

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

UNITED STATES OF AMERICA

v.

JOHN N. KAPOOR,

Defendant.

Criminal No.: 16-CR-10343-7-ADB

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

Defendant John Kapoor respectfully asks this Court to continue his self-surrender date to the Bureau of Prisons (“BOP”), currently set for February 2, 2021. Kapoor is well aware, and thankful, that the Court has continued his self-surrender date on several occasions already due to the COVID-19 pandemic. He is reluctant to call on the Court again, but the pandemic is at peak levels and the risk to him is as great as ever.

While this Court has previously treated all Defendants in this case similarly in terms of extending self-surrender, and Kapoor does not seek to undermine any motions his co-defendants may file, his circumstances remain unique. Of all Defendants in this case, he is the only one who is elderly, and he is at the highest risk category of hospitalization and death from the virus. Yet his unique circumstances also give hope that he will be vaccinated against COVID-19 in the coming months. Multiple COVID-19 vaccines have now been approved. The Centers for Disease Control (“CDC”) has identified individuals over 75—like Kapoor—as the second highest priority for vaccination. The state of Arizona, where he resides, is following the CDC’s approach.

Kapoor hereby represents that he will undertake and complete COVID-19 vaccination in Arizona as soon as the vaccine is made available to him there. That would be safer and more

humane than making him surrender without vaccination, including because BOP is placing unvaccinated new surrenders in extended solitary quarantine to protect existing inmates from new virus exposure, and because COVID-19 vaccination requires multiple courses over time and thus cannot simply be administered to an inmate on his way into a BOP facility.

Kapoor asks this Court to continue his self-surrender date by approximately two months, to April 6, 2021, so that he has an opportunity to undertake and complete COVID-19 vaccination in Arizona before his surrender.

BACKGROUND

The Court initially ordered each Defendant, including Kapoor, to self-surrender approximately six weeks after their sentencings. The Court subsequently extended Defendants' self-surrender dates to account for additional time needed to issue final judgments. *See* Dkt. Nos. 1223; 1271. In April 2020, in light of the COVID-19 pandemic, the government assented to a two-month extension of the self-surrender dates for Kapoor's co-defendants, which the Court granted. *See* Dkt. Nos. 1335, 1338, 1339, 1341. The government opposed Kapoor's request for a comparable extension, but the Court granted it. Dkt. No. 1359. In July, Defendants filed a joint motion, this time with the government's full assent, for another two-month extension, and the Court granted it. 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, and the Court granted it. Dkt. No. 1397.¹ Most recently, the Court continued each Defendant's surrender date again, to February 2, 2021, over the government's opposition. Dkt. No. 1419.

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

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*, 463 F. Supp. 3d 118, 125 (D. Mass. 2020).² Kapoor’s advanced age—he is now at least 77 years old—and known medical conditions place him in the highest risk category for severe illness were he to contract the virus.³ Moreover, development and approval of COVID-19 vaccines since the Court’s last continuance ruling supports his request here. Instead of being required to surrender in early February, Kapoor’s surrender should be continued so that he can undertake and complete COVID-19 vaccination in Arizona before he surrenders to BOP.

1. Globally, COVID-19 is known to have infected more than 88.2 million people and caused at least 1.9 million deaths as of January 8, 2020,⁴ and the true figures are almost certainly

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

³ As noted in the Presentence Report (“PSR”), Kapoor was born at his home in India and his mother could not recall whether he was born in 1942 or 1943. He uses August 29, 1943 as his birthday for legal purposes, but it is possible that he is a full year older. See PSR at 34 n.18. In any case, he is above the age 75 threshold for phase 1b vaccination.

⁴ *Coronavirus World Map: Tracking the Global Outbreak*, The N.Y. Times (Jan. 8, 2021), <https://perma.cc/D5V8-62CW>.

higher. The United States accounts for a large fraction of the known cases and deaths, as the virus has infected more than 20 million Americans and caused nearly 360,000 deaths.⁵ The pandemic has not abated. Instead, the total infection count in the United States has *more than doubled* from the 9.1 million figure the CDC reported when Kapoor moved for his most recent continuance two months ago, and the death count has gone up by more than 100,000 in that time.⁶

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, then-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

⁵ Centers for Disease Control, “CDC COVID Data Tracker” (Jan. 8, 2021), <https://perma.cc/7XXY-N8PD>.

⁶ *See* Centers for Disease Control, “CDC COVID Data Tracker” (Nov. 2, 2020), <https://perma.cc/P9RV-H2GU>.

home confinement.⁷ In assessing which inmates should be released, Attorney General Barr directed BOP to consider “the totality of circumstances” regarding each inmate, including the “danger 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-19.⁸ 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. FCP Duluth—the facility where Kapoor has been designated by the Bureau of Prisons—has not been spared from the virus. As of January 6, at least 215 out of the 305 inmates there who have been tested have tested positive.⁹ Moreover, as the government learned last November, inmates at the facility are continuing to disregard quarantine guidance, resulting in active community spread of the virus in the facility. *See* Dkt. No. 1416 at 5.

5. 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*, 463 F. Supp.

⁷ *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>.

⁸ Bureau of Prisons, “COVID-19 Action Plan: Phase Five” (Mar. 31, 2020), <https://perma.cc/YRR4-UNMK>.

⁹ BOP, “COVID-19 Inmate Test Information,” (Jan. 6, 2021), <https://perma.cc/5CRA-AGPP>.

3d at 125. Being in his late 70s is more than reason enough to conclude that Kapoor faces an acute risk of serious consequences as a result of a COVID-19 infection. *Id.* at 121 (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, he suffers from a host of underlying health conditions that also increase his risk of serious infection. *See* PSR at 39–40, ¶¶ 185–87 (documenting 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, e.g., United States v. Bray*, No. 19-20216-9, 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). As explained by Dr. Kapoor’s personal physician, his medical history “place[s] him at an increased risk of serious medical illness or death should he contract the COVID-19 virus,” and it would be “medically advisable” to allow Kapoor to undertake and complete COVID-19 vaccination prior to surrendering to BOP custody, in order to protect against this significant risk. *See* Ex. A (1/8/21 Ltr. from Dr. Helene Wechsler).

6. “[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 Perkins*, 2020 WL

4783558, at *9 (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).

7. 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. He 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.

8. Courts have considered whether “a vaccine or cure is yet available” in granting defendants’ motions to extend their surrender dates. *See, e.g., United States v. Decoteau*, No. CV 4:18-40042-TSH, 2020 WL 7042941, at *2 (D. Mass. Dec. 1, 2020); *United States v. Stavrakis*, No. CR ELH-19-00160, 2020 WL 5747196, at *2 (D. Md. Sept. 25, 2020). Since this Court’s most recent continuance orders, multiple vaccines for COVID-19 have been approved, and plans for national vaccination are underway. The CDC has identified individuals over 75 as the second highest priority for vaccination, after health care personnel and long-term care facility residents.¹⁰ In particular, the CDC advises that “[i]n Phase 1b, COVID-19 vaccine should be offered to persons aged ≥ 75 years and non–health care frontline essential workers.”¹¹ Arizona, where Kapoor resides,

¹⁰ *See* Dooling K, et al., The Advisory Committee on Immunization Practices’ Updated Interim Recommendation for Allocation of COVID-19 Vaccine (Jan 1, 2021), <https://perma.cc/WT97-SJ7V>.

¹¹ *Id.*

is following the CDC's guidance and will make vaccines available to seniors 75 and older in phase 1b, which the state had hoped to being by late January although the schedule remains fluid.¹²

9. Individuals are required to take multiple courses to complete COVID-19 vaccination.¹³ Thus, COVID-19 vaccination cannot be accomplished by giving a single course to a new surrender upon his report to a BOP facility. Moreover, on information and belief, BOP is placing new surrenders into solitary quarantine for at least 14 days in order to protect existing inmates and prison staff from additional virus exposure. Allowing Kapoor to undertake and complete COVID-19 vaccination before his surrender, and present proof of the same to BOP, could avoid such extreme measures, which absent the pandemic he surely would not be subject to upon reporting to a minimum security federal camp for a first-time, non-violent offense.

10. 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 changing circumstances of the COVID-19 pandemic. Another two-month continuance is warranted now given the increasing rates of COVID-19 infections, and the possibility that such a continuance would allow Kapoor to undertake and complete COVID-19 vaccination in Arizona before he surrenders to BOP.

CONCLUSION

Defendant John Kapoor respectfully requests that the Court continue his self-surrender date to April 6, 2021.

¹² See Office of the Governor Doug Ducey, "State Committee Prioritizes Those 75 And Older For Second Phase Of COVID-19 Vaccination" (Dec. 28, 2020), <https://perma.cc/7753-PZM4>.

¹³ Centers for Disease Control and Prevention, "Frequently Asked Questions About Vaccination" (Dec. 29, 2020), <https://perma.cc/4AGJ-QW6H>.

Dated: January 8, 2021

Respectfully submitted,

/s/ Kosta S. Stojilkovic

Beth A. Wilkinson (admitted *pro hac vice*)
bwilkinson@wilkinsonstekloff.com

Kosta S. Stojilkovic (admitted *pro hac vice*)
kstoilkovic@wilkinsonstekloff.com

Chanakya A. Sethi (admitted *pro hac vice*)
csethi@wilkinsonstekloff.com

Wilkinson Stekloff LLP

2001 M Street NW

Washington, D.C. 20036

Telephone: (202) 847-4000

Brien T. O'Connor (BBO# 546767)

brien.o'connor@ropesgray.com

Aaron M. Katz (BBO# 662457)

aaron.katz@ropesgray.com

Ropes & Gray LLP

Prudential Tower 800 Boylston Street

Boston, MA 02199

Telephone: (617) 951-7000

Attorneys for Dr. John Kapoor

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
Counsel for Dr. John Kapoor

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
Kosta S. Stojilkovic
Counsel for Dr. John Kapoor