UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO. H-18-CR-115-S3
v.	§	
	§	
RODOLFO "RUDY" DELGADO	§	

UNITED STATES' RESPONSE TO DEFENDANT'S EMERGENCY MOTION FOR COMPASSIONATE RELEASE

The United States of America, by and through undersigned counsel, respectfully submits this response to the defendant's Emergency Motion for Compassionate Release Pursuant to 18 U.S.C § 3582(c)(1)(A)(i) (the "Motion"). The defendant, who has served fewer than six months of a 60-month sentence, argues in the Motion that he is entitled to immediate compassionate release because he bears risk factors for complications from COVID-19, should he contract it, and because he is presently housed at a medical facility where many other inmates have contracted the respiratory illness.

This Court should deny the Motion without prejudice because the defendant has failed to request compassionate release through the warden of the facility at which he is imprisoned, let alone exhaust his administrative remedies, which are statutory prerequisites to Court action. Should the Court reach the merits, it should deny the motion with prejudice because defendant has not met his burden of establishing that a sentence reduction is warranted under the statute, and because the defendant's request for early release would result in the defendant being sentenced to six months instead of 60 months, which is not consistent with the principles of justice contained in Section 3553(a).

I. FACTUAL BACKGROUND

A. BOP's Response to the COVID-19 Pandemic

As this Court is well aware, COVID-19 is an extremely dangerous illness that has caused many deaths in the United States in a short period of time and that has resulted in massive disruption to our society and economy. In response to the pandemic, BOP has taken significant measures to protect the health of the inmates in its charge.

BOP has explained that "maintaining safety and security of [BOP] institutions is [BOP's] highest priority." BOP, Updates to BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), *available at* https://www.bop.gov/resources/news/20200319_covid19_update.jsp.

Indeed, BOP has had a Pandemic Influenza Plan in place since 2012. BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), *available at* https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That protocol is lengthy and detailed, establishing a six-phase framework requiring BOP facilities to begin preparations when there is first a "[s]uspected human outbreak overseas." *Id*. at i. The plan addresses social distancing, hygienic and cleaning protocols, and the quarantining and treatment of symptomatic inmates.

Consistent with that plan, BOP began planning for potential coronavirus transmissions in January. At that time, the agency established a working group to develop policies in consultation with subject matter experts in the Centers for Disease Control, including by reviewing guidance from the World Health Organization.

On March 13, 2020, BOP began to modify its operations, in accordance with its Coronavirus (COVID-19) Action Plan ("Action Plan"), to minimize the risk of COVID-19

transmission into and inside its facilities. Since that time, as events require, BOP has repeatedly revised the Action Plan to address the crisis.

Beginning April 1, 2020, BOP implemented Phase Five of the Action Plan, which currently governs operations. The current modified operations plan requires that all inmates in every BOP institution be secured in their assigned cells/quarters for a period of at least 14 days, in order to stop any spread of the disease. Only limited group gathering is afforded, with attention to social distancing to the extent possible, to facilitate commissary, laundry, showers, telephone, and computer access. Further, BOP has severely limited the movement of inmates and detainees among its facilities.[1] Though there will be exceptions for medical treatment and similar exigencies, this step as well will limit transmissions of the disease. Likewise, all official staff travel has been cancelled, as has most staff training.

All staff and inmates have been and will continue to be issued face masks and strongly encouraged to wear an appropriate face covering when in public areas when social distancing cannot be achieved.

Every newly admitted inmate is screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. In addition, in areas with sustained community transmission, such as Philadelphia, all facility staff are screened for symptoms. Staff registering a temperature of 100.4 degrees

1 The defendant asserts that he comes into close contact with other inmates throughout his day in Fort Worth FMC and that shared facilities are not regularly cleaned, but it is unclear whether this close contact and lack of cleaning was before or after BOP's response to COVID-19.

Fahrenheit or higher are barred from the facility on that basis alone. A staff member with a stuffy or runny nose can be placed on leave by a medical officer.

Contractor access to BOP facilities is restricted to only those performing essential services (*e.g.* medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. All volunteer visits are suspended absent authorization by the Deputy Director of BOP. Any contractor or volunteer who requires access will be screened for symptoms and risk factors.

Social and legal visits were stopped as of March 13, and remain suspended until at least May 18, 2020, to limit the number of people entering the facility and interacting with inmates. In order to ensure that familial relationships are maintained throughout this disruption, BOP has increased detainees' telephone allowance to 500 minutes per month. Tours of facilities are also suspended. Legal visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols for prison staff.

Further details and updates of BOP's modified operations are available to the public on BOP website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

In addition, in an effort to relieve the strain on BOP facilities and assist inmates who are most vulnerable to the disease and pose the least threat to the community, BOP is exercising greater authority to designate inmates for home confinement. On March 26, 2020, the Attorney General directed the Director of the Bureau of Prisons (BOP), upon considering the totality of the circumstances concerning each inmate, to prioritize the use of statutory authority to place prisoners in home confinement. That authority includes the ability to place an inmate in home confinement during the last six months or 10% of a sentence, whichever is shorter, *see* 18 U.S.C. § 3624(c)(2),

and to move to home confinement those elderly and terminally ill inmates specified in 34 U.S.C. § 60541(g). Congress has also acted to enhance BOP's flexibility to respond to the pandemic. Under the Coronavirus Aid, Relief, and Economic Security Act, enacted on March 27, 2020, BOP may "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement" if the Attorney General finds that emergency conditions will materially affect the functioning of BOP. Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (to be codified at 18 U.S.C. § 3621 note). On April 3, 2020, the Attorney General gave the Director of BOP the authority to exercise this discretion, beginning at the facilities that thus far have seen the greatest incidence of coronavirus transmission. As of this filing, BOP has transferred 1,576 inmates to home confinement. *See* Federal Bureau of Prisons, *COVID-19 Home Confinement Information, at* https://www.bop.gov/coronavirus/.

Taken together, all of these measures are designed to mitigate sharply the risks of COVID-19 transmission in a BOP institution. BOP has pledged to continue monitoring the pandemic and to adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders. Unfortunately and inevitably, some inmates have become ill, and more likely will in the weeks ahead. But BOP must consider its concern for the health of its inmates and staff alongside other critical considerations. For example, notwithstanding the current pandemic crisis, BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live

and access to health care in these difficult times. And it must consider myriad other factors, including the availability of both transportation for inmates (at a time that interstate transportation services often used by released inmates are providing reduced service), and supervision of inmates once released (at a time that the Probation Office has necessarily cut back on home visits and supervision).

B. The Defendant's Trial, Conviction and Sentence

On February 28, 2018, a federal grand jury in Houston, Texas returned an indictment against the defendant charging him with three counts of federal program bribery in violation of 18 U.S.C. § 666 and three counts of interstate travel in aid of racketeering (also known as the "Travel Act") in violation of 18 U.S.C. § 1952. The grand jury superseded this indictment on June 19, 2018, July 25, 2018, and November 15, 2018. The final charging instrument accused the defendant of one count of conspiracy to commit federal program bribery in violation of 18 U.S.C. § 371, three counts of federal program bribery in violation of 18 U.S.C. § 666, three counts of Travel Act offenses in violation of 18 U.S.C. § 1952 and one count of obstruction of justice in violation of 18 U.S.C. § 1512.

The defendant proceeded to a jury trial on these charges. The trial was held in McAllen, Texas from July 3-11, 2019. At trial the jury convicted the defendant of all charges. The defendant had been on bond for these charges since his arrest in the case, and after he was convicted the United States moved for the Court to have his bond revoked and have him taken into custody. The Court denied this request and allowed the defendant to remain on bond pending sentencing.

On September 25, 2019, this Court sentenced the defendant to 60 months of imprisonment and a two-year term of supervised release. The Court found the defendant was facing an advisory

range of imprisonment of 78-97 months for the crimes he was convicted of, but imposed a below-guidelines sentence, at least in part because of the defendant's age and medical conditions. After sentencing, the United States moved for the Court to have the defendant taken into custody, but the Court denied this request and allowed the defendant to remain on bond pending his designation to a facility in BOP to serve the custodial portion of his sentence.

BOP designated the defendant serve his sentence at the Federal Medical Center facility in Fort Worth, Texas (FMC Fort Worth), and the defendant reported there on November 19, 2019. He has served fewer than six months of his 60-month sentence.

C. Procedural Background

According to the defendant, on April 1, he met with his case manager, "Mr. Brown" and "requested a release to home confinement." Mot. at 11. The defendant asserts that on April 3 he submitted to "Mr. Brown" and "Unit Manager Mr. Gutierrez" a "Form FTW 1330.13, commonly referred to as 'BP 8' requesting transfer to home confinement." *Id*. at 12. The defendant was advised that his request was under consideration. *Id*. The defendant further asserts that on Thursday, April 23, the inmates at FMC Fort Worth were advised that requests for release to home confinement would be "*prioritized* according to whether the prisoner has served at least 50% of their sentence or served at least 25% and have 18 months or less to serve." *Id*. at 13 (emphasis added).

According to BOP counsel, the defendant's request for home confinement was denied on April 20 and the defendant was informed of this decision.[2] BOP's records do not show that the

2 The defendant's supplemental motion, filed on May 2, suggests that the government has capriciously and unnecessarily delayed in responding to the defendant's request for release. *See* Dkt. 192 at 1-2. This is not the case. On Sunday, April 26, at 6:39 pm ET, counsel for the defendant provided government counsel with his proposed motion for compassionate release and requesting a response from the government "asap, given the emergency nature of this

defendant has initiated any appeal of BOP's decision. *See* Ex. A.

The defendant has not submitted a request for compassionate release to the warden of FMC Fort Worth. The defendant's April 1, 2020 request for home confinement to his case manager is not a request for compassionate release, which can only be submitted directly to the warden of the facility where an inmate is being housed.

II. LAW AND ARGUMENT

Under 18 U.S.C. § 3582(c)(1)(A), a court may reduce a defendant's term of imprisonment upon finding "extraordinary and compelling circumstances," consistent with guideline policy statements, commonly referred to as "compassionate release." Under the statute, as amended by the First Step Act, a court may act "upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id*. Therefore, under § 3582, a defendant must first exhaust administrative procedures with BOP regarding his request for compassionate release before a court may act on that defendant's compassionate release motion.

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motion." *See* Ex. B. At 6:28 am ET the next day, government counsel responded, informing counsel for the defendant that given the urgency, government counsel would review and respond promptly. *Id*.

Government counsel then began to attempt to contact the defendant's case manager at Fort Worth FMC to collect key facts not included in the defendant's proposed motion, such as whether the defendant had made a request for compassionate release and BOP's position on such a request. At 9:07 am ET, counsel for the defendant requested a response by the government by "10am," presumably central time. The government responded by informing counsel for the defendant that efforts were underway to contact the defendant's case manager and requesting the case manager's contact information to facilitate those efforts. *Id*. Counsel for the defendant indicated that he did not have the requested contact information. *Id*. At 11:41 am CT, counsel for the defendant filed the instant motion.

Over the ensuing days, the government has dutifully attempted to collect from BOP information that is important to this Court's consideration of the defendant's motion. It was only late on May 4 that the government was able to determine the status of the defendant's request for home confinement. This filing followed.

Compassionate release, a sentencing option available to this Court once the defendant has exhausted his administrative remedies, is separate and distinct from BOP's ability to transfer the defendant to home confinement. Once a sentence is imposed, BOP is solely responsible for determining an inmate's place of incarceration. *See* 18 U.S.C. § 3621(b); *Moore v. United States Att'y Gen.*, 473 F.2d 1375, 1376 (5th Cir. 1973) (*per curiam*); *see also McKune v. Lile*, 536 U.S. 24, 39 (2002) (plurality opinion) ("It is well settled that the decision where to house inmates is at the core of prison administrators' expertise."). Following the imposition of sentence, the Court has limited jurisdiction to correct or modify that sentence absent specific circumstances enumerated by Congress in 18 U.S.C. § 3582. *United States v. Garcia*, 606 F.3d 209, 212 n.5 (5th Cir. 2010) (*per curiam*). Section 3582(c) contemplates only a reduction in sentence. *See* § 3582(c). Because the defendant's request for home confinement alters only the place of incarceration, not the actual term of incarceration, only BOP may grant or deny his request. A court has no authority to designate a prisoner's place of incarceration. *United States v. Voda*, 994 F.2d 149, 151-52 (5th Cir. 1993).

A. The Defendant Has Not Exhausted Administrative Remedies.

This Court lacks authority to act on the defendant's motion for compassionate release at this time. The defendant has requested *home confinement* from BOP, which is solely within the province of BOP, but the defendant's motion asks this Court for compassionate release, which this Court is not empowered to grant until the defendant has first requested compassionate release from the warden of FMC Fort Worth and exhausted his administrative remedies. The defendant has not made the required request for compassionate release to the warden of FMC Fort Worth, so he has not even begun the administrative remedies clock.

Neither the defendant's April 1 in-person request for "release to home confinement" (Mot. at 11) nor his April 3 request for home confinement through a "BP 8" constitutes a request to the warden, which begin the 30-day time period under 18 U.S.C. § 3582. The defendant is statutorily-required to first present his request to the warden of his facility, permitting the warden to evaluate the inmate's current circumstances in light of the COVID-19 concerns, before this Court is authorized to act on his compassionate release motion. This Court cannot grant judicial relief until, as the statute provides, the warden either denies the request or 30 days have passed since the warden of FMC Fort Worth received the defendant's request, whichever is earlier. Because the defendant has not yet exhausted his administrative remedies as required by law, this Court should dismiss his motion. *See United States v. Eberhart*, No. 13-cr-00313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) (holding, in a case involving a compassionate release motion based on COVID-19 concerns, "[b]ecause defendant has not satisfied the exhaustion requirement, the court lacks authority to grant relief under § 3582(c)(1)(A)(i).").

The exhaustion requirement exists because BOP is in by far the best position to determine how to best prevent inmates at a given facility from being exposed to or infected by COVID-19, and also in the best position to provide care to an inmate who may contract the disease. This fact is especially true regarding a potential outbreak in one of their medical facilities, such as the one where the defendant is housed. There are numerous valid ways for BOP to deal with such a potential problem that they should be allowed to consider and potentially implement before this Court should consider granting the defendant the extreme relief he seeks. Among the options BOP could consider include transferring this defendant to another facility, COVID-19 testing of FMC Fort Worth inmates and isolation or separation of those who are positive from those who are not,

and myriad other methods of dealing with this issue that BOP and FMC Fort Worth officials would presumably be in a much better position of developing than any parties to this litigation.

None of the cases cited by the defendant for the proposition that this Court may ignore the requirement that the defendant exhaust his administrative remedies before this Court can act are plainly distinguishable. *See* Mot. at 16. In each of the cases, the defendant had served nearly the entire sentence. In *Perez*, the defendant had only three weeks remaining on his three-year sentence, logically leading the Court to find that " pursuing the administrative process would be a futile endeavor; he is unlikely to receive a final decision from BOP, and certainly will not see 30 days lapse before his release date." *United States v. Perez*, 17-cr-513-3-AT, Dkt. 98 at 5 (S.D.N.Y. Apr. 1, 2020) (Ex. C).

In *Colvin*, the defendant was sentenced to a term of imprisonment of 30 days, commencing on March 16, 2020. *United States v. Colvin*, 3:19-cr-179-JBA, Dkt. 38 at 1 (D. Conn. Apr. 2, 2020) (Ex. D). At the time of her motion, Colvin had only eleven days remaining on her sentence. *Id*. The Court found, in part, that the Colvin need not exhaust her administrative remedies because "given the brief duration of Defendant's remaining term of imprisonment, the exhaustion requirement likely renders BOP incapable of granting adequate relief, as her sentence will likely already have expired by the time her appeals are exhausted and would certainly already have expired by the time the thirty-day waiting period ends." *Id*. at 3.

Finally, the defendant's citation to *United States v. Rodriguez* is not, as it appears to be, a citation to an order of the district court. Mot at 16. The quote provided by the defendant is from a motion filed by the *defendant's counsel* seeking to waive the administrative exhaustion requirement. *United States v. Rodriguez*, 2:093-cr-00271-AB, Dkt. 128 at 2 (E.D.P.A. Mar. 26,

2020) (Ex. E). The district court in that case granted the defendant compassionate release but did not rule specifically on the defendant's request for waiver. *Id*., Dkt. 135 (Apr. 1, 2020) (Ex. F). In its opinion, however, the district court noted that "Mr. Rodriguez has served the *vast majority* of his sentence, *seventeen years*. He is *a year and a half away from his release date*." *Id*. at 19 (emphasis added).

The defendant has not cited to a single case in which a district court has waived the administrative exhaustion requirements for an inmate seeking compassionate release where the defendant has served almost none of the duly imposed sentence. To the contrary, the cases show that district courts heavily weigh imminent release from incarceration when considering waiver of administrative remedies. This Court should not excuse the defendant from the requirement to exhaust his administrative remedies.

B. The Defendant Is Not Entitled to Compassionate Release

Alternatively, the defendant's motion should be denied because it also fails on the merits, for three reasons.

1. <u>The Defendant's COVID-Related Concerns Do Not Constitute Extraordinary and Compelling Reasons for Release.</u>

Section 3582(c)(1)(A) provides that any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Here, the applicable policy statement, USSG § 1B1.13, provides no basis for a sentence reduction based on COVID-19. Rather, the policy statement allows a reduction for "extraordinary and compelling reasons" only if the reasons are "consistent with this policy statement." USSG §§ 1B1.13(1)(A) & (3). Application Note 1 to the policy statement then explains that "extraordinary and compelling reasons exist under any of the circumstances set forth below," which include only (a) a defendant

suffering from a terminal illness or other medical condition "that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover"; (b) a defendant at least 65 years old who "is experiencing a serious deterioration in physical or mental health because of the aging process" and "has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less"; (c) a defendant who has minor children without a caregiver or with an incapacitated spouse or partner who needs the defendant to be the caregiver; or (d) "[a]s determined by the Director of the Bureau of Prisons, . . . an extraordinary and compelling reason other than, or in combination with, the [above] reasons." USSG § 1B1.13, comment. (n.1).

With regard to the last consideration relating to extraordinary and compelling reasons the Director of BOP has identified, BOP has issued a regulation defining its own consideration of compassionate release requests. *See* BOP Program Statement 5050.50, *available at* https://www.bop.gov/policy/progstat/5050_050_EN.pdf. This program statement was amended effective January 17, 2019, following the First Step Act's passage. It sets forth in detail BOP's definition of the circumstances that may support a request for compassionate release, limited to the same bases the Sentencing Commission identified: serious medical condition, advanced age, and family circumstances. The defendant might argue that this policy statement is only advisory, but to do so would be incorrect. The policy statement is binding under the express terms of Section 3582(c)(1)(A), and because it concerns only possible sentence reductions, not increases, it is not subject to the rule of *Booker v. United States*, 543 U.S. 220 (2005), that mandates any guideline that increases a sentence must be deemed advisory. *See Dillon v. United States*, 560 U.S. 817, 830 (2010) (making clear that the statutory requirement in Section 3582 that a court heed the

restrictions stated by the Sentencing Commission is binding).

Neither the policy statement nor BOP regulation provides any basis for compassionate release based on general COVID-19 concerns. The grounds for compassionate release the Commission identified are all based on inherently individual circumstances such as health, age, and family responsibilities, and, not on anything remotely comparable to the general COVID-19 concerns that any inmate could cite in compassionate release motions as a basis for release. At least one district court has already denied a defendant's compassionate release motion on this basis. *See United States v. Eberhart*, No. 13-cr-00313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) ("As defendant does not assert that he is suffering from a medical condition as defined in U.S.S.G. § 1B1.13, a reduction of sentence due solely to concerns about the spread of COVID-19 is not consistent with the applicable policy statement of the Sentencing Commission as required by § 3582(c)(1)(A).").

2. The Defendant Has Not Shown That BOP Is Incapable of Managing the Situation Such that Release Is Warranted.

Even If COVID-19 concerns were to qualify as extraordinary and compelling circumstances under the policy statement, the defendant has not shown that BOP is incapable of managing the situation such that release is warranted. BOP is monitoring the situation on a daily, and often hourly, basis, and has taken aggressive action to mitigate any health risks for prisoners.[3] The defendant is already being held in a BOP medical facility–if the defendant were to unfortunately contract COVID-19, he is in one of the best places for him to be treated for it.

BOP has been planning for potential COVID-19 transmissions since January. At that time,

[3] The following information comes from https://www.bop.gov/resources/news/20200313_covid-19.jsp and https://www.bop.gov/coronavirus/index.jsp.

the agency established a working group to develop policies in consultation with subject matter experts in the Centers for Disease Control, including by reviewing guidance from the World Health Organization. As is stated above, BOP announced on March 13, 2020 that it was implementing a Phase Two Action Plan to minimize the risk of COVID-19 transmission into and inside its facilities. The Action Plan comprises several preventive and mitigation measures, including the following:

Screening of Inmates and Staff: All new BOP inmates are screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a documented risk of exposure will be quarantined; symptomatic inmates with documented risk of exposure will be isolated and tested pursuant to local health authority protocols. In areas with sustained community transmission and in medical referral centers, all facility staff will be screened for self-reported risk factors and elevated temperatures. Contractor access to BOP facilities is restricted to only those performing essential services (*e.g.*, medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. All volunteer visits are suspended absent authorization by BOP Deputy Director. Any contractor or volunteer who requires access will be screened using the same procedures as applied to staff prior to entry.

Suspension of Social Visits and Tours: BOP has placed a 30-day hold on all social visits, such as visits from friends and family, to limit the number of people entering the facility and interacting with detainees. To ensure that familial relationships are maintained throughout this disruption, BOP has increased detainees' telephone allowance to 500 minutes per month. Tours of facilities are also suspended for at least the first 30 days that the Action Plan is in effect.

Suspension of Legal Visits: BOP has also placed a 30-day hold on legal visits, though such

visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols for prison staff.

Suspension of Inmate Movements: With limited exceptions, BOP has also ceased the movement of inmates and detainees among its facilities, and all inmates who are set to be moved are first being screened for COVID-19 symptoms. This will prevent transmissions between institutional populations. Likewise, all official staff travel has been cancelled, as has most staff training.

Modified Operations: The Action Plan requires wardens at BOP facilities to modify operations in order to maximize social distancing. Among the possible actions are staggering of meal times and recreation time.

Taken together, the above measures are designed to sharply mitigate the risks of COVID-19 transmission in a BOP institution. BOP professionals will continue to monitor this situation and adjust its practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

In addition, COVID-19 is a disease that is not limited to correctional facilities, and there is no guarantee an inmate who is released will not be exposed to or contract the disease. For these reasons, modifying the defendant's sentence as he requests would likely not result in any meaningful mitigation of the risk he may face of contracting COVID-19. In fact, this defendant is much more likely to avoid getting COVID-19 in the controlled environment found in a BOP facility than if he were to be released into the community and left to his own devices. This defendant has shown a lack of regard for the laws and rules of society over a period of years, and it is unlikely he will suddenly start taking all recommended precautionary measures necessary to

avoid contracting the virus if he were released. The defendant has also shown a disregard for his own health over the years, most specifically by continuing to drink alcohol heavily even after he was somehow able to procure a liver transplant for himself. The evidence does not support that the defendant would suddenly start to follow medical advice to avoid contracting COVID-19 if he were granted the relief he seeks. For these reasons there would be no meaningful mitigation of the risk the defendant faces regarding COVID-19 were he to be released.

Furthermore, defendant's health concerns are what led him to be placed in a Federal Medical Center to serve his sentence, which is a facility designed, staffed and equipped to appropriately address and treat any medical concerns the defendant may have, including the possibility of contracting COVID-19. There is also no indication the defendant will not be exposed to COVID-19 in McAllen, Texas area should he be released, nor can BOP show he may not transmit the virus to others in the community there if he has already been exposed to it. Releasing the defendant as he requests would not effectively mitigate the risk to him or others regarding COVID-19, nor would it address the other medical conditions he has which BOP is currently treating while he is at FMC Fort Worth.

Moreover, per the Attorney General's instruction, BOP is also prioritizing the use of BOP's various statutory authorities (such as 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541(g)) to grant home confinement in appropriate circumstances for inmates seeking transfer in connection with COVID-19.[4] Per this procedure, if the defendant is statutorily eligible for home confinement and meets certain other criteria, before BOP grants discretionary release, a BOP Medical Director will "make an assessment of the inmate's risk factors for severe COVID-19 illness, risks of COVID-

[4] This information comes from the publicly available memorandum from the Attorney General to BOP Director, available at https://www.justice.gov/file/1262731/download.

19 at the inmate's prison facility, as well as the risks of COVID-19 at the location at which the inmate seeks home confinement."

Given all of the above, judicial action is unnecessary and would be detrimental to this process as it would inevitably result in scattershot treatment of inmates and contravene BOP's organized, comprehensive approach of granting home confinement under consistent criteria to eligible inmates in its custody. As just outlined, BOP is also employing practices to keep the prison population at low risk for COVID-19 spread. Accordingly, the government opposes judicial action in individual cases such as this one.

In addition, the Fifth Circuit has already denied prisoners' motions for bail pending appeal that rested on COVID-19 concerns. *See United States v. Anderson*, Fifth Cir. No. 19-10963 (3/19/20 & 3/23/20 orders). District courts in other districts have also denied similar motions. *See, e.g.*, *United States v. Gileno*, No. 3:19-cr-161, 2020 WL 1307108 (D. Conn. Mar. 19, 2020); *United States v. Cohen*, No. 18-cr-602, 2020 WL 1428778 (S.D.N.Y. Mar. 24, 2020). As the *Gileno* court reasoned:

> With regard to the COVID-19 pandemic, Mr. Gileno has . . . not shown that the plan proposed by the Bureau of Prisons is inadequate to manage the pandemic within Mr. Gileno's correctional facility, or that the facility is specifically unable to adequately treat Mr. Gileno. The Court takes judicial notice of the fact that public health recommendations are rapidly changing. But at this time the Court cannot assume that the Bureau of Prisons will be unable to manage the outbreak or adequately treat Mr. Gileno should it emerge at his correctional facility while he is still incarcerated.

Id. at *4 (citation omitted).

3. Resentencing the Defendant to a Six-Month Sentence Instead of a 60-Month Sentence~~,~~ Would Not be Consistent with the Principles of Section 3553(a).

The defendant's request for compassionate release is essentially a request that this Court commute more than 90% of his 60-month sentence. He is asking this Court to ignore the crimes that this Court described as "tearing at the fabric of society." This Court frequently observed during trial and sentencing that the defendant's case was of keen interest to the people of the McAllen area, particularly the jury, who were "adamant" and "angry" when this Court spoke with them after trial. According to this Court, their anger was "because they though that the conduct they saw . . . had become the way of doing business in the place they call the Valley—and the public wants it stopped."

That *any* prisoner who has only served less than 10% of his adjudged prison sentence should be released from custody because he *may* be at risk of contracting COVID-19 would be a miscarriage of justice. Erasing the defendant's wholly-justified 60-month sentence would absolve the defendant of *any* punishment for his wrongdoing and send a terrible message to the local community the defendant was previously sworn to serve. Release at this point would not be consistent with the need for the sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C § 3553(a)(a)(A). It would allow him to avoid any meaningful consequences for the approximately decade-long corruption scheme he was convicted of engaging in, and make it appear he was above the law. There would truly be almost no consequences to him for the serious crimes the defendant has committed, crimes that strike at the very heart of the public's faith in their judges and the criminal justice system as a whole.

Release at this time would also not "afford adequate deterrence to criminal conduct" to other public officials who consider abusing their positions of power and trust. *Id*. at §

3553(a)(2)(B). Too often the public perceives that officials are given preferential treatment when charged with crimes, and releasing the defendant from any meaningful punishment simply because he is at higher risk for complications should he contract an illness he does not have would only reinforce that perception, making it reality.

Throughout his case, the defendant has already used his age and health conditions to his benefit on numerous occasions.[5] He has used those things to help justify him getting a bond pending trial, to allow himself to stay out on bond after being convicted, to argue for the Court to give him a custodial sentence below what the Guidelines advised, and to stay out on bond after sentencing and voluntarily surrender to BOP. The defendant should not be allowed to use his age and medical conditions to once more avoid any meaningful consequences for the very serious crimes for he was convicted and sentenced.

The defendant claims in his Motion that this case is not a close one. The government agrees, but not for the reasons the defense asserts. This Court should not seriously consider granting the defendant's requested extreme and unwarranted remedy.

The crimes the defendant has been convicted of showed the defendant engaged in a pattern of using his office for personal gain for years, with no regard for his oath of office or the citizens of Hidalgo County. The evidence at trial showed that for years he viewed his office as his personal fiefdom to do as he pleased, to include enriching himself, with impunity. The defendant is simply continuing to manifest his selfish behavior by yet again trying to use his age and medical conditions as a way of avoiding responsibility for these crimes. His age and medical conditions never got in

5 Notably, one of the health conditions on which the defendant relies for his request for compassionate release is his liver transplant more than 10 years ago. Mot. at 2-3, 5. As this Court is aware, one of the justifications the defendant put forth for his behavior throughout the trial was excessive drinking. It appears that the defendant now demonstrates more concern for his health condition than he did over the previous decade.

the way of him committing his crimes, and they should not be something he can hide behind now to avoid the consequences of his actions. He already received a very generous sentence relative to the advisory range of imprisonment he faced, despite never taking responsibility for his actions. Granting him the additional and extreme relief he now seeks is not warranted by the facts of this case, the law or common sense, and would not be in the interests of justice.

III. CONCLUSION

For all of the reasons detailed above, we respectfully request the Court deny the defendant's Emergency Motion for Compassionate Release.

Respectfully submitted,

RYAN PATRICK
UNITED STATES ATTORNEY

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COREY R. AMUNDSON
CHIEF, PUBLIC INTEGRITY SECTION

/s/ Peter M. Nothstein
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CERTIFICATE OF SERVICE

I, Arthur R. Jones, certify that a true and correct copy of this notice was served on counsel for defendant via electronic case filing on this, the 6th day of May, 2020.

By: /s/ Arthur R. Jones
ARTHUR R. JONES
Assistant United States Attorney

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  CRWIP          *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL *       05-04-2020
PAGE 001 OF 001                                                       12:58:10
      FUNCTION: L-P SCOPE: REG   EQ 35946-479     OUTPUT FORMAT: FULL
-------LIMITED TO SUBMISSIONS WHICH MATCH ALL LIMITATIONS KEYED BELOW----------
DT RCV: FROM __________ THRU __________ DT STS: FROM __________ THRU __________
DT STS: FROM ___ TO ___ DAYS BEFORE "OR" FROM ___ TO ___ DAYS AFTER DT RDU
DT TDU: FROM ___ TO ___ DAYS BEFORE "OR" FROM ___ TO ___ DAYS AFTER DT TRT
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EXTENDED: _ REMEDY LEVEL: _ _                RECEIPT: _ _ _ "OR" EXTENSION: _ _ _
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ORIG QTR.: EQ _________ _________ _________ _________ _________ _________


G5152       NO REMEDY DATA EXISTS FOR THIS INMATE
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Nothstein, Peter (CRM)

From: Maria Franco <assistant@mccrumlegal.com>
Sent: Monday, April 27, 2020 10:17 AM
To: Nothstein, Peter (CRM)
Cc: Jones, Arthur (USATXS); Guerra, Robert (USATXS); Michael McCrum; Front Desk
Subject: Re: US v. Delgado

Good morning Mr. Nothstein,

Unfortunately, Mr. McCrum only has the names he listed in the motion, no contact info.

Thank you,
Maria Franco
Legal Assistant
McCrum Law Office
404 E. Ramsey Rd. Suite 102
San Antonio, TX 78216
Main: 210.225.2285
F: 210.225.7045
eMail: maria@mccrumlegal.com

> On Apr 27, 2020, at 8:08 AM, Nothstein, Peter (CRM) <Peter.Nothstein@usdoj.gov> wrote:
>
> Michael, we are trying to contact Mr. Delgado's BOP case manager, and so will need longer than that to make contact and consider your request. If you have the contact information, that would be helpful.
>
> Peter
>
> ---
>
> **From:** Michael McCrum <michael@mccrumlegal.com>
> **Sent:** Monday, April 27, 2020 9:05 AM
> **To:** Nothstein, Peter (CRM) <Peter.Nothstein@CRM.USDOJ.GOV>
> **Cc:** Jones, Arthur (USATXS) <AJones4@usa.doj.gov>; Guerra, Robert (USATXS) <RGuerra2@usa.doj.gov>; Maria Franco office <assistant@mccrumlegal.com>; Front Desk <frontdesk@mccrumlegal.com>
> **Subject:** Re: US v. Delgado

Peter, please let me know no later than 10am.

Michael McCrum

On Apr 27, 2020, at 6:28 AM, Nothstein, Peter (CRM) <Peter.Nothstein@usdoj.gov> wrote:

Michael, we understand the urgency; we will review and get back to you promptly.

Best regards,

Peter

From: Michael McCrum <michael@mccrumlegal.com>
Sent: Sunday, April 26, 2020 6:39 PM
To: Nothstein, Peter (CRM) <Peter.Nothstein@CRM.USDOJ.GOV>; Jones, Arthur (USATXS) <AJones4@usa.doj.gov>
Cc: Guerra, Robert (USATXS) <RGuerra2@usa.doj.gov>; Maria Franco office <assistant@mccrumlegal.com>; Front Desk <frontdesk@mccrumlegal.com>
Subject: Re: US v. Delgado

Peter and Rob,
I hope this email finds you well.

Attached is a Word version of a motion I will be filing. I have not attached the exhibits, as they are lengthy and I'm not sure you need them in order to give me the government's position. I assume you will tell me the government is objecting, but I am required to confer. Please respond asap, given the emergency nature of this motion.

Michael McCrum

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210.225.2285
www.mccrumlegal.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

WILSON PEREZ,

Defendant.

17 Cr. 513-3 (AT)

ORDER

ANALISA TORRES, District Judge:

Wilson Perez, a prisoner serving his sentence at the Metropolitan Detention Center (the "MDC"), moves for a reduction of his term of imprisonment under the federal compassionate release statute, codified at 18 U.S.C. § 3582(c)(1)(A). Def. Letter, ECF No. 92. For the reasons stated below, Perez's motion is GRANTED.

BACKGROUND

On October 21, 2019, Perez pleaded guilty to kidnapping and conspiracy in violation of 18 U.S.C. § 1201. ECF No. 85. On January 2, 2020, the Court sentenced him to three years of imprisonment and two years of supervised release. ECF No. 89. "Perez has a well-documented history of medical complications which stem from injuries suffered during his incarceration." Gov't Letter at 3, ECF No. 95. While housed at the Metropolitan Correctional Center, he was the victim of two vicious beatings, resulting in a broken jaw and shattered bones around his eye socket; both attacks sent him to the hospital and necessitated reconstructive surgeries of his face, with the second surgery requiring metal implants. *See* Sentencing Tr. 9:8–18, ECF No. 74. Although Perez's physicians directed that he receive follow-up care, such care was repeatedly delayed or difficult to obtain. *See id.* 10:22–12:17. He continues to suffer from pain and persistent vision problems. Because Perez has been detained since his arrest on September 27, 2017, ECF No. 17, his prison sentence is set to terminate on April 17, 2020, Def. Letter at 1.

Perez requests release in advance of that date because he is at risk of contracting, and experiencing serious complications from, COVID-19 if he remains at the MDC. *Id.* at 1–2. He spends most of each day with a cellmate in a small cell "that is barely large enough for a single occupant," where he is "breathing recirculated air" and "unable to practice proper hygiene." *Id.* at 1. Additionally, Perez "is in pain and not receiving pain medication." *Id.* The Federal Bureau of Prisons (the "BOP") acknowledges that COVID-19 is present within the MDC. *See* COVID-19 Tested Positive Cases, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/. The Government does not object to Perez's release on the merits, conceding that Perez has a "heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues," and that "he has less than a month remaining on his sentence." Gov't Letter at 3. But the Government questions the Court's authority to act on Perez's application, arguing that he has not exhausted the administrative remedies under § 3582(c)(1)(A), which requires that a defendant seeking compassionate release present his application to the BOP and then either (1) administratively appeal an adverse result if the BOP does not agree that his sentence should be modified, or (2) wait for 30 days to pass. Gov't Letter at 3–4.

On March 26, 2020, Perez submitted to the BOP his application for a sentence modification. ECF No. 96 at 4. To date, the BOP has not acted on that request. The Court holds, however, that Perez's exhaustion of the administrative process can be waived in light of the extraordinary threat posed—in his unique circumstances—by the COVID-19 pandemic. And the Court agrees with the parties that this threat also constitutes an extraordinary and compelling reason to reduce Perez's sentence to time served. Accordingly, Perez's motion is GRANTED.

DISCUSSION

As amended by the First Step Act, 18 U.S.C. § 3582(c)(1)(A) authorizes courts to modify terms of imprisonment as follows:

> The court may not modify a term of imprisonment once it has been imposed except that—in any case—the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Accordingly, in order to be entitled to relief under 18 U.S.C. § 3582(c)(1)(A)(i), Perez must both meet the exhaustion requirement and demonstrate that "extraordinary and compelling reasons" warrant a reduction of his sentence. The Court addresses these requirements in turn.

I. Exhaustion

Section 3582(c)(1)(A) imposes "a statutory exhaustion requirement" that "must be strictly enforced." *United States v. Monzon*, No. 99 Cr. 157, 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020) (citing *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (2d Cir. 2004) (internal quotation marks and alterations omitted)).[1] The Court may waive that requirement only if one of the recognized exceptions to exhaustion applies.

"Even where exhaustion is seemingly mandated by statute . . . , the requirement is not absolute." *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) (citing *McCarthy v. Madigan*, 503

[1] The Court need not decide whether § 3582(c)'s exhaustion requirement is a jurisdictional requirement or merely a mandatory claim-processing rule. *See Monzon*, 2020 WL 550220, at *2 (describing split between courts on that question).

U.S. 140, 146–47 (1992)).[2] There are three circumstances where failure to exhaust may be excused. "First, exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue." *Id.* Second, "exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief." *Id.* at 119. Third, "exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice." *Id.*

All three of these exceptions apply here. "[U]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile. Moreover, the relief the agency might provide could, because of undue delay, become inadequate. Finally, and obviously, [Perez] could be unduly prejudiced by such delay." *Washington*, 925 F.3d at 120–21; *see also Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (holding that irreparable injury justifying the waiver of exhaustion requirements exists where "the ordeal of having to go through the administrative process may trigger a severe medical setback" (internal quotation marks, citation, and alterations omitted)); *Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) ("[I]f the delay attending exhaustion would subject claimants to deteriorating health, . . . then waiver may be appropriate."); *New York v. Sullivan*, 906 F.2d 910, 918 (2d Cir. 1990) (holding that waiver was appropriate where "enforcement of the exhaustion requirement would cause the claimants irreparable injury" by risking "deteriorating health, and possibly even . . . death"). Here, even a few weeks' delay carries the risk of catastrophic health consequences for Perez. The Court concludes that requiring him to exhaust administrative

[2] The Supreme Court has stressed that for "a statutory exhaustion provision . . . Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Even when faced with statutory exhaustion requirements, however, the Supreme Court has allowed claims to proceed notwithstanding a party's failure to complete the administrative review process established by the agency "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate," so long as the party presented the claim to the agency. *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). That reasoning explains the Second Circuit's holding that even statutory exhaustion requirements are "not absolute." *Washington*, 925 F.3d at 118. Perez has presented his claim to the BOP, *see* ECF No. 96 at 1, so the situation here is analogous.

remedies, given his unique circumstances and the exigency of a rapidly advancing pandemic, would result in undue prejudice and render exhaustion of the full BOP administrative process both futile and inadequate.

To be sure, "the policies favoring exhaustion are most strongly implicated" by challenges to the application of existing regulations to particular individuals. *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996) (internal quotation marks, citation, and alterations omitted). Ordinarily, requests for a sentence reduction under § 3582(c) would fall squarely into that category. But "courts should be flexible in determining whether exhaustion should be excused," *id.* at 151, and "[t]he ultimate decision of whether to waive exhaustion . . . should also be guided by the policies underlying the exhaustion requirement." *Bowen*, 476 U.S. at 484. The provision allowing defendants to bring motions under § 3582(c) was added by the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), in order to "increas[e] the use and transparency of compassionate release." 132 Stat. 5239. Requiring exhaustion generally furthers that purpose, because the BOP is best situated to understand an inmate's health and circumstances relative to the rest of the prison population and identify "extraordinary and compelling reasons" for release. 18 U.S.C. § 3582(c)(1)(A)(i). In Perez's case, however, administrative exhaustion would defeat, not further, the policies underlying § 3582(c).

Here, delaying release amounts to denying relief altogether. Perez has less than three weeks remaining on his sentence, and pursuing the administrative process would be a futile endeavor; he is unlikely to receive a final decision from the BOP, and certainly will not see 30 days lapse before his release date. Perez asks that his sentence be modified so that he can be released now, and not on April 17, 2020, because remaining incarcerated for even a few weeks increases the risk that he will contract COVID-19. He has had two surgeries while incarcerated, and continues to suffer severe side effects such as ongoing pain and persistent vision problems. ECF No. 96 at 4. As the Government

concedes, Perez faces a "heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues." Gov't Letter at 3. Requiring exhaustion, therefore, would be directly contrary to the purpose of identifying and releasing individuals whose circumstances are "extraordinary and compelling."

Accordingly, the Court holds that Perez's undisputed fragile health, combined with the high risk of contracting COVID-19 in the MDC, justifies waiver of the exhaustion requirement.[3]

II. Extraordinary and Compelling Reasons for Release

The Court also finds that Perez has set forth "extraordinary and compelling reasons" to reduce his sentence to time served. 18 U.S.C. § 3582(c)(1)(A)(i). The Government does not dispute that Perez has done so. Gov't Letter at 3. And Perez's medical condition, combined with the limited time remaining on his prison sentence and the high risk in the MDC posed by COVID-19, clears the high bar set by § 3582(c)(1)(A)(i).

The authority to define "extraordinary and compelling reasons" has been granted to the United States Sentencing Commission, which has defined that term at U.S.S.G. § 1B1.13, comment n.1. *See United States v. Ebbers*, No. 02 Cr. 11443, 2020 WL 91399, at *4–5 (S.D.N.Y. Jan. 8, 2020). Two components of the definition are relevant. First, extraordinary and compelling reasons for modification exist where "[t]he defendant is . . . suffering from a serious physical or medical condition . . . that substantially diminishes the ability to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13

[3] A number of courts have denied applications for sentence modification under § 3582(c)(1)(A) brought on the basis of the risk posed by COVID-19 on the ground that the defendants failed to exhaust administrative remedies. *See, e.g.*, *United States v. Zywotko*, No. 2:19 Cr. 113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020); *United States v. Garza*, No. 18 Cr. 1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020); *United States v. Eberhart*, No. 13 Cr. 00313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020); *United States v. Hernandez*, No. 19 Cr. 834, 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020); *United States v. Gileno*, No. 19 Cr. 161, 2020 WL 1307108, at *3 (D. Conn. Mar. 19, 2020). But in several of those cases, the defendant was not in a facility where COVID-19 was spreading, and in none of them did the defendant present compelling evidence that his medical condition put him at particular risk of experiencing deadly complications from COVID-19. In this case, unlike those, Perez has established that enforcing the exhaustion requirement carries the real risk of inflicting severe and irreparable harm to his health.

comment n.1(A)(ii). Perez's recent surgeries, and his persistent pain and vision complications, satisfy that requirement. Confined to a small cell where social distancing is impossible, Perez cannot provide self-care because he cannot protect himself from the spread of a dangerous and highly contagious virus. And although he may recover in the future from the surgeries and their complications, there is no defined timeline for that recovery; certainly, he is not expected to recover within the remainder of his sentence.

The Honorable Lorna G. Schofield recently granted an application for sentence reduction under § 3582(c) under similar circumstances. *See United States v. Campagna*, No. 16 Cr. 78-01, 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020). Judge Schofield approved the request of a defendant confined to the Brooklyn Residential Reentry Center (the "RCC") stating that his "compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and compelling reason to modify [d]efendant's sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the environment of the RCC." *Id.* at *3 (citing U.S.S.G. § 1B1.13 comment. n.1(A)). The same justifications apply here.

Second, U.S.S.G. § 1B1.13 comment. n.1(D) authorizes release based on "an extraordinary and compelling reason other than, or in combination with, the [other] reasons described." Perez meets this requirement as well, because he has weeks left on his sentence, is in weakened health, and faces the threat of a potentially fatal virus. The benefits of keeping him in prison for the remainder of his sentence are minimal, and the potential consequences of doing so are extraordinarily grave.

Accordingly, the Court finds that Perez has demonstrated extraordinary and compelling reasons justifying his release.

CONCLUSION

For the reasons stated above, Perez's motion for a reduction of his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(A) is GRANTED. Perez's term of imprisonment is reduced to time served. It is ORDERED that Perez be released immediately to begin his two-year term of supervised release.

The Clerk of Court is directed to terminate the motion at ECF No. 92.

SO ORDERED.

Dated: April 1, 2020
New York, New York

ANALISA TORRES
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA *v.* LATRICE COLVIN	Criminal No. 3:19cr179 (JBA) April 2, 2020

RULING GRANTING DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE

Defendant Latrice Colvin moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). (Emerg. Mot. for Compassionate Release [Doc. # 30].) The Government opposes. (Gov't Opp. [Doc. # 32].) The Court heard oral argument on this motion via teleconference on April 2, 2020. For the reasons that follow, Defendant's motion is granted.

I. Background

Defendant was convicted by guilty plea of one count of mail fraud in violation of 18 U.S.C. § 1341. (Am. J. [Doc. # 29].) She was sentenced to a term of imprisonment of 30 days, followed by two years of supervised release, the first seven months of which shall be served in home detention. (*Id.*) Defendant self-surrendered to the BOP at its at FDC Philadelphia facility on March 16, 2020, leaving approximately eleven days of imprisonment remaining in her sentence as of the date of this ruling. (Emerg. Mot. at 2.)

Defendant suffers from Type II Diabetes. (Medical Records [Doc. # 35].) When not incarcerated, Defendant sees "medical professionals at Bridgeport Hospital who have treated her for her diabetes and high blood pressure, have seen her through a difficult pregnancy, and have performed surgery on her back," and thus "know her and can properly care for her." (Emerg. Mot. at 7.)

Although "COVID-19 is a new disease[,] . . . based on currently available information and clinical expertise," the Centers for Disease Control and Prevention list "[p]eople with diabetes" among the groups of "[p]eople who are at higher risk for severe illness" from COVID-19. CENTERS FOR DISEASE CONTROL AND PREVENTION, PEOPLE WHO ARE AT HIGHER RISK FOR

SEVERE ILLNESS ("CDC Guidance"), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited Apr. 2, 2020).

On March 27, 2020, Defendant "filed an administrative relief request with the Warden [of] FDC Philadelphia seeking compassionate release on the same grounds as" argued in her motion for compassionate release. (Emerg. Mot. at 1 n.1) She has not yet received any response to that request.

II. Discussion

Defendant moves for release under 18 U.S.C. § 3582(c)(1)(A), which provides,

> the court . . . upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Thus there are two questions before the Court: first, whether Defendant should be excused from her administrative exhaustion requirement, and second, whether Defendant has demonstrated extraordinary and compelling reasons for a sentence reduction.

A. Exhaustion Requirement

Section 3582(c)(1)(A) plainly imposes an exhaustion requirement which must be satisfied before a defendant may move the court for release. Defendant asks the Court to waive that requirement, arguing that it would be futile for her to seek to exhaust her administrative remedies or wait thirty days. (Emerg. Mot. at 1 n.1.) The Government argues that the Court must not consider Defendant's request because she has not satisfied the exhaustion requirement but fails to convincingly address the merits of Defendant's request for a waiver of that requirement.

"Even where exhaustion is seemingly mandated by statute . . . , the requirement is not absolute." *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019). There are generally three bases for waiver of an exhaustion requirement. *See United States v. Perez*, No. 17cr513-3(AT), ECF No. 98 at 3-4 (S.D.N.Y. Apr. 1, 2020) (discussing exceptions to statutory exhaustion in context of motion for compassionate release during COVID-19 pandemic).

"First, exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue." *Washington*, 925 F.3d at 118. "[U]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile." *Id.* at 120. Second, "exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief," including situations where "the relief the agency might provide could, because of undue delay, become inadequate." Id. at 119-20. Third, "exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice." Id. at 119

The Court concludes that all three exceptions to the exhaustion requirement apply to Defendant's request. First, if Defendant contracts COVID-19 before her appeals are exhausted, that undue delay might cause her to endure precisely the "catastrophic health consequences" she now seeks to avoid. *See* CDC Guidance. Second, given the brief duration of Defendant's remaining term of imprisonment, the exhaustion requirement likely renders BOP incapable of granting adequate relief, as her sentence will likely already have expired by the time her appeals are exhausted and would certainly already have expired by the time the thirty-day waiting period ends. Third, Defendant would be subjected to undue prejudice—the heightened risk of severe illness—while attempting to exhaust her appeals.

Thus, in light of the urgency of Defendant's request, the likelihood that she cannot exhaust her administrative appeals during her remaining eleven days of imprisonment, and the potential for serious health consequences, the Court waives the exhaustion requirement of Section 3582(c)(1)(A). *See Perez,* No. 17cr513-3(AT), ECF No. 98 at 4 (waiving exhaustion

requirement for sentence ending approximately three weeks after defendant's request to BOP); *United States v. Powell*, No. 1:94-cr-316(ESH), ECF No. 98 (D.D.C. Mar. 28, 2020) (finding administrative exhaustion futile, waiving § 3582(c)(1)(A)'s exhaustion requirement, and granting motion for compassionate release in light of COVID-19 pandemic and defendant's underlying health issues).

B. Extraordinary and Compelling Reasons

Section 3582(c)(1)(A) permits a sentence reduction only upon a showing of "extraordinary and compelling reasons," and only if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Section 1B1.13 of the Sentencing Guidelines further explains that a sentence reduction under § 3582(c)(1)(A) may be ordered where a court determines, "after considering the factors set forth in 18 U.S.C. § 3553(a)," that

> (1)(A) Extraordinary and compelling reasons warrant the reduction; . . .
> (2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
> (3) The reduction is consistent with this policy statement.

Application Note 1 to that Guidelines provision enumerates certain circumstances constituting "extraordinary and compelling reasons" that justify a sentence reduction, including certain medical conditions, advanced age, certain family circumstances, or some "other" reason "[a]s determined by the Director of the Bureau of Prisons." The Note specifies that "a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover" constitutes "extraordinary and compelling reasons" which justify compassionate release.

Defendant argues that there are extraordinary and compelling reasons justifying her release because she "is at significant risk of contracting and developing severe complications from an exposure to COVID-19 due to her diabetes and high blood pressure." (Emerg. Mot.

at 1.) Thus, Defendant argues, release is warranted to avoid confinement in a "densely populated prison" where it will "inevitably [be] . . . more difficult to engage in the social distancing that will be critical to her health" during the COVID-19 pandemic. (*Id.* at 3.) Defendant asserts that "medical care is limited in federal pretrial detention centers," but if granted compassionate release, she would have "access to medical professionals at Bridgeport Hospital who have treated her for her diabetes and high blood pressure, have seen her through a difficult pregnancy, and have performed surgery on her back," and thus "know her and can properly care for her." (*Id.* at 7.)

The Government argues that Defendant has failed to demonstrate extraordinary and compelling reasons for her release because she "has not described any particular vulnerability to COVID-19 or explained any deficiency in the BOP's response to this public health situation." (Gov't Opp. at 3.) The Government clarified its position during the Court's teleconference with the parties, explaining that because Defendant's diabetes appears to be under control, the risk she faces while incarcerated is insufficient to justify her release. But contrary to the Government's suggestion, Defendant did describe a "particular vulnerability to COVID-19," (*id.*), when she explained that she "is particularly vulnerable to COVID-19 due to her diabetes and high blood pressure," putting her "at greater risk of complications," (Emerg. Mot. at 3). The CDC Guidance confirms Defendant's position, stating plainly that "[p]ersons with diabetes" face a "higher risk for severe illness" if they contract COVID-19. Moreover, the Bureau of Prisons itself has acknowledged that home confinement may be appropriate for certain "at-risk inmates" in order "to protect the health and safety of . . . people in our custody." (Ex. 1 (BOP Memo) to Emerg. Mot. [Doc. # 30-1] at 1.) Like Defendant, the BOP intends to rely upon "CDC guidance" to "make an assessment of the inmate's risk factors for severe COVID-19 illness." (*Id.* at 2.)

Thus the Court concludes that Defendant has demonstrated extraordinary and compelling reasons justifying her immediate release under Section 3582(c)(1)(A) and

U.S.S.G. § 1B1.13. She has diabetes, a "serious . . . medical condition," which substantially increases her risk of severe illness if she contracts COVID-19. *See United States v. Rodriguez,* No. 2:03-cr-271, Doc. # 135 at 2 (E.D.P.A. Apr. 1, 2020) (granting compassionate release because for a diabetic inmate, "nothing could be more extraordinary and compelling than this pandemic"). Defendant is "unable to provide self-care within the environment of" FDC Philadelphia in light of the ongoing and growing COVID-19 pandemic because she is unable to practice effective social distancing and hygiene to minimize her risk of exposure, and if she did develop complications, she would be unable to access her team of doctors at Bridgeport Hospital.

In light of the expectation that the COVID-19 pandemic will continue to grow and spread over the next several weeks, the Court concludes that the risks faced by Defendant will be minimized by her immediate release to home, where she will quarantine herself. Continued exposure to the large population of FDC Philadelphia over the coming weeks would impose upon Defendant additional, unnecessary health risks which can be minimized by her early release.

Separately, the Court concludes that Defendant is not a danger to the safety of any other person or to the community, and the factors set forth in 18 U.S.C. § 3553(a) weigh in favor of her release.

III. Conclusion

For the foregoing reasons, Defendant's Emergency Motion for Compassionate Release [Doc. # 30] is GRANTED. Defendant's previously imposed sentence of 30 days imprisonment is reduced to time served, and she shall be immediately released from BOP custody. Upon her release, Defendant shall be subject to the additional conditions imposed in the Court's Order of Release, ([Doc. # 37]). All other aspects of Defendant's sentence remain unchanged.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 2nd day of April 2020.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	
UNITED STATES OF AMERICA	:	
	:	Case No.: 03-CR-00271-01
v.	:	
	:	
JEREMY RODRIGUEZ	:	
Defendant.	:	

SUPPLEMENTAL MOTION TO WAIVE EXHAUSTION REQUIREMENTS DUE TO COVID-19 PUBLIC HEALTH EMERGENCY

Defendant, Jeremy Rodriguez, respectfully moves this Court to waive the exhaustion requirements outlined in 18 U.S.C. § 3582(c)(1)(A)(i) due to the COVID-19 public health emergency. In support thereof, he avers the following:

1. Mr. Rodriguez filed a Motion for a Sentence Reduction with this Court on March 25, 2020.
2. Several hours after filing, Mr. Rodriguez was able to communicate to his counsel that the warden of the facility where he is held, FCI Elkton, denied his request for the Bureau of Prison to file a motion on the defendant's behalf with the Court.
3. Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), Mr. Rodriguez is now required to exhaust "all administrative rights to appeal" this denial before he can bring his motion before the Court.
4. As laid out in 28 C.F.R. §§ 571.63 and 542.18, if Mr. Rodriguez exhausts all his administrative rights to appeal, his motion for a sentence reduction will not come

back in front of this Court on the merits before *110 days*, almost four months, have passed.

5. It is almost a certainty that the Bureau of Prisons ("BOP") will deny Mr. Rodriguez's request to file a motion on his behalf with this Court. Therefore, any appeal to the BOP for administrative assistance in this matter is both futile and perilously time consuming; time Mr. Rodriguez does not have.
6. Time is of the essence for inmates with preexisting conditions which place them at a high risk for serious complications from COVID-19.
7. The COVID-19 virus is spreading exponentially and "stringent measures to limit social contact . . . are needed to significantly stem the tide of illness and death in the coming months." *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, New York Times (Mar. 20, 2020), *available at* https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html.
8. Without such measures, such as social distancing, it appears a 75% infection rate is possible throughout the nation. *Id.*
9. It is well-documented that prisons are "petri dishes for contagious respiratory illness." *Letters to the Editor: A prison doctor's stark warning on coronavirus, jails and prisons*, Los Angeles Times (Mar. 20, 2020), *available at* https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration; *see also* Joseph A. Bick, *Infection Control in Jails and Prisons*, Clinical Infectious Diseases 45(8):1047–55 (2007), *available at* https://doi.org/10.1086/521910 ("The probability of transmission of potentially

pathogenic organisms is increased by crowing, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, insufficient infection-control expertise, and prohibitions against the use of proven harm-reduction tools.")

10. The practice of social distancing is essentially impossible in correctional facilities. Indeed, "[m]uch of the advice given by the federal Centers for Disease Control and Prevention—such as staying six feet away from others and routinely disinfecting surfaces—can be nearly impossible to follow behind bars." *'We Are Not a Hospital': A Prison Braces for the Coronavirus,* New York Times (Mar. 17, 2020) *available at* https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html.

11. As detailed in Mr. Rodriguez's Motion for Sentence Reduction (Dkt. No. 127), he is a diabetic with high blood pressure and as such is at higher risk for developing more serious complications from COVID-19. *See* CDC: COVID-19: What if You are High Risk, *available at* https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html.

12. As a result of this public health crisis and its impending arrival at correctional facilities nationwide, Mr. Rodriguez's motion, and his request for release, are filed in exceptional circumstances.

13. Under Third Circuit precedent, courts may disregard procedural hurdles such as exhaustion requirements "when exceptional circumstances" exist. "[I]n rare cases exceptional circumstances of peculiar urgency may exist which permit a federal court to entertain an unexhausted claim." *Christy v. Horn*, 115 F.3d 201, 206 (3d Cir. 1997) (determining exhaustion requirements can be waived if it would be futile). *See also* 28 U.S.C. § 2254(b) (authorizing application for writ of habeas corpus in the absence

of exhaustion of state remedies where "circumstances exist that render such process ineffective to protect the rights of the applicant.").

14. This is one of those rare cases; this is a public health emergency unlike any other faced in our lifetime. It is truly a moment where time sensitive action must be taken to protect people's lives, like Mr. Rodriguez.

15. Based upon the COVID-19 public health emergency and its impending life-threatening impact on inmates with preexisting conditions, including himself, Mr. Rodriguez requests this Honorable Court determine that his motion filed on March 25, 2020 (Dkt. No. 127) is ripe for review.

WHEREFORE, for all the foregoing reasons, Mr. Rodriguez requests this Court waive the exhaustion requirement in Section 3582(c)(1)(A) and determine his Motion for Sentence Reduction on the merits at this time.

Respectfully,

s/ Mira E. Baylson

Mira E. Baylson
Attorney for Defendant Jeremy Rodriguez

CERTIFICATE OF SERVICE

I, Mira E. Baylson Esq., hereby certify that I have electronically filed the foregoing Defendant Jeremy Rodriguez's Supplemental Motion to Waive Exhaustion Requirements Due to COVID-19 Public Health Emergency via the ECF Filing system. A notice of Electronic Case filing shall automatically be generated by the system, and shall be sent automatically to Assistant United States Attorneys for the Eastern District of Pennsylvania assigned to this case, constituting service of the filed document.

Dated: March 26, 2020

/s/ Mira Baylson
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES v. JEREMY RODRIGUEZ	Criminal Action No. 2:03-cr-00271-AB-1

MEMORANDUM

We are in the midst of an unprecedented pandemic. COVID-19 has paralyzed the entire world. The disease has spread exponentially, shutting down schools, jobs, professional sports seasons, and life as we know it. It may kill 200,000 Americans and infect millions more.[1] At this point, there is no approved cure, treatment, or vaccine to prevent it.[2] People with pre-existing medical conditions—like petitioner Jeremy Rodriguez—face a particularly high risk of dying or suffering severe health effects should they contract the disease.

Mr. Rodriguez is an inmate at the federal detention center in Elkton, Ohio. He is in year seventeen of a twenty-year, mandatory-minimum sentence for drug distribution and unlawful firearm possession, and is one year away from becoming eligible for home confinement. Mr. Rodriguez has diabetes, high blood pressure, and liver abnormalities. He has shown significant rehabilitation in prison, earning his GED and bettering himself with numerous classes. He moves for a reduction of his prison sentence and immediate release under the "compassionate release"

[1] Bobby Allyn, *Fauci Estimates That 100,000 To 200,000 Americans Could Die From The Coronavirus*, National Public Radio (Mar. 29, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/29/823517467/fauci-estimates-that-100-000-to-200-000-americans-could-die-from-the-coronavirus.

[2] *See* Pien Huang, *How the Novel Coronavirus and the Flu Are Alike . . . And Different*, National Public Radio (Mar. 20, 2020), https://www.npr.org/sections/goatsandsoda/2020/03/20/815408287/how-the-novel-coronavirus-and-the-flu-are-alike-and-different.

statute, 18 U.S.C. § 3582(c)(1)(A). He argues that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. §3582(c)(1)(A)(i).

For Mr. Rodriguez, nothing could be more extraordinary and compelling than this pandemic. Early research shows that diabetes patients, like Mr. Rodriguez, have mortality rates that are more than twice as high as overall mortality rates.[3] One recent report revealed: "Among 784 patients with diabetes, half were hospitalized, including 148 (18.8%) in intensive care. That compares with 2.2% of those with no underlying conditions needing ICU treatment."[4]

These statistics—which focus on the non-prison population—become even more concerning when considered in the prison context. Prisons are tinderboxes for infectious disease. The question whether the government can protect inmates from COVID-19 is being answered every day, as outbreaks appear in new facilities. Two inmates have already tested positive for COVID-19 in the federal detention center in Elkton—the place of Rodriguez's incarceration.[5] After examining the law, holding oral argument, and evaluating all the evidence that has been presented, I reach the inescapable conclusion that Mr. Rodriguez must be granted "compassionate release."

I. DISCUSSION

18 U.S.C. § 3852(c)(1)(A)(i) allows a court to reduce an inmate's sentence if the court finds that (1) "extraordinary and compelling reasons" warrant a reduction, (2) the reduction

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[3] *See Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 24, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf.

[4] Tom Avril, *How much diabetes, smoking, and other risk factors worsen your coronavirus odds*, Phialdelphia Inquirer (Mar. 31, 2020), https://www.inquirer.com/health/coronavirus/coronavirus-underlying-conditions-heart-lung-kidney-cdc-20200331.html.

[5] *COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 31, 2020), https://www.bop.gov/coronavirus/index.jsp.

would be "consistent with any applicable policy statements issued by the Sentencing Commission," and (3) the applicable sentencing factors under § 3553(a) warrant a reduction.[6] Congress has not defined the term "extraordinary and compelling," but the Sentencing Commission ("Commission") has issued a policy statement defining the term. The policy statement lists three specific examples of "extraordinary and compelling reasons," none of which apply to Mr. Rodriguez. U.S.S.G. § 1B1.13 cmt. n.1(A)-(C). It also provides a fourth "catchall" provision if the Director of the Bureau of Prisons determines that "there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described." *Id.* § 1B1.13, cmt. n.1(D). Mr. Rodriguez argues that, in light of the First Step Act, the Court is no longer bound by the policy statement. Therefore, he argues, the Court can and should exercise its discretion to determine that "extraordinary and compelling reasons" exist for his release. The government argues that Rodriguez does not meet any of the enumerated criteria in the policy statement, and that the Court cannot independently assess whether other extraordinary and compelling reasons exist that warrant a sentence reduction.

I conclude that (1) the Court may independently assess whether "extraordinary and compelling reasons" exist; (2) the COVID-19 pandemic—in combination with Mr. Rodriguez's underlying health conditions, proximity to his release date, and rehabilitation—constitute "extraordinary and compelling reasons" that warrant a reduction; (3) Mr. Rodriguez is not a danger to his community; and (4) the factors under § 3553(a) favor reducing Mr. Rodriguez's sentence. Therefore, I will grant the motion.

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[6] The government agrees that Rodriguez's motion is properly before the Court because he has complied with § 3582(c)(1)(A)'s 30-day lapse provision. *See* 18 U.S.C. § 3582(c)(1)(A) (providing that a prisoner can file a motion with the court upon the "lapse of 30 days from the receipt of [a request for compassionate release] by the warden of the defendant's facility.").

A. The Court may decide whether "extraordinary and compelling reasons" exist

Federal courts may reduce a prisoner's sentence under the circumstances outlined in 18 U.S.C. § 3852(c). Under § 3852(c)(1)(A)(i), a court may reduce a prisoner's sentence "if it finds that" (1) "extraordinary and compelling reasons warrant such a reduction" and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." Prior to 2018 only the Director of the Bureau of Prisons ("BOP") could file these kinds of "compassionate-release motions." *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).

The BOP rarely did so. The BOP was first authorized to file compassionate-release motions in 1984. From 1984 to 2013, an average of only 24 inmates were released each year through BOP-filed motions. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice). According to a 2013 report from the Office of the Inspector General, these low numbers resulted, in part, because the BOP's "compassionate release program had been poorly managed and implemented inconsistently, . . . resulting in eligible inmates . . . not being considered for release, and terminally ill inmates dying before their requests were decided." *Id.* The report also found that the BOP "did not have clear standards as to when compassionate release is warranted and . . . BOP staff therefore had varied and inconsistent understandings of the circumstances that warrant consideration for compassionate release." *Id.*

Against this backdrop, Congress passed and President Trump signed the First Step Act in 2018, a landmark piece of criminal-justice reform legislation that "amend[ed] numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration." *Brown*, 411 F. Supp. 3d at 448 (citing Cong. Research Serv., R45558, *The First*

Step Act of 2018: An Overview 1 (2019)). In an effort to improve and increase the use of the compassionate-release process, the First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP's exclusive "gatekeeper" role.[7] Congress made this change in § 603(b) of the First Step Act. Section 603(b)'s purpose is enshrined in its title: "Increasing the Use and Transparency of Compassionate Release." Section 603(b) was initially a standalone bill that "explicitly sought to 'improve the compassionate release process of the Bureau of Prisons.'" *Brown*, 411 F. Supp. 3d at 451 (quoting Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong. (2018)).

The amendment to § 3852(c)(1)(A) provided prisoners with two direct routes to court: (1) file a motion after fully exhausting administrative appeals of the BOP's decision not to file a motion, or (2) file a motion after "the lapse of 30 days from the receipt . . . of such a request" by the warden of the defendant's facility, "whichever is earlier." 18 U.S.C. § 3852(c)(1)(A). These changes gave the "district judge . . . the ability to grant a prisoner's motion for compassionate release even in the face of BOP opposition or its failure to respond to the prisoner's compassionate release request in a timely manner." *United States v. Young*, 2020 WL 1047815, at *5 (M.D. Tenn. Mar. 3, 2020). The substantive criteria of § 3582(c)(1)(A)(i) remained the same.

Congress never defined the term "extraordinary and compelling reasons," except to state that "[r]ehabilitation . . . alone" does not suffice. 18 U.S.C. § 994(t). Rather, Congress directed the Sentencing Commission to define the term. *Id.* The Commission did so prior to the passage

[7] S*ee also United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("The First Step Act was passed against the backdrop of documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants."); 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of the First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

of the First Step Act, but has not since updated the policy statement. *See* U.S.S.G. §1B1.13 cmt. n.1(A)-(D). In subsections (A)-(C) of an Application Note to U.S.S.G. §1B1.13, the Commission enumerated three specific "reasons" that qualify as "extraordinary and compelling": (A) terminal illness diagnoses or serious medical, physical or mental impairments from which a defendant is unlikely to recover, and which "substantially diminish" the defendant's capacity for self-care in prison; (B) aging-related health decline where a defendant is over 65 years old and has served at least ten years or 75% of his sentence; or (C) two family related circumstances: (i) death/incapacitation of the only caregiver for the inmate's children or (ii) incapacitation of an inmate's spouse, if the inmate is the spouse's only caregiver. *See id.* cmt. n.1(A)-(C). The policy statement also added a catchall provision that gave the Director of the BOP the authority to determine if "there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with" the other three categories. *Id.* cmt. n.1(D).

Thus, implicitly recognizing that it is impossible to package all "extraordinary and compelling" circumstances into three neat boxes, the Commission made subsections (A)-(C) non-exclusive by creating a catchall that recognized that other "compelling reasons" could exist. *See United States v. Urkevich*, 2019 WL 6037391, at *3 (D. Neb. Nov. 14, 2019) (noting that §1B1.13 never "suggests that [its] list [of criteria] is exclusive"); *United States v. Beck*, --- F. Supp. 3d ----, 2019 WL 2716505, at *8 (M.D.N.C. June 28, 2019) ("Read as a whole, the application notes suggest a flexible approach . . . [and] recognize that the examples listed in the application note do not capture all extraordinary and compelling circumstances.").

The Commission has not updated its policy statement to account for the changes imposed by the First Step Act,[8] and the policy statement is now clearly outdated. The very first sentence of §1B1.13 constrains the entire policy statement to motions filed solely by the BOP. And an Application Note also explicitly confines the policy statement to such motions. *See* U.S.S.G. §1B1.13 ("Upon motion of the Director of the [BOP] . . . the court may reduce a term of imprisonment . . . ."); *id.* at cmt n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the [BOP]."); *see also Brown* at 449 (describing the old policy statement as "outdated," adding that the Commission "has not made the policy statement for the old [statutory] regime applicable to the new one."); *United States v. Ebbers*, --- F. Supp. 3d ----, 2020 WL 91399, at *4 (S.D.N.Y. 2020) (describing the old policy statement as "at least partly anachronistic").

Accordingly, a majority of district courts have concluded that the "old policy statement provides helpful guidance, [but] . . . does not constrain [a court's] independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under § 3852(c)(1)(A)." *United States v. Beck*, --- F. Supp. 3d ---- , No. 13-cr-186-6, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019); *see also Brown*, 411 F. Supp. 3d at 451 ("[T]he most natural reading of the amended § 3582(c) . . . is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it."); *United States v. Fox*, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("[D]eference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role."); *United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("Application Note 1(D)'s

[8] As several courts have recognized, the Commission is unable to update the Sentencing Guidelines because, at the moment, it lacks a sufficient number of appointed commissioners to take this action. *See, e.g., United States v. Maumau*, No. 08-cr-00785, 2020 WL 806121, at *1 n.3 (Feb. 18, 2020).

prefatory language, which requires a [catchall] determination by the BOP Director, is, in substance, part and parcel of the eliminated requirement that relief must be sought by the BOP Director in the first instance. . . . [R]estricting the Court to those reasons set forth in §1B1.13 cmt. n.1(A)-(C) would effectively preserve to a large extent the BOP's role as exclusive gatekeeper, which the First Step Act substantially eliminated . . . ."); *United States v. Young*, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) ("[T]he dependence on the BOP to determine the existence of an extraordinary and compelling reason, like the requirement for a motion by the BOP Director, is a relic of the prior procedure that is inconsistent with the amendments implemented by the First Step Act."); *Maumau*, 2020 WL at *2-*3 (D. Utah Feb. 18, 2020) (collecting cases).

A smaller number of courts have concluded that the Sentencing Commission's policy statement prevents district courts from considering any "extraordinary and compelling reasons" outside of those listed in subsections (A)-(C) of the policy statement. *See, e.g., United States v. Lynn*, 2019 WL 3805349, at *2-*5 (S.D. Ala. Aug. 12, 2019); *United States v. Shields*, 2019 WL 2359231, at *4 (N.D. Cal. June 4, 2019); *United States v. Willingham*, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019). The government urges this Court to follow these minority decisions.

The conclusion reached by the majority of courts is more persuasive. It is true that §3852(c)(1)(A) requires courts to act consistently with *applicable* policy statements under the Sentencing Guidelines, but the Sentencing Commission simply has not issued a policy statement that addresses prisoner-filed motions post-First Step Act:

> There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. By its terms, the old policy statement applies to motions filed by the [BOP] Director and makes no mention of motions filed by defendants. . . . The Sentencing Commission has not amended or updated the old policy statement since the First Step Act was enacted, nor has it adopted a new policy statement applicable to motions filed by defendants.

Beck, --- F. Supp. 3d ----, 2019 WL 2716505, at *5 (citations omitted). The introductory sentence of §1B1.13, "*[u]pon motion of the Director of the [BOP . . . the court may reduce a term of imprisonment*," limits the policy statement's scope to a procedural scheme exclusively involving the BOP that does not exist anymore. And comment 4 of §1B1.13's Application Note expressly states that "[a] reduction *under this policy statement may be granted only upon motion by the Director of the [BOP]*." Accordingly, by its own terms, the scope of the old policy statement is clearly outdated and, at the very least, does not apply to the entire field of post-First Step Act motions. In other words, for prisoner-filed motions, there is a gap left open that no "applicable" policy statement has addressed. Therefore, the policy statement may provide "helpful guidance" but does not limit the Court's independent assessment of whether "extraordinary and compelling reasons" exist under § 3582(c)(1)(A)(i). *See Beck* at *6; *Fox*, 2019 WL 3046086, at *3 ("I agree with the courts that have said that the Commission's existing policy statement provides helpful guidance . . . [but] is not ultimately conclusive given the statutory change.").

Minority cases like *Lynn* attempt to refute this point by minimizing the impact of the First Step Act's changes. *See Lynn*, 2019 WL 38505349, at *4 n.5 ("While Section 1B1.13 and application note 4 reference motions brought by BOP, this merely restates the restriction on proper movants [that existed] prior to the [First Step] Act . . . ."). The First Step Act, however, significantly altered the landscape of compassionate-release motions and created a procedural gap that the Sentencing Commission's policy statement never had a chance to address.

When the Commission wrote its policy statement, a motion could reach the court only through the BOP. By providing the catchall provision, the Commission recognized that it may be impossible to definitively predict what reasons may qualify as "extraordinary and

compelling." Rather than attempt to make a definitive prediction, the Commission covered all of its bases by ensuring that *every motion* to reach the court would have an opportunity to be assessed under the flexible catchall provision. At the time the Commission wrote, the catchall provision's BOP-focused language[9] accomplished that task, because every motion to reach the court necessarily had to be filed and approved by the BOP.

Under the First Step Act, however, it is possible for inmates to file compassionate-release motions—under the 30-day lapse provision—when their warden *never* responds to their request for relief. Thus, Congress specifically envisioned situations where inmates could file direct motions in cases where nobody in the BOP *ever* decided whether the motion qualified for relief under the catchall provision that the Commission originally sought to apply to *all* motions.

It would be a strange remedy indeed if Congress provided that prisoners whose wardens failed to respond in such a situation could only take advantage of the thirty-day lapse provision by accepting a pared-down standard of review that omitted the flexible catchall standard. But under the minority view, that is exactly what would happen: prisoners in this situation would never have the chance for the BOP to assess their claim under the catchall provision and would never get the chance for this kind of flexible review in the district court, since under the minority view, the court would be constrained to the specific criteria in subsections (A)-(C) of the policy statement.[10] This would have the perverse effect of *penalizing* prisoners who take advantage of

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[9] *See* U.S.S.G. §1B1.13 cmt. n.1(D) (providing for relief if, "[a]s determined by the Director of the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

[10] The minority bases this view on the BOP-focused language of the policy statement's catchall provision. *See* U.S.S.G. §1B1.13 cmt. n.1(D) (asking only the BOP Director to determine if other extraordinary and compelling circumstances exist).

the First Step Act's fast-track procedures and rewarding prisoners who endure the BOP-related delay that the Act sought to alleviate.

That would be antithetical to the First Step Act. The First Step Act—and the critical 30-day lapse route it provided—directly responded to a compassionate-release system so plagued by delay that prisoners sometimes died while waiting for the BOP to make a decision. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); *see also* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications."). Under the minority view, Congress would have created a two-tiered system that poses a Sophie's Choice to prisoners with unresponsive wardens: (1) opt for quicker relief at the cost of a disadvantageous standard with no catchall; or (2) endure delay—and, possibly, complete inaction—to retain a more flexible standard. Congress sought to help, not hinder, these sorts of prisoners, and clearly did not intend to create this outcome. Nothing in the text of the old policy statement calls for it, since that statement expressly limits itself to motions filed by the BOP and was written before this situation was even possible to envision.

Adopting the minority view, then, would undermine the purpose of the First Step Act and create an inconsistent and shifting definition of the term "extraordinary and compelling." Because the Sentencing Commission has not issued a policy statement addressing post-First Step Act procedures, it certainly has not mandated that courts take such an approach. Accordingly, as a result of the First Step Act, there is simply a procedural gap that the Sentencing Commission—currently lacking a quorum and unable to act—has not yet had the chance to fill. Nothing in

§ 3852(c)(1)(A)(i) requires courts to sit on their hands in situations like these. Rather, the statute's text directly instructs *courts* to "find that" extraordinary circumstances exist.[11]

Therefore, this Court has discretion to assess whether Mr. Rodriguez presents "extraordinary and compelling reasons" for his release outside of those listed in the non-exclusive criteria of subsections (A)-(C) of the old policy statement.[12] Of course, this policy statement remains informative in guiding my determination. *See, e.g.*, *Fox*, 2019 WL 3046086, at *3 ("[T]he Commission's existing policy statement provides helpful guidance on the factors that support compassionate release, although it is not ultimately conclusive . . . ."); *Beck*, 2019 WL 2716505, at *7 ("While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment . . . ."); *United States v. Lisi*, 2020 WL 881994, at *3 (S.D.N.Y. Feb. 24, 2020) ("[T]he Court may independently evaluate whether [defendant] has

[11] Indeed, the compassionate-release provision was first introduced in 1984—with the same "consistent with applicable policy statements" requirement—but the Sentencing Commission did not issue a policy statement until 2006. *See Young*, 2020 WL 1047815, at *3-*4 (providing history of the compassionate-release statute and the Commission's policy statement). Surely courts were not required to refrain from assessing "extraordinary and compelling circumstances" in that interim period. Until the Commission updates its policy statement in light of the First Step Act, the same point applies here.

[12] Accepting the minority view—which appears to treat the BOP's internal guidance on the catchall provision as definitive—also ignores the point that courts "do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency." *Chao v. Community Tr. Co.*, 474 F.3d 75, 85 (3d Cir. 2007) (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003)). While it is true that Congress provides that courts must act consistently with the Sentencing Commission's policy statements, Congress never delegated any authority to the BOP to define the term "extraordinary and compelling," nor did it ever instruct courts to act consistently with the BOP's internal guidance. *Accord United States v. Ebbers*, --- F. Supp. 3d ----, 2020 WL 91399, at *4 n.6 (S.D.N.Y. 2020) ("[N]o statute directs the Court to consult the BOP's rules or guidelines, and no statute delegates authority to the BOP to define the requirements for compassionate release. . . . Moreover, the First Step Act reduced the BOP's control over compassionate release and vested greater discretion with the courts. Deferring to the BOP would seem to frustrate that purpose."); *cf. U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so."); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) (same).

raised an extraordinary and compelling reason for compassionate release . . . [but §1B1.13's policy statement] remain[s] as helpful guidance to courts . . . .").

B. Extraordinary and compelling reasons exist here

Mr. Rodriguez's circumstances—particularly the outbreak of COVID-19 and his underlying medical conditions that place him at a high risk should he contract the disease—present "extraordinary and compelling reasons" to reduce his sentence. Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common." *Extraordinary*, Black's Law Dictionary (11th ed. 2019). It defines "compelling need" as a "need so great that irreparable harm or injustice would result if it is not met." *Compelling Need*, Black's Law Dictionary (11th ed. 2019).

Mr. Rodriguez has shown extraordinary and compelling reasons to reduce his sentence. First, he suffers from underlying health conditions that render him especially vulnerable to COVID-19. Second, prison is a particularly dangerous place for Mr. Rodriguez at this moment. Third, he has served almost all of his sentence and has shown commendable rehabilitation while in prison. None of these reasons *alone* is extraordinary and compelling. Taken together, however, they constitute reasons for reducing his sentence "[b]eyond what is usual, customary, regular, or common," and reasons "so great that irreparable harm or injustice would result if [the relief] is not [granted]." *Extraordinary*, Black's Law Dictionary (11th ed. 2019); *Compelling Need*, Black's Law Dictionary (11th ed. 2019).

i. <u>Mr. Rodriguez's Health Conditions Make Him Especially Vulnerable to COVID-19</u>

Mr. Rodriguez's health conditions put him at high risk of grave illness or death if he gets infected with coronavirus. Dr. Cameron Baston, Assistant Professor of Clinical Medicine at the University of Pennsylvania Perelman School of Medicine, reviewed Mr. Rodriguez's medical

records from 2018 to 2020 and found that Mr. Rodriguez is in the "higher risk category" for developing more serious disease. Baston Decl. ¶¶ 14-17, Def. Reply Br. Ex. B, ECF No. 134-2. Mr. Rodriguez has Type 2 diabetes mellitus with diabetic neuropathy, essential hypertension, obesity, and "abnormal liver enzymes in a pattern most consistent with non-alcoholic fatty liver disease." *Id.* ¶ 15. Dr. Baston explained that "Mr. Rodriguez is in the higher risk category as a result of the immunosuppression from his preexisting condition, Type 2 Diabetes." *Id.* ¶ 16. Further, "[w]ere he to contract the virus, he would be at a higher risk of morbidity and mortality due to his liver abnormalities, obesity, and hypertension" and "would also be at a higher risk to require more advanced support such as ventilation and oxygenation." *Id.* ¶¶ 17-18.

Preliminary research has borne out Dr. Baston's professional opinion. An early World Health Organization report on COVID-19 found that "[i]ndividuals at highest risk for severe disease and death include people . . . with underlying conditions such as hypertension [and] diabetes."[13] While the preliminary overall fatality rate in the report was 3.8%, the fatality rate for people with diabetes was 9.2%.[14] The fatality rate for people with hypertension was 8.4%.[15] The

[13] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 24, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf.

[14] *Id.* The report noted that these figures represented the "crude fatality ratio." The Joint Mission acknowledged the challenges of reporting crude fatality ratio early in an epidemic. The overall fatality rate in the report is higher than current global estimates, but these numbers nonetheless show that fatality rates for people with diabetes and hypertension are elevated.

[15] *Id.* The relationship between hypertension and elevated risk from COVID-19 is not fully understood. Some experts say that high blood pressure alone is not a risk factor, but that it may be a risk factor when combined with another underlying health condition. *See* Rob Stein, *High Blood Pressure Not Seen As Major Independent Risk For COVID-19*, National Public Radio (Mar. 20, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818986656/high-blood-pressure-not-seen-as-major-independent-risk-for-covid-19. Other experts believe that COVID-19 strains the heart, making people with hypertension more vulnerable to the disease. *See* Anna Medaris Miller et al., *10 common health conditions that may increase risk of death from the coronavirus, including diabetes and heart disease*, Business Insider (Mar. 23, 2020), https://www.businessinsider.com/hypertension-diabetes-conditions-that-make-coronavirus-more-deadly-2020-3 (noting that 76% of people in Italy who died from

Centers for Disease Control and Prevention also explains that "[p]eople of any age" with "certain underlying medical conditions" are at high risk of severe illness from COVID-19.[16] It names diabetes as one such condition.

The government argues that Mr. Rodriguez's "conditions are not unusual" and notes that the BOP classifies him in its lowest medical care level, for "inmates who are generally healthy with limited needs for clinician evaluation and monitoring." Resp. in Opp'n to Mot. Reduce Sentence 8-9, ECF No. 129 ("Resp. Br."). In the absence of a deadly pandemic that is deadlier to those with Mr. Rodriguez's underlying conditions, these conditions would not constitute "extraordinary and compelling reasons." It is the confluence of COVID-19 and Mr. Rodriguez's health conditions that makes this circumstance extraordinary and compelling.

ii. Mr. Rodriguez Cannot Adequately Protect Himself Against Infection in Prison

Given Mr. Rodriguez's vulnerability to COVID-19, prison is a particularly dangerous place for him. COVID-19 is now inside FCI Elkton. Many of the recommended measures to prevent infection are impossible or unfeasible in prison. The government's assurances that the BOP's "extraordinary actions" can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease at the facility where Mr. Rodriguez is housed. *See* Resp. Br. 10. Indeed, Congress and the Department of Justice are increasingly recognizing the danger of COVID-19 outbreaks in prison and encouraging steps to release some inmates. *See infra* at 18.

COVID-19 had hypertension). Mr. Rodriguez has hypertension and diabetes, so hypertension is probably a risk factor for him in either case.

[16] *People who are at higher risk for severe illness*, Centers for Disease Control & Prevention (Mar. 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

Prisons are ill-equipped to prevent the spread of COVID-19. Public health experts recommend containing the virus through measures such as social distancing, frequently disinfecting shared surfaces, and frequently washing hands or using hand sanitizer.[17] Joseph J. Amon, an infectious disease epidemiologist and Director of Global Health and Clinical Professor in the department of Community Health and Prevention at the Drexel Dornsife School of Public Health, has studied infectious diseases in detention settings and states:

> Detention facilities have even greater risk of infectious spread because of conditions of crowding, the proportion of vulnerable people detained, and often scant medical care. People live in close quarters and are also subject to security measures which prohibit successful "social distancing" that is needed to effectively prevent the spread of COVID-19. Toilets, sinks, and showers are shared, without disinfection between use. Food preparation and food service is communal, with little opportunity for surface disinfection. The crowded conditions, in both sleeping areas and social areas, and the shared objects (bathrooms, sinks, etc.) will facilitate transmission.

Amon Decl. ¶ 20, Def. Reply Br. Ex. A, ECF No. 134-1. Some jails and prisons have already become COVID-19 hotspots. For instance, the infection rate in New York City jails is far outpacing the infection rate in the city as a whole.[18] FCI Oakdale, a BOP facility in Louisiana, recently "exploded with coronavirus" cases, leading to the death of an inmate and positive test

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[17] *See, e.g.*, *How to Protect Yourself*, Centers for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html; Dr. Asaf Bitton, *Social distancing in the coronavirus pandemic — maintaining public health by staying apart*, Boston Globe (Mar. 14, 2020), https://www.bostonglobe.com/2020/03/14/opinion/social-distancing-coronavirus-pandemic-maintaining-public-health-by-staying-apart/.

[18] *See* Elizabeth Weill-Greenberg, *New York City Jails Have an Alarmingly High Infection Rate, According to an Analysis by the Legal Aid Society*, The Appeal (Mar. 26, 2020), https://theappeal.org/new-york-city-jails-coronavirus-covid-19-legal-aid-society/.

results for thirty other inmates and staff.[19] As of March 31, 2020, the BOP has reported that two inmates at FCI Elkton—Rodriguez's facility—have tested positive for COVID-19.[20]

The BOP cannot adequately protect Mr. Rodriguez from infection, especially in light of his vulnerability and the presence of COVID-19 in FCI Elkton.

The BOP's containment measures have already proven insufficient to prevent the spread of COVID-19. As of March 26, the BOP reported eighteen known cases of COVID-19 among inmates and staff.[21] Just four days later, the BOP reported fifty-two cases, an inmate had died, and COVID-19 had reached FCI Elkton.[22] The BOP's reported cases are rapidly growing and almost certainly underestimate the true number of infections. For instance, as of March 29, the BOP only listed eight COVID-19 cases at FCI Oakdale, while the Washington Post reported thirty-one.[23] Testing is also scarce throughout the country.[24] Within the BOP, not all inmates with symptoms are being tested or quarantined.[25] Further, the BOP's protocols for screening inmates and staff depend on documented risk of exposure. Preliminary research indicates that

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[19] Kimberly Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, Washington Post (Mar. 29 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html.

[20] *COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 31, 2020), https://www.bop.gov/coronavirus/index.jsp.

[21] *Id.* (accessed Mar. 26, 2020).

[22] *Id.* (accessed Mar. 30, 2020); *Inmate Death at FCI Oakdale I*, Bureau of Prisons (Mar. 28, 2020), https://www.bop.gov/resources/news/pdfs/20200328_press_release_oak_death.pdf

[23] *Compare* Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, *supra* note 19, *with COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 29, 2020), https://www.bop.gov/coronavirus/index.jsp.

[24] *See, e.g.*, Robert P. Baird, *Why Widespread Coronavirus Testing Isn't Coming Anytime Soon*, New Yorker (Mar. 24, 2020), https://www.newyorker.com/news/news-desk/why-widespread-coronavirus-testing-isnt-coming-anytime-soon.

[25] *See* Michael Balsamo & Michael R. Sisak, *Federal prisons struggle to combat growing COVID-19 fears*, AP (Mar. 27, 2020), https://apnews.com/724ee94ac5ba37b4df33c417f2bf78a2.

undocumented cases of coronavirus, including those of people who have not yet begun to show symptoms, are responsible for a significant portion of the virus's transmission.[26]

The situation at FCI Elkton in particular is alarming. The first cases of COVID-19 appeared there *after* the government assured the Court that the BOP was taking aggressive action to contain the disease. Elkton is filled to capacity and appears to have few tests.[27] Mr. Rodriguez represents that inmates at Elkton do not have adequate soap or disinfectant, are still housed together in large groups, and share a thermometer without sanitization, against critical public health recommendations. Reply Br. 1. These representations are consistent with reports of conditions in federal prisons, including at Elkton.[28] At Elkton, prisoners themselves are responsible for cleaning and sanitation.[29]

Recognizing the risk of COVID-19 outbreaks in prisons, Congress, the President, and the Department of Justice have begun encouraging steps to release some prisoners to safer home environments. The coronavirus relief bill enacted on March 27 allows the Attorney General to

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[26] *See* Ruiyun Li et al., *Substantial undocumented infection facilitates the rapid dissemination of novel coronavirus (SARS-CoV2)*, Science (Mar. 16, 2020), https://doi.org/10.1126/science.abb3221 (86% of Chinese cases before January 23 were undocumented, and undocumented cases were the infection source for 79% of documented cases); Zhanwei Du et al., *Serial Interval of COVID-19 among Publicly Reported Confirmed Cases*, 26 Emerging Infectious Diseases (Mar. 19, 2020), https://doi.org/10.3201/eid2606.200357 (as of February 8, 12.6% of reported infections in China were caused by pre-symptomatic transmission).

[27] *See* Deanne Johnson, *Two positive tests reported at Elkton prison*, Morning Journal (Mar. 31, 2020), https://www.morningjournalnews.com/news/local-news/2020/03/two-positive-tests-reported-at-elkton-prison/; Stan Boney, *Union president wants change after 2 Elkton prison inmates test positive for COVID-19*, WKBN (Mar. 30, 2020), https://www.wkbn.com/news/coronavirus/2-positive-cases-of-covid-19-confirmed-at-columbiana-county-prison/.

[28] *See* Michael Balsamo & Michael R. Sisak, *Federal prisons struggle to combat growing COVID-19 fears*, *supra* note 25; Deanne Johnson, *Two positive tests reported at Elkton prison*, *supra* note 27; Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, *supra* note 19; Danielle Ivory, *'We Are Not a Hospital': A Prison Braces for the Coronavirus*, New York Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html.

[29] *See Inmate Information Handbook, Federal Bureau of Prisons FCI Elkton, Ohio* at 9, Bureau of Prisons (2012), https://www.bop.gov/locations/institutions/elk/ELK_aohandbook.pdf.

expand the BOP's ability to move prisoners to home confinement. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 12003(b)(2) (2020). This congressional action came after Attorney General William Barr sent a memo to the Director of the BOP recognizing that "there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities."[30] Attorney General Barr accordingly requested that the BOP use its statutory authority to release certain inmates to home confinement.[31] *Id.* While he also expressed confidence in the BOP's "ability to keep inmates in our prisons as safe as possible from the pandemic sweeping across the globe," the situation has changed swiftly since he wrote the memo and the BOP's reported COVID-19 cases have since tripled.

iii. Mr. Rodriguez is Close to His Release Date and has Demonstrated Rehabilitation

Mr. Rodriguez has served the vast majority of his sentence, seventeen years. He is a year and a half away from his release date, assuming continued good behavior. He is a year away from eligibility for home confinement. Keeping him in prison for one more year makes a marginal difference to his punishment. But the difference to his health could be profound. That is why being so close to his release date in a long sentence adds to the extraordinary and compelling reasons to reduce his punishment.

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[30] Memo. from Attorney Gen. William Barr to Director of BOP, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), at https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000.

[31] Mr. Rodriguez will not be statutorily eligible to be released to home confinement for about a year. Therefore, he is not among those who could be released under Attorney General Barr's memo. I note, however, that Mr. Rodriguez meets many of the discretionary factors outlined in the memo for good candidates for release. He is particularly vulnerable to COVID-19; he is housed in a low-security facility; he has shown overall good conduct and no violent conduct in prison; he has a reentry plan that will maximize public safety; and I find below that he does not pose a danger to others or the community. *See id.*

He has also shown rehabilitation in prison. While serving his sentence, Mr. Rodriguez took GED classes and earned his GED. *See* U.S. Probation Office Memo (Mar. 31, 2020). In 2019, he completed an apprenticeship in computer operations. He has also taken classes about fitness and nutrition, anger management, parenting, financial education, decision-making, and hobbies. Furthermore, Mr. Rodriguez has had only two infractions in seventeen years of incarceration, one for alcohol and one for having a cell phone. Neither were violent or raise concerns about recidivism.

The government objects that rehabilitation is not an appropriate basis for granting compassionate release. It cites Congress's directive to the Sentencing Commission that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). Mr. Rodriguez's rehabilitation *alone* would not constitute an extraordinary and compelling reason. But the qualifier "alone" implies that rehabilitation can contribute to extraordinary and compelling reasons. That is how the Commission has understood the statute. *See* U.S.S.G. § 1B1.13 cmt. n.3 ("Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, *by itself*, an extraordinary and compelling reason for purposes of this policy statement.") (emphasis added); *Brown*, 411 F. Supp. 3d at 449 ("[T]he Commission implies that rehabilitation may be considered with other factors."). I consider rehabilitation in conjunction with the other reasons outlined here.[32]

[32] I do not find the purported changes in Department of Justice (DOJ) policy to be extraordinary and compelling reasons. Whether or not this could be an appropriate basis for compassionate release, Mr. Rodriguez has not demonstrated that he would be charged differently today. He presents no evidence that any official DOJ policy would have made a difference to his designation under the Armed Career Criminal Act, the law that made his prior state drug convictions the predicate for a fifteen-year mandatory minimum sentence. He also fails to show that under current DOJ policy he would not have been charged with violating 18 U.S.C. § 924(c).

Indeed, no single reason would provide a basis for reducing Mr. Rodriguez's sentence. Without the COVID-19 pandemic—an undeniably extraordinary event—Mr. Rodriguez's health problems, proximity to his release date, and rehabilitation would not present extraordinary and compelling reasons to reduce his sentence. But taken together, they warrant reducing his sentence.

C. Mr. Rodriguez is not a danger to others or the community

The Commission's policy statement, which provides helpful guidance, provides for granting a sentence reduction only if "[t]he defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(2).

Mr. Rodriguez is not a danger to the safety of others or to the community under the factors listed in in 18 U.S.C. § 3142(g). Section 3142(g) sets out the factors courts must consider in deciding whether to release a defendant pending trial. These factors weigh both the defendant's possible danger to the community and the defendant's likelihood to appear at trial. Only the former is relevant here. The factors that weigh danger to the community include "the nature and circumstances of the offense charged," "the history and characteristics of the person," including "the person's character, physical and mental condition, family ties, . . . community ties, past conduct, history relating to drug or alcohol abuse, [and] criminal history," and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g).

Mr. Rodriguez's criminal history involves a series of convictions for drug dealing as well as the firearm offenses in this case. While this history is serious, I find that Mr. Rodriguez does not pose a danger to others. Nothing in his record suggests that he has been violent. The firearms charges related to a gun Mr. Rodriguez disclosed to police officers when they were executing a

search warrant on his home. While he pleaded guilty to possessing a firearm in furtherance of a drug offense, there was no evidence that he used the gun during the drug transactions or at any other time. *See Beck*, 2019 WL 2716505, at *10 (noting in similar circumstances that "there was no evidence or indication that [defendant] ever used or pointed a gun at anyone or that she threatened anyone with a firearm"). His history of drug dealing is seventeen years behind him, and nothing in his prison record raises concerns about violence or drug dealing.

I also find that Mr. Rodriguez is not a danger to the community during this pandemic because he has a home to return to—where he can self-quarantine—and an adequate reentry plan, as verified by the Probation Office.

D. The sentence reduction is consistent with the Section 3553(a) factors

Finally, the Court must "consider[] the [sentencing] factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). The applicable sentencing factors warrant a sentence reduction for Mr. Rodriguez. Because section 3553(a) establishes factors to consider in initially imposing a sentence, not every factor applies here. The applicable factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> . . . [and]
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

18 U.S.C. § 3553(a). The statute also mandates: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." *Id.*

The first factor is "the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a)(1). As described above, Mr. Rodriguez's extensive criminal history is mostly composed of low-level drug dealing. The predicate offenses to his mandatory minimum sentences were non-violent. He has shown rehabilitation and good conduct over the past seventeen years.

The second factor is the need for the sentence imposed to serve the enumerated purposes of punishment. *Id.* § 3553(a)(2). The court should "impose a sentence sufficient, but not greater than necessary, to comply with [these] purposes." *Id.* § 3553(a). Mr. Rodriguez has served seventeen years, most of the original sentence imposed. Seventeen years is a long time—long enough to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of Mr. Rodriguez. Rather than being long enough to provide Mr. Rodriguez with needed medical care, it may interfere with his ability to get needed medical care. To prolong his incarceration further would be to impose a sentence "greater than necessary" to comply with the statutory purposes of punishment.

The final relevant factor is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). Because Mr. Rodriguez has served the vast majority of his mandatory minimum sentence and is a year and a half away from release, granting his motion sufficiently minimizes sentence disparities between him and similarly situated defendants.

II. CONCLUSION

Mr. Rodriguez has now served the lion's share of his sentence. But his sentence did not include incurring a great and unforeseen risk of severe illness or death. For this reason, I will

grant Mr. Rodriguez's motion for a sentence reduction. I will sentence him to time served, six years of supervised release, and a supervised release condition that he must remain in home quarantine for at least 14 days and until further order of the Court.

S/ANITA B. BRODY, J.
ANITA B. BRODY, J.

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