

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ABDOULAYE DIALLO,

Defendant.

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Crim. No. 18-07-LPS

ORDER

At Wilmington this 21st day of July, 2021, having reviewed Defendant Abdoulaye Diallo's Emergency Motion to Modify Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A) (D.I. 46) and exhibits (Exs. 1, 2, 3, 4) and the government's response (D.I. 48) and exhibits (Exs. A, B, C);

IT IS HEREBY ORDERED that Diallo's motion (D.I. 46) is **DENIED**.

A compassionate release motion by a sentenced defendant requires the defendant "(1) to exhaust administrative remedies, (2) to show extraordinary and compelling circumstances, (3) to show an absence of dangerousness, and (4) to show that the section 3553(a) factors support a reduced sentence." *United States v. Vurgich*, 2020 WL 4335783, at *3 (D. Del. July 28, 2020) (internal citation omitted).¹

As to the first requirement, the government acknowledges that Diallo has exhausted his administrative remedies. (*See* D.I. 48 at 3) Under 18 U.S.C. § 3582(c)(1)(A), a defendant

¹ Judge Andrews, who authored *Vurgich*, has expressed skepticism that prong (3), dangerousness, is applicable in light of other circuit court rulings. *See United States v. Flagg*, Crim. A. No. 19-30-RGA D.I. 59 at 2. Whether absence of dangerousness is a separate requirement does not affect the disposition of the pending motion because the Court is denying it under prong (2).

seeking a reduced sentence must first ask the Bureau of Prisons (“BOP”) and then either (i) wait 30 days for the BOP to respond or (ii) exhaust all available administrative appeals after receiving an adverse decision. *See United States v. Raia*, 954 F.3d 594, 595, 597 (3d Cir. 2020). Diallo requested compassionate release from the Warden at F.C.I. Schuylkill three times, on September 25, 2020; October 7, 2020; and October 14, 2020. (D.I. 46 Ex. 1) In his first two requests, Diallo cited a fear of contracting COVID-19 and his desire to work to support his siblings. (*Id.*) In his third request, he again cited COVID-19 as well as a desire to care for his parents and siblings. (*Id.*) All three compassionate release requests were denied. (D.I. 46 at 12) Diallo filed the instant motion on May 27, 2021, more than 30 days after his most recent request. (*Id.*) Therefore, the first requirement is met.

Diallo, however, has not met his burden at the second prong, which requires him to demonstrate extraordinary and compelling circumstances that merit modifying his sentence. Diallo first attempts to satisfy the second factor by referencing his fear of contracting COVID-19 in light of his medical history. (*Id.* at 12-13) But “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release.” *Raia*, 954 F.3d at 597. Although extraordinary and compelling circumstances may exist where “underlying health conditions . . . render [one] especially vulnerable to COVID-19,” *United States v. Rodriguez*, 451 F. Supp. 3d 392, 401 (E.D. Pa. 2020), Diallo has not demonstrated the presence of such health conditions. Diallo contends that he has “chronic strep throat infections,” which he asserts “fall squarely into respiratory distress disorders that are highly comorbid with severe COVID-19 infections.” (D.I. 46 at 12-13) The government, however, notes that Diallo’s recent medical records indicate he “was once treated

for strep throat, but there is no suggestion of a chronic illness.”² (D.I. 48 at 2)

Further, Diallo has been fully vaccinated for COVID-19. (D.I. 48 Ex. C at 15, 20, 22)

As the government explains, scientific findings demonstrate that vaccination is effective in protecting against severe illness from the virus. (D.I. 48 at 12-16) This weighs against finding eligibility for compassionate release under the second prong. *See, e.g., United States v. Singh*, 2021 WL 928740 (M.D. Pa. Mar. 11, 2021) (finding no compelling or extraordinary circumstances even where defendant’s underlying health conditions increased his risk of serious illness or death from COVID-19 because he was fully vaccinated against COVID-19); *United States v. Smith*, 2021 WL 364636, at *2 (E.D. Mich. Feb. 3, 2021) (“[A]bsent some shift in the scientific consensus, Defendant’s vaccination against COVID-19 precludes the argument that his susceptibility to the disease is ‘extraordinary and compelling’ for purposes of § 3582(c)(1)(A).”).

Diallo’s vaccination status also undermines his contention that conditions at F.C.I. Schuylkill do not allow him to take precautions for disease prevention. (*See* D.I. 46 at 15-16)³

Diallo further attempts to demonstrate extraordinary and compelling circumstances based on his parents’ medical needs. (*Id.* at 13-15) He explains that his father’s health is in rapid decline. (*See id.*; *see also* D.I. 46 Ex. 3 at 3-4) Diallo reasons that because his father may soon need a kidney transplant and is unlikely to be matched with an organ donor, his motion should be

² Moreover, chronic strep throat does not qualify as a risk factor identified by the CDC as increasing the likelihood of getting severely ill from COVID-19. *See People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention (May 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

³ While Diallo argues that the conditions at F.C.I. Schuylkill “are not conducive . . . [to] disease prevention” (D.I. 46 at 15), the government responds that the BOP has implemented extensive changes to its operations in accordance with a plan developed with the CDC and the World Health Organization (D.I. 48 at 3). The government also points out that there are currently “zero active COVID-19 cases” at F.C.I. Schuylkill. (*Id.* at 5)

granted so that he can be tested as a donor match. (*See* D.I. 46 at 14-15) Diallo, however, provides no evidence suggesting that his father is in need of a kidney, that he has asked the BOP if he can be tested as a match and it has denied his request, or that being tested as a match would not be possible in the prison setting.

Finally, Diallo asserts that he will need to help his mother care for his siblings if his father becomes incapacitated or dies. (*See id.* at 15) “[A] petitioner may present an extraordinary and compelling reason for release if (1) the caregiver of the petitioner’s minor child or children dies or becomes incapacitated or (2) the petitioner’s spouse or registered partner becomes incapacitated and the petitioner is the partner’s ‘only available caregiver.’” *United States v. Moore*, 2020 WL 7024245, at *5 (E.D. Pa. Nov. 30, 2020) (citing U.S.S.G. § 1B1.13, Appl. Note 1(C)). Even putting aside the fact that Diallo’s request does not concern a child or spouse, the concerns about his family at this stage are speculative. While the Court is sympathetic to Diallo’s desire to help his family, his circumstances do not rise to the level of extraordinary and compelling. (*See* D.I. 48 at 17-18) (“While it is noble that the defendant wants to care for his family, that desire simply does not present an extraordinary and compelling reason for release.”)

Because Diallo has not met the extraordinary and compelling circumstances requirement, the Court need not reach the third or fourth prongs of the compassionate release inquiry.


HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE