenton
	)	
IMADELDIN KHAIR,	)	<u>ORAL ARGUMENT REQUESTED</u>
	)	
Defendant.	)	
	)	

**EMERGENCY SUPPLEMENTAL MOTION FOR  
COMPASSIONATE RELEASE**

Undersigned counsel hereby supplements Imadeldin Khair’s *pro se* Motion for Compassionate Release, which was filed on May 29, 2020. ECF No. 160. In 2016, after a bench trial, Your Honor found Mr. Khair guilty of committing health care and tax fraud between 2005 and 2014. He has been incarcerated since August 2, 2016, and is serving a sentence of 216 months in prison, with 3 years of supervised release, for his crimes. When Mr. Khair entered prison, he was 56 years old and suffered from obesity, diabetes, high blood pressure and heart palpitations. See PSR ¶ 132. He is now about to turn 61 and his health is considerably worse. In addition to becoming more obese, during the last 50 months in prison Mr. Khair has developed chronic kidney disease and renal cell carcinoma, which required doctors to remove his right kidney. Renal carcinoma is now suspected to be present in Mr. Khair’s remaining kidney, but he has not been able to receive an MRI or ultrasound

to confirm that suspicion, because such a procedure would require him to go to a hospital, which is only permitted at FCI Fort Dix in immediately life-threatening emergencies due to the COVID-19 epidemic. In addition, Mr. Khair can only sleep on a lower bunk in his prison cell, and he now walks with a cane.

Several of Mr. Khair's conditions—chronic kidney disease (CKD), obesity, and type 2 diabetes mellitus—unequivocally place him at a higher risk of dying if he contracts COVID-19, particularly in combination with his age. Mr. Khair does not necessarily seek a reduction in sentence. His primary goal is to be relieved of the fear that he will suffer severe illness or death in prison due to circumstances out of his control. Because Mr. Khair is quite ill, because the § 3553(a) factors will be satisfied if he is placed under home incarceration, and because he is a non-violent offender who presents absolutely no danger to the community, release from his BOP institution to home incarceration is appropriate in this case.

## **I. Background**

On October 7, 2014, Mr. Khair was arrested on a criminal complaint charging him with fraud. On August 2, 2016, following a bench trial, Your Honor found Mr. Khair guilty of health care fraud, obstruction of a federal audit, and multiple counts of money laundering and tax fraud. ECF No. 83. Mr. Khair was immediately remanded to jail pending sentencing. ECF No. 84. On January 30, 2017, he was sentenced to 216 months in prison, with 3 years of supervised release, and ordered to pay Medicare and NJ Medicaid over \$8.5 million in restitution. ECF No. 97.

Mr. Khair appealed unsuccessfully. ECF No. 107. On May 29, 2020, Mr. Khair filed a Motion for Compassionate Release. ECF No. 116. On July 15, 2020, undersigned counsel filed a request for compassionate release with the Warden at FCI Fort Dix, where Mr. Khair is incarcerated. Ex. 1.<sup>1</sup>

Mr. Khair's current projected release date is January 11, 2032. Ex. 2. He is classified by BOP as presenting a low risk of recidivism. Ex. 3. Assuming the Elderly Offender Home Detention Pilot Program that began under section 603(a) of the First Step Act continues beyond fiscal year 2023, its current expiration date, Mr. Khair will likely be eligible for release to home confinement in August 2028, after he has completed two-thirds of his prison sentence. See BOP, "Home Confinement under the First Step Act," pp. 2-3, *available at* <https://www.bop.gov/policy/om/001-2019.pdf>.

## **II. Relevant Law**

As amended by the First Step Act of 2018, a court may grant compassionate release "upon motion of the defendant after . . . the lapse of 30 days from the receipt" of a request for such release "by the warden of the defendant's [BOP] facility." 18 U.S.C. § 3582(c)(1)(A). Section 3582(c)(1)(A) allows courts to "reduce [a federal inmate's] term of imprisonment and impose a term of probation or supervised release if it finds that extraordinary and compelling reasons warrant

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<sup>1</sup> Exhibits to this pleading will be submitted to chambers and the government under separate cover.

such a reduction.” *United States v. Pawlowski*, 967 F.3d 327 (3d Cir. 2020) (ellipses omitted). “[B]efore granting compassionate release, a district court must consider the factors set forth in 18 U.S.C. § 3553(a) to the extent they are applicable.” *Id.* (alterations omitted). In addition, the Court must find that such reduction is “consistent with applicable policy statements issued by the Sentencing Commission,” § 3582(c)(1)(A), which for instant purposes means that the Court must conclude the defendant “is not a danger to the safety of any other person or to the community,” USSG § 1B1.13(2).

### **III. Discussion**

#### **A. Administrative exhaustion**

Mr. Khair’s request for compassionate release is properly before the Court because more than 30 days have lapsed since a request to the Warden of his facility was sent on July 15, 2020. *See* § 3182(c)(1)(A); Ex. 1.

#### **B. Extraordinary and compelling reasons**

Mr. Khair suffers from a raft of serious health problems, including suspected renal cell carcinoma in his one remaining kidney, chronic kidney disease, type 2 diabetes mellitus, obesity, hypertension, and the inability to walk without a cane. *See* Ex. 4. He might present extraordinary and compelling reasons for compassionate release even outside the context of the COVID-19 epidemic, but he certainly presents such reasons within it.

## 1. Renal cell carcinoma

In June 2018, Mr. Khair was diagnosed with suspected bilateral renal cell carcinoma, due to a large mass on his right kidney and a smaller mass on his left kidney, which showed the “[p]ossibility of a second foci of renal cell carcinoma.”

Ex. 5. In August 2018, Mr. Khair’s right kidney was removed. Ex. 6. Since then, Mr. Khair has received periodic exams to monitor the size of the mass on his left kidney. In June 2019, there was a “mild[] increase[] in size” in his left kidney mass. Ex. 7. In August 2019, another exam showed “increased density” in the mass. Ex. 8. In November 2019, Mr. Khair’s health provider “recommend[ed] continued imaging every six months with either a CT [scan], ultrasound, or MRI [exam],” and said that if the mass was determined to be “solid, then a partial” removal of the left kidney “w[ould] be considered.” Ex. 9. Mr. Khair agreed to this treatment plan. *Id.*

On March 16, 2020, Mr. Khair had a CT scan. Ex. 10. It was unclear from the scan whether Mr. Khair’s left kidney mass was solid, so his physician recommended either an “ultrasound or MRI to further evaluate.”<sup>2</sup> Ex. 10. However, due to the coronavirus epidemic, Mr. Khair has still not been able to receive an ultrasound or MRI. *See* Ex. 11 ¶ 7. That means Mr. Khair may very well have cancer in his remaining kidney, and it may be metastasizing, but he

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<sup>2</sup> The CT scan also showed lung pleural plaques consistent with asbestos exposure. Ex. 10.

simply cannot know it yet. *Id.*

## 2. Chronic kidney disease, obesity, and type 2 diabetes

Mr. Khair also suffers from chronic kidney disease, a body mass index (BMI) above 30, and type 2 diabetes mellitus. Ex. 4. According to the Centers for Disease Control, the “strongest and most consistent evidence” shows that *any one of* those conditions will put an “adult[] of any age at increased risk of severe illness from” COVID-19, meaning increased risk of “hospitalization, admission to the ICU, intubation or mechanical ventilation, or death.” CDC, “Scientific Evidence for Conditions that Increase Risk of Severe Illness,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html>. Indeed, Mr. Khair’s obesity not only makes him more likely to suffer severe illness if he contracts COVID-19, it makes him more likely to contract the virus in the first place. According to a recent “systematic review and meta-analysis of . . . studies on obesity and COVID-19,” people like Mr. Khair are 1.5 times more likely to contract COVID-19 than others, most likely due to impaired immune response. Center for Infectious Disease Research and Policy at the University of Minnesota, “Obesity, Metabolic Syndrome Tied to Risk of COVID Infection, Severity,” Aug. 26, 2020, <https://www.cidrap.umn.edu/news-perspective/2020/08/obesity-metabolic-syndrome-tied-risk-covid-infection-severity>. Another study found that “[c]ompared with healthy-weight control subjects, . . . obese people were 1.3 times more likely” to contract COVID-19, “even after

adjustment for sociodemographic factors, the presence of underlying medical conditions, laboratory values, and the use of medications.” *Id.*

### 3. Hypertension

Mr. Khair also suffers from severe hypertension. Ex. 12 (showing Mr. Khair’s most recent blood pressure reading was 154/83). An upper number of 140 or higher qualifies as stage 2 hypertension, which is the stage immediately preceding hypertensive crisis. American Heart Association, “Understanding Blood Pressure Readings,” <https://www.heart.org/en/health-topics/high-blood-pressure/understanding-blood-pressure-readings>. “People with high blood pressure are more likely to experience dangerous symptoms if infected with COVID-19.” *United States v. Mueller*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 3791548, at \*1 (E.D. Pa. July 7, 2020) (footnote and ellipses omitted). “A recent study [from Wuhan, China] found that . . . patients with hypertension had a twofold increase in the relative risk of mortality.” *Id.* (footnote omitted). And in New York State, over half of nearly 25,000 people who died from COVID-19 had hypertension, making it the “top comorbidity” among the fatalities. *Id.* at \*3; *see also United States v. Robinson*, 2020 WL 4041436, at \*5 (E.D. Va. July 17, 2020) (“[S]everal peer-reviewed scientific studies and research commentaries in reputable scientific journals conclude that hypertension is independently associated with severe manifestations of COVID-19, controlling for the confounding variables of age and other health conditions.”) (citations omitted).

#### 4. Other health problems

Mr. Khair has pain caused by a dental abscess. Ex. 13. Because the abscess is so close to his sinuses, he has been placed on a surgery list to address the infection. *Id.*

Because of severe back pain, Mr. Khair is restricted to the lower bunk in his prison cell, cannot lift more than 15 pounds, and now walks with a cane. *See* Ex. 14. In addition, in August 2020, Mr. Khair went to Health Services because of numbness in his left hand. Ex. 15. A registered nurse found that Mr. Khair had weakened motor function and atrophied muscles in his left hand. *Id.* These problems suggest at least ulnar neuropathy in his left arm, if not a problem with his spine. *Id.* He is scheduled for follow-up this month. *Id.*

Moreover, on October 5, 2020, Mr. Khair went to Health Services because “for a while now it has been very hard to hear from the left ear.” Ex. 12. A Health Services employee found that his tympanic membrane (also referred to as a “TM” or “ear drum”) did not “loo[k] normal” and it looked like there was a “cluster of blisters” on the membrane. *Id.*

#### 5. Age

On top of all the health conditions he has, Mr. Khair is at significantly greater risk of severe illness from COVID-19 due to the fact that he is nearly 61 years old. “The CDC has . . . consistently found over the course of the pandemic that death counts rise with each decade of age.” *Mueller*, 2020 WL 3791548, at \*4



(footnote omitted). Indeed, the death rate for people in their sixties from COVID-19 was more than three times as high as the rate for people in their fifties, *id.*, which was already much higher than the rate for younger people. Mr. Khair's CKD (and possible undiagnosed cancer) in his one remaining kidney; his obesity; his type 2 diabetes mellitus; his serious hypertension; and his need to walk with a cane show that he is already severely ill. He is at risk of even more severe illness or death if he contracts COVID-19.

## 6. Conditions at Fort Dix

A month ago, on September 14, there were no reported infections among the inmates and no infections among the staff at FCI Fort Dix. *United States v. Stockton*, 2020 WL 5544203, at \*8 (D. Md. Sept. 16, 2020). However, as of October 15, 2020, there are 9 positive inmates, 1 positive staff member, and there are 2 tests pending. BOP, "COVID-19 Update," <https://www.bop.gov/coronavirus/>. There are 2,465 inmates at FCI Fort Dix but only about a quarter that number, 642, have been tested. *Id.* Of those, 106 inmates have tested positive. *Id.*

The government should concede that extraordinary and compelling reasons exist for Mr. Khair's release, as the Department of Justice (DOJ) "has taken the position that inmates who suffer from a condition identified by the Centers for Disease Control and Prevention ("CDC") as putting them at higher risk for severe illness from COVID-19 and who are not expected to recover from that condition, present an 'extraordinary and compelling reason' to be considered for compassionate

release—even if that condition in ordinary times would not” present such a reason. *United States v. Wise*, No. 1:18-cr-72, ECF No. 185 at 1 (D. Md. May 18, 2020) (citing U.S.S.G. § 1B1.13, app. note 1(A)(ii)(I)); *see also United States v. Cole*, No. 1:18-cr-167, ECF No. 95 (D. Md. July 30, 2020) (“The Department continues to follow the CDC’s guidance in determining whether an ‘extraordinary and compelling reason’ exists.”); *United States v. Morales*, 2020 WL 5369198, at \*3 (D. Conn. Sept. 8, 2020) (“The Government does not dispute that his medical conditions qualify Defendant to seek compassionate release.”); *United States v. Simon*, 2020 WL 5077390, at \*3 (S.D.N.Y. Aug. 27, 2020) (“[T]he Government, to its credit, forthrightly recognizes that [the defendant] is at a significantly heightened risk of complications from COVID-19 compared to the average person incarcerated at FCI Fort Dix and that he has supplied a basis for finding that extraordinary and compelling circumstances exist under Section 3582 based on his proffered medical conditions.”).

Such a concession is appropriate because the CDC has recognized that the integration of housing, food service, and workplace components “in a single physical setting” presents “unique challenges for control of SARS-CoV-2 transmission among incarcerated/detained persons, staff, and visitors.” CDC, “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. No

reasonable person—let alone someone of Mr. Khair’s age and with his medical conditions—would feel safe spending even one night in a closed facility with hundreds of others, especially knowing that staff members coming into the facility were not tested for COVID-19. Indeed, a District Judge recently expressed skepticism of the BOP’s measures to prevent another COVID-19 outbreak at Fort Dix, noting that BOP’s protocols “do not include mass-testing of inmates or any testing of staff.” *United States v. Brown*, 2020 WL 5801494, at \*3 (E.D. Pa. Sept. 29, 2020); *see also* Letter from BOP Director M.D. Carvajal to Members of Congress, June 17, 2020, [https://www.warren.senate.gov/imo/media/doc/Warren\\_Markey\\_Trahan\\_DEV.pdf](https://www.warren.senate.gov/imo/media/doc/Warren_Markey_Trahan_DEV.pdf) (“I have encouraged Wardens to identify and publish locations in the community where interested staff can voluntarily get tested; however, *we cannot mandate staff be tested.*”) (emphasis added).

Given the seriousness of Mr. Khair’s medical conditions, particularly in combination with his age, and given that rapid spread of COVID-19 is inherently more likely to happen in a prison setting—and given that there are *currently* at least 10 active cases of COVID-19 associated with FCI Fort Dix—the Court should find that extraordinary and compelling reasons exist for granting compassionate release to Mr. Khair. It is difficult to think of a less safe environment that Mr. Khair could be in with his health conditions. The Court should “not wait to decide [Mr. Khair’s] request to prevent his untimely death until it is too late to actually do

so.” *Brown*, 2020 WL 5801494, at \*5.

**C. Section 3553(a) factors**

The section 3553(a) factors support releasing Mr. Khair to a special period of supervised release with home incarceration as a condition. Counsel will not attempt to convince the Court that Mr. Khair has only a trivial portion of his sentence remaining. However, Mr. Khair is quite sick and in danger at Fort Dix, and those personal characteristics should be taken into account. *See* 18 U.S.C. § 3553(a)(1). Once again, no reasonable person his age and with his health conditions would choose to sleep with five other people in a room, *see* Ex. 11, and to share hallways, cafeterias, and bathrooms with almost 2,500 others, in a facility that has already had over 100 coronavirus infections, in which outside staff may enter without being tested, and in which there are *currently* 10 infections. Mr. Khair certainly deserves punishment for his offenses, but incarceration is not supposed to put inmates at a high risk of death or injury. The situation Mr. Khair and his family are in is cruel. The imposition of a special period of supervised release with home incarceration as a condition would continue to punish Mr. Khair for his transgressions, while recognizing that the COVID-19 crisis presents an extraordinary need to protect his life and health, however wrong his past actions may have been. A different kind of sentence for Mr. Khair is available, § 3553(a)(3), and he asks the Court to give it to him to protect his life.

Releasing Mr. Khair to home incarceration would not cause unwarranted

sentencing disparities. Indeed, another fraud defendant with more than 7 years remaining on his sentence was recently released from FCI Fort Dix due to health conditions that were less serious than Mr. Khair's. *See United States v. Brown*, 2020 WL 5801494 (E.D. Pa. Sept. 29, 2020). In *Brown*, the Court granted compassionate release to a defendant who was sentenced to 180 months in prison in 2014 for "play[ing] a central role in a sophisticated mortgage-fraud conspiracy that resulted in millions of dollars in losses to various lenders" over the course of five years. *Id.* at \*1. The defendant in *Brown* suffered from only prediabetes, whereas Mr. Khair suffers from type 2 diabetes. *Id.* Moreover, the defendant in *Brown* had no history of cancer, had not had any organs removed due to cancer, and did not have suspected cancer in any of his remaining organs. Finally, the defendant in *Brown* did not have the same mobility issues that Mr. Khair has. Although the defendant in *Brown* had more than 7 years remaining on his sentence, the Court allowed him to return home to serve merely "a one-year period of home confinement, to be followed by a four-year term of supervised release." *Id.* at \*5.

Mr. Khair does not ask for such a windfall. To the contrary, he seeks *no windfall whatsoever*, merely the ability to be incarcerated somewhere other than a tinderbox environment where COVID-19 cases continue, where staff members coming in from the outside are not tested, and where he is acutely at risk as a nearly-61 year old man who may have cancer again and who definitely suffers from chronic kidney disease, type 2 diabetes, obesity, and hypertension.

The letters from Mr. Khair's children and nephews, which are highlighted and attached as Ex. 16, show what is at stake here. In particular, the letter from Mr. Khair's 13-year-old daughter talks about how she fears that his final breath will be taken in prison. Ex. 16. A sentence of home incarceration would drastically reduce Mr. Khair's risk of severe illness or death. Undersigned counsel has spoken with Mr. Khair's wife Muhaira, who conveyed that because one of their children has a medical condition that is a COVID risk factor, the family members are very careful about not leaving the home except when absolutely necessary, and about making sure everyone wears a mask and socially distances when they must leave the home.

**D. Danger to the community**

No serious argument can be made that Mr. Khair would pose a danger to the community if released to home incarceration. He has absolutely no history of violence. Moreover, it would be incredibly difficult for Mr. Khair to engage in fraud—the only crime he's ever committed—while under home incarceration. Finally, he is considered a low recidivism risk by BOP.

**IV. Conclusion**

Because Mr. Khair's life and health are at stake, and because an alternative sentence is available, he respectfully asks the Court to reduce his term of imprisonment pursuant to § 3182(c)(1), either with or without a special term of supervised release with the condition of home incarceration.

Respectfully submitted,

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