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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 17-CR-00169(ILG)

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:  
-against- : United States Courthouse  
: Brooklyn, New York

:  
: Thursday, May 7, 2020  
JAMES GOMEZ, : 12:15 p.m.

:  
Defendant. :  
:

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TRANSCRIPT OF CRIMINAL CAUSE FOR BAIL HEARING  
BEFORE THE HONORABLE I. LEO GLASSER  
UNITED STATES SENIOR DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Government: RICHARD P. DONOGHUE  
United States Attorney  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201  
BY: JOSHUA HAFETZ, ESQ.  
Assistant United States Attorney

For the Defendant: LAW OFFICE OF ROBERT OSUNA, P.C.  
11 Park Place  
New York, New York 10007  
BY: ROBERT OSUNA, ESQ.

Court Reporter: Michele D. Lucchese, RPR, CRR  
Official Court Reporter  
E-mail: MLuccheseENDY@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

1 THE COURTROOM DEPUTY: Criminal Cause for Motion,  
2 United States versus James Gomez. Counsel and other  
3 participants, please state your appearances for the record.  
4 Please keep your voices up and remember to identify yourself  
5 each time you speak.

6 MR. HAFETZ: Good afternoon, Your Honor. Josh  
7 Hafetz on behalf of the United States.

8 THE COURT: Good afternoon, Mr. Hafetz.

9 MR. OSUNA: Robert Osuna on behalf of Mr. Gomez.  
10 Good afternoon, Your Honor.

11 THE COURT: Good afternoon. Are you ready to  
12 proceed, Mr. Osuna?

13 MR. OSUNA: Yes, Your Honor.

14 THE COURT: You are waiving the presence of your  
15 client here today?

16 MR. OSUNA: Yes, sir.

17 THE COURT: If you are ready to proceed, I will hear  
18 you.

19 MR. OSUNA: Thank you.

20 Your Honor, it has come to my attention that during  
21 the time my client has been incarcerated he has indeed tested  
22 positive for COVID-19. It appears from the medical records  
23 that were obtained by the Government, which I thank the  
24 Government for being able to do that, he tested positive back  
25 in April. In mid April, he tested positive. He is now on his

1 third week of quarantine. It appears as of last week he was  
2 still presenting with symptoms of his COVID.

3 It doesn't appear that the prison has any kind of  
4 clear re-entry plan. Based on those reasons, I am asking for  
5 compassionate release, that he be allowed to be removed from  
6 prison, be placed in home confinement where he could  
7 successfully complete his quarantine.

8 Apparently, what's happening at this facility is  
9 they keep bringing in separate individuals who are testing  
10 positive from quarantine. So when an additional person comes  
11 in, that extends the period of time that these individuals are  
12 quarantined. Normally a COVID-related quarantine should last  
13 14 days. He is on his third week of being quarantined. It  
14 appears this will never finish if they keep bringing in  
15 individuals that are testing positive.

16 I know the Government made an issue as to whether he  
17 exhausted his remedies as to 30 days, but what will happen is  
18 that if we wait the 30 days, we don't know what his condition  
19 will be like next week. We keep testing his condition every  
20 day, but we don't know what his condition will be. Will it  
21 better? Will it be worse? There is just no way of knowing if  
22 he remains in that location.

23 He has completed the majority of his sentence.  
24 There is an issue as to whether he's eligible for home  
25 release. I had spoken to Ms. Wright at the facility who

1 indicated to me when I spoke to her that he was on a list for  
2 removal to a halfway house. Apparently, she said that's not  
3 the case. My conversation with her was that she was so busy  
4 dealing with phone calls from attorneys, that she couldn't do  
5 her work. We left her alone. That was last month and that  
6 was before he tested positive. That was before he tested  
7 positive that I spoke to her. But now it is confirmed my  
8 client is COVID positive. For his safety, for the safety of  
9 the staff, for the correction officers, and the medical  
10 personally and the other inmates, he should be removed and put  
11 in home confinement where, of course, he will remain  
12 quarantine, have access to medical care, and he will be under  
13 supervised release regardless. So his period of supervised  
14 release will just begin then. I think that's the appropriate  
15 remedy.

16 Thank you, Your Honor.

17 THE COURT: Mr. Hafetz.

18 MR. HAFETZ: Judge, in the main, I will rest on my  
19 papers, but I do want to address a couple of brief points:  
20 One, as we set forth, and I won't spend a lot of time on it, I  
21 know Your Honor in the case of Tony Leung -- I think it was  
22 two days ago -- issued a ruling on the exhaustion issue. But  
23 I will just point out that as a legal matter he is required to  
24 exhaust his administrative remedies. And on the factual point  
25 on that, I will say I think what Mr. Osuna says bears out a

1 significant portion of the reason why such an exhaustion not  
2 only is legally required but actually makes sense in this  
3 case. What he kept saying is we don't know what it will be  
4 when it gets to 30 days. That's exactly what the process is  
5 designed to do.

6           So, in this case, the facts are -- just now moving  
7 to the merits of this -- he has recovered. So I am not, as I  
8 said in my papers, in any way making light of the fact that he  
9 contracted COVID-19. In fact, as is borne out by the medical  
10 records, suffered many of the symptoms that we all read about  
11 every day. He did. It is a nationwide problem. But Mr.  
12 Gomez has recovered.

13           He is on a phone call on May 4th for 15 minutes  
14 talking as happy as anyone I have heard. In it, he says he  
15 feels fine and literally, in quotation marks, is saying I  
16 don't have any more symptoms. That what he said, not  
17 suffering from symptoms anymore. He repeats the same in the  
18 e-mails that I have provided to the Court.

19           What this really is -- Judge, there is just no  
20 basis, no basis, let alone a compelling one, under  
21 compassionate release to release him at this point. What this  
22 really is is what Your Honor pointed out the other day in that  
23 the Leung case is this really a Rule 35 request, the old Rule  
24 35 to try to re-evaluate and release Mr. Gomez after this  
25 Court already imposed its sentence.

1           There is just no basis to release him from his  
2 mandatory minimum 15-month sentence.

3           I am happy to answer any other questions the Court  
4 might have about that. Our position is there just is no  
5 basis.

6           I do think, in the end, while I am not faulting  
7 counsel for it because I don't think he had access to the  
8 medical records that clearly belie any claim that the  
9 defendant is in any imminent danger at the time, meaning now,  
10 but this is really an end run around the sentence that this  
11 Court imposed. In light of what Your Honor knows and everyone  
12 in this district knows are an inundation of these claims right  
13 now. Many of them serious with people with real underlying  
14 conditions who face a danger, but this is simply not one of  
15 them.

16           THE COURT: Mr. Osuna, is there anything that you  
17 want to say in response? Mr. Osuna, are you still there?

18           MR. OSUNA: Yes, I'm still here.

19           THE COURT: Is there anything you want to say in  
20 response?

21           MR. OSUNA: Yes. I would like to say something in  
22 response. I do think that the fact that my client has tested  
23 positive, I think the reason -- it's not just for his safety,  
24 it's for the safety of the other people in the prison as well.  
25 This is not just a sentence reduction. He completed -- out of

1 his mandatory minimum sentence, he has completed the majority  
2 of it. So it's not just that he got sentenced recently. It  
3 is not just a regular Rule 35. I think taking into  
4 consideration the exhaustion, I mean, it would make no sense  
5 for me to just re-file it next week because it's not that --  
6 you know, we're not close to the exhaustion period. If it  
7 were just that, then I would just re-file it next week. But  
8 for the safety of the other inmates, the fact that he would  
9 continue being quarantined endlessly, because they keep  
10 bringing in other individuals that are positive. So his  
11 quarantine will never end. He just won't have an opportunity  
12 to recover unless he is removed from this location.

13 THE COURT: All right. You are finished, I take it.

14 Mr. Osuna, did I understand you to say initially  
15 that you just became aware of the fact that Mr. Gomez has  
16 tested positive?

17 MR. OSUNA: No. What had happen is this: When I  
18 first learned -- when the pandemic first hit -- my client is  
19 very overweight. He's clinically obese under the BMI  
20 standards, so --

21 THE COURT: Mr. Osuna, the question I asked was that  
22 you knew that Mr. Gomez had tested positive when you submitted  
23 the motion on his behalf, yes?

24 MR. OSUNA: Oh, yes, I filed it. Yes. Absolutely.  
25 Yes.

1 THE COURT: Now, I just want to make sure that I  
2 understand what it is that you have written in your  
3 memorandum. You say that Mr. Gomez tested positive for  
4 COVID-19 and you have been unable to speak to him for several  
5 weeks. I take it that when you submitted this memorandum, you  
6 submitted it not having been able to speak to him for several  
7 weeks; is that right?

8 MR. OSUNA: That's correct.

9 THE COURT: I have spoken to his brother and  
10 co-defendant Marlon, but I have been unable to speak to him  
11 for several weeks. That is what you say. I take it that's  
12 correct.

13 MR. OSUNA: That was correct when I filed it. I  
14 spoke to him --

15 THE COURT: Excuse me, Mr. Osuna, please. Is it  
16 correct that you say that you have been unable to speak to him  
17 for several weeks when you submitted this petition for  
18 compassionate release? Yes?

19 MR. OSUNA: Yes.

20 THE COURT: And then you say Marlon Gomez indicates  
21 that the facility is poorly equipped to quarantine. And have  
22 you made some independent inquiry about whether the facility  
23 is or is not adequately equipped? Hold that.

24 Then you go on to say Marlon Gomez indicated that  
25 James was last seen. I spoke to Mr. Gomez's father who

1 indicated that he spoke to James last Friday. I did confer  
2 several weeks ago with his case manager, who, by the way,  
3 looking at Mr. Hafetz's response, the case manager says he  
4 never said any such thing as has been attributed to her in  
5 your petition.

6           And then you say "Given the imminent danger that my  
7 client faces." What is the imminent danger that your client  
8 is facing? Then you say, in conclusion, my client is a  
9 35-year-old man now stricken with a potentially fatal disease.  
10 He is apparently being treated with nothing other than  
11 Tylenol.

12           Now, to begin with, your petition is premature.  
13 Exhaustion of remedies is in my view required by 3582 of Title  
14 18 of the United States Code. And secondly, Mr. Gomez's  
15 situation is nowhere near presenting an extraordinary and  
16 compelling reason for compassionate release. Mr. Gomez had  
17 tested positively, as about 70,000 people, judging by the  
18 latest statistic that I have seen on TV, have been tested  
19 positive, and Mr. Gomez, perhaps more fortunately than many of  
20 the other 70,000, was provided medical attention, was provided  
21 with whatever it was that was needed to address his positive  
22 response and he has been completely recovered.

23           I take it you have read the e-mails which have been  
24 attached to Mr. Hafetz's response where Mr. Gomez says he is  
25 now 100 percent, he is feeling fine. You have read all of

1 that, haven't you?

2 MR. OSUNA: Yes, Judge.

3 THE COURT: Now, Mr. Osuna, I want to call your  
4 attention, if you haven't looked at it lately, to Rule 11 of  
5 the Federal Rules of Civil Procedure. When you filed this  
6 petition, you certified that you have knowledge and belief  
7 formed after reasonable inquiry. Formed after reasonable  
8 inquiry with whom? You say you haven't spoken to your client  
9 in weeks before you submitted this petition.

10 You also certified that the facts have evidentiary  
11 support. What evidentiary support do you have for the facts  
12 that you have submitted in support of this application?

13 Now, I am pointing this out to you, Mr. Osuna,  
14 because the representations in this petition that you made  
15 were reckless and were not true and there is every basis for  
16 sanctioning you for presenting this petition. But more  
17 importantly, what is troublesome about this is what Mr.  
18 Hafetz, whether intentionally or knowingly was meant to convey  
19 the thought that I am about to convey, filing a petition, such  
20 as one you have filed, does a disservice to every lawyer who  
21 is filing petitions for compassionate release because it  
22 would, in effect, create some question in the mind of a judge  
23 as to whether the petitions which are being submitted are  
24 being submitted, as this one is, without any factual basis,  
25 without any justification for claiming that your client was

1 about to die, that there is an extraordinary and compelling  
2 reason to release him from prison, and it does a disservice  
3 and raises questions about these petitions, which are being  
4 filed not by the hundreds now but by the thousands.

5 I would suggest that you give some very careful  
6 thought, Mr. Osuna, as to what it is that you submit to a  
7 court on behalf of a client.

8 You certify that everything that you put in your  
9 petition, your pleading is correct and that you have made  
10 inquiry of the underlying facts and you haven't.

11 How long have you been practicing, Mr. Osuna?

12 MR. OSUNA: Your Honor, I'm practicing 25 years.

13 THE COURT: I think you should know, Mr. Osuna, that  
14 the most significant factor for every lawyer is his  
15 credibility, and you put your credibility in question when you  
16 submit this petition that you submitted.

17 When you say you haven't discussed anything with  
18 your client for weeks before you submitted this petition. Is  
19 there some reason you couldn't have obtained the medical  
20 records of James Gomez? Is there any reason why you couldn't  
21 gotten them and made inquiry about it, what his condition is?

22 MR. OSUNA: Your Honor, generally for us to get  
23 medical records we have to send in a HIPAA form and that HIPAA  
24 form has to be signed and notarized and then returned back.

25 THE COURT: Well, is that such a terrible hardship?

1 Is that something that you shouldn't do or can't do? Is that  
2 inconsistent with your certification that you have made  
3 reasonable inquiry of the underlying facts? You have to fill  
4 out a form, but not having done that, you make representations  
5 in the petition which are completely belied by the records  
6 which you could have obtained.

7 Mr. Osuna, I am making these observations to a  
8 considerable extent for your benefit. I am not going to  
9 impose sanctions on you, which I really could, but more  
10 troublesome is that the petition that you have submitted, they  
11 raise questions in the mind of some other judge who gets a  
12 petition like this as to whether how many petitions like this  
13 are being filed without any real justification.

14 The Bureau of Prisons facility treated your client  
15 and relieved him from this positive test of the corona virus  
16 to the point where he's feeling 100 percent and he is feeling  
17 fine, but you want to release him, to finished his sentence.  
18 His sentence was mandatory, but given the facts in this case:  
19 The amount of cocaine, drugs, and everything else which was  
20 found when his brother's house was searched, as I recall it,  
21 might have justified a more difficult sentence than 60 months.

22 The Bureau of Prisons is doing the best it can under  
23 the circumstances, which is no-fault of their own. Everybody  
24 is dealing with the terrible, terrible situation. You make it  
25 worse when you submit a petition such as the one you

1 submitted. Your motion is denied. I have nothing more to  
2 say. Thank you all very much.

3 MR. OSUNA: Thank you very much, Your Honor.

4 MR. HAFETZ: Thank you, Your Honor.

5 (Matter concluded.)

6 \* \* \* \* \*

7 I certify that the foregoing is a correct transcript from the  
8 record of proceedings in the above-entitled matter.

9 /s/ Michele D. Lucchese

May 8, 2020

10 \_\_\_\_\_  
Michele D. Lucchese

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DATE

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