

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA :
 :
 v. : **APPEAL NO. 20-1682¹**
 :
CALVIN ROEDER, :
 Appellant :

**UNOPPOSED EMERGENCY MOTION REQUESTING
POSTPONEMENT OF SELF-SURRENDER DATE**

Pursuant to Federal Rules of Appellate Procedure 8 and 9(b), and Local Appellate Rule 9.1(b), appellant Calvin Roeder respectfully moves this Court to postpone his self-surrender date for a further 60 days, until **July 6, 2020**.

Alternatively, the case should be remanded with instructions for the district court to do so forthwith. The government does not oppose.

Mr. Roeder's self-surrender date should be postponed in light of the COVID-19 pandemic as explained in detail below. This would preserve the status quo. It is undisputed that, under 18 U.S.C. § 3143(a)(1), Mr. Roeder has established by clear and convincing evidence that he is not likely to flee or pose a

¹ Although this appeal has been administratively closed by the Clerk of the Court, this motion is being filed under No. 20-1682 because the district court has not issued a new order as to which a notice of appeal may be filed.

danger to the safety of any other person or the community if granted continued release pending execution of sentence.

Factual and Procedural History

1. Mr. Roeder is a 36-year-old man with no criminal history who lives in the attic of his parents' home in Pottstown, Pennsylvania. *See* Presentence Investigation Report (PSR), at p.3, ¶¶ 36-39, 51.² Professional evaluation in these proceedings has concluded that he suffers from Asperger's Disorder/Autism Spectrum Disorder, although those conditions were never clinically diagnosed or treated. Despite a childhood and adulthood of social alienation, Mr. Roeder continued his education through a masters degree from Kutztown University. *Id.* at ¶ 66.

2. Mr. Roeder's social isolation and deep-seated feelings of worthlessness led to the development of numerous addictions. He smoked marijuana daily from his teen years until mid-2018. PSR at ¶ 64. He sporadically used methamphetamine. *Id.* Of most consequence here, as a teen he discovered child pornography. *Id.* at ¶ 58. Rather than amassing a large collection of such material, as is typical in child-pornography cases, Mr. Roeder has been watching

² The Presentence Investigation Report was previously filed under seal in this appeal.

the same twelve videos since he was 15 years old—viewing them approximately eight times per year. *Id.* at ¶¶ 58-59. He would sometimes view other child pornography and immediately delete it, and forensic examination of his computer revealed seven thumbnail images and “artifacts” of 30 videos. *Id.* at ¶¶ 12-14. All of this makes him feel “below human.” *Id.* at ¶ 61.

3. In June 2018, Mr. Roeder was charged with one count of possession of child pornography and two counts of distribution, based on law enforcement’s downloading of two video files from a folder on Mr. Roeder’s computer that he made available on a file-sharing network. PSR at ¶¶ 1, 8, 11. He immediately confessed to agents executing a search warrant on his parents’ home, and pleaded guilty in March 2019. *Id.* at ¶¶ 12-14, 18. On February 11, 2020, the district court sentenced Mr. Roeder to 78 months’ imprisonment to be followed by 15 years of supervised release.

4. Mr. Roeder has been released on conditions since his initial appearance. The conditions are strict: house arrest and no computer use whatsoever, among others. DDE 8, 39. It is undisputed that Mr. Roeder is not a flight risk or a danger to the community. Release was continued by the district

court through execution of sentence, owing in part to the fact that Mr. Roeder's mother fell ill and has now died. DDE 52.³

5. Mr. Roeder was originally set to self-surrender on March 30, 2020 at FCI Allenwood Low, in northeastern Pennsylvania, for service of his sentence. DDE 52. Due to the then-emerging COVID-19 pandemic, he moved in the district court for a 30-day extension of the self-surrender date, until May 4, 2020. DDE 58. The government initially opposed, but then consented to the request. DDE 59. The district court denied the motion by summary order. DDE 62.

6. Mr. Roeder appealed, asking this Court to reverse the district court's order and to extend the self-surrender date by 90 days. Third Cir. Dkt. 5, No. 20-1682.

a. A panel of the Court (Smith, C.J., and Ambro and Chagares, JJ.) reversed by Order dated March 29, 2020. The Order states:

The [Emergency Motion filed by Appellant Calvin Roeder Appealing the District Court's Denial of Appellant's Motion to Delay Execution of Sentence Until May 4, 2020] is granted. The order of the District

³ Mr. Roeder was briefly detained in November 2019 to adjudicate allegations that he had used drugs and tampered with his ankle monitor. DDE 36. Mr. Roeder admitted his drug use, but denied tampering. It is undisputed that Mr. Roeder never impermissibly left his parents' home. After an evidentiary hearing, the government's detention motion was denied and Mr. Roeder was returned to pre-sentence release. DDE 39.

Court entered March 26, 2020 denying Appellant's request to delay execution of sentence is reversed.

On March 25, 2020, the Government filed a non-objection in the District Court stating that the Government was willing to extend the self-surrender date. This Court's reversal of the District Court order is based on the willingness of the Government at that time to extend the report date. This ruling gives no cognizance to the basis advanced by the Appellant in the emergency motion presented to this Court. The panel will issue a supporting memorandum or opinion at its earliest convenience.

Appellant will not be required to self-report on March 30, 2020 and the current conditions for Appellant's release are continued until Appellant self-surrenders or until a subsequent order is entered.

Third Cir. Dkt. 11, No. 20-1682.

b. A not-precedential opinion followed on April 1, 2020, clarifying the basis for the reversal. *United States v. Roeder*, __ F. App'x __, 2020 WL 1545872 (3d Cir. 2020). The panel explained that its review was hampered by the lack of an explanation by the district court for the denial of Mr. Roeder's motion, as is required by Federal Rule of Appellate Procedure 9(a)(1). *Id.* at *3. Given "the exigent circumstances surrounding the COVID-19 pandemic" and Mr. Roeder's then-imminent self-surrender date, the panel elected to grant relief rather than to remand to the district court for an explanation of the denial. *Id.* The panel also explained that it was not considering any "arguments proffered for the first time" on appeal by Mr. Roeder. *Id.* at *3 n.14.

7. The panel’s Order expressly excused Mr. Roeder from self-surrendering on March 30, 2020. It is unclear, however, whether the Order put in place a new self-surrender date (which would obviously be subject to potential future modification by the district court). After conferring on April 20, 2020, defense and government counsel were of the same view: the Order left no self-surrender date in force. Neither the Order nor the subsequent opinion expressly sets forth a new self-surrender date, either by calendar date or by specifying the length of the extension. Instead, the Order refers broadly to a future point when “Appellant self-surrenders or [] a subsequent order is entered.” Third Cir. Dkt. 11, No. 20-1682.⁴

8. On April 29, 2020, defense counsel was contacted for the first time by the Pretrial Services Office, which conveyed its understanding that Mr. Roeder is

⁴ We note that the Order can arguably be read in two additional ways. First, it might be read to extend the then-extant March 30, 2020 self-surrender date by a period of 90 days—the order granted Mr. Roeder’s motion appeal, and that motion requested a 90-day extension. Third Cir. Dkt. 5, No. 20-1682; *Roeder*, 2020 WL 1545872, at *2. Alternatively, the Order might be read to grant only the 30-day extension that was sought in the district court. That would require reading (erroneously, in our view) the Order and opinion’s statements about not crediting the new “basis” and “arguments” on appeal as including the new *relief* sought on appeal. While the Order does refer to May 4, 2020, that is simply a description of the motion presented in the district court, not a statement of the relief being granted by the panel.

currently due to self-surrender on May 4, 2020. Defense counsel explained their contrary understanding, and over the next two days attempted to reach the U.S. Marshals for clarification. Late in the afternoon of May 1, 2020, the Marshals responded and forwarded an email indicating that at present the district court is requiring Mr. Roeder to self-surrender on May 4, 2020 without further court order.

9. Defense counsel immediately conferred with government counsel, who indicated that the government does not oppose a further 60-day extension of Mr. Roeder's self-surrender date due to the continuing effects of the COVID-19 pandemic.

a. Mr. Roeder promptly sought the extension in the district court, filing an unopposed motion before 9:30 a.m. on May 2, 2020. As of now, the district court has not acted on the motion.

b. Given the exigency of the situation, Mr. Roeder now moves for the same relief directly in this Court.

Jurisdiction and Standard of Review

10. The Court has jurisdiction pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291, and exercises plenary review while giving respectful consideration to the reasons articulated by the district court in support of its order. *See United*

States v. Strong, 775 F.2d 504, 505 (3d Cir. 1985). Here, no respectful consideration is due as the district court issued no order.

11. Federal Rule of Appellate Procedure 8 provides that a request to stay execution of an order pending appeal “must ordinarily” be presented first to the district court. Fed. R. App. P. 8(a)(1). Mr. Roeder respectfully submits that he has done so. But Rule 8 also expressly contemplates the filing of a motion in this Court when the district court has failed to act, as is the case here:

A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges. The motion must . . . state that, a motion having been made, the district court denied the motion *or failed to afford the relief requested* and state any reasons given by the district court for its action.

Fed. R. App. P. 8(a)(2)(A)(ii) (emphasis added). This Court has the power to grant the relief Mr. Roeder seeks here. *See, e.g., United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980) (holding, in the double jeopardy context, that Rule 8 stay is available to safeguard criminal defendant’s rights where district court has not issued a stay or documented the basis of its decision on the record); *Jackson v. Danberg*, 656 F.3d 157, 162 (3d Cir. 2011) (applying standard for imposing a stay under Rule 8 in determining whether to stay execution in criminal case).

12. The present circumstances warrant the emergency filing in this Court. Absent the Court’s extension of the self-surrender date, and assuming the district

court eventually denies the unopposed motion pending before it or effectively does so by taking no action, Mr. Roeder will be forced to report to prison without full adjudication of his extension request. That result might eventually be undone by a subsequent action of this Court, but significant harm would already have occurred—particularly given the grounds for the extension request in the first place. Requiring Mr. Roeder to report will also impose an unnecessary administrative burden on the Bureau of Prisons and/or the U.S. Marshals if Mr. Roeder is subsequently ordered released in relatively short order.

Statutory Standard for Release Pending Execution of Sentence

13. Release of a criminal defendant pending execution of sentence is governed by 18 U.S.C. § 3143(a). That statute provides varying standards for making release determinations, depending on the nature of the offense of conviction and whether the U.S. Sentencing Guidelines recommend a sentence of imprisonment.

Here, the release standard is set forth in § 3143(a)(2), which normally requires detention unless the defendant is not likely to flee or pose a danger, and there is either a substantial likelihood that a motion for acquittal or new trial will

be granted or the government is not seeking imprisonment.⁵ However, upon a clear showing of “exceptional reasons why such person’s detention would not be appropriate,” release on conditions may be ordered so long as the defendant is not a flight risk or a danger to the community. 18 U.S.C. § 3145(c).

14. The panel in the previous appeal in this case appropriately ruled that the COVID-19 pandemic can be an “exceptional reason” under § 3145(c). *Roeder*, 2020 WL 1545872, at *2. That is surely correct. “Exceptional” in this context means “clearly out of the ordinary, uncommon, or rare.” *United States v. Little*, 485 F.3d 1210, 1211 (8th Cir. 2007). *Accord United States v. Garcia*, 340 F.3d 1013, 1018-19 (9th Cir. 2003); *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991).

As of this writing, the global COVID-19 pandemic has resulted in 3,349,786 confirmed cases and 238,628 deaths;⁶ a National Emergency Proclamation by the

⁵ Section 3143(a)(2) applies because Mr. Roeder’s convictions are pursuant to 18 U.S.C. §§ 2252(a)(2) and (a)(4)(b), which are defined as “crimes of violence” under 18 U.S.C. §§ 3156(a)(4)(C) and 3142(f)(1)(A).

⁶ World Health Organization Coronavirus Disease (COVID-19) Situation Dashboard, at <https://experience.arcgis.com/experience/685d0ace521648f8a5beeee1b9125cd>.

President of the United States;⁷ a statewide non-life-sustaining business closure and a stay-at-home order for ten counties (including Mr. Roeder’s county of residence) by the Governor of Pennsylvania;⁸ and a temporary closure of the James A. Byrne United States Courthouse, the principal seat of this Court.⁹ That is “clearly out of the ordinary, uncommon, or rare.” *Little*, 485 F.3d at 1211.

The Self-Surrender Date Should be Postponed
a Further Sixty Days in Light of the COVID-19 Pandemic

15. The parties in this case agree that a further 60-day extension from May 4, 2020 is appropriate in light of the continuing effects of the COVID-19 pandemic. The district court previously determined that Mr. Roeder is not a flight

⁷ *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>.

⁸ *Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of all Businesses that are not Life Sustaining*, at <https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order>; *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, at <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>.

⁹ *In re Temporary Closing of the James A. Byrne U.S. Courthouse in Philadelphia* (Standing Order Mar. 25, 2020).

risk or danger to the community, and the government agrees. *Roeder*, 2020 WL 1545872, at *3.

16. BOP is managing a still-escalating crisis. When the district court originally declined to extend Mr. Roeder’s self surrender date, on March 26, 2020, there were a total of 18 test-confirmed cases of COVID-19 throughout the federal prison system, including both inmates and staff. As of today, there have been 2,967 cases of COVID-19, and 37 inmates have died.¹⁰ Even those staggering numbers are by definition an undercount, because they reflect only test-confirmed cases, yet very little testing is actually being done—whether of symptomatics or asymptomatics, whether at prisons seriously affected or purportedly unaffected. *See Eric Heisig, Judge Grills Federal Prisons Lawyer On Lack of Coronavirus Tests*, Cleveland.com (Apr. 18, 2020) (reporting that FCI Elkton, one of the hardest hit facilities, tested 59 inmates out of its population of 2000, and receives only 25 rapid tests per week); Jeremy Roebuck, *One Philadelphia Prison Has Yet to Report a Single Case of the Coronavirus, But It Hasn’t Tested Any Inmates*, Inquirer.com

¹⁰ *See BOP COVID-19 Cases*, available at <https://www.bop.gov/coronavirus>. BOP declines to aggregate confirmed cases, and its website can easily be misinterpreted to suggest lower numbers by implying that positive cases include those who have recovered and those who have died. The fine print, however, states that positive cases include only “open cases,” not recoveries or deaths.

(Apr. 23, 2020) (“Sean Marler, the [FDC Philadelphia] warden, acknowledged in court filings this week that none of the inmates under his care had been tested.

None have exhibited symptoms to warrant it, he said.”).¹¹

17. None of this is to impugn BOP’s efforts or question its commitment. *See* Bureau of Prisons, *BOP Implementing Modified Operations*.¹² Instead, it simply demonstrates the inherent susceptibility of inmates to contagion and shows that BOP’s commendable measures have not yet “flattened the curve.”

18. It is important to understand that this request is not about releasing an inmate from prison due to the risk of contracting the COVID-19 disease. Every inmate already in prison presents an existing risk of transmitting the virus to other inmates and prison staff, and suffers an existing risk of receiving the virus from other inmates and staff. Courts deciding whether to release an inmate attempt to quantify those risks, estimate the potential consequences to the inmate based on age and medical condition, and then weigh all of that against the compelling

¹¹ Available at <https://www.cleveland.com/court-justice/2020/04/judge-grills-federal-prisons-lawyer-on-lack-of-coronavirus-tests-at-ohio-facility-in-wake-of-trumps-claim-that-anybody-can-get-tested.html>; <https://www.inquirer.com/news/coronavirus-fdc-philadelphia-inmate-release-covid-class-action-public-interest-law-center-justice-department-20200422.html>.

¹² Available at https://www.bop.gov/coronavirus/covid19_status.jsp.

interest of continuing to detain someone who is already in prison either because he or she is serving a sentence or has been deemed a danger or flight risk pretrial.

19. That is an exceedingly difficult calculation that the Court does not have to attempt here. This request presents a far easier question: Does it make sense to order a person currently sheltering in place by order of both the district court (release conditions) and the Governor of Pennsylvania (COVID-19 restrictions) to leave his parents' home, travel across the state of Pennsylvania, and introduce himself into the federal prison population *now*, as opposed to sixty days from now when BOP may have flattened the curve and the risks of the pandemic may have abated?

The answer is “no.” There is no social or penological benefit to Mr. Roeder beginning his sentence on May 4, 2020 as opposed to two months from now. He is not a danger or flight risk, and the computer restriction in his release conditions guarantees he could not reoffend even if he wanted to—which assuredly he does not. All of that is why he is currently on release. Society will get its full measure of retribution, deterrence, and incapacitation from the sentence imposed regardless of the exact date it commences. Unlike a refusal to release an inmate from prison, which maintains the status quo, insisting that Mr. Roeder begin his sentence now *disrupts* the status quo and increases the risk for everyone.

20. The COVID-19 risk is high.

a. First, with respect to Mr. Roeder. He is a relatively healthy 36-year-old man. But it is a myth that COVID-19 poses serious risk only to the elderly and medically compromised. According to a Centers for Disease Control and Prevention analysis of the first 2,449 confirmed COVID-19 cases involving Americans of known age, those in Mr. Roeder's age cohort (20-44 years) represented 29% of diagnoses, 20% of hospitalizations, and 12% of ICU admissions. The non-elderly, defined as 20-64 years, represented 20% of deaths.¹³

That represents the risk in the general population—Mr. Roeder's risk would be far higher in prison at this moment, as demonstrated by fast spread on COVID-19 in BOP facilities. In the last three weeks alone, inmate infections have increased by 636%—more than doubling each week. Although BOP for unknown reasons does not presently report any positives at FCI Allenwood, at least one staff member has tested positive in the last several weeks and may still be a carrier, or may have transmitted the virus to other symptomatic or asymptomatic carriers. *See*

¹³ *See Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States*, February 12-March 16, 2020, at https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w.

M. Moore, *Allenwood prison worker tests positive for COVID-19*, The Daily Item (Apr. 13, 2020).¹⁴

Conditions of confinement in prisons, and at FCI Allenwood Low in particular, create an optimal environment for the transmission of infectious disease. People who work in the prison leave and return daily; people deliver supplies to the facility daily; and inmates were having social, legal and medical visits regularly after the initial spread of the virus before the BOP's decision to stop visits for 30 days on March 13, 2020.¹⁵ The CDC has explained that inmates are at special risk of infection because they "live, work, eat, study, and recreate within congregate environments," their ability "to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations," and they "may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation."¹⁶

¹⁴ Available at https://www.dailyitem.com/news/snyder_county/allenwood-prison-worker-tests-positive-for-covid-19/article_4c7c4484-b39b-5b59-9429-0d4fe2797f71.html.

¹⁵ *Federal Bureau of Prisons Covid-19 Modified Operations Plan*, at https://www.bop.gov/coronavirus/covid19_status.jsp.

¹⁶ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Mar. 23, 2020), at

Mr. Roeder would be powerless to take the preventative self-care measures directed by the CDC to remain safe from COVID-19 infection. He would not be able to self-quarantine or engage in “social distancing,” for instance. He would be housed in a community dormitory environment that beds many inmates in close proximity with limited and shared facilities. There are community spaces where inmates and prison staff gather, including common rooms, laundry facilities, a barber shop, medical areas, and dining halls. These high-density areas are precisely the kind of spaces that have caused the alarmingly high spread rates of COVID-19.

b. The health risk to other inmates and prison staff from the introduction at this time of people like Mr. Roeder presenting no flight or danger risk is substantial, as well. He would not be preemptively tested, and BOP’s tool for screening new prisoners is antiquated and largely ineffectual.¹⁷ The tool dates to February, and asks about travel and close contact with people diagnosed with COVID-19. If the answers to those two questions are “no,” BOP personnel are

<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening>.

¹⁷ *Coronavirus Disease 2019 (COVID-19) Inmate Screening Tool*, available at https://www.bop.gov/coronavirus/docs/covid19_inmate_screening_tool_20200202.pdf.

instructed to proceed with normal intake without asking whether the person is experiencing any symptoms of COVID-19. The problems with the tool are manifest. First and foremost, its approach to exposure risk ignores the phenomena of community spread and asymptomatic carriers. Travel is now an inconsequential criterion as community spread has been present throughout the country for some time. And the requirement that a close contact actually be diagnosed with COVID-19 all but ensures an answer of “no”—testing has been largely unavailable in this country from the beginning, particularly for the poor and unconnected who make up the vast majority of incoming inmates.

* * *

Everyone—courts, BOP, the government, and defense counsel—is doing their best to deal with this unprecedented global public health challenge. Nobody can confidently predict the outcome or quantify the risk of disease and death to anyone in particular, including Mr. Roeder and the inmates and staff of FCI Allenwood Low. The only sensible approach is caution. And here, caution dictates the simple and cost-free result the parties agree upon: the status quo should be preserved, and Mr. Roeder’s self-surrender should be postponed.

While COVID-19 is not a “reason for every individual subject to a properly imposed federal sentence of imprisonment to avoid or substantially delay reporting

for that sentence,” *Roeder*, 2020 WL 1545872, at *3, postponement is justified here given that Mr. Roeder poses no flight or danger risk, the government consents to postponement, and preservation of the status quo is the safest course for all concerned.

WHEREFORE, for the foregoing reasons, the Court should amend the conditions of Mr. Roeder’s release by extending his self-surrender date a further 60 days, until **July 6, 2020**. Alternatively, the case should be remanded with instructions for the district court to do so forthwith.

Respectfully submitted,

/s/ Brett G. Sweitzer
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Assistant Federal Defender
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LEIGH M. SKIPPER
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CERTIFICATE OF SERVICE

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have electronically filed and served a copy of *Unopposed Emergency Motion Requesting Postponement of Self-Surrender Date* upon Filing User of record through the Third Circuit Court of Appeals' Electronic Case Filing (CM/ECF) system, and upon Assistant United States Attorneys Robert A. Zauzmer and Josh Davison by e-mail.

/s/ Brett G. Sweitzer
BRETT G. SWEITZER

DATE: May 3, 2020