

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 96-16-P-H</b>
	)	<b>(Civil No. 97-24-P-H)</b>
<b>DENNIS PHILLIPO,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S PETITION FOR  
COLLATERAL RELIEF**

In a pleading styled “Petition for Writ of Audita Querela or Other General Powers Writ under the All Writs Act” (“Petition”) (Docket No. 24), Dennis Phillippo, appearing *pro se*, asks this court to vacate the sentence imposed by this court in this action, alter his sentence to one of home confinement instead of imprisonment, order the Bureau of Prisons to provide him with a liver transplant, or stay the remaining portion of his sentence for three years in order to enable him to obtain a liver transplant. Phillippo was sentenced to a term of imprisonment of 90 months after pleading guilty to one count of possession with intent to distribute of cocaine and cocaine base and one count of conspiracy to possess these materials with intent to distribute. Finding that the relief sought by Phillippo is not available in this court, I recommend that the petition be denied.

**I. Background**

Phillippo pleaded guilty to a two-count information charging him with conspiracy to possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846 and

with possession with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. § 841(a)(1). Information (Docket No. 9); Judgment (Docket No. 20). On July 24, 1996 he was sentenced to 90 months imprisonment and four years of supervised release. Judgment (Docket No. 20) at 2-3. This sentence was adjusted downward from the guideline sentencing range of 130 to 162 months as a result of the government's motion under United States Sentencing Commission Guidelines ("U.S.S.G.") § 5K1.1. *Id.* at 6; Partial Transcript of Sentencing Hearing ("Transcript"), Exh. A to Judgment, at 10. Phillip's motion for a further downward departure under U.S.S.G. § 5H1.4 was denied. Docket No. 19; Transcript at 10-12. Phillip did not appeal his sentence. On September 27, 1996 he filed an Application for Compassionate Release or Reconsideration of Sentence. Docket No. 21. This motion was denied on October 30, 1996. *Id.* Phillip took no appeal from that ruling. He filed this petition on January 21, 1997. Docket No. 24.

Phillip's motion for downward departure at his sentencing and his application for compassionate release were both based on his terminal liver disease. At the time of his sentencing, his treating physician informed the court that Phillip's life expectancy was under two years, that he had been attempting for a year to have Phillip accepted as a candidate for liver transplant, that Phillip had failed to follow up with the psychological evaluations requested by the transplant team, that a condition of the transplant program was that Phillip prove that he was complying with his drug rehabilitation program because he had to be free of illicit substances for six to twelve months before transplant, and that Phillip's activities leading to his conviction made it unlikely that he would be considered eligible for a transplant. Letter of W. Stephen Gefvert, D.O., Exh.1 to Defendant's Motion for Downward Departure from Applicable Guideline Sentence Pursuant to U.S.S.G. § 5H1.4 ("Downward Departure Motion") (Docket No. 19). Phillip also submitted a letter

from Harold H. Sullivan, Jr., M.D., stating that his request for a liver transplant would probably not receive a favorable response because of the need for an extended period of rehabilitation and abstinence in view of his recent drug use; the long waiting period for liver transplants in the New England area, which generates a reluctance to provide new livers to patients who show repeated return to drug use; the recent improvement in the overall condition of his liver; and the need for a period of medical therapy prior to consideration of a transplant, as a result of that improvement. Letter of Harold H. Sullivan, Jr., M.D., Exh. 2 to Downward Departure Motion. Dr. Sullivan stated that this medical therapy could be provided during Phillippo's incarceration. *Id.*

At sentencing, this court denied the motion for downward departure, noting that Phillippo's physical condition was improving in prison, that the greatest departure that could be given would still result in a five year mandatory minimum sentence, that Phillippo had an extremely extensive criminal history, and that the Bureau of Prisons has the power to grant a compassionate discharge for a life threatening condition. Transcript at 10-12. The court recommended that Phillippo be assigned to a Bureau of Prisons medical installation to serve his sentence. Judgment at 2. Phillippo is currently incarcerated at the United States Medical Center for Federal Prisoners at Springfield, Missouri. Petition at 12.

Phillippo has attached to his petition a copy of a letter from the warden at the Medical Center dated September 16, 1996 denying his request for a compassionate release. Exh. B to Petition. He has also submitted a copy of a "Special Progress Note" from the Medical Center's records dated September 10, 1996 and signed by Tamer G. Khalil, M.D., reporting that the opinion of a consulting gastroenterologist is that Phillippo's life expectancy is about one year. *Id.*, Exh. C. Dr. Khalil's note dated August 23, 1996 reports that Phillippo "is hardly able to move around because of discomfort

in his stomach” associated with abdominal distension with hernia. *Id.* The stated diagnosis includes end-stage liver failure. *Id.*

Phillipo makes the following allegations in his petition without documentary support: The surgeons at the Medical Center have determined that a procedure to repair the hernia, which appeared on August 23, 1996, would have a 70% chance of mortality due to his liver failure and associated complications. Petition at 3. A liver transplant will not be made available to him under the Bureau of Prisons’ policy for inmate terminal care. *Id.* at 4. The Bureau’s refusal to provide a liver transplant is due to the cost of the procedure. *Id.* at 8. The transplant team at the Medical Center is “extremely optimistic” that Phillippo will be cured if he receives a liver transplant. *Id.* at 9.

Phillipo also refers the court to a report of the United States General Accounting Office dated February 1994 entitled “Bureau of Prisons Health Care: Inmates’ Access to Health Care is Limited by Lack of Clinical Staff,” *id.* Exh. A, to support his argument that “the medical care within the Bureau of Prisons will kill him,” *id.* at 11.

## **II. Analysis**

The petition does not invoke the jurisdiction of this court pursuant to 28 U.S.C. § 2255(a), which provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

While Phillippo does seek, as one alternative, to have this court vacate his sentence, he does not base this request on any claim cognizable under the statute. Even if the petition could be construed to raise a claim under section 2255, Phillippo's failure to appeal his sentence makes relief under the statute unavailable in the absence of a showing of cause for the failure to appeal and resulting prejudice. *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996). Phillippo shows neither factor. *See also United States v. Sisneros*, 599 F.2d 946, 947 (10th Cir. 1979) (claim of inadequate medical treatment not cognizable in habeas corpus proceeding); *Fielding v. LeFevre*, 548 F.2d 1102, 1108 (2d Cir. 1977) (same).

Phillippo's request for a writ of *audita querela* is equally unavailing. That writ is available only if the petitioner raises a legal defect in his conviction or sentence that is not cognizable under existing post-conviction remedies, *United States v. Holder*, 936 F.2d 1, 5 (1st Cir. 1991), and may not be issued on purely equitable grounds, *United States v. Johnson*, 962 F.2d 579, 580 (7th Cir. 1992); *United States v. Ayala*, 894 F.2d 425, 426 (D. C. Cir. 1994). Phillippo would have been able to attack the failure of this court to grant his motion for downward departure in his sentence under section 2255 if he had filed an appeal; he is able to seek compassionate release from the court upon motion of the Director of the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A). He appears to seek a writ of *audita querela*, or other relief under the All Writs Act, 28 U.S.C. § 1651, purely on equitable grounds. Phillippo is not entitled to relief under the All Writs Act under the circumstances he presents.

The petition demonstrates that Phillippo has applied for compassionate release and that this application was denied by the warden of the Medical Center. Phillippo argues that the warden misunderstood the reason for which this court granted a downward departure at his sentencing, and

that this misinterpretation was the basis for the denial. Phillipio makes no showing that he has appealed the denial of his request through the Administrative Remedy Procedure set forth at 28 C.F.R. § 571.63 (incorporating 28 C.F.R. §§ 542.10-542.19). This failure to exhaust administrative remedies would bar court review in any event. *Williams v. Holbrook*, 691 F.2d 3, 5 (1st Cir. 1982) (state prisoner); *Mazzanti v. Bogan*, 866 F. Supp. 1029, 1033 (E. D. Mich. 1994) (federal prisoner); *see McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992) (exhaustion not required where prisoner seeks only money damages in a civil rights action, resort to administrative proceeding would prejudice subsequent court action, question exists concerning power of administrative agency to grant requested relief, or administrative body is shown to be biased). In addition, actions concerning the terms and conditions of a prisoner's incarceration, as opposed to the validity of his sentence, are properly brought in the United States District Court in the district in which the prisoner is incarcerated, *Coates v. Smith*, 746 F.2d 393, 395 (7th Cir. 1984); *Crawford v. Bell*, 599 F.2d 890, 891-92 (9th Cir. 1979), in this case the Western District of Missouri.

### III. Conclusion

For the foregoing reasons, I recommend that the petition for writ of *audita querela* be **DENIED**.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 14th day of March, 1997.*

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*David M. Cohen  
United States Magistrate Judge*