

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**CRIMINAL MINUTES - GENERAL**

Case No. LA CR14-00521 JAK (2), (3)

Date March 30, 2020

Present: The Honorable John A. Kronstadt, United States District Judge

Interpreter N/A

Cheryl Wynn

Not Reported

Julie J. Shemitz; John Kucera;
Puneet V. Kakkar; Not Present*Deputy Clerk**Court Reporter/Recorder**Assistant U.S. Attorneys*U.S.A. v. Defendant(s):Present Cust. BondAttorneys for Defendants: Present App. Ret.

Morad Neman (2)

Not X

Terry W. Bird, Rtnd.
Ariel A. Newman, Rtnd.

Not X

Hersel Neman (3)

Not X

Pamela L. Johnston, Rtnd.
Jaime Guerrero, Rtnd.

Not

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS HERSEL NEMAN'S AND MORAD NEMAN'S JOINT EMERGENCY MOTION FOR COMPASSIONATE RELEASE FROM INCARCERATION (DKT. 853)

I. Introduction

On December 21, 2017, Morad Neman ("Morad")¹ pleaded guilty to one count of conspiring to structure monetary transactions with a domestic financial institution in violation of 18 U.S.C. § 371, one count of conspiring to defraud the United States in violation of 18 U.S.C. § 371, one count of filing and subscribing to a false tax return in violation of 26 U.S.C. § 7206(1), and one count of aiding, assisting and procuring the filing of a false tax return in violation of 26 U.S.C. § 7206(2). Dkt. 414 (minutes of change of plea hearing); Dkt. 379 (First Superseding Indictment). On the same day, his brother, Hersel Neman ("Hersel") pleaded guilty to one count of conspiring to launder monetary instruments in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), (ii), one count of conspiring to defraud the United States in violation of 18 U.S.C. § 371, and one count of filing and subscribing to a false tax return in violation of 26 U.S.C. § 7206(1). Dkt. 415 (minutes of change of plea hearing); Dkt. 379 (First Superseding Indictment).

Morad and Hersel (the "Neman Defendants") were sentenced on December 18, 2018. Dkt. 749 (Hersel); Dkt. 751 (Morad). Morad was sentenced to serve 24 months in the custody of the Bureau of Prisons ("BOP") on each of the four counts, all to be served concurrently. The sentence also included three years of supervised release, with the first six months in home confinement. Dkt. 752. Hersel was sentenced to 18 months in the custody of the BOP on each of the three counts, all to be served concurrently. The sentence also included three years of supervised release, with the first six months in home confinement. Dkt. 750. At the request of

¹ The use of first names to identify those with common surnames follows the common practice designed to facilitate the discussion in this Order. No disrespect is intended by the use of this common convention, which is also used by counsel for the Nemans. See, e.g., Dkt. 853 at 14.

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the Neman Defendants, they were permitted to defer their surrender to the BOP until May 1, 2019, in part so that arrangements could be made for them to be housed at the same BOP facility. Dkt. 797. Both surrendered on May 1, 2019, and are housed at the BOP facility in Lompoc, California ("Lompoc USP"). Dkts. 849, 850.

On March 23, 2020, the Neman Defendants filed a joint motion for compassionate release ("Motion" (Dkt. 853)), as well as a motion for an order shortening the time for a hearing on the Motion. Dkt. 855. They also sought the scheduling of a telephonic hearing on the Motion on an expedited basis. In support of the Motion, they argue that the COVID-19 outbreak,² and their respective ages, health conditions and other circumstances, warrants immediate, compassionate release from Lompoc USP and the commencement of home confinement. Based on a review of these filings, an Order issued that required the Government to respond to both motions by March 25, 2020, and provided that, upon a review of that submission, the Court would determine whether to schedule a hearing or to take the matters under submission. Dkt. 857. The Government filed its opposition to the Motion on March 25, 2020 ("Opposition" (Dkt. 858)).³ Without seeking leave to do so, the Neman Defendants filed a reply in support of the Motion on March 26, 2020 ("Reply" (Dkt. 861)). The Neman Defendants also filed a joint notice of supplemental authority in support of the Motion, to which they attached a March 26, 2020 memorandum from Attorney General William Barr to the Director of the BOP concerning the "Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic." Barr Memo., Dkt. 862-1.

Based on a review of all of the aforementioned filings, it is determined that the Motion is one suitable for decision without a hearing. Hearings are not required for compassionate release motions under 18 U.S.C. § 3582(c). *United States v. Mercado-Moreno*, 869 F.3d 942, 955 (9th Cir. 2017). Further, Fed. R. Crim. P. 43(b)(4) provides that a defendant's presence is not required at a proceeding that "involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *See also Dillon v. United States*, 560 U.S. 817, 827-28 (2010). Similarly, the Continuity of Operations ("COOP") Plan for the Central District of California, effective March 23, 2020 through and including May 1, 2020, encourages that, where appropriate, matters be decided without hearings. *See* Order of the Chief Judge 20-042, available at www.cacd.uscourts.gov. Finally, the present disposition addresses the requirement for the exhaustion of administrative remedies, and not the merits of the Motion.

For the reasons stated in this Order, the Motion is **DENIED WITHOUT PREJUDICE** to its renewal, if it remains justiciable, following the exhaustion of administrative remedies by the Neman Defendants.

II. Motion for Compassionate Release**A. General Legal Standards**

The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, was enacted in 2018. It amended the procedures by which a defendant can seek a reduction of a sentence through compassionate release. The First Step Act

² The World Health Organization and Centers for Disease Control have used the term "COVID-19" to refer to the disease caused by the novel coronavirus identified in 2019. "Coronavirus" is a generic term that refers to a category of viruses. Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed March 26, 2020). The terms "COVID-19" and "coronavirus" have the same meaning when used in this Order.

³ The Government described this filing as a "Motion to Dismiss and, in the Alternative, Opposition to Defendants' Joint Emergency Motion." Dkt. 858 at 1. Because the Government does not adequately explain why its filing is a motion to dismiss, it is considered only as an opposition to the Motion. *Cf.* Fed. R. Crim. P. 48 (referring to the dismissal of an indictment, information, or complaint).

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permits defendants to petition district courts directly for such relief. See 18 U.S.C. § 3582(c)(1)(A). 18 U.S.C. § 3582(c)(1)(A) incorporated the following procedures with respect to such a request:

The court may not modify a term of imprisonment once it has been imposed except that . . . the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons 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, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

This statute established a three-step process that applies when a defendant seeks compassionate release. *First*, a defendant must exhaust his or her administrative remedies by either "exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or waiting until "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility" to reduce the term of imprisonment. 18 U.S.C. § 3582(c)(1)(A). *Second*, a district court then evaluates whether "extraordinary and compelling reasons warrant such a reduction" and that such a reduction "is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* *Third*, a district court "consider[s] the [sentencing] factors set forth in section 3553(a) to the extent that they are applicable." *Id.*

In a motion for compassionate release, the defendant "bears the initial burden to put forward evidence that establishes an entitlement to a sentence reduction." *United States v. Greenhut*, No. 2:18-CR-00048-CAS-1, 2020 WL 509385, at *1 (C.D. Cal. Jan. 31, 2020) (citing *United States v. Sprague*, 135 F.3d 1301, 1306-07 (9th Cir. 1998)).

B. Application – Exhaustion of Administrative Remedies

1. Positions of the Parties

On March 19, 2020, counsel for the Neman Defendants sent letters to the Warden of Lompoc USP that requested the immediate release of the Neman Defendants pursuant to the compassionate release statute, as modified by the First Step Act. Dkt. 853 at 18; Dkt. 853-2 at 5-23 (letters to Warden). The Neman Defendants have acknowledged that the Warden has not yet refused to bring a motion on their behalf, and that the 30-day period has not passed. Accordingly, the Neman Defendants acknowledge that they have not yet exhausted their administrative remedies.

The Neman Defendants contend that the administrative exhaustion requirement should be waived or excused in light of the exigent circumstances that are presented by health risks to them created by COVID-19 if they remain in custody. In support of this position they rely on *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993). The Neman Defendants contend that the BOP has a record of refusing to bring compassionate release motions on behalf of those in custody who are seeking release due to the COVID-19 outbreak. The Neman Defendants then argue that requiring the exhaustion of their administrative remedies is unwarranted and would be unreasonable for several reasons: the previously expressed positions of the BOP about COVID-19 make it unlikely that they will obtain such relief; COVID-19 is spreading rapidly, and there is no assurance that it will not be present at Lompoc USP notwithstanding the professed efforts by the BOP to prevent that result; the

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health conditions and ages of the Neman Defendants make them quite vulnerable to harm from COVID-19; and given the housing and dining conditions at Lompoc USP, they are likely to be exposed to COVID-19 before the 30-day period ends. The Neman Defendants also presented the Barr Memorandum in connection with the Motion. Dkt. 862.

The Government responds that the administrative exhaustion requirement under the compassionate release statute is mandatory. It also contends that, even if exhaustion were not mandatory, the failure to exhaust by the Neman Defendants should not be excused. In support of this position it states that the claims of the Neman Defendants “cut straight to the BOP’s own areas of administrative expertise: both in (1) assessing the safety and health of their inmates and (2) managing the administration of their facilities.” Dkt. 858 at 9. The Government also argues that *Hendricks* is distinguishable.

2. Whether Exhaustion Is Mandatory for a Compassionate Release Motion

A mandatory exhaustion requirement “foreclos[es] judicial discretion” and “means that a court may not excuse a failure to exhaust, even to take [special circumstances] into account.” *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016) (citing *Miller v. French*, 520 U.S. 327, 337 (2000); *McNeil v. United States*, 508 U.S. 106, 111 (1993)); see *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004) (citing *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 746 (9th Cir. 1991); *Stratman v. Watt*, 656 F.2d 1321, 1325-26 (9th Cir. 1991)) (courts may waive prudential exhaustion requirements but not mandatory ones).⁴ Whether Congress has adopted a mandatory exhaustion requirement is determined primarily by evaluating the text of the statute, although legislative history may also be considered as part of the review. See *Ross*, 136 S. Ct. at 1856-58 (emphasizing the text of the Prison Litigation Reform Act of 1995, and also considering its legislative history).

There is no controlling, appellate authority as to whether the administrative exhaustion requirement in the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), is mandatory. District courts in the Ninth Circuit have recognized that it may be. See, e.g., *United States v. Rodriguez*, No. 17-CR-00021-WHO-1, 2019 WL 6311388, at *6 (N.D. Cal. Nov. 25, 2019) (citing *United States v. Solis*, No. 16-CR-015-CG-MU, 2019 WL 2518452, at *2 (S.D. Ala. June 18, 2019)) (assuming, but not expressly holding, that exhaustion is mandatory); *United States v. Weidenhamer*, No. CR-16-01072-001-PHX-ROS, 2019 WL 6050264, at *2 (D. Az. Nov. 8, 2019) (citing *Solis*, 2019 WL 2618452, at *2) (similar); *United States v. Miller*, No. 2:16-CR-00269-BLW, 2020 WL 113349, at *2 (D. Id. Jan. 8, 2020), *appeal filed*, No. 20-30065 (9th Cir.) (similar).

The statute states that “the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons 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, may reduce the term of imprisonment” This plain text clearly supports the interpretation of the exhaustion requirement as mandatory. It states that a court “may reduce the term of imprisonment,” only “after the defendant *has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf . . .*” (emphasis added).

⁴ Whether an exhaustion requirement is mandatory is a distinct question from whether an exhaustion requirement is jurisdictional. *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1849-50 (2019). An exhaustion requirement is deemed jurisdictional only when Congress clearly states such an intent. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006). Here, the compassionate release statute “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Id.* (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Therefore, the administrative exhaustion requirement is not jurisdictional, and the question presented here is whether the administrative exhaustion requirement is mandatory.

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The statute does not state any exception to this requirement, but only recognizes that a warden must act within 30 days of receiving the request. To interpret the exhaustion requirement as a non-mandatory condition to a court considering and granting a reduction in the term of imprisonment would be improper because a court is “not free to rewrite the statutory text.” *McNeil*, 508 U.S. at 111. For these reasons, based on the text of the statute, the exhaustion requirement is a mandatory one that cannot be excused or waived.

This interpretation is also consistent with the history of 18 U.S.C. § 3582. “Previously, motions for compassionate release could only be brought to the court by the Director of the U.S. Bureau of Prisons. In December 2018, however, Congress passed the First Step Act and it permits defendants to bring their own motions for compassionate release after first exhausting their administrative remedies with the Bureau of Prisons.” *United States v. Ayon-Nunez*, No. 1:16-CR-00130-DAD, 2020 WL 704785, at *2 (E.D. Cal. Feb. 12, 2020). Treating the exhaustion requirement as mandatory is consistent with what was historically a very limited availability of a request for compassionate release, and with the key role the BOP had in that process. See *United States v. Spears*, No. 3:98-CR-0208-SI-22, 2019 WL 5190877, at *3 (D. Or. Oct. 15, 2019) (the purpose of the 30-day period “is to allow the BOP time to consider and act upon requests before necessitating court intervention”).

The Neman Defendants argue that the exhaustion requirement can and should be waived here. As noted, in support of this position they rely on *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993). *Hendricks* evaluated the exhaustion requirement in 28 U.S.C. § 2254(b) (1988), which applies to a federal writ of habeas corpus for a person in state custody. At the time of that decision,⁵ 28 U.S.C. § 2254(b) (1988) provided:

[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Hendricks treated this exhaustion requirement as prudential, and reasoned that the requirement could be waived “in rare cases where exceptional circumstances of peculiar urgency are shown to exist.” *Hendricks*, 993 F.2d at 672. *Hendricks* concluded that the administrative exhaustion requirement should be waived for the petitioner there because the “[s]tate . . . ha[d] [already] had the first opportunity to examine” the alleged constitutional violations, and “the interests of comity and federalism” reflected in 28 U.S.C. § 2854(b) “ha[d] been served.” *Id.*

Hendricks is distinguishable for three reasons. *First*, the exhaustion requirement at issue in *Hendricks* included a broad exception where state processes were deemed ineffective. The exhaustion requirement in the compassionate release statute, by contrast, contains no exceptions and is mandatory. This distinction is also in harmony with the somewhat flexible language elsewhere in 28 U.S.C. § 2254(b), *i.e.*, that a writ “shall not be granted *unless it appears* that the applicant has exhausted the remedies available . . .” (emphasis added). *Second*, the exhaustion requirement in 28 U.S.C. § 2254(b) is fundamentally different than the one in the compassionate release statute. 28 U.S.C. § 2254(b) codified an exhaustion requirement that was developed through the common law and that “is grounded in principles of comity and reflects a desire to ‘protect the state courts’ role in the enforcement of federal law.” *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)); see *O’Sullivan v. Boerckel*, 526 U.S. 838, 842-45 (1999) (similar). Because it is grounded in common law, the exhaustion requirement in 28 U.S.C. § 2254(b) is analogous to “[a] judge-

⁵ The current version of 28 U.S.C. § 2254(b) (2018), has been modified slightly, but without any substantive changes that are relevant to the analysis in this Order.

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made exhaustion doctrine[], even if flatly stated at first, [that] remain[s] amenable to judge-made exceptions.” *Ross*, 136 S. Ct. at 1857 (citing and quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). Meanwhile, the compassionate release statute is a congressionally established exhaustion doctrine for which “Congress sets the rules.” *Id.* at 1857. *Third*, *Hendricks* concluded that the “[s]tate . . . ha[d] [already] had the first opportunity to examine” the alleged constitutional violations. 993 F.2d at 672. The Warden has not yet had a similar opportunity to respond to the March 19, 2020 letters sent on behalf of the Neman Defendants.

Even if the exhaustion requirement in the compassionate release statute could be waived, the Neman Defendants have not shown a sufficient basis for such relief at this time. Their argument that the administrative process of the BOP will be futile, is supported only by citations to strategies announced by the BOP concerning COVID-19 (Dkt. 853 at 18-19), and a citation to one other action in which the Government has opposed compassionate release in light of COVID-19 (*id.* at 10 (citing *United States v. Gileno*, No. 3:19-CR-161-(VAB)-1, 2020 WL 1307108 (D. Conn. Mar. 19, 2020))). The steps reportedly undertaken by the BOP in response to COVID-19 have very substantive elements and cannot be deemed *per se* as ones that will have no effect. Further, the Barr Memorandum requires the BOP to assess whether certain inmates should be transferred to home confinement in light of the COVID-19 pandemic based on a consideration of some of the very issues raised by the Neman Defendants. These include their health, their age, their vulnerability to COVID-19, the risks posed by COVID-19 at their particular detention facility, and their suitability for home confinement as an alternative to custody. Therefore, there is not a sufficient showing that the required administrative process will not be applied suitably, timely and in good faith.

For these reasons, the Motion is **DENIED WITHOUT PREJUDICE**. The Neman Defendants must exhaust their administrative remedies before the Court can consider the merits of their requests for compassionate release. However, in order to expedite these proceedings, as necessary, if the request for administrative relief is denied or not addressed within the 30-day period, and given the Government’s stated wish to gather and present further information about the specific conditions at Lompoc USP (Dkt. 858 at 16 n.1), the parties should continue to gather information relevant to the merits of the Motion. This should include, but is not limited to:

1. Information that the Government can assemble with respect to the conditions at Lompoc USP, including any testing for COVID-19 among inmates, staff, contractors or others, and all other steps that are being taken there in response to COVID-19;
2. Whether any known cases of COVID-19 have been identified among anyone detained in, or who has had contact with Lompoc USP;
3. Admissible evidence as to the precise medical conditions of each of the Neman Defendants, and the relationship to the risks presented by COVID-19; and
4. What steps, if any, have been taken by the BOP to consider the black spots allegedly found during a routine chest X-ray of Hersel, and their relationship, if any, to the risks presented by COVID-19.

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On or before April 6, 2020, and following a telephonic or electronic meet and confer process among counsel, the parties shall file a joint report as to the status of efforts to gather such information. To the extent that the joint report contains confidential medical information as to one or both of the Neman Defendants, one or both parties may, in conformance with the process stated in the Local Rules and Standing Order D (pg. 4-7), request leave to redact those portions from the version filed on the publicly-available docket, and to file the unredacted version under seal.

IT IS SO ORDERED.

Initials of Deputy Clerk :
cw

CC: