

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FILED

JAN 11 2021

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTH DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff

v.

Sean Cutting, Brian Melland
and David Lonich,
Defendants

Case Nos. CR 14-139 SI +
CR 17-139-SI

Defendant David Lonich's Notice of
Motion and Motion For Compassionate
Release Sentence Modification
Under 18 U.S.C. §3582(c)(1)(A)(i)
(Renewal)

Location: Courtroom 1, 17th Floor

Date: TBD

Time: TBD

Before the Honorable Susan Illston
United States District Judge.

I. Introduction

On May 4, 2020 Defendant David Lonich, then represented by George C. Harris, Filed a Notice of Motion for Compassionate Release Sentence Modification under 18 U.S.C. §3582(c)(1)(A)(i) (the "May 2020 Motion"). On May 22, 2020 this Court entered the Order (the "Order") denying the request that was made pursuant to the May 2020 Motion. The Order cited U.S.S.G. §1B1.3 cmt. N. 1(A)(ii)(I) in support of this Court's finding "... that on this record none of the defendants is currently suffering from a serious physical or medical condition, ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional

facility and from which he ... is not expected to recover." Additionally, this Court stated in the Order that "...the Court finds it significant that defendants have served far less than half of their sentences. Finally, this Court stated that it was "...not unsympathetic to the concerns defendants have raised. Defendants' motions are denied without prejudice to renewal in the event defendant's health or prison conditions significantly deteriorates."

Lonich, who is no longer represented, is by this motion (the "January Motion") renewing, as the Order allowed, his request to have this Court grant compassionate release sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). This January Motion is based upon all of the grounds set forth in the May 2020 Motion, which is incorporated herein by reference, and each and every of the grounds set forth below.

II. ARGUMENT

1. Both Lonich's health and prison conditions have significantly deteriorated.

In the over seven (7) months since the Order was entered the spread of COVID-19 within the Federal prison system has increased so dramatically that the percentage of confirmed cases is, per capita, higher than any country in the world. (See worldometers.info/coronavirus/ [bop.gov/coronavirus/](https://www.bop.gov/coronavirus/)). This was expected and was the reason that Attorney General William Barr made the April 3, 2020 finding that an emergency existed in the Federal prison system.

On December 4, 2020 as many as 11 inmates at FPC Montgomery tested positive for COVID-19. Over the next three (3) weeks at least another 45 inmates have tested positive. Unfortunately for Lonich, on December 22, 2020 he was diagnosed with having contracted COVID-19.

The medical clinic at FPC Montgomery has recently began placing the following statement on inmates medical records reports

"Home confinement provides the opportunity for the inmate to practice optimal infection control measures, which may mitigate existing risks based on rates of transmission in the local area, and is likely not to increase the inmates risk of contracting COVID-19."

It is, therefore, undeniable that conditions at FPC Montgomery, and Lonich's personal health, have materially deteriorated since the Order. The only available remedy is for this Court to, as was requested in the May 2020 Motion, order Lonich's sentence reduced with a special condition that he be subject to home confinement.

2. U.S.S.G. §1B1.13 should not be applied to this January Motion since Lonich, and not the BOP Director, has brought this motion.

In the Order this Court found that relief

was not allowed under U.S.S.G. §1B1.13 cmt N.1(A)(ii)(I). Since the Order, numerous court's have addressed whether this Guideline is applicable to a motion brought by an inmate. The argument faced in these cases was that the Guideline had not been updated after the First Step Act, passed in December 2018, granted a defendant the right to pursue compassionate relief.

In U.S. v. Brooker, 978 F.3d 228, 2020 US App LEXIS 30605 (2nd Cir., 9/25/20) the Court fully examined the issue and held that

"In other words, if a compassionate release motion is not brought by the BOP Director, Guideline §1B1.13 does not, by its own terms, apply to it. Brooker@ 236.

See also U.S. v. Ruffin, 978 F.3d 1000 (6th Cir, 10/26/20), U.S. v. Jones, 2020 WL 6817488 (6th Cir, 11/20/20); U.S. v. Gunn, 2020 WL 6813995 (7th Cir, 11/20/20).

Other Court's found that §1B1.13 was satisfied where, as is the case for Lonich at FPC Montgomery, the manner in which an inmate is housed may itself be an extraordinary and compelling circumstance that satisfies U.S.S.G. §1B1.13. In U.S. v. Atkinson, 2020 WL 1904585, **2-4 (D.C.Nev., 4/17/20) the Court found that

"Granting compassionate release to defendant, notwithstanding that FPC Atwater

where he is housed has seen no cases of COVID-19 recognizes how the reality of prison life makes it impossible for medically vulnerable inmates to follow CDC guidelines to protect themselves in the face of COVID-19".

(See also, U.S. v. Muniz, 2020 U.S. Dist. LEXIS 59255, *3, 4 (S.D. Tex. 3/30/20) where the finding was made that the inability to protect from COVID-19 is an extraordinary and compelling circumstance that satisfies U.S.S.C. § 1B1.13.)

As shown in the May 2020 Motion, and continues to be the case today, the physical setting at FPC Montgomery makes it impossible for Lonich, or any inmate, to socially distance or avoid group settings. This conclusion was not controverted by the Government in response to the May 2020 Motion, nor obviously can it today be disputed.

3. There is no nexus between the emergency that indisputably exists within the Federal prison system and the percentage of his sentence that Lonich has served.

In the Order the Court noted that Lonich had in May 2020 served substantially less than half of his sentence. Obviously, the risk Lonich faced then, and now faces, from COVID-19 is not minimized based upon the amount of sentence served. FPC Montgomery recognizes this since it has sent numerous inmates

to home confinement since June 2020 who have served even less of a percentage of their sentences than Lonich has served. Consistent with the preceding, the CARES Act no longer limits home confinement to the lesser of 6 months or 10% of an inmate's sentence.

34 U.S.C. §60541(g), after the amendment made by the First Step Act, provides that an inmate who is 60 years old, or older, and has served 2/3rds of his sentence is eligible for home confinement. This should mean that Lonich is eligible for home confinement under §60541(g) when he has served 46 months. As of January 2021 Lonich has served 27 months, or approximately 60% of that 46 months. This calculation is provided not to assert that percentage of sentence served should be a factor in granting compassionate release, but rather to illustrate that Lonich has already served a substantial portion of his sentence should the January Motion be granted.

4. No jurisdictional argument can be made in opposition to the January Motion.

After this Court issued the Order, Lonich and four other inmates who were deemed at higher risk should they contract COVID-19, were submitted for, and then denied, transfer to home confinement. Less than a month later, Lonich was told by two of those four inmates that they had now been approved for transfer to home confinement. Lonich then requested that he be approved for home confinement since he

met all of the stated requirements for such a transfer to the same, if not greater, extent than these two inmates. Lonich was told, and had it confirmed by higher level staff, that since he had been denied by the "Central Office Review Committee" he could not be considered for home confinement. When Lonich pointed out that these other two inmates had similarly been denied by the same committee, but had then been approved for transfer, he was given no explanation for this disparity in treatment. FPC Montgomery staff have confirmed that "Central Office Review Committee" is based in Washington, D.C. and that there is no further review available.

Based upon the preceding, there is no further administrative review, and further, the government should be prevented from raising any jurisdictional argument. Also, since this is a renewal of the May 2020 Motion, this Court's finding of jurisdiction should remain the law of this case.

• • •

For all of the preceding reasons, compassionate release is readily justified. But even more, when we are all facing a potentially fatal virus from which Lonich, and other inmates, are incapable of protecting themselves, and could not have been considered when Lonich was sentenced, what justifies requiring Lonich to remain at FPC Montgomery when a viable, much safer alternative exists? This Court knows that if Lonich's

sentence is modified to time served with the condition that he be subject to supervised release under home confinement. Lonich is not freed from custody. Home confinement imposes substantial restrictions on freedom and does not in any appreciable way make a nullity of the sentence imposed by this Court. Instead, home confinement is the solution mandated by the Attorney General in recognition of the material, life-threatening risk to vulnerable inmates such as Lonich, who is by every measure neither a flight risk nor a danger to the public. That the BOP has refused to transfer Lonich to home confinement does not mean that he is not a proper candidate for compassionate release, but rather that the BOP has failed to acquit the responsibility imposed by the Attorney General. Lonich requests that this Court, in recognition of the risk, and the authorization it has, grant this January Motion by modifying Lonich's sentence to time-served with the condition that he be subject to supervised release under home confinement.

Respectfully submitted



David Lonich, Reg. No. 19668-111

Federal Prison Camp

Maxwell AFB

Montgomery, AL 36112

Date: December 30, 2020

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JAN 11 2021

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTH DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff

v.

Sean Cutting, Brian Melland
and David Lonich,
Defendants

Case Nos. CR14-139 SI +
CR17-139 SI

Declaration of David Lonich
in Support of Motion Under
18 U.S.C. § 3582(c)(1)(A)(i)
(Renewal)

Location: Courtroom 1, 17th Floor

Date: TBD

Time: TBD

Before the Honorable Susan Illston
United States District Judge.

I, David Lonich, declare as follows:

1. I am the defendant in the instant case who has brought this pending motion. I state the following on personal knowledge except as otherwise noted, and if called as a witness, could testify competently thereto.

2. On December 4, 2020 all of the inmates housed in one housing unit ("Montgomery Unit"), where I was housed, were tested for COVID-19.

3. On that date I observed 11 inmates being transferred to another housing unit ("Birmingham Unit") from Montgomery

Unit. When I inquired of a staff member, I was told that the inmates being transferred had tested positive for COVID-19.

4. On December 22, 2020 I was tested for COVID-19 and was told that I tested positive. I was immediately transferred to "D Wing" in Birmingham Unit where I am in isolation with 21 other inmates who tested positive.

5. I have been told that "B Wing" and "C Wing" house a similar number of inmates in isolation, all of which have tested positive for COVID-19. Therefore, I estimate that approximately 60 inmates have tested positive since December 4, 2020.

6. Since June 2020 FPC Montgomery have transferred, by my observation, at least 60 inmates to home confinement. Of that number there have been many who have served less a percentage of their sentences than me, have more than a minimum PATTERN score such as mine, are not at higher risk due to their age or health conditions and have received BOP discipline, which I have not.

7. I was told in June 2020 that the Central Office Review Committee had refused to transfer me to home confinement. When I asked the reason, I was told none was given, or would be given. Subsequently I spoke with two inmates who had been refused a transfer to home confinement on the same date as me,

and they both said that they had been approved for home confinement. When I asked if anything had changed in their situation, they both said nothing had changed. I immediately asked my Case Manager to resubmit me for home confinement. He responded by saying he could not resubmit me because I had been denied by Central Office Review Committee. When I told him that the other two inmates had similarly been denied, he had no response. When I then asked him to resubmit me, he said he would not.

8. In response to my inquiry FPC Montgomery staff have told me that Central Office Review Committee is in Washington, D.C., and that that committee decision cannot be appealed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 30, 2020 in Montgomery, Alabama


David Lonich, Reg No. 19668-111

30 December 2020

RECEIVED

Clerk, United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

JAN 11 2021

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTH DISTRICT OF CALIFORNIA

re: USA v Lonich et al
Case Nos. CR 14-139 SI + CR 17-139 SI

Dear Clerk:

Enclosed is "Defendant David Lonich's Notice of Motion and Motion For Compassionate Release Sentence Modification Under 18 U.S.C. § 3582(c)(1)(A)(i)" and a "Declaration of David Lonich in Support of Motion Under 18 U.S.C. § 3582(c)(1)(A)(i)", both of which I am submitting on a pro se basis. I am incarcerated at FPC Montgomery in Montgomery, Alabama and have recently been diagnosed with COVID-19. This has resulted in my being placed in isolation without access to a law library or copiers.

Please file the enclosed motion and declaration and serve copies on the AUSA. Please also mail me filed copies so that I can have a record of these filings.

Thank you.



David Lonich, Reg. No. 19668-111
Federal Prison Camp, Maxwell AFB
Montgomery, AL 36112