UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA	:	
-*v*.-	:	09 Cr. 581 (WHP)
PAUL M. DAUGERDAS,	:	
Defendant.	:	

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MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN
<u>OPPOSITION TO DEFENDANT PAUL M. DAUGERDAS'S MOTION FOR RELEASE</u>

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The United States respectfully submits this memorandum of law in opposition to the motion for release filed by defendant Paul M. Daugerdas ("Daugerdas" or the "defendant").

PRELIMINARY STATEMENT

The defendant, a notorious tax shelter promoter who has served well less than half of his sentence, moves this Court to release him immediately and permanently from prison on the ground that he is a greater risk for potential complications from COVID-19. In advancing his argument for release, Daugerdas maintains that he will be safer from COVID-19 by moving from a place with no direct and few surrounding cases of COVID-19 (Marion Camp, in rural, southern Illinois) to a place where he will reside with his wife, a nurse who works in Chicago (a city with numerous COVID-19 cases) at a hospital where coronavirus numerous patients are being treated. For the reasons set forth below, the motion should be denied.

First, this Court lacks authority to order the defendant's release at this time, because he has not exhausted his administrative remedies. The defendant's claim that the Court may simply waive, excuse, or ignore that undisputed failure, over the Government's objection, is wrong. It has been rejected by the Third Circuit, *see United States v. Raia*, No. 20-1033, --- F.3d ---, 2020

WL 1647922, at *2 (3d Cir. Apr. 2, 2020), by this Court, *United States v. Crosby*, 09 Cr. 1056 (WHP), Tr. at 13 (S.D.N.Y., April 3, 2020) (transcript of oral decision attached hereto as Exhibit A), and the overwhelming majority of the courts in this district to have been presented with it, *see, e.g.*, *United States v. Woodson*, No. 18 Cr. 845 (PKC), 2020 WL 1673253, at *4 (S.D.N.Y. Apr. 6, 2020). For good reason: "Lawmakers who created the statutory right of a convicted defendant to bring an application to reduce his sentence placed a limitation on his right to do so." *Id.* at *3. "[T]he Court is not free" to disregard that limitation by "infer[ring] a general 'unwritten 'special circumstances' exception'" that is irreconcilable with the statute's plain language. *United States v. Roberts*, No. 18 Cr. 528 (JMF), 2020 WL 1700032, at *2 (S.D.N.Y Apr. 8, 2020) (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016)) (denying motion of HIV-positive inmate); *see also United States v. Rabadi*, 13 Cr. 353 (KMK) (S.D.N.Y., April 14, 2020) [Dkt. 93, at 5-6].

Second, the defendant fails to discharge his burden to demonstrate that he, personally and individually, falls into the narrow band of inmates for whom "extraordinary and compelling reasons" warrant immediate and permanent release. 18 U.S.C. § 3582(c)(1)(A). The defendant's medical conditions, while undoubtedly real, predate his incarceration by years (and were taken into account by this Court in imposing a significantly below-Guidelines sentence), are both reasonably common and stable, and do not distinguish him from numerous others. Moreover, the defendant, unlike many others who have recently moved for release, is in a long-term, low-security facility—and one without any known cases of inmates or staff with COVID-19.

Third, even assuming that the defendant were deemed to have otherwise met his burden, release would remain unwarranted. The law requires that the same Section 3553(a) factors considered at sentencing be considered in weighing a motion for release. As noted above, the defendant, progenitor of the largest criminal tax scheme ever (netting him over $95 million), has

served well under half of his sentence—just five-and-a-half years of the fifteen-year sentence imposed. Release at this time, as he proposes, to reside with his wife—a nurse currently working at a hospital in Chicago that serves hundreds of COVID-19 cases—would not be in accord with those factors. Indeed, release likely would result in exposure to greater risk of COVID-19 infection than at the Bureau of Prisons facility at Marion, where there are no cases of COVID-19 and a markedly lower number of cases in the surrounding areas of rural southern Illinois than Chicago and its suburbs.

ARGUMENT

I. THE DEFENDANT'S MOTION MUST BE DENIED FOR FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES

The defendant does not dispute that he has failed to exhaust his administrative remedies. Nor could he, because his request to the Federal Bureau of Prisons ("BOP"), which was made only recently (on March 24, 2020), and has not yet been ruled upon; thus, he has not availed himself of his right to appeal a denial within the BOP, *see* 28 C.F.R. §§ 542.15, 571.63. Nor has it been 30 days from the receipt by the BOP of his request (or April 23, 2020), which would trigger the right to make a motion to this Court. ,. The defendant asserts that, nonetheless, the Court should "waive" or "excuse" his failure to exhaust his administrative remedies. (Def. Mem. 9-12). The law is squarely to the contrary.

A. The Statute's Exhaustion Requirement Is Mandatory and Contains No Exceptions

Under 18 U.S.C. § 3582(c), a district court "may not" modify a term of imprisonment once imposed, except under limited circumstances. One such circumstance is the so-called compassionate release provision, under which the defendant here seeks relief, which provides that a district court "may reduce the term of imprisonment" where it finds "extraordinary and compelling circumstances." *Id.* § 3582(c)(1)(A)(i). A motion under this provision may be made

by either the BOP or a defendant, but in the latter case only "after the defendant has *fully exhausted all administrative rights* to appeal a failure of the [BOP] 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.* (emphasis added). Accordingly, where a compassionate release motion is brought by a defendant who has not fully exhausted all administrative rights, the district court may not modify his term of imprisonment. In short, Section 3582(c)(1)(A)'s exhaustion requirement requires "ful[] exhaust[ion]." The defendant's assertion that he should be excused (Def. Mem. 9-12) from that express, unambiguous requirement has no basis in the statute.

That ends this matter at this time. Section 3582(c)'s exhaustion requirement is statutory, not the sort of judicially-crafted exhaustion requirement that "remain[s] amenable to judge-made exceptions." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Statutory exhaustion requirements "stand[] on a different footing." *Id.* "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* Thus, where a statute contains mandatory exhaustion language, as it does here, the only permissible exceptions are those contained in the statute. *Id.*; *see also Bastek v. Fed. Crop. Ins.*, 145 F.3d 90, 94 (2d Cir. 1998) ("Faced with unambiguous statutory language requiring exhaustion of administrative remedies, we are not free to rewrite the statutory text.").

As noted, Section 3582(c)(1)(A) has mandatory exhaustion language with no exceptions. The plain language of the statute states that a court "may not" modify a sentence unless the defendant has first "fully exhausted all administrative rights" or waited 30 days after transmitting his request to the warden. Unlike the Prison Litigation Reform Act ("PLRA"), for example (cited at Def. Mem. 12, n.8), there is no statutory qualifier that a defendant need only to exhaust all

"available" remedies.[1] *Cf. Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 750 (2017) (statute requiring that certain types of claims "shall be exhausted" is a mandatory exhaustion provision for those types of claims). For this reason, as Judge Cote and others have explained, this Court lacks the authority to grant the defendant's motion at this time. *United States v. Monzon*, No. 99 Cr. 157 (DLC), 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020).

In recent weeks, as the Court is aware, numerous defendants have cited the unusual circumstances presented by COVID-19 as a basis for compassionate release, and have argued that the exhaustion requirement should be waived or excused. The only court of appeals to have addressed the question has rejected the argument and required exhaustion. *See United States v. Raia*, No. 20-1033, --- F.3d ---, 2020 WL 1647922 (3d Cir. Apr. 2, 2020). In *Raia* (a case that the defendant omits from his brief), the Third Circuit recognized the serious concerns presented by COVID-19, but held that, in light of these concerns, as well as the BOP's statutory role and its "extensive and professional efforts to curtail the virus's spread, . . . strict compliance with Section 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." *Id.* at *2.

This Court recently addressed the exhaustion issue in *United States v. Crosby*, 09 Cr. 1056, Tr. at 13 (S.D.N.Y., April 7, 2020), observing that "this Court lacks the authority to waive that time bar because Section 3582's exhaustion requirement is mandatory." Consistent with this Court's determination in *Crosby*, the vast majority of district courts that have reached the issue have also required exhaustion. *See, e.g.*, *United States v. Ogarro*, 18 Cr. 373 (RJS) (S.D.N.Y., April 14, 2020) [Dkt. 666, at 6]. ("[S]ection 3582's exhaustion requirement is clear as day.");

[1] In particular, the PLRA demands that an inmate exhaust "such administrative remedies *as are available*," meaning that the only permissible exception to exhaustion is where the remedies are "unavailable." *Ross*, 136 S. Ct. at 1856-58 (emphasis added); *see also id.* at 1855 (criticizing the "freewheeling approach" adopted by some courts of appeals to exhaustion requirements, and overruling precedent from the Second Circuit and other circuits that had read additional exceptions into the rule). Here, no such exception exists in the statute.

United States v. Rabadi, 13 Cr. 353 (KMK) (S.D.N.Y., April 14, 2020) [Dkt. 93, at 5-6]. (noting "vast majority" of cases holding that prisoners must exhaust administrative remedies); *Roberts*, 2020 WL 1700032, at *2; *United States v. Canale*, No. 17 Cr. 287 (JPO), 2020 WL 1809287, at *1 (S.D.N.Y. Apr. 9, 2020); *United States v. Woodson*, No. 18 Cr. 845 (PKC), 2020 WL 1673253, at *4 (S.D.N.Y. Apr. 6, 2020); *United States v. Weiland*, No. 18 Cr. 273 (LGS), 2020 WL 1674137, at *1 (S.D.N.Y. Apr. 6, 2020); *United States v. Arena*, No. 18 Cr. 14 (VM) (S.D.N.Y. Apr. 6, 2020) [Dkt. 354, at 2-3]; *United States v. Hernandez*, No. 18 Cr. 834 (PAE), 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020); *United States v. Cohen*, No. 18 Cr. 602 (WHP), 2020 WL 1428778, at *1 (S.D.N.Y. Mar. 24, 2020); *United States v. Johnson*, No. 14-CR-4-0441, 2020 WL 1663360, at *1 (D. Md. Apr. 3, 2020); *United States v. Carver*, No. 19 Cr. 6044, 2020 WL 1604968, at *1 (E.D. Wa. Apr. 1, 2020); *United States v. Clark*, No. 17 Cr. 85 (SDD), 2020 WL 1557397, at *3 (M.D. La. Apr. 1, 2020); *United States v. Williams*, No. 15 Cr. 646, 2020 WL 1506222, at *1 (D. Md. Mar. 30, 2020); *United States v. Garza*, No. 18 Cr. 1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020); *United States v. Zywotko*, No. 19 Cr. 113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020); *United States v. Eberhart,* No. 13 Cr. 313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020); *United States v. Gileno*, No. 19 Cr. 161, 2020 WL 1307108, at *3 (D. Conn. Mar.

19, 2020); *see also Monzon*, 2020 WL 550220, at *2; *United States v. Bolino*. No. 6 Cr. 806, 2020 WL 32461, at *1 (E.D.N.Y. Jan. 2, 2020) (citing cases).[2]

To be sure, COVID-19 presents unusual circumstances, in which compassionate release decisions should be made expeditiously. But the text of Section 3582 contains no exigency or similar exception, and indeed, the text refutes the availability of such an exception in two respects.

First, while many statutory exhaustion provisions require exhaustion of all administrative remedies before a claim may be brought in court, Section 3582 provides an alternative: exhaustion of all administrative rights *or* the lapse of 30 days from the warden's receipt of the inmate's request for compassionate release, whichever is earlier. 18 U.S.C. § 3582(c)(1)(A). This statutory alternative suggests that the Congress recognized that even if compassionate release requests cannot always await the full administrative process to be completed, the BOP should have at least 30 days to act on such a request. Legislative history is in accord. *See Roberts*, 2020 WL 1700032, at *2 (legislative history "indicates that Congress recognized the importance of expediting applications for compassionate release and still chose to require a thirty-day waiting period"). As Judge Marrero recently recognized, there is "simply no authority that permits [the defendant] to circumvent the administrative exhaustion requirement" based on a claim of futility, because the

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[2] *But see United States v. Perez*, No. 17 Cr. 513 (AT), 2020 WL 1546422, at *3 (S.D.N.Y. Apr. 1, 2020); *United States v. Colvin*, No. 19 Cr. 179, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020). However, both *Perez* and *Colvin* relied on *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019), which, as discussed below, is inapposite because it involves judge-made exhaustion doctrine. *Perez* and *Colvin* are also are inapposite because each was a case where delay amounted to denial because the defendant had a very short period (less than three weeks in *Perez*, and eleven days in *Colvin*) remaining on his or her sentence. *See Perez*, 2020 WL 1546422, at *3; *Colvin*, 2020 WL 1613943, at *2. This Court has properly labeled Judge Torres' decision in *Perez* an "outlier," given that it is among the handful of cases that have ignored the unambiguous exhaustion requirement in the statute. *United States v. Crosby*, Tr. at 8 (observing that the ruling in *Perez* was prohibited by the "plain command of the statute"). The fact that Judge Torres followed her own (incorrect) analysis from *Perez* in a later case, *United States v. Zukerman*, 2020 WL 1659880, at *3 (S.D.N.Y., April 3, 2020), provides no further support for Daugerdas's position. It means only that the "exhaustion" issue was decided incorrectly again.

ability to seek relief after 30 days constitutes "an express futility provision." *Arena*, No. 18 Cr. 14 (VM) (Dkt. 354, at 2); *see also United States v. Gross*, No. 15 Cr. 769 (AJN), 2020 WL 1673244, at *2 (S.D.N.Y. Apr. 6, 2020) ("the case for carving out an equitable exception here is weak" because Section 3582(c) "provides a built-in futility exception in the form of the 30-day rule").

Second, in cases presenting the most urgent circumstance—inmates diagnosed with a terminal illness—Section 3582(d) requires the BOP to process any application for compassionate release in 14 days. That Congress allowed 14 days to process the claims of even a terminally ill inmate suggests that it could not have intended to allow a shorter period (which excusing exhaustion would effectively provide) in a case, such as this, where the potential risk to the inmate, while serious, remains potential and opaque.

As the Third Circuit recognized, the mandatory exhaustion requirement accommodates the valuable role that the BOP plays in the compassionate release process. Informed decisions about compassionate release require the collection of information, like disciplinary records, medical history, and facility details, which the BOP is uniquely suited to obtain and that will benefit both the BOP and later a court evaluating such claims. The BOP is also well situated to make relative judgments about the merits of compassionate release requests—particularly at a time like this when many inmates, in different circumstances, are making requests advancing similar claims—and adjudicate those positions in a consistent manner. The Court may of course review those judgments, but Congress expressed its clear intent that such review would come second, after the benefit of the BOP's initial assessment. *See United States v. Russo*, No. 16 Cr. 441 (LJL) (S.D.N.Y. Apr. 3, 2020) (Dkt. 54, at 4) (The statutory text "recognizes that the BOP is frequently in the best position to assess, at least in the first instance, a defendant's conditions, the risk presented to the public by his release, and the adequacy of a release plan. That recognition is

consistent with one of the bedrock principles underlying administrative exhaustion—to permit the agency, with its expertise and with its responsibility over the movant, to make a decision in the first instance."); *see also Woodson*, 2020 WL 1673253, at *3 ("If the BOP denies a defendant's application, the BOP's decision may inform the Court of why the agency does not consider the relief warranted. The present national health emergency makes thoughtful and considered input from the BOP all the more valuable in avoiding unwarranted disparities among convicted defendants.").

In any event, to ignore the mandatory, express, statutory exhaustion requirement, whatever its merits, would be legal error. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018) ("[T]his case presents a question of statutory interpretation, not a question of policy."); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (Where a "statute's language is plain, the sole function of the courts is to enforce it according to its terms." (internal quotation marks omitted)); *cf., e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("This is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation." (internal quotation marks omitted)).

B. The Defendant's "Waiver" and "Exceptions" Arguments Fail

In the face of unambiguous statutory language, and numerous cases applying it in this district and elsewhere, the defendant cites principally to *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) and Judge Torres's opinions in *Perez* and *Zukerman*, and claims that this Court both may and should find that the exhaustion requirement is "waived" or "excused" because he fits within certain unwritten, but allegedly applicable, "exceptions." (Def. Mem. 10-12.) That claim is wrong. The statute's plain language does not permit exceptions. And *Washington* is inapposite for precisely that reason.

Washington involved a *judge-made*, not statutory, exhaustion. *See Washington*, 925 F.3d at 116 (stating that the statute in question "does not mandate exhaustion of administrative remedies" but finding that exhaustion requirement was nevertheless appropriate); *id.* at 118 ("Although not mandated by Congress, [exhaustion] is consistent with congressional intent."). Thus, it was appropriate for the court to consider judge-made exceptions to the judge-made exhaustion requirement, or, to put it differently, the scope of the judge-made requirement. *See Ross*, 136 S. Ct. at 1857. But this case involves an express mandatory statutory exhaustion requirement. That is entirely different. *See Bastek*, 145 F.3d at 95 (rejecting application of various exceptions to exhaustion requirement where clear statutory requirement exists); *Theodoropoulos v. INS*, 358 F.3d 162, 172 (2d Cir. 2004) (rejecting futility exception to exhaustion requirement in Immigration and Nationality Act because such an exception is "simply not available when the exhaustion requirement is statutory," as opposed to judicial); *United States v. Gonzalez-Roque*, 301 F.3d 39, 46-48 (2d Cir. 2002) (rejecting argument that statutory exhaustion requirement for collaterally attacking a removal order should be excused in light of defendant's *pro se* status in removal proceedings).

To be sure, *Washington* states: "Even where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute. The Supreme Court itself has recognized exceptions to the exhaustion requirement under 'three broad sets of categories.'" *Washington*, 925 F.3d at 118 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)). But the inclusion of the foregoing phrase "by statute" is not supported by the citation that follows. Indeed, *McCarthy* – the cited case -- is another case involving a judge-made exhaustion requirement. *See McCarthy*, 503 U.S. at 152 ("Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim." (emphasis in original)). It thus provides no support for the notion that exhaustion mandated "by

statute" is not absolute. *See Bastek*, 145 F.3d at 95 (rejecting application of *McCarthy* exceptions in a statutory case). Moreover, while *Washington* goes on to discuss three recognized exceptions to exhaustion, it is again describing three exceptions recognized in *McCarthy* in the judge-made context, and as the Supreme Court made crystal clear in *Ross*, there is a critical distinction between statutory and judge-made exhaustion requirements. Given that *Washington* was a judge-made exhaustion case, its unexplained statement that exhaustion mandated "by statute" is "not absolute" is dicta, and cannot supplant the clear statements to the contrary in cases like *Ross* and *Bastek*, and the plain language of the statute here. *See Woodson*, 2020 WL 1673253, at *3 ("The passing reference to 'exhaustion [that] is seemingly mandated by statute . . . is not absolute' in [*Washington*] was not necessary to the Court of Appeals' holding." (ellipsis in original)); *Roberts*, 2020 WL 1700032, at *2 (rejecting argument that *Washington* permits excusing exhaustion under Section 3582(c); unlike those that are judge-made, "statutory exhaustion requirements, such as those set forth in Section 3582(c), must be strictly enforced" (internal quotation marks omitted)).

Mathews v. Eldridge, 424 U.S. 319 (1976) (cited at Def. Mem. 12 & n. 8), is similarly inapposite. There, the Supreme Court considered a provision of the Social Security Act providing that a claimant could bring a civil action challenging a decision by the Secretary of Health, Education and Welfare only after "a final decision of the Secretary made after a hearing." 42 U.S.C. § 405(g). The Supreme Court construed this to contain two requirements: (1) a non-waivable, "jurisdictional" element that a claim shall have been brought before the Secretary, and (2) a waivable element that the remedies prescribed by the Secretary be exhausted. *Eldridge*, 424 U.S. at 328. The claimant argued that the Due Process Clause of the Fifth Amendment requires that prior to termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing. In evaluating whether the denial of his claim was

sufficiently "final" so as to "satisfy the exhaustion requirement," the Supreme Court noted that (1) his Due Process claim was entirely "collateral" to his substantive claim of entitlement, and (2) his claim to a pre-deprivation hearing as a matter of constitutional right "rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.* at 330-31. The Court accordingly concluded that the denial of the claimant's request for benefits "constitutes a final decision" for purposes of the exhaustion requirement. *Id.* at 332. Thus, *Eldridge* did not excuse an exhaustion requirement; it found it to have been satisfied. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) ("*Eldridge*, however, is a case in which the Court found that the respondent *had followed* the special review procedures set forth in § 405(g), thereby *complying with*, rather than *disregarding*, the strictures of § 405(h).").

As the Supreme Court has made clear numerous times since *Eldridge*—and which the defendant largely ignores—courts are "not free to rewrite the statutory text" when Congress has "barred claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 111 (1993). And where Congress has mandated exhaustion, the Supreme Court has rejected attempts to rely on the policies of administrative exhaustion, like those cited in *Bowen*, or the notion of a futility requirement. *See, e.g.*, *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also Woodson*, 2020 WL 1673253, at *3.

Thus, particularly in light of subsequent precedent, *Eldridge* stands at most for the proposition that the specific statutory exhaustion requirement at issue in those cases can be excused by a court where the two-part *Eldridge* test is satisfied. But by no means does it stand for the proposition that *all* statutory exhaustion requirements may be excused, let alone one as unambiguous as Section 3582(c). Indeed, when the Supreme Court recently reiterated the two-part *Eldridge* test, it emphasized that exhaustion schemes should be interpreted "with a regard for

the particular administrative scheme at issue" and that the Social Security Administration is "unusually protective of claimants." *Smith v. Berryhill*, 139 S. Ct. 1765, 1774, 1776 (2019). *Smith* and *Ross* both make clear that the analysis of whether any given statutory exhaustion provision allows for exceptions is unique to that statute. While one statute's text and history may give judges leeway to make exceptions, another may not. *See Ross*, 136 S. Ct. at 1858 n.2; *see also Smith*, 139 S. Ct. at 1776; *Illinois Council on Long Term Care, Inc.*, 529 U.S. at 14 (while interpreting one statutory exhaustion provision, rejecting reliance on a case interpreting a different statutory exhaustion provision because the outcome "turned on the different language of that different statute").[3]

In sum, the analysis of a statutory exhaustion requirement, like any other statutory requirement, must "begin[] with the text" and utilize "ordinary interpretive techniques." *Ross*, 136 S. Ct. at 1856 and 1858 n.2; *see also, e.g.*, *Ron Pair Enters.*, 489 U.S. at 241. The text of Section 3582(c) is unambiguous and provides for no exceptions. "[T]he Court is not free to infer" one that is irreconcilable with that text. *Roberts*, 2020 WL 1700032, at *2; *see also, e.g.*, *Woodson*, 2020 WL 1673253, at *3.

II. THE DEFENDANT HAS NOT DEMONSTRATED EXTRAORDINARY AND COMPELLING REASONS FOR HIS IMMEDIATE RELEASE

Because the defendant's motion must be denied at this time for failure to exhaust his administrative remedies, the Court need not reach the merits of his motion. But if the Court were to choose to reach the merits, it should reject the motion (and for the same reasons, should reject the defendant's alternative request for a release recommendation to the BOP). While COVID-19 is undoubtedly serious, and the situation is dynamic, the defendant has not met his burden to

[3] It bears noting that even if *Eldridge* and *Bowen* were applicable here, the two-part test set forth therein would not be satisfied. The defendant's claim before this Court is not collateral to the claim he is raising with the BOP—it is one and the same.

demonstrate compelling and extraordinary circumstances warranting immediate release. On the contrary, if the Court were to accept his apparent logic, every elderly federal prisoner with diabetes and/or high blood pressure, elevated cholesterol levels, and a history of smoking or similar conditions, regardless of the severity of those conditions, where the inmate is located, what the inmate did, the length of time left on his sentence, or what will follow release, would be entitled to immediate and permanent release. That is unfeasible, unwarranted, and inconsistent with the public interest, the applicable statutory framework, and the purpose underlying the framework.

A. Applicable Law

Under Section 3582, the Court "may reduce the 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." 18 U.S.C. § 3582(c)(1)(A).

The relevant Sentencing Commission policy statement is U.S.S.G. § 1B1.13. That statement provides that the Court may reduce the term of imprisonment if "extraordinary and compelling reasons warrant the reduction," *id.* § 1B1.13(1)(A); "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)," *id.* § 1B1.13(2); and "the reduction is consistent with this policy statement," *id.* § 1B1.13(3).

The Application Note describes the circumstances under which "extraordinary and compelling reasons exist":

(A) Medical Condition of the Defendant. —

> (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not

required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,
(II) suffering from a serious functional or cognitive impairment, or
(III) experiencing deteriorating physical or mental health because of the aging process,

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) Age of the Defendant. — The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family circumstances. —

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons. — As determined by the Director of the Bureau of Prisons, 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).

Id. § 1B1.13 Application Note 1.

Regardless of the theory of "extraordinary and compelling reasons" under which a defendant proceeds, as noted above, the Section 3553(a) factors are relevant to whether release is warranted. *See* 18 U.S.C. § 3582; U.S.S.G. § 1B1.13.

As the proponent of release, the defendant bears the burden of proving that "extraordinary and compelling reasons" exist. *See United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) ("If the defendant seeks decreased punishment, he or she has the burden of showing that the

circumstances warrant that decrease."); *United States v. Gotti*, No. 02 Cr. 743 (CM), --- F. Supp. 3d ---, 2020 WL 497987, at *5 (S.D.N.Y. Jan. 15, 2020) (defendant "has the burden of showing that 'extraordinary and compelling reasons' to reduce his sentence exist").

B. The BOP and COVID-19

The BOP has made and continues to make significant efforts to respond to the threat posed by COVID-19.

Since at least October 2012, the BOP has had a Pandemic Influenza Plan. *See* BOP Health Management Resources, https://www.bop.gov/resources/health_care_mngmt.jsp. In January 2020, the BOP began to plan specifically for COVID-19 to ensure the health and safety of inmates and BOP personnel. *See* BOP COVID-19 Action Plan, https://www.bop.gov/resources/news/20200313_covid-19.jsp. As part of its Phase One response, the BOP began to study "where the infection was occurring and best practices to mitigate transmission." *Id.* In addition, the BOP established "an agency task force" to study and coordinate its response, including using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the [Centers for Disease Control and Prevention (CDC)], the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the Vice President. BOP's planning is structured using the Incident Command System (ICS) framework." *Id.*

On or about March 13, 2020, the BOP implemented its Phase Two response "to mitigate the spread of COVID-19, acknowledging the United States will have more confirmed cases in the coming weeks and also noting that the population density of prisons creates a risk of infection and transmission for inmates and staff." *Id.* These national measures are intended to "ensure the continued effective operations of the federal prison system and to ensure that staff remain healthy

and available for duty." *Id.* For example, the BOP (a) suspended social visits for 30 days (but increased inmates access to telephone calls); (b) suspended legal visits for 30 days (with case-by-case accommodations); (c) suspended inmate movement for 30 days (with case-by-case exceptions, including for medical treatment); (d) suspended official staff travel for 30 days; (e) suspended staff training for 30 days; (f) restricted contractor access to BOP facilities to only those performing essential services, such as medical treatment; (g) suspended volunteer visits for 30 days; (h) suspended tours for 30 days; and (i) generally "implement[ed] nationwide modified operations to maximize social distancing and limit group gatherings in [its] facilities." *Id.* In addition, the BOP implemented screening protocols for both BOP staff and inmates, with staff being subject to "enhanced screening" and inmates being subject to screening managed by its infectious disease management programs. *Id.* As part of the BOP's inmate screening process, (i) "[a]ll newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms"; (ii) "[a]symptomatic inmates with exposure risk factors are quarantined; and (iii) "[s]ymptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols." *Id.*

On or about March 18, 2020, the BOP implemented Phase Three, which entailed: (a) implementing an action plan to maximize telework for employees and staff; (b) inventorying all cleaning, sanitation, and medical supplies; (c) making sure that ample supplies were on hand and ready to be distributed or moved to any facility as deemed necessary; and (d) placing additional orders for those supplies, in case of a protracted event. *See* BOP Update on COVID-19, *at* https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

On or about March 26, 2020, the BOP implemented Phase Four, which entailed: (a) updating its quarantine and isolation procedures to require all newly admitted inmates to BOP,

whether in a sustained community transition area or not, be assessed using a screening tool and temperature check (including all new intakes, detainees, commitments, writ returns from judicial proceedings, and parole violators, regardless of their method of arrival); (b) placing asymptomatic inmates in quarantine for a minimum of 14 days or until cleared by medical staff; and (c) placing symptomatic inmates in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. *See* BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

On or about April 1, 2020, the BOP implemented Phase Five, which entails: (a) securing inmates in every institution to their assigned cells/quarters for a 14-day period to decrease the spread of the virus; (b) to the extent practicable, offering inmates access to programs and services that are offered under normal operating procedures, such as mental health treatment and education; (c) coordinating with the United States Marshals Service to significantly decrease incoming movement; (d) preparing to reevaluate after 14 days and make a decision as to whether or not to return to modified operations; and (e) affording limited group gathering to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access. *Id.*

The BOP has also "increased Home Confinement by over 40% since March and is continuing to aggressively screen all potential inmates for Home Confinement." Update on COVID-19 and Home Confinement, https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp. In addition, the BOP "has begun immediately reviewing all inmates who have COVID-19 risk factors, as described by the CDC, starting with the inmates incarcerated at FCI Oakdale, FCI Danbury, FCI

Elkton and similarly-situated facilities [with COVID-19 outbreaks] to determine which inmates are suitable for home confinement." *Id.*

As of today, USP Marion (Camp), where the defendant is housed, has zero inmates or staff members who have tested positive for COVID-19. *See* https://www.bop.gov/coronavirus/index.jsp (last viewed April 17, 2020, at 3:11 p.m.).[4]

These and other steps belie any suggestion that the BOP is failing to address meaningfully the risk posed by COVID-19 to inmates. To the contrary, they show that the BOP has taken the threat seriously, has mitigated it, and continues to update policies and procedures in accord with the facts and recommendations, as well as directives from the Attorney General. Indeed, the Government has been informed by officials at Marion Camp that, over the last two weeks, BOP has done an evaluation—consistent with the Attorney General's March 26 and April 1, 2020 Directives—of Marion Camp prisoners and decided that over twenty (20) should be re-designated to home confinement. But Daugerdas was not among those for whom home confinement was deemed appropriate at this time.

The defendant appears to suggest that, notwithstanding the foregoing, because certain facilities are still accepting new inmates, the BOP has not done enough to mitigate the risk to current inmates. (*See* Def. Mem. 17-19.) The defendant omits that, under current procedures, all new inmates are screened, and those with any risk factors, even if asymptomatic, are quarantined. *See* BOP Implementing Modified Operations, https://www.bop.gov/coronavirus/covid19_status.jsp; BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp. Nor is USP Marion

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[4] The Government has confirmed this fact with the BOP. In a footnote (Def. Mem. 15 n.20), the defendant incorrectly suggests that an inmate at his facility tested positive.

permitting visitation. *See* https://www.bop.gov/locations/institutions/alf/; *see also* BOP COVID-19 Action Plan: Phase Five.

By contrast, although the defendant suggests (Def. Mem. at 23-24) that his wife's status as a nurse could help keep him safe as part of his "release plan," such a plan would actually put him in greater peril of COVID-19 infection than serving the remainder of his sentence at Marion Camp, given his wife's potential exposure to infected patients at the Chicago hospital at which she works. *Cf.* Michael Rothfeld, Jesse Drucker & William K. Rashbaum, *"A Hospital Worker's Tragic Final Texts,"* **New York Times**, April 17, 2020, at A16 (discussing cases of Brooklyn hospital workers who caught Coronovirus and died).

C. Discussion

There is no dispute that the defendant has heart disease, diabetes, and certain other conditions. There is also no dispute that at least heart disease and diabetes, along with the defendant's age, are COVID-19 risk factors. *See* CDC, Groups at Higher Risk for Severe Illness https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. But serious though the defendant's conditions may be, either individually or as a group, they pre-date his incarceration by years, and they are both stable and manageable. Nor does the defendant allege that he is not being treated properly for any of his conditions. In support of his motion, he notably encloses no updated medical examinations or facts, strongly indicating that he faces no health crisis, acute or otherwise.

Hyperbole aside (*e.g.*, Def. Mem. 3, 26 (warning of "a death sentence")), the defendant's argument reduces to the contention that he is older; he has certain reasonably common, though potentially serious health conditions; he is in prison; and there is a COVID-19 pandemic—so he should be immediately released. That is not sufficient for the defendant to discharge his burden to

demonstrate that he—personally and individually—falls into the narrow band of inmates who are "suffering from 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." U.S.S.G. § 1B1.13, Application Note 1(A). *See Raia*, 2020 WL 1647922, at *2 ("We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread."); *cf. Gileno*, 2020 WL 1307108, at *4 (finding that defendant who allegedly suffered from high blood pressure, high cholesterol, asthma, and allergies "has not shown that his medical issues, which remain largely the same as when he was sentenced, 'substantially diminish [his] ability . . . to provide self-care' within the correctional facility" (brackets in original)).

Indeed, the defendant does not persuasively demonstrate what is required for release, instead suggesting that anyone at high risk for COVID-19 complications should be immediately released, regardless of what they did, how much time they have served, where they are housed, or any other individual factors, because the BOP purportedly has had a generally "ineffective" response to COVID-19. That suggestion is not in accord with the facts or the law.[5]

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[5] Courts considering bail applications, where, unlike here, the defendant is presumed innocent, have rejected this kind of sweeping, non-case specific argument. *See*, *e.g.*, *United States v. Chambers*, No. 20 Cr. 135 (JMF), 2020 WL 1530746 (S.D.N.Y. Mar. 31, 2020) (asthma); *United States v. Michael Valdez*, No. 19 Cr. 883 (JPO) (S.D.N.Y. Mar. 27, 2020) (asthma); *United States v. Rivera*, No. 20 Cr. 6 (JSR) (S.D.N.Y. Mar. 25, 2020) (asthma); *United States v. Gonzalez*¸ No. 19 Cr. 123 (NRB) (S.D.N.Y. Mar. 25, 2020) (asthma); *United States v. Fofana*, No. 19 Cr. 447 (DLC) (S.D.N.Y. Mar. 30, 2020) (asthma); *United States v. Steward*, No. 20 Cr. 52 (DLC) (S.D.N.Y. Mar. 26, 2020) ("high-risk" list); *United States v. White*, No. 19 Cr. 536 (PKC) (S.D.N.Y. Mar. 25, 2020) (whooping cough); *United States v. Knight*, No. 20 Cr. 216 (CS) (S.D.N.Y. Mar. 27, 2020) (age and underlying health condition); *United States v. Bradley*, No. 19

As noted above, the defendant has also not cogently explained why both he and those with whom he lives and interacts at Marion Camp (which is in rural, southern Illinois and where authorities are enforcing screening and quarantine as warranted) allegedly would be safer if he were out of prison, and instead living in suburban Chicago (which has a high rate of COVID-19 infection) with a nurse who has exposure to COVID-19 patients. Put simply, while the work of Daugerdas's wife on the front lines of this public health crisis is laudable, the fact remains that she (and, therefore, the defendant) faces a greater risk of Coronavirus infection as a result. *Cf. United States v. Davenport*, No. 17 Cr. 61 (LAP) (S.D.N.Y. Apr. 9, 2020) [Dkt. 255, at 2] (denying motion of defendant with diabetes and heart disease; explaining "that there are no current cases of COVID-19 at Schuylkill but that Haverford, the town in which [the defendant] proposes to be released, has one of the highest rates of COVID-19 infection in the Commonwealth of Pennsylvania").

Finally, and in any event, the same Section 3553(a) factors that warranted the defendant's sentence counsel against release, particularly given that he has served well less than half of his sentence. After presiding over the defendant's two trials, this Court observed at sentencing:

> Mr. Daugerdas was a tax shelter racketeer who tapped into the incredible greed of some of the super wealthy who didn't want to contribute to the nation whose freedom made their huge financial successes possible. Daugerdas's sophisticated tax shelter fraud scheme found willing customers in a sordid crowd of real estate tycoons, tire magnates, software developers, and many others. None of them cared one whit about lying to the government, and they were all brazen tax cheats. A number of them successful. He evaded their tax obligations causing the Treasury to lose more than a billion dollars in revenue, and no one knows how much time and effort was devoted to the investigation of these fraudulent shelters.
>
> Mr. Daugerdas, as I have said, was charismatic, highly respected by his partners and associates, and sought out by some of the wealthiest Americans who didn't want to pay their taxes. He was the biggest business generator at one of the largest law firms in the United States. But he corrupted numerous professionals, including attorneys, accountants, and financial advisors. His fraud involved some of the country's largest financial institutions and accounting firms, including Deutsche Bank and BDO Seidman. The success of the scheme depended on the unethical and

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Cr. 632 (GBD) (S.D.N.Y. Mar. 24, 2020) (recent stroke and high blood pressure).

> criminal behavior of highly educated and highly compensated professionals. Nearly $8 billion in fraudulent tax benefits were claimed by the super wealthy and Mr. Daugerdas, himself, received more than $95 million in illicit proceeds in just a few years.
>
> As I said, while Mr. Daugerdas was the architect of the fraud, he found willing co-conspirators everywhere he looked. He had a Midas touch. Just about everyone he came in contact with, he managed to corrupt. He even entangled his college roommate, a successful insurance broker, into a money laundering scheme to conceal fees he appropriated for himself from Arthur Anderson. He provided his partner Donna Guerin with talking points to train fledgling lawyers at Jenkins & Gilchrist to commit fraud. Young associates took his talking point about the *hide the ball strategy* as gospel, because he was the senior partner and ringmaster of the firm. And when the tax shelter fraud came to light, a firm of 600 attorneys with offices around the country collapsed under the weight of his criminal acts. There is a compelling need for general deterrence. Indeed, many of the professionals involved in this tax shelter fraud scheme were not charged, nor were the super wealthy tax cheats. But that reality merely underscores the importance of general deterrence for tax fraud schemes.

(Sentencing Tr. (Dkt. 839) at 68-70.) This Court also explained that the defendant was "caught red-handed" diverting fees from his partners at Arthur Andersen in the early 1990s (*id.* at 67), that, unsatisfied with the millions in income he was receiving at Jenkens & Gilchrist, he "set up private side agreements to grab even more money and deceive his law partners" at J&G (*id.* at 68), that, rather than assisting the government, he "let his clients lie instead," which "allowed the scheme to continue and facilitate the loss of more and more tax revenue," (*id.* at 70), and that, among all the culpable actors in the world of tax shelter defendants, "Daugerdas is in a class by himself . . . at the apex of tax shelter fraudsters. (*Id.* at 71). Based on those findings, the Court observed before imposing sentence that there was a "compelling need [in Daugerdas's case] for general deterrence and for respect for the rule of law." (*Id.* at 72).

Everything that the Court said remains true. Daugerdas's criminal conduct was unique—indeed, unprecedented—in the financial harm that is caused to the country, as well as the duration and scope of his conspiratorial scheme. Reducing the sentence of the architect and principal

financial beneficiary of that scheme to less than half of what he was sentenced to serve, particularly given where he is housed and the speculative basis of his motion, is unwarranted and utterly inconsistent with principles of deterrence. *Cf.*, *e.g.*, *United States v. Credidio*, No. 19 Cr. 111 (PAE), 2020 WL 1644010, at *1 (S.D.N.Y. Apr. 2, 2020) (explaining the court denied a request to change a sentence of 33 months' imprisonment to home confinement for 72-year old defendant at MCC deemed by BOP to be at high risk of COVID-19 complications, because "a lengthy term of imprisonment is required for [the defendant] for all the reasons reviewed at sentencing," and recommending BOP expedite designation to a long-term facility); *United States v. Lisi*, No. 15 Cr. 457 (KPF), 2020 WL 881994, at *5 (S.D.N.Y. Feb. 24, 2020) (denying motion of defendant suffering from, among other things, asthma and high blood pressure; "The sentencing factors weigh heavily against the reduction of [the defendant's] sentence to time served."), *reconsideration denied*, 2020 WL 1331955 (S.D.N.Y. Mar. 23, 2020).

Finally, it bears noting that although Daugerdas recognizes, as he must, that his criminal conduct was "serious," he refuses to acknowledge any acceptance of responsibility. He remains unrepentant to this day—refusing to admit he fraudulently diverted fees from his partners at Arthur Andersen, Altheimer & Gray, and J&G, refusing to admit he committed perjury at the deposition given in the DGI litigation, and, most notably, refusing to admit that he violated the law through his design, sale, and implementation of fraudulent tax shelters. He also has not voluntarily paid a dime of restitution, and continues, through the nominee he enlisted to hold his multi-million dollar lakefront home in Wisconsin (that is, his wife), to challenge the Government's efforts to achieve some measure of recoupment through forfeiture of that home, which was bought with the fruits of Daugerdas's scheme. Such a defendant is particularly undeserving of "compassionate" release. Likewise, such a defendant is not deserving of a recommendation to BOP that he be released to

home confinement. That recommendation could result, indirectly, in giving the defendant the relief he is undeserving of directly.

* * *

The defendant committed unprecedentedly serious offenses, and rightly received a multi-year term of imprisonment, which represented a considerable variance from the applicable guidelines. He appealed his conviction, and it was affirmed. Real though his medical conditions are, they pre-date his sentencing, were taken into account by the Court in imposing sentence, and are stable, manageable, and being properly treated. And real though the risk of COVID-19 is, the BOP has taken and continues to take meaningful steps to mitigate that risk—and appears to have done so particularly effectively with respect to the long-term, low-security facility where the defendant is housed, a locale markedly safer than Chicago. The defendant is not entitled to immediate and permanent release, more than halving his sentence. He is also not entitled to a recommendation to BOP that he be released.

CONCLUSION

For the foregoing reasons, the defendant's motion should be denied.

Dated: New York, New York
April 17, 2020

Respectfully submitted,

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