

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA

CRIMINAL ACTION: 3:16-cr-00073

VERSUS

JUDGE BRIAN A. JACKSON

BENJAMIN ROSENTHAL

**MAGISTRATE JUDGE
RICHARD L. BOURGEOIS, JR.**

**MOTION TO RECONSIDER
MOTION TO RELEASE PENDING SENTENCE**

NOW INTO COURT, through undersigned counsel, comes Defendant Benjamin Rosenthal who respectfully moves this Honorable Court to reconsider its ruling revoking his release on home incarceration pending sentence.

In support of this motion, counsel states:

1. On July 7, 2016, Benjamin Rosenthal was indicted by the grand jury on one count of transporting child pornography in violation of 18 U.S.C. § 2252(A)(1) and one count of possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B). The transportation count alleged that Mr. Rosenthal uploaded a single image of child pornography to “chatrandom,” a chatting website, which may have been inadvertent.

2. At his initial appearance on August 22, 2016, United States Magistrate Judge Richard Bourgeois released Mr. Rosenthal on home incarceration with conditions to be monitored by Pre-Trial Services. Rec.Doc. 7.

3. On March 1, 2017, Mr. Rosenthal entered a guilty plea to Count 2 of the Indictment pursuant to a plea agreement with the Government. Rec.Doc. 35. The Court scheduled sentencing for June 29, 2017.

4. Following the entry of the plea, the Court proceeded to a determination of Mr. Rosenthal's custody status. The Government represented that it had been notified by the Pretrial service office that Mr. Rosenthal had not been compliant with the conditions of his supervised release. Specifically, the Government argued that Mr. Rosenthal should be remanded to custody of the U.S. Marshal's because he had "gone places without preapproval of the Pretrial services office," failed to keep his equipment charged and had not received mandatory mental health assessment and treatment as ordered. *Transcript 3/1/2017 at 32-33*. Although counsel was notified by the attorney for the Government that Pretrial Services had filed a Notice of Violation, the Government did not file a Motion to Revoke Mr. Rosenthal's release status, and Mr. Rosenthal was not given a meaningful opportunity to confront the allegations of his violations.

5. The Court took note that the Magistrate Judge permitted Mr. Rosenthal to remain out of the custody of the U.S. Marshal Service largely because of his medical condition which the Court stated "appears that you've been treated, hopefully successfully... so there's no imminent risk to your health that would be brought on by being placed in the custody of the Marshal Service." *Transcript 3/1/2017 at 36*.

6. The Court then referenced those several conditions which Benjamin Rosenthal allegedly violated to which Mr. Rosenthal neither had notice or an opportunity to meaningfully respond. *Id at 36-39*.

7. Following its order remanding Mr. Rosenthal to the custody of the U.S. Marshal's Service, the Court invited counsel to file a Motion to Reconsider along with the submission of any evidence she would like to the Court to review.

8. On or about April 5, 2017, undersigned counsel was contacted by Ben Rosenthal from the Ascension Parish jail and informed that he was being discontinued from taking Imodium,

which was the sole medication being used to treat his chronic Crohn's disease while the medical staff at Ascension Parish Prison determined how to treat his condition. Counsel contacted Danielle Lacy at USMS to obtain Mr. Rosenthal's medical records and was informed that the USMS could not release his medical records with a HIPAA compliant release, but needed a Court Order from this Court to release those records. *See emails attached as Exhibit A.*

9. Counsel also attempted to obtain the records maintained by Pretrial Services to determine that Mr. Rosenthal was out of compliance with its conditions and was informed that those records could not be released without a court order. *See emails attached as Exhibit B.*

10. Counsel for Mr. Rosenthal now submits this Motion for Reconsideration, along with 2399 pages of Benjamin Rosenthal's extensive medical records, filed under seal. *See Medical Records, attached under seal as Exhibit C.* By separate motions to compel, Mr. Rosenthal requests that this Court supplement his motion with orders to produce Mr. Rosenthal's medical records from Ascension Parish Prison and the Pretrial Services records regarding his period of pretrial supervision.

11. For the following reasons, Mr. Rosenthal now respectfully requests that this Court reconsider his pretrial release status and release him to home incarceration with the conditions previously imposed.

A. Mr. Rosenthal should be released because there exists clear and convincing evidence that he is neither a danger to himself or to the community.

12. The matter of release pending sentencing is governed by 18 U.S.C. § 3143(a)(1) which reads as follows: the judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

13. Ben Rosenthal submits that he is not likely to flee or to pose a danger to any other person or the community. During the six-month period during which he was under home incarceration, Mr. Rosenthal did not leave his residence under any circumstances other than for medical appointments with his doctor. Mr. Rosenthal's medical condition makes it extremely unlikely that he would flee. With carefully constructed and tight restrictions, defendant would not pose a risk to the safety of any other person or the community. Cf. *U.S. v. Farlow, D.Me.2011, 824 F.Supp.2d 189* (Release appropriate under 18 U.S.C. § 3143(a)(1) where defendant's medical condition, hepatic encephalopathy and abdominal ascites caused by advancing liver disease, requiring ongoing medical treatment which rendered his chances of flight legally unlikely, though not inconceivable.).

14. Mr. Rosenthal did not access any computer devices and did not have contact with anyone under 18 and with anyone, period, with the exception of a few adult members of his immediate family, his attorney and medical personnel. It is worth noting that while extremely serious, the charges never involved any inappropriate contact with children, any attempt to contact children, nor do they allege that his "transportation" of illegal images was intentional. Mr. Rosenthal has no criminal record.

15. Mr. Rosenthal can be adequately supervised by Pretrial Services.

B. Additionally, Mr. Rosenthal should be released because there exist exceptional circumstances warranting his release.

16. A person not otherwise subject to release pursuant to 18 U.S.C. § 3143(a)(2), but who meets the conditions of release set forth in 18 U.S.C. §§ 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions by the judicial officer, if it is clearly shown that there are “exceptional reasons” why such person's detention would not be appropriate. Ben Rosenthal should be released pursuant to 18 U.S.C. § 3143(a)(1) as he is not likely to flee or pose a danger to any other person or the community and also because there exist exceptional circumstances warranting his release.

17. Mr. Rosenthal submits that his medical condition, specifically severe Crohn’s disease, warrants his release due to the exceptional circumstances justification described in 18 U.S.C. § 3143(a)(2).

18. As the Court noted, Mr. Rosenthal was originally placed on home incarceration in large part due to his diagnosis with chronic Crohn’s Disease, a debilitating health condition which he has suffered from for over 20 years. Crohn's disease is a chronic inflammatory bowel disease (IBD), which causes inflammation of the lining of the digestive tract, which can lead to abdominal pain, severe diarrhea, fatigue, weight loss and malnutrition. Inflammation caused by Crohn's disease can involve different areas of the digestive tract in different people. The inflammation caused by Crohn's disease often spreads deep into the layers of affected bowel tissue. Crohn's disease can be both painful and debilitating, and sometimes may lead to life-threatening complications. There is no known cure for Crohn's disease.

19. Mr. Rosenthal was diagnosed with Crohn's disease in 1999 at the age of 18, though he had complained of symptoms since the age of 12, when he underwent major surgery. Exhibit C, 014, 015.

20. Mr. Rosenthal underwent a second major abdominal surgery in May 2016 to remove another large part of his infected colon. He developed complications from the surgery and, while on home incarceration before this Court, underwent a second major abdominal surgery in December 2016. *See Medical Records, attached as Exhibit C.* Mr. Rosenthal did not recover from this third abdominal surgery until well into February 2017.

21. While at home, Mr. Rosenthal was prescribed a number of medications to control the symptoms of Crohn's including Methocarbamol 750 mg, a muscle relaxant, Pantoprazole, a proton pump inhibitor, for damage to the esophagus, Levsin for spasms and Percocet for pain. Mr. Rosenthal is not able to receive any of those medications in U.S. Marshal custody. The U.S. Marshal's had been administering Imodium for symptomatic diarrhea, but, upon information and belief, were not administering any of the medications prescribed by his treating physicians on the outside.

22. Many jurisdictions have found that serious medical conditions, like Crohn's Disease, which both threaten a defendant's life and cannot be adequately treated by the Bureau of Prisons, can constitute an extraordinary physical impairment justifying a downward departure from the United States Sentencing Guidelines. See, e.g., *United States v. Martin*, 363 F.3d 25, 49 (1st Cir. 2004) ("A court may find such an extraordinary impairment when imprisonment would threaten or shorten a defendant's life or when the Bureau of Prisons would be unable to adequately meet the defendant's medical needs.") (citing *United States v. LeBlanc*, 24 F.3d 340, 348-49 (1st Cir.1994)); *United States v. Johnson*, 318 F.3d 821, 825-26 (8th Cir.2003)("[R]ather than being

viewed in the abstract, a defendant's physical condition must be assessed in the light of the situation the defendant would encounter while imprisoned.”); *United States v. Albarran*, 233 F.3d 972, 979 (7th Cir.2000) (“The district court when considering a departure based upon a physical impairment must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated.”); *United States v. Willis*, 322 F.Supp.2d 76 (D.Mass.2004) (downward departure to 2 years probation warranted for defendant convicted of tax evasion because defendant was 69 years old and suffering from a combination of conditions including phlebitis, early stage chronic lymphocytic leukemia, colon polyps, hypercholesterolemia, and heart murmur.); *United States v. Blarek*, 7 F.Supp.2d 192 (E.D.N.Y.1998) (defendant convicted of conspiracy to commit racketeering and money laundering granted downward departure to three years of supervised release because of HIV-positive status); *United States v. Rioux*, 97 F.3d 648 (2d Cir.1996) (upholding downward departure based on physical condition and good works for a defendant convicted of violation of the travel act and scheme to commit extortion; defendant had received a kidney transplant 20 years prior, and the new kidney was diseased requiring regular blood tests and medicines, and the defendant also received a double hip replacement requiring monitoring); *United States v. Long*, 977 F.2d 1264 (8th Cir.1992) (upholding probation for defendant convicted of money laundering whose extraordinary physical impairment left him vulnerable to victimization in prison and where “the imposition of a term of imprisonment could be the equivalent of a death sentence for [defendant]”); *United States v. Baron*, 914 F.Supp. 660 D.Mass.1995) (age and physical ailment of 76-year-old defendant, convicted of bank fraud, warranted downward departure to home detention and probation where defendant had cardiac condition and pituitary removed due to cancer, and was suspected of having prostate cancer).

23. In *Martin*, the defendant pled guilty to participating in a scheme to defraud a supermarket chain of more than \$1.8 million. The First Circuit found that Martin's adjusted offense level was properly calculated at 16, with a sentencing range of 21-27 months, in Zone D. However, the Court found that Martin, who had suffered from Crohn's Disease for more than 30 years, met the definition of an extraordinary physical impairment, warranting a downward departure pursuant to U.S.S.G. § 5H1.4. Specifically, the Court found that Martin's prescription for Demerol, a narcotic, was the only treatment successful in combating symptoms of Crohn's. The record indicated that the Bureau of Prisons (BOP) would not administer Demerol to Martin during his incarceration, putting him at risk for a severe episode. In addition to Crohn's disease, the Court found that the defendant suffered from suppression of his immune system as a result of the continued steroid therapy necessary to treat Crohn's disease which placed him at "an unacceptable risk for serious infectious disease."

24. Significantly in *Martin*, in response the Government offered letters from BOP officials that offered an overview of how the BOP assesses the medical needs of prisoners. The first letter described the general process undertaken by the BOP in assigning prisoners to various facilities based on medical need. The Court found that the BOP's conclusory "boilerplate language" was inadequate "to assure the court that the BOP can ... care for Martin given his substantial history of medical difficulty." *United States v. Martin*, 363 F.3d 25, 30 (1st Cir.2004); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir.2000)(refusing to credit "a form letter trumpeting the BOP's ability to handle medical conditions of all kinds"). Concluding that "there is a high probability that lengthy incarceration will shorten Martin's life span," the First Circuit upheld the district court's imposition of a downward departure based on Martin's "extraordinary physical impairment." *Id.*

25. Contrary to the Court's conclusion that Mr. Rosenthal's medical condition was "successfully treated" prior to being remanded into U.S. Marshal custody, his chronic, potentially terminal, illness requires ongoing treatment that cannot be adequately addressed by the staff at Ascension Parish Prison.

26. Wherefore, due to Mr. Rosenthal's medical condition, prevalent jurisprudence supporting the treatment of Crohn's disease as an extraordinary physical impairment, and evidence that he is neither a flight risk or a danger, Mr. Rosenthal respectfully requests that this Court reconsider its ruling denying him release pending his sentence on June 29, 2017.

Respectfully submitted,

/s/ Rachel Conner

Rachel I. Conner (La. Bar No. 29726)
3015 Magazine Street
New Orleans, LA 70115-2232
Telephone: (504) 581-9083
Facsimile: (504) 527-6156

James E. Boren (La. Bar No. 3252)
830 Main Street
Baton Rouge, Louisiana 70802
Telephone: (225) 387-5786
Facsimile: (225) 336-4667

Attorneys for Benjamin Rosenthal

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, I filed the foregoing *Motion to Reconsider Motion to Release Pending Sentence* and that all counsel of record were served with a copy of this motion via the CM/ECF System.

/s/ Rachel Conner

Rachel Jones Conner

Monday, April 24, 2017 at 11:51:05 AM Central Daylight Time

Subject: RE: Benjamin Rosenthal
Date: Monday, April 10, 2017 at 11:34:52 AM Central Daylight Time
From: Lacy, Danielle (USMS)
To: Kelley Williams
CC: 'Rachel Conner', McDonough, Clayton (USMS), Pam_Harter@lamd.uscourts.gov

I talked to Judge Jackson's Chambers, and was told, USMS would have to have an order from the Judge to release those records.

Thanks,
Danielle Lacy
Middle District of Louisiana
United States Marshals Service
225-382-0304
225-389-0370 (f)

From: Kelley Williams [mailto:kelley@connersothern.com]
Sent: Monday, April 10, 2017 11:32 AM
To: Lacy, Danielle (USMS)
Cc: 'Rachel Conner'
Subject: RE: Benjamin Rosenthal

Ms. Lacy,
I am following up on the medical records.
Thanks,
Kelley Williams

From: Rachel Conner [mailto:rachel@connersothern.com]
Sent: Wednesday, April 05, 2017 3:22 PM
To: danielle.lacy@usdoj.gov
Cc: Kelley Williams <kelley@connersothern.com>
Subject: Benjamin Rosenthal

Dear Danielle,
Here is the HIPAA-compliant release signed by Benjamin Rosenthal authorizing you to release his medical records to me.
They can be emailed to rachel@connersothern.com or faxed to: 504-527-6156.
If this release is not sufficient, please provide Mr. Rosenthal with a release for his signature.

I have cc'd my assistant, Kelley Williams, who can also answer any questions.

Please keep me notified of any developments with Ben's health.

Thank you very much for your attention to this matter.

Sincerely,

Rachel I. Conner
Conner & Sothern
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083

This message is a PRIVILEGED AND CONFIDENTIAL communication. This message and all attachments are a private communication sent by a law office and may be confidential or protected by privilege. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of the information contained in or attached to this message is strictly prohibited. Please notify the sender of the delivery error by replying to this message, and then delete it from your system. Thank you.

Monday, April 24, 2017 at 11:51:44 AM Central Daylight Time

Subject: Re: Request for Information - ROSENTHAL
Date: Monday, March 13, 2017 at 5:11:54 PM Central Daylight Time
From: Patrick_S_Smith@lamd.uscourts.gov
To: Rachel Conner
CC: Jamie.flowers@usdoj.gov, jim@jamesboren.com, kelley@connersothern.com, Lynn_Guillot@lamd.uscourts.gov
Attachments: JPEG image, JPEG image

Ms. Conner:

Regardless of the reasons the Court ultimately decided to take Mr. Rosenthal into custody upon entering a guilty plea, our office is not authorized to release those records to you without approval directly from the Court.

It would appear to me that you would have to file a motion directly with the Court to release those records even prior to your Motion to Reconsider Bond Decision if it's your intention to make those records a part of your support for the motion. Simply filing the Motion to Reconsider and an Evidentiary Hearing being set would not provide my office any additional authorization to release this requested information as we do now.

In summary, the information your requesting is under the purview of Chief Judge Jackson, only he can authorize your request. Hope that this helps. Please do not hesitate to contact me should you have any additional questions or concerns.



Patrick S. Smith
Supervisory U.S. Probation Officer
Middle District of Louisiana
Office: (225) 389-3671 / Fax: (225) 389-3681
Email: patrick_s_smith@lamd.uscourts.gov

From: Rachel Conner <rachel@connersothern.com>
To: <Patrick_S_Smith@lamd.uscourts.gov>
Cc: <Jamie.flowers@usdoj.gov>, <kelley@connersothern.com>, <jim@jamesboren.com>, <Lynn_Guillot@lamd.uscourts.gov>
Date: 03/13/2017 04:15 PM
Subject: Re: Request for Information - ROSENTHAL

Thank you for getting back to me, Patrick, and for your explanation.

It was my appreciation that Judge Jackson remanded Ben Rosenthal based both on his change of plea and, in large part, based on the violation filed by US Probation, attached to this email. The bases for the violation in the written Notice, including Mr. Rosenthal's failure to properly charge the bracelet and his side-trip to McDonald's after a doctor's appointment, were specifically orally cited by Judge Jackson in his ruling remanding Mr. Rosenthal for not taking his conditions of pre-trial release seriously enough. Following his ruling, the judge suggested that I file a Motion to Reconsider his decision remanding Ben Rosenthal and to be sure to include supporting documents in support of the motion. For that reason, and in support of a Motion to Reconsider, I am requesting the home incarceration records.

In order not to waste anyone's time with an unnecessary Motion to Compel, please let me know if it is still US Probation's position that the disclosure of these records – in support of a Motion to Reconsider his Bond Decision - is not authorized by you and, if so, whether they would be so authorized in the event a Motion to Reconsider was filed and set for an evidentiary hearing.

Thank you again for your attention to this matter,

Rachel I. Conner
Conner & Sothern
3015 Magazine Street
New Orleans, LA 70115
(504) 581-9083

This message is a PRIVILEGED AND CONFIDENTIAL communication. This message and all attachments are a private communication sent by a law office and may be confidential or protected by privilege. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of the information contained in or attached to this message is strictly prohibited. Please notify the sender of the delivery error by replying to this message, and then delete it from your system. Thank you.

From: <Patrick_S_Smith@lamd.uscourts.gov>
Date: Thursday, March 9, 2017 at 12:02 PM
To: <Rachel@connersothern.com>
Cc: <Jamie.flowers@usdoj.gov>, <kelley@connersothern.com>, <jim@jamesboren.com>, <Lynn_Guillot@lamd.uscourts.gov>
Subject: Request for Information - ROSENTHAL

Ms. Conners:

I am writing you in response to your email request of 3/6/17, requesting our office provide "documentary evidence" to include all documents related to the electronic monitoring from 8/22/2016 through 3/1/2017. Because Mr. Rosenthal was taken into custody as a result of his plea and not because the Court held a bond revocation hearing, we are not authorized to release any court file information.

Thank you.

[attachment "ROSENTHAL - 3rd Violation Memo.pdf" deleted by Patrick S Smith/LAMD/05/USCOURTS]



Patrick S. Smith
Supervisory U.S. Probation Officer
Middle District of Louisiana
Office: (225) 389-3671 / Fax: (225) 389-3681
Email: patrick_s_smith@lamd.uscourts.gov

EXHIBIT C

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA

CRIMINAL ACTION: 3:16-cr-00073

VERSUS

JUDGE BRIAN A. JACKSON

BENJAMIN ROSENTHAL

**MAGISTRATE JUDGE
RICHARD L. BOURGEOIS, JR.**

ORDER

IT IS HEREBY ORDERED that the Motion to Reconsider in the above-captioned matter is **GRANTED**.

IN THE ALTERNATIVE, IT IS ORDERED that the matter be set for hearing on the ___ day of _____, 2017 at ___ o'clock __.m.

Signed in Baton Rouge, Louisiana, this ___ day of _____, 2017.

Judge, U.S. District Court