

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

**Leave To File Granted 4/27/2000  
(Dkt. No. 1357)**

**DEFENDANT JOHN KAPOOR’S REPLY IN SUPPORT OF  
MOTION TO CONTINUE SELF-SURRENDER DATE**

The government’s initial position—that Dr. Kapoor should be forced to self-surrender to BOP custody in the middle of a global pandemic—is baseless and cruel. Dr. Kapoor is at the highest risk of suffering serious consequences, including death, as a result of a COVID-19 infection. All available evidence shows that “older adults” and those with “underlying medical conditions” face a “higher risk for severe illness from COVID-19.”<sup>1</sup> Dr. Kapoor, who turns 77 this summer and has a relevant pre-existing condition, *see* Mot. at 8, would face a substantial risk of death were he infected. Surely that is not what this Court wants to happen. Indeed, when sentencing Dr. Kapoor, the Court referenced its own father who lived into his 90s, and the Court “attempted to fashion a sentence that is fair, but also acknowledges [Dr. Kapoor’s] age and gives [him] some light at the end of the tunnel, so that [he] can be released from prison” and attend to “family and . . . personal affairs.” 1/23/20 Tr. 59:13–60:2. Given the pandemic, maintaining the May 19 surrender date is plainly inconsistent with that goal.

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<sup>1</sup> *See* Centers for Disease Control & Prevention, “At Risk For Severe Illness,” *available at* <https://tinyurl.com/CDChigherrisk>.

The government's fallback position—conditioning delayed surrender on electronic monitoring or house arrest—unfairly singles out Dr. Kapoor for worse treatment than his co-defendants. Social distancing imposes practical restrictions on us all, but the government has not used that common fact to seek more restrictive conditions for anyone in this case other than Dr. Kapoor. For his trial co-defendants, the government has already agreed to delayed surrender with no change in conditions. Moreover, although it maintains that Dr. Kapoor, “along with two government cooperators, was principally responsible for the criminal scheme in this case,” Opp. at 3, the government invited the same continuance of surrender for Michael Babich and Alec Burlakoff with no change in their conditions. *See* Ex. A (4/7/20 email from N. Yeager to defense counsel expressing the government's “willing[ness] to assent to an extension of the reporting date for a period of 60 days for defendants who, in our view, do not present a risk of flight”). Dr. Kapoor expects that, as soon as his motion is resolved, this Court will see an assented-to motion to extend Mr. Babich and Mr. Burlakoff's surrender dates. Only for Dr. Kapoor is the government trying to condition delayed surrender on more restrictive conditions. *See* Ex. B (4/7/20 email from N. Yeager to K. Stojilkovic); Ex. C (4/8/20 email from K. Stojilkovic to N. Yeager).

Yet the government does not cite *any* evidence justifying such disparate treatment. The government has sought more restrictive conditions for Dr. Kapoor on at least four prior occasions, and has lost every time. *See* Mot. at 8–9. The government now notes that Dr. Kapoor is a convicted defendant. Opp. at 4. But that was true the last *three* times the parties argued this issue—after the jury's verdict, at sentencing, and on the motion for bail pending appeal—and each time this Court found that Dr. Kapoor was not a flight risk. Similarly, the government now points to the length of Dr. Kapoor's sentence as a reason why he might flee. *Id.* But that was true the last *two* times the parties argued this issue. That includes the Court's rejection of the same requested relief at Dr.

Kapoor's sentencing, where the Court found that Dr. Kapoor "has shown up at every single thing he is supposed to show up for and I'm going to give him the benefit of the doubt and assume that he will continue to do that." 1/23/20 Tr. 62:24–63:1. It also includes the Court's finding in the motion for release pending appeal that Dr. Kapoor "is neither a flight risk nor a danger to the community." Dkt. No. 1252 at 4.

The only new argument the government can muster is to suggest that Dr. Kapoor might really try to flee this time because he lost his motion for bail pending appeal. Opp. at 4. But a defendant lawfully seeking relief and not obtaining it does not make him a flight risk. It just confirms what Dr. Kapoor has done at all times since he was charged, which is to submit disputes to this Court and abide by its rulings, win or lose. Plus, the bail pending appeal issue is very much alive and is now before the First Circuit. There, the government devoted 84 pages of briefing to resisting the request of Dr. Kapoor and his trial co-defendants for bail pending appeal. But, despite the volume of its appellate briefing, the government did not challenge this Court's finding that Dr. Kapoor is not a flight risk. Dr. Kapoor understands that deference to this Court's factual findings may have informed the government's decision not to raise the issue on appeal. See Opp. at 2 n.3. But the same deference should also inform the government's attempt to revisit the issue here without citing any new facts.

Finally, the government mentions the case of Carlos Wanzeler, a *Brazilian citizen* who fled the United States *prior to his arrest* and *never appeared in court*. Opp. at 3. Dr. Kapoor, in contrast, is an American citizen who has complied with every court-imposed requirement and appeared at every required hearing in the two and a half years since his arrest. That includes his sentencing, when he knew he would face the government's request for a 15-year prison term, the emotional statements of patients, and the possibility of remand on the spot. There is simply no

basis for comparing him to Mr. Wanzeler. Indeed, in his motion, Dr. Kapoor challenged the government to produce evidence that he has substantial assets overseas. *See* Mot. at 10–11. Despite previously using that accusation as the reason for its flight risk concerns, *see* 1/23/20 Tr. 62:16–20 (government’s claim that Dr. Kapoor has “substantial resources, many of which—much of which is overseas”), when challenged to substantiate it the government has fallen utterly silent. In sum, the relevant facts do not distinguish Dr. Kapoor from his co-defendants, and the only things that do—his birth in India and his asset level in the United States—are not valid bases for treating him worse than the others.

Ultimately, the undersigned counsel suspect that the government’s position is driven more by perception than reality. For two and a half years, the government has demonized Dr. Kapoor in both this Court and the court of public opinion. Agreeing to even a simple continuance of surrender is inconsistent with that campaign. But for two and a half years, Dr. Kapoor has been compliant. Even now, while he pursues his appeals and the financial aspects of his sentence threaten most of his remaining net worth, he is negotiating through his lawyers on a plan to make additional large payments to government escrow that would be applied to his financial obligations if his appeals are not successful. In other words, he continues to act in good faith and play by the rules. It is not too much to ask that he be treated fairly in return.<sup>2</sup>

Dr. Kapoor requests that the Court continue his self-surrender date by approximately 60 days, to July 21, 2020, without a change in his current conditions of release.

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<sup>2</sup> If the government is concerned that the pandemic may require additional continuances that stretch for longer periods of time, there are other avenues open to the Court and the parties, including a sentence modification that would involve home confinement. But that is not at issue here. The only question here is whether Dr. Kapoor should get the same two-month continuance of surrender that the government has offered and agreed to for his co-defendants.

Dated: April 27, 2020

Respectfully submitted,

/s/ Kosta S. Stojilkovic

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*Attorneys 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

# **EXHIBIT A**

**From:** [Yeager, Nathaniel \(USAMA\)](#)  
**To:** [William Fick](#); [T Miner](#); [Megan Siddall](#); [Kendall, Michael](#); [alexandra.gliga@whitecase.com](mailto:alexandra.gliga@whitecase.com); [pete@horstmannlaw.com](mailto:pete@horstmannlaw.com); [Daniel Marx](#); [Beth Wilkinson](#); [George W. Vien](#); [Jensen, Mark](#); [Sollers, Wick](#); [Kosta Stojilkovic](#)  
**Cc:** [Wyshak, Fred \(USAMA\)](#); [Lazarus, David \(USAMA\)](#); [Quinlivan, Mark \(USAMA\)](#)  
**Subject:** Extension of Report Dates  
**Date:** Tuesday, April 7, 2020 9:34:36 AM

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Counsel:

Hope all are well. Consistent with the Department's guidance regarding the COVID 19 pandemic, we are at present willing to assent to an extension of the reporting date for a period of 60 days for defendants who, in our view, do not present a risk of flight. As you know, we did not object to self-reporting dates for most of the defendants in this case. Please know that our willingness to join such a motion is based upon an assessment of the current situation and we reserve the right to change our position should circumstances change. If you are interested in filing such a motion, please contact us today to discuss our position on your respective clients before informing the court that we assent. Thanks.

Nat

Nathaniel Yeager | Assistant United States Attorney | District of Massachusetts  
Phone: 617.893.5722 |



# **EXHIBIT B**

**From:** [Yeager, Nathaniel \(USAMA\)](#)  
**To:** [Kosta Stojilkovic](#)  
**Cc:** [Wyshak, Fred \(USAMA\)](#); [Lazarus, David \(USAMA\)](#); [Quinlivan, Mark \(USAMA\)](#)  
**Subject:** RE: Extension of Report Dates  
**Date:** Tuesday, April 7, 2020 10:17:18 AM

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We believe that your client is a flight risk, but are open to discussing conditions that might lead us to assent to your motion. I would need to obtain approval for such an agreement, but we are willing to discuss it.

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**From:** Kosta Stojilkovic <[kstojilkovic@wilkinsonwalsh.com](mailto:kstojilkovic@wilkinsonwalsh.com)>  
**Sent:** Tuesday, April 7, 2020 9:43 AM  
**To:** Yeager, Nathaniel (USAMA) <[NYeager@usa.doj.gov](mailto:NYeager@usa.doj.gov)>  
**Cc:** Wyshak, Fred (USAMA) <[FWyshak@usa.doj.gov](mailto:FWyshak@usa.doj.gov)>; Lazarus, David (USAMA) <[dlazarus2@usa.doj.gov](mailto:dlazarus2@usa.doj.gov)>; Quinlivan, Mark (USAMA) <[MQuinlivan@usa.doj.gov](mailto:MQuinlivan@usa.doj.gov)>  
**Subject:** RE: Extension of Report Dates

Hi Nat. Is Dr. Kapoor covered by this offer, or do you maintain your concern that he is a flight risk?

Thanks,  
Kosta

**Kosta Stojilkovic** | Partner

**WILKINSON WALSH LLP**

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[wilkinsonwalsh.com](http://wilkinsonwalsh.com)

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**Sent:** Tuesday, April 7, 2020 9:34 AM  
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**Cc:** Wyshak, Fred (USAMA) <[Fred.Wyshak@usdoj.gov](mailto:Fred.Wyshak@usdoj.gov)>; Lazarus, David (USAMA) <[David.Lazarus2@usdoj.gov](mailto:David.Lazarus2@usdoj.gov)>; Quinlivan, Mark (USAMA) <[Mark.Quinlivan@usdoj.gov](mailto:Mark.Quinlivan@usdoj.gov)>  
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60 days for defendants who, in our view, do not present a risk of flight. As you know, we did not object to self-reporting dates for most of the defendants in this case. Please know that our willingness to join such a motion is based upon an assessment of the current situation and we reserve the right to change our position should circumstances change. If you are interested in filing such a motion, please contact us today to discuss our position on your respective clients before informing the court that we assent. Thanks.

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# **EXHIBIT C**

**From:** [Kosta Stojilkovic](#)  
**To:** [Yeager, Nathaniel \(USAMA\)](#)  
**Cc:** [Wyshak, Fred \(USAMA\)](#); [Lazarus, David \(USAMA\)](#); [Quinlivan, Mark \(USAMA\)](#)  
**Subject:** RE: Extension of Report Dates  
**Date:** Wednesday, April 8, 2020 4:00:00 PM

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Nat,

I've discussed with my client. We don't believe that he, alone among the defendants in this case, should have to change his conditions of release in order to obtain a continuance of his surrender date. A few reasons for this:

1. Judge Burroughs has held on at least four occasions that Dr. Kapoor is not a flight risk—in rejecting electronic monitoring following his arrest, after the jury's verdict last May, at his sentencing this January, and in her ruling this March on our bail pending appeal motion. She has also granted two prior continuances of his surrender date without changing his conditions of release.
2. We don't think anything has happened since those rulings that would warrant a finding that Dr. Kapoor is now a flight risk. Indeed, given current limitations and risks of air travel as well as the state of the pandemic in India, the basis for a flight risk finding now is weaker than it's ever been.
3. Dr. Kapoor has complied fully with his conditions of release, spanning nearly two and a half years. As a practical matter, he is rarely leaving his house now because of the risk of coronavirus exposure. But that is true for most of us, including the other defendants, yet the government is not conditioning its assent to their delayed surrender on any change in their conditions of release.
4. The CDC guidance on coronavirus confirms that Dr. Kapoor is at far more risk than the other defendants in this case. Per the CDC, 8 out of 10 coronavirus deaths in the U.S. have been in adults 65 and older, and the risk increases with age. Dr. Kapoor turns 77 in August. Moreover, he has cardiovascular disease (as noted in his PSR he takes medication for hypertension), and this is a known co-morbidity that further increases his risk if he were to contract the virus.

I hope you will reconsider and assent to a simple continuance of his release date as you are doing for the other defendants. Please let me know your position and we'll proceed accordingly.

Thanks, and stay well.

Kosta

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**From:** Yeager, Nathaniel (USAMA) <Nathaniel.Yeager@usdoj.gov>  
**Sent:** Tuesday, April 7, 2020 10:17 AM  
**To:** Kosta Stojilkovic <kstojilkovic@wilkinsonwalsh.com>  
**Cc:** Wyshak, Fred (USAMA) <Fred.Wyshak@usdoj.gov>; Lazarus, David (USAMA) <David.Lazarus2@usdoj.gov>; Quinlivan, Mark (USAMA) <Mark.Quinlivan@usdoj.gov>  
**Subject:** RE: Extension of Report Dates

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