

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

1:18-CR-0283 (LEK)

THOMAS K. LAGAN,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

Defendant Thomas Lagan, currently incarcerated at Brooklyn Metropolitan Detention Center (“MDC”), has filed a motion under 18 U.S.C. § 3582(c) asking, in light of the COVID-19 pandemic, for compassionate release from MDC and for an order remanding him to temporary home confinement. Dkt. Nos. 82-1 (“Motion”); 87 (“Reply”). The Government opposes the Motion. Dkt. Nos. 83 (“Opposition”); 90 (“Sur-Reply”). For the reasons that follow, the Court denies Lagan’s Motion.

II. BACKGROUND

A. Charges, Plea, and Sentencing

Prior to his incarceration, Lagan worked as an attorney and investment advisor. Opp’n at 2. On September 6, 2018, a federal grand jury indicted Lagan on one count of conspiracy to launder money and two counts of filing a false income tax return, in connection with a fraudulent scheme in which he stole millions of dollars from elderly clients and their estates. Dkt. No. 1 (“Indictment”). Lagan pled guilty to the conspiracy charge and one count of filing a false tax return on August 7, 2019, Dkt. No. 30, and per the Court’s order, he surrendered to the custody of the United States Marshals on September 23, 2019, Dkt. No. 34.

In parallel state proceedings arising out of the same fraudulent scheme, Lagan pled guilty on April 30, 2019 in Albany County Court to a charge of grand larceny in the first degree. Dkt. No. 49 (“Presentence Investigation Report” or “PSIR”) ¶ 61. On October 8, 2019, the Albany County Court sentenced Lagan to four to twelve years imprisonment for his state offense. Id.

On December 11, 2019, this Court sentenced Lagan to a total term of imprisonment of 78 months for his federal crimes and ordered that the federal sentence would run concurrently to the New York state sentence. Dkt. No. 58 (“Judgment”). The 78-month sentence fell at the low end of the Sentencing Guidelines range, which ran from 78 to 97 months. PSIR ¶ 80.

On January 8, 2020, the Bureau of Prisons (“BOP”) transported Lagan from the Rensselaer County Jail to MDC, where he still awaits assignment to the facility in which he will serve the balance of his sentence. Mot. at 4; Opp’n at 3. BOP has temporarily suspended transfers of inmates from one facility to another because of the COVID-19 pandemic, “making it unlikely that [Lagan] will be transported to a designated facility any time soon.”. See United States v. Credidio, No. 19-CR-111, 2020 WL 1644010, at *1 (S.D.N.Y. Apr. 2, 2020).

B. The Instant Motion

On April 24, 2020, Lagan filed the instant Motion, arguing that, in light of the COVID-19 pandemic, “extraordinary and compelling reason[s]” warrant his release under § 3582. See Mot. at 22 (quoting 18 U.S.C. § 3582(c)(1)(A)). In support of his Motion, Lagan points first to the “specific conditions at the MDC,” Mot. at 7–9; Reply at 1–4, asserting “that MDC Brooklyn has proven—recently and repeatedly—that they are unable to protect the health and safety of defendants in their custody,” Mot. at 7.¹ According to Lagan, the conditions at MDC are

¹ The Motion also includes significant discussion of the dangers posed by the spread of COVID-19 in prisons and jails more generally, as well as Attorney General William Barr’s memoranda to the Department of Justice regarding COVID-19. Mot. at 9–15.

especially dangerous to him because certain health conditions—namely his age (62), obesity, “a family history of heart disease and lung cancer,” and his history of heavy smoking and drinking— “make him more vulnerable to COVID-19.” Mot. at 5, 22; see also Dkt. No. 82-2 (“Medical Records”) (confirming that Lagan suffers from obesity and has a history of significant alcohol consumption). Lagan also points out that his crimes were nonviolent, and that he poses little danger of recidivism since he will never be able to work as a lawyer or trusted financial advisor again. Mot. at 19; Reply at 5.

On this basis, Lagan requests one of three alternative forms of relief. Alternative one is “interim home confinement.” Mot. at 2–3. Specifically, Lagan asks the Court to order BOP under § 3582 to transfer him to home confinement until BOP designates where he will serve the bulk of his sentence. Id. He would then self-surrender once the BOP designates him to a correctional institution. Id.

Alternative two is “full home confinement.” Id. at 3. In the event that the Court cannot grant his request for interim home confinement, Lagan asks the Court to order his compassionate release and then order “that he serve the resulting balance of his sentence at his home with a leg monitor and under such other conditions that this Court deems appropriate.” Id.

Failing that, alternative three is “full home confinement unless the BOP allows a furlough.” Id. Specifically, Lagan asks the Court to issue an order presenting the BOP with a choice: either quickly furlough Lagan under 18 U.S.C. § 3622,² or the Court will order his full compassionate release. Id.; see also Reply at 4 (“[T]his Court has jurisdiction to order

² Section 3622 permits BOP to furlough an inmate under certain conditions. See 18 U.S.C. § 3622. The Court has no authority to order such relief itself, see United States v. Roberts, No. 18-CR-528, 2020 WL 1700032, at *3 (S.D.N.Y. Apr. 8, 2020) (“[T]he decision of whether to grant Ms. Roberts a furlough under Section 3622 is committed to sole discretion of the BOP.”), hence Lagan’s somewhat unorthodox request.

compassionate release and should do so unless the BOP and the Department of Justice allow a furlough . . . so that [Lagan] can leave the MDC while remaining in its custody.”).

Lagan does not appear to have exhausted his administrative remedies by filing a request for release with the MDC warden or any other BOP official. See generally Mot.; Reply.

III. LEGAL STANDARD

As amended by the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), 18 U.S.C.

§ 3582(c)(1)(A) authorizes courts to modify terms of imprisonment:

upon motion of the Director of the [BOP], or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

§ 3582(c)(1)(A).

Section 1B1.13 of the United States Sentencing Guidelines contains the only policy statement issued by the Sentencing Commission pertaining to compassionate release. This policy statement, which has not been amended since the passage of the First Step Act, states, in relevant part:

Upon motion of the Director of the [BOP] under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction;
...

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g);

and (3) the reduction is consistent with this policy statement.

§ 1B1.13.

Section 1B1.13 provides that extraordinary and compelling reasons exist in the following situations:

(A) Medical Condition of the Defendant.—

(i) 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. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the [BOP], there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

§ 1B1.13 cmt. n.1.

IV. DISCUSSION

A. Extraordinary and Compelling Reasons

Lagan has failed to show that extraordinary and compelling reasons justify his release.³ See United States v. Belle, No. 18-CR-117, 2020 WL 2129412, at *2 (D. Conn. May 5, 2020) (“[T]he defendant has the burden to show he is entitled to a sentence reduction.”).

To begin, many courts—including this Court—have based their resolution of compassionate release requests in the COVID-19 era on whether the inmate-movant had an underlying medical condition that placed her or him at risk of developing a severe case of the illness. See, e.g., United States v. Logan, No. 12-CR-307, Dkt. No. 140, at 10 (N.D.N.Y. April 22, 2020) (Kahn, J.) (determining that the confluence of the COVID-19 pandemic and the defendant’s medical conditions, including “diabetes, hypertension, hypercholesterolemia, and coronary artery disease,” justified release); United States v. Colvin, No. 19-CR-179, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) (diabetes and high blood pressure); United States v. Sawicz, No. 08-CR-287, 2020 WL 1815851, at *2 (E.D.N.Y. Apr. 10, 2020) (finding that “the

³ Because the Court finds that Lagan’s claim fails on the merits, it need not address whether to excuse Lagan’s failure to exhaust his administrative remedies. United States v. Zehner, No. 19-CR-485, 2020 WL 1892188, at *2 (S.D.N.Y. Apr. 15, 2020) (“The Court need not reach the question of whether Defendant’s failure to complete administrative exhaustion bars his application [for compassionate release], because the request for release can be denied on the merits.”).

COVID-19 pandemic, combined with” hypertension, constitutes an extraordinary and compelling reason). In making such a determination, numerous courts have looked to guidelines issued by the Centers for Disease Control and Prevention (“CDC”) as to what conditions place an individual “at higher risk for severe illness.” See, e.g., United States v. Zukerman, No. 16-CR-194, 2020 WL 1659880, at *3–4 (S.D.N.Y. Apr. 3, 2020) (granting release where defendant was elderly, obese, diabetic, and had high blood pressure, all risk factors identified by the CDC); United States v. Park, No. 16-CR-473, 2020 WL 1970603, at *1 (S.D.N.Y. Apr. 24, 2020) (granting release where defendant had CDC-identified risk factors, including asthma and a compromised immune system).

Here, Lagan asserts that he “is 62 years old, obese, has a family history of heart disease and lung cancer and he has been a heavy smoker and alcohol drinker, making him more vulnerable to COVID-19.” Mot. at 5. He also states that he has sleep apnea. Reply at 1. And he has provided documentation of these conditions in the form of a medical history from his primary care physician. See Medical Records at 2. However, while similar to conditions the CDC recognizes as elevating an individual’s risk for severe illness, none of Mr. Lagan’s conditions are squarely on the CDC’s list. Specifically, where the CDC states that “[p]eople 65 years and older” are at high-risk for severe illness from COVID-19, CDC High-Risk List, Lagan is 62, Medical Records at 2. The CDC also states that “[p]eople who have serious heart conditions” are at risk, CDC High-Risk List, but Lagan claims only “a family history of heart disease,” Medical Records at 2. And, according to the CDC, “[p]eople with severe obesity (body mass index [BMI] of 40 or higher)” are high-risk, CDC High-Risk List, but as of December 2016, Lagan’s BMI was only “30-39.9,” Medical Records at 2. Perhaps more importantly, neither Lagan’s own Medical Records nor his health records from the BOP—submitted by the

Government in support of their Opposition—indicate that Lagan suffers from any of the other primary risk factors identified by the CDC and looked to by courts, such as asthma, diabetes, or immunocompromization. See Medical Records; Dkt. No. 83-4 (“BOP Health Records”); see also PSIR ¶ 70 (“The defendant has no . . . reported no medical problems or medications.”).

Lagan asserts that his combination of risk factors places him at “extraordinary risk of severe illness and death from COVID-19.” Mot. at 22. But he offers little more than his say-so in support of this assertion and does not proffer any authority that might buttress his claim that his constellation of health conditions makes him especially vulnerable to COVID-19.⁴ The Court is sympathetic to Lagan’s situation, and does not wish him—or anybody else—to get sick while in prison, but it cannot release Lagan merely upon his own assertion that he is at high risk. See United States v. Johnson, No. 98-CR-860, 2020 WL 2124461, at *2 (E.D.N.Y. May 5, 2020) (“Johnson’s health conditions do not meet the standard of extraordinary or compelling circumstances, even in light of the COVID-19 pandemic. He has not demonstrated that his medical conditions are serious in that, for example, they significantly affect his functioning or threaten his life.”); United States v. Washington, No. 14-CR-215, 2020 WL 1969301, at *4 (W.D.N.Y. Apr. 24, 2020) (finding no extraordinary and compelling reasons for release when defendant submitted no medical evidence showing that COVID-19 posed increased risk to him, despite presence of COVID-19 at defendant’s facility).

Of course, Lagan also points to the “dire conditions” at MDC to support his compassionate release request. Mot. at 22. The Court acknowledges that, even now, litigation is

⁴ Lagan does submit an affidavit from Dr. Brie Williams, which discusses the risk of spread of COVID-19 in prisons generally. See Dkt. No. 82-4 (“Williams Affidavit”). But there is no indication that Dr. Williams examined Lagan, and the affidavit does not describe how Lagan’s particular characteristics place him in the high-risk pool. Id.

pending in the Eastern District of New York regarding whether the conditions of confinement at MDC are so dangerous as to constitute a violation of the Eighth Amendment, see Chunn v. Edge, No. 20-CV-1590 (E.D.N.Y. filed Mar. 27, 2020), and that the most recent information arising out of that lawsuit suggests that conditions at the MDC are, indeed, hazardous, see id. at Dkt. No. 72-1 (inspection report of plaintiffs' expert Dr. Homer Venters). Without downplaying the seriousness of the situation at MDC in any way, these facts are insufficient to establish and extraordinary and compelling reason justifying release in the absence of Lagan demonstrating a "particular vulnerability to contracting a deadly case of COVID-19." Logan, No. 12-CR-307, at 8 n.4; see also Johnson, 2020 WL 2124461, at *2 ("COVID-19 poses a risk to the imprisoned population . . . , but Johnson has presented me with no basis on which I can conclude that his particular risk is exceptional."). In this vein, the Court finds persuasive the reasoning of the court in United States v. Haney, which addressed an inmate's request to be released from MDC under circumstances closely analogous to those here:

[The defendant] is less than 65 years old and—unlike many of the prisoners who have applied in recent days for release because they suffer from asthma, diabetes, heart disease, or other deleterious health conditions that make them unusually vulnerable to the effects of COVID-19—[he] is in reasonably good health. Admittedly, [the defendant's] age of 61 places him at a higher risk of experiencing complications from COVID-19 than the general prison population. But if . . . age alone were a sufficient factor to grant compassionate release in these circumstances, it follows that every federal inmate in the country above the age of 60 should be forthwith released from detention, a result that does not remotely comply with the limited scope of compassionate release

No. 19-CR-541, 2020 WL 1821988, at *5 (S.D.N.Y. Apr. 13, 2020). For reasons similar to those offered in Haney, and in light of the medical evidence Lagan has placed before the Court, the Court cannot say that extraordinary and compelling reasons justify Lagan's release, even from the MDC. See Zehner, 2020 WL 1892188, at *2 (denying request by defendant who was

incarcerated at MDC because, “although [defendant] suffers from high blood pressure and depression, he does not claim to have an underlying condition that indicates that he is at heightened risk for severe illness from COVID-19”).

Moreover, in light of the Court’s inability to grant Lagan’s request for temporary release,⁵ the § 3553(a) factors also counsel against granting Lagan’s compassionate release request. See United States v. Rodriguez, No. 03-CR-271, 2020 WL 1627331, at *11 (E.D. Pa. Apr. 1, 2020) (“Finally, the Court must consider[] the [sentencing] factors set forth in [S]ection 3553(a) to the extent that they are applicable.”) (internal quotation marks omitted). As described above, Lagan has served about seven months of his 78-month sentence. “For the reasons stated in detail at [Lagan’s] sentencing, which the Court incorporates by reference, a sentence [of 78] months’ imprisonment was necessary to achieve [the] goals” of § 3553, United States v. Walter, No. 18-CR-834, 2020 WL 1892063, at *3 (S.D.N.Y. Apr. 16, 2020), including “the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law[,] . . . to provide just punishment for the offense[,] . . . to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a). Without belaboring the point, ordering Lagan released “when he has served just [7] months of a [78]-month term of incarceration, would disserve these important § 3553(a) factors.” See Walter, 2020 WL 1892063, at *3; see also Roberts, 2020 WL 1700032, at *3 (explaining that the court is “hard pressed to conclude that, whereas the Section 3553(a) factors justified a forty-eight-month sentence only a month ago, the same factors suddenly justify a time-served sentence today.”).⁶

⁵ See sub-section IV.B., below.

⁶ The Court notes here as well that the longest period of incarceration it has seen “converted” to home confinement in the manner Lagan requests is about 50 months, less than

B. Remedial Problems

Even if the Court found that Lagan had met his burden of demonstrating that extraordinary and compelling reasons justify his release, the specific remedies he has requested pose problems of their own.

First, with regard to Lagan’s request for interim home confinement, it does not appear that the Court has the authority to grant such a request. Faced with similar requests, several courts have found that § 3582 allows a Court only to “reduce [a] term of imprisonment,” see 18 U.S.C. § 3582, not to suspend it temporarily. See, e.g., Roberts, 2020 WL 1700032, at *3 (“At most, Section 3582(c) allows a court to ‘*reduce*’ a term of imprisonment if the requirements for compassionate release are satisfied. By its plain terms, therefore, the statute does not permit the Court to order [Ms. Roberts] temporarily released from custody until circumstances improve.”) (emphasis in original; internal citations and quotation marks omitted); United States v. Pereyra-Polanco, No. 19-CR-10, 2020 WL 1862639, at *2 (S.D.N.Y. Apr. 14, 2020) (“Section 3582(c) . . . does not grant the Court the authority to release Mr. Pereyra-Polanco temporarily until the COVID-19 pandemic abates.”); United States v. Daugerdas, No. 09-CR-581, 2020 WL 2097653, at *5 (S.D.N.Y. May 1, 2020) (“[T]his Court believes that Daugerdas is fit for temporary release from prison—but only until the COVID-19 pandemic abates. However, the catch is that this Court lacks the authority to grant Daugerdas temporary release.”). For this reason, Lagan’s first proposed remedy is foreclosed to him.

Turning next to the third proposed remedy—full home confinement unless BOP allows a furlough—the Court has identified no cases in which a court has presented BOP with a similar threat. This Court declines to be the first. Even assuming BOP would be willing to accede to

Lagan’s remaining 70. See United States v. Ben-Yhwh, No. 15-CR-830, 2020 WL 1874125, at *2 (D. Haw. Apr. 13, 2020).

these sorts of “hardball” tactics, the Court is reluctant to intrude into the authority of the executive where Congress has explicitly and exclusively conferred the furlough power upon that branch. See 18 U.S.C. § 3622 (“The Bureau of Prisons may [furlough] a prisoner . . .”).

In contrast to the first and third proposed remedies, Lagan’s second proposed remedy—full home confinement—is more viable. Specifically, Lagan asks the Court to reduce his sentence to time served and then impose a new condition of release requiring Lagan to confine himself at home for the remainder of the time—seventy or so months—he was due to spend in prison. Mot. at 3. There is little dispute that the Court has the authority to fashion such a remedy, as numerous other courts have ordered just this relief in the face of the COVID-19 pandemic. See, e.g., United States v. Sanchez, No. 18-CR-140, 2020 WL 1933815, at *3 (D. Conn. Apr. 22, 2020); United States v. Hernandez, No. 18-CR-834, 2020 WL 1684062, at *4 (S.D.N.Y. Apr. 2, 2020); United States v. Bess, No. 16-CR-156, 2020 WL 1940809, at *1 (W.D.N.Y. Apr. 22, 2020). However, even were the Court inclined to grant Lagan’s Motion and order this remedy, there is an additional obstacle, namely, Lagan’s state court conviction and sentence.

In addition to his federal sentence, Lagan is concurrently serving a state sentence of four to twelve years in prison. See PSIR ¶ 61; Judgment. The Government points out that, in furtherance of this sentence, New York State’s Department of Corrections and Community Supervision (“DOCCS”) has issued a detainer for Lagan. See Sur-Reply at 3 (citing Dkt. No. 83-1 “Detainer”) (“The [Government] has confirmed, with both BOP and the New York State Department of Corrections and Community Supervision, that Lagan is subject to a detainer, such that he will be transferred to state custody if the instant motion is granted.”)). This means that, if

the Court ordered Lagan released, he “would simply be transferred to state custody.” Opp’n at 9.⁷ Given BOP’s current moratorium on inmate transfers, Lagan might not be handed over to DOCCS’ custody immediately, but in such a case he would be forced to wait at MDC—exactly the place from which he seeks to escape—until such a transfer could be arranged. See Weeks v. Quinlan, 838 F.2d 41, 42–43 (2d Cir. 1988) (“[T]he state detainer directed the federal correctional officials to continue holding Weeks in custody pending state action.”). Under the circumstances, granting Lagan’s second proposed form of relief would, likely, provide no relief at all.⁸

* * *

“[T]he Court is ever mindful of the fact that conditions of confinement—sharing small cells, eating together, using same bathrooms and sinks, delays in medical evaluation and treatment, and rationed access to soap—make prisons more potentially conducive to the transmission of COVID-19 than elsewhere.” See Haney, 2020 WL 1821988, at *6. But given Lagan’s lack of a demonstrated COVID-19 risk factor, how recently the Court sentenced him to

⁷ The Government also argues that, if granting Lagan’s Motion would result merely in Lagan’s transfer to a DOCCS facility pursuant to the Detainer, this “would only increase the risk to [Lagan] and others.” Sur-Reply at 3 (citing United States v. Sellers, 10-CR-434, 2020 WL 1972862, *4–5 (D.N.J. April 24, 2020) (denying compassionate release motion where the defendant was subject to a state detainer, noting that “[t]his scenario adds a whole new layer of risks that the Court is not prepared to take, i.e. additional law enforcement officers, a new inmate population, etc.”)).

⁸ Lagan’s briefing does not appear to recognize the effect of the Detainer, stating only that “if there was an immediate hold on Mr. Lagan, . . . [he would] be able to seek relief from the state court system, either in terms of where he would serve his state sentence or when it would start.” Reply at 6. This may be true, but there is no guarantee any such request in state court would be successful, and therefore there is some likelihood that Lagan would still be confined in the MDC or a DOCCS facility regardless of the Court’s decision here.

a 78-month term of incarceration, and the challenges in fashioning an appropriate remedy, the Court is compelled to deny Lagan's request for compassionate release.

V. CONCLUSION

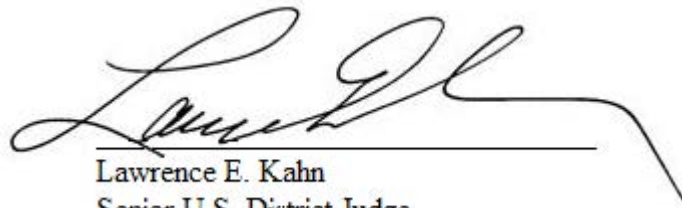
Accordingly, it is hereby:

ORDERED, that Lagan's Motion for compassionate release (Dkt. No. 82) is **DENIED without prejudice**; and it is further

ORDERED, that the Clerk serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: May 11, 2020
Albany, New York



Lawrence E. Kahn
Senior U.S. District Judge