

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	NO. 10-338
	:	
v.	:	(JUDGE CAPUTO)
	:	
RAPHAEL J. MUSTO	:	(ELECTRONICALLY FILED)
Defendant	:	

**RESPONSE OF UNITED STATES TO DEFENDANT'S
MOTION FOR FURTHER AMENDMENT OF AMENDED ORDER OF
JANUARY 7, 2014**

COMES NOW, Peter J. Smith, United States Attorney for the Middle District of Pennsylvania and represents to the District Court the following:

1. On or about January 6, 2014 an evidentiary hearing was held on the defendant Musto's Motion to Continue Trial based upon the defendant's physical incompetence.
2. On January 7, 2014, the District Court entered an Amended Order, denying defendant's Motion on the basis of physical incompetence but granting the Motion on the basis of the defendant's mental incompetence. The District Court committed the defendant to the custody of the Attorney General for mental health evaluation.

3. On February 3, 2014, the defendant reported to the Federal Medical Center at Butner, North Carolina (FMC Butner).

4. On March 24, 2014, counsel for Musto filed the present Motion, alleging that since his commitment to FMC Butner, the defendant has been diagnosed with Non-Hodgkin's Lymphoma, also known as lymph cell cancer.

5. In his Motion, Musto represents that the "the consensus of medical opinion from the medical staff at Butner as well as [the defendant's personal physician in Pittston, PA] that the defendant is suffering from Stage IV, large B-cell Lymphoma and that the medical prognosis is very poor." Defendant's Motion at page 4, paragraph 10.

6. Although chemotherapy is indicated, the defendant argues that the medical consensus is that Musto "may not be a candidate for meaningful or effective...treatment." Defendant's Motion at page 4, paragraph 10. Without such treatment, however, the consensus is that Musto may have as little as two months to live. *Id.* To confirm this prognosis, the defendant maintains, he needs to be fully examined by Dr. Greenwald, his treating physician in Pittston. *Id.*

7. Counsel for Musto also identified his client's continuing deteriorating physical and mental deficits as complications contributing to Musto's poor prognosis. *Id.* at pages 5-6, paragraphs 11-15.

8. Counsel submits that, given his client's "health forecast," the defendant's condition can be fairly characterized as "grave." *Id.* at pages 6-7, paragraphs 16-17.

9. Musto argues that, given the recent developments at FMC Butner, it is now clearly established that the defendant is now both mentally and physically incompetent to stand trial. *Id.* at page 7, paragraph 17. Moreover, the likelihood of his physical and mental health improving so that he would be able to stand trial is minimal. *Id.* at page 8, paragraph 18.

10. Musto asks this Court to direct that he be released from federal custody to his family, who would transport him from North Carolina back to Luzerne County, PA for further medical evaluation and care. *Id.* at page 8-9, paragraphs 18-19.

11. The defendant seeks an indefinite continuance of his trial, during which time Musto will undergo treatment by his personal physician in Luzerne County. After four months of treatment, the

defendant requests that this Court direct a status report on his health, “so that the Court may consider any further options consistent with [the defendant’s] health status at that time.” Defendant’s Proposed Order (Document 163-1), filed March 24, 2014.

12. On March 25, 2014, Dr. Alton Williams, the staff psychiatrist at FMC Butner, reported the parties and the court as follows:

Mr. Musto has had a consultation with an oncologist at FMC Butner. The oncologist has opined that patients with Mr. Musto’s condition typically would have a predicted 5-year survival rate of 26% with a complete course of the chemotherapeutic agents. However, due to his cirrhosis (i.e. liver disease) and thrombocytopenia (i.e. low platlets) the oncologist does not recommend all of the chemotherapeutic agents as Mr. Musto would be at risk for exacerbation of his above conditions. Given the opinion not to use all the chemotherapeutic agents that are typically used it was also opined that Mr. Musto would have less than the 26% survival rate with treatment discussed above. Without treatment it is opined that Mr. Musto’s lifespan would be on the order of months. Per Mr. Musto’s discussion with medical team at FMC Butner he would like to defer a decision regarding treatment at this time.

13. In light of the above described prognosis, the government concurs in the motion to the extent that Mr. Musto should be released from FMC Butner temporarily so that he can be examined by his local

treating physicians. The government further requests that in one month Mr. Musto be directed to provide the court and the government with an update report including all appropriate medical diagnoses and decisions regarding his medical treatment for the Non-Hodgkins Lymphoma. The government further requests that at that time, if appropriate, Mr. Musto file a renewed motion to continue the trial indefinitely. In the absence of said motion, the government requests that the court hold a scheduling hearing to determine the next appropriate procedural steps in this case.

WHEREFORE, the United States requests this Court to allow the temporary release of the defendant for medical analysis and treatment.

Respectfully submitted,

PETER J. SMITH
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 31st day of March, 2014, she served a copy of the attached

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by first class United States mail and/or electronic mail to the following:

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