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March 16, 2021

BY ECF

The Honorable Vernon S. Broderick
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: United States v. Ng Lap Seng, S5 15 Cr. 706 (VSB)

Dear Judge Broderick:

Counsel for Defendant Ng Lap Seng (“Mr. Ng”) respectfully writes in the above-captioned matter in response to the Government’s letter of earlier today (Doc. 991).

In an opinion and order entered yesterday, the Court granted “compassionate release” to Mr. Ng and reduced his sentence to time served. (Doc. 989). In its letter, the Government requests both an emergency stay and reconsideration of the Compassionate Release Order, on the basis that Mr. Ng had “declined to be vaccinated against COVID-19 on February 9, 2021, thereafter changed his mind and received his first dose of the Moderna vaccine on February 24, 2021, and is scheduled to receive his second dose next week.” (Doc. 991 at 1). The Court has granted the stay request and ordered Mr. Ng’s response due by close of business tomorrow. (Doc. 992 at 1). For the following reasons, the Government’s reconsideration request should be denied.

The Government argues that Mr. Ng’s “refusal to be vaccinated and/or vaccination substantially diminishes any otherwise-applicable basis to be considered for early release in light of the pandemic.” (Doc. 991 at 2). But Mr. Ng’s decision to decline to take the vaccine in February

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2021 was based on legitimate concerns regarding its potential side effects. When a Federal Bureau of Prisons (“BOP”) officer asked Mr. Ng last month whether he would like to sign up to take the vaccine, he responded that he wants to first consult with a physician and family members regarding the health risks associated with the vaccine. After Mr. Ng was informed by a BOP nurse that the benefits of the vaccine outweigh any risks, he filed an application to receive the vaccine. According to an “online survey of 5,537 Americans conducted between December 4 and 14, 2020,” just “53% said they were willing to get the vaccine.” <https://www.biospace.com/article/47-percent-of-americans-still-hesitant-to-get-covid-19-vaccine-new-poll-says/> (last visited Mar. 16, 2021). No one should be faulted for taking time to learn about the benefits and risks of a vaccine, especially inmates who have restricted access to the news.

Moreover, the Government totally ignores the emergence of multiple new COVID-19 variants that “have been documented in the United States and globally during this pandemic” and that “seem to spread more easily and quickly than other variants.” *See* <https://yalehealth.yale.edu/yale-covid-19-vaccine-program/covid-19-vaccination-faqs> (last visited Mar. 16, 2021). Notably, the “percentage of positive antibodies that neutralized the South African variant was 12.4 fold lower for the Moderna vaccine than against the original coronavirus and 10.3 fold lower for the Pfizer vaccine.” <https://www.webmd.com/vaccines/covid-19-vaccine/news/20210309/s-african-variant-challenges-pfizer-moderna-vaccines> (last visited Mar. 16, 2021).

The string of cases relied upon by the Government (*see* Doc. 991 at 2) are materially distinguishable from Mr. Ng’s case in multiple ways. Most significantly, none of the cited cases concerned a defendant who has already been granted compassionate release.

The Government asserts that it did not learn about the vaccine information regarding Mr. Ng until this morning. (Doc. 991 at 1). But the Government has been in constant communication with BOP officials about these compassionate release proceedings,¹ and Mr. Ng’s emergency motion for reconsideration (from the initial denial compassionate release) was pending since December 15, 2020 (*see* Doc. 974). The Government provides no explanation whatsoever as to the BOP’s failure to alert the Government during the past several weeks about the allegedly “material” vaccine information.

Finally, the Court should deny the Government’s reconsideration request on humanitarian grounds. Immediately after receiving the Court’s well-reasoned and compassionate decision granting compassionate release to Mr. Ng, we notified his representative in the United States who then communicated the decision to Mr. Ng and to his family in China. As one can only imagine,

¹ *See, e.g.*, Doc. 936 (4/10/20 Gov’t Opp. to Compassionate Release Mot.) at 20 n.5 (“The Government has confirmed [a certain] fact with the BOP.”); Doc. 960 (7/22/20 Gov’t Letter) at 2 & Ex. A (noting that the BOP had sent the Government Mr. Ng’s July 2, 2020, medical records); Doc. 980 (1/8/21 Gov’t Opp. to Mr. Ng’s Reconsideration Mot.) at 2 (noting communications with the BOP regarding a December 2020 event).

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everyone was relieved and very happy, generating genuine emotional relief, especially to Mr. Ng's children and grandchildren who had prayed each day for his healthy return to his home in Macau and who have not seen their father/grandfather for years.² It would be the ultimate form of cruelty to now have to inform Mr. Ng and his family members that upon reflection, the Court changed its mind based on a Hail Mary attempt by the Government after the fact. Having waited months for Your Honor's decision on Mr. Ng's reconsideration motion, we respectfully ask that the Court abide by its original position, and do nothing to further delay Mr. Ng's return home, especially when the Government's letter is completely devoid of any of the humanitarian considerations that helped fueled the Court's opinion.

With great respect for the Court's independence and integrity, we ask the Court not to interfere in any fashion with the Compassionate Release Order, which is already being processed by the BOP. (Ex. 2, Email from BOP Attorney).³

² This morning, Mr. Ng's daughter, Janet, sent his representative a message (via WeChat) to be forwarded to Your Honor. (Ex. 1, Thank You Message from Mr. Ng's Daughter). In the message, Janet thanks the Court for compassionately releasing her father. (*Id.* at 1–2). Janet also states, “My family, my kids, and my relatives all want to express their deep gratitudes to you and say thank you, they are happy and his siblings cried for my father's release.” (*Id.* at 1). When Janet sent the message, she did not know that the Government was going to seek reconsideration of the Compassionate Release Order (and based upon information and belief, she still does not know about the Government's efforts to get the order vacated).

³ In a footnote, the Government asserts that “[e]ven if the Court is not inclined to grant reconsideration on the merits,” the Court should stay its Compassionate Release Order “for a sufficient period such that the defendant is not released to ICE custody prior to two weeks after receiving his second shot.” (Doc. 991 at 3 n.2). The Government's alleged “public health and safety” concerns (*see id.*) are unfounded. First, the undersigned and other of Mr. Ng's representatives will try to ensure that he will get a second dose of the Moderna vaccine while he is in ICE custody (and if that is not possible, then immediately after his removal from the United States). Second, Mr. Ng's immigration attorney has already been in touch with an ICE officer to arrange for a private charter for Mr. Ng's flight to China. Third, Mr. Ng is expected to be in ICE custody for a short period of time because he is subject to a final judicial removal order (*see* Doc. 782) and because the removal process has already been initiated.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brafman", written over a horizontal line.

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