IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 17-390**
EDWIN PAWLOWSKI	**:**	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

Defendant Edwin Pawlowski seeks compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). This motion should be denied, given the serious nature of his convictions, the fact that he has served only approximately 18 months of a 180-month sentence, and because his medical conditions are well controlled with treatment in BOP custody.

I. Background.

A. Criminal Conduct.

Edwin Pawlowski, the Mayor of Allentown, Pennsylvania, used and sold his public office to raise campaign funds for his campaigns to become the Governor of Pennsylvania and a United States Senator. In order to identify potential donors to his campaigns, Pawlowski generated lists of vendors who held City contracts and used those lists to determine the amount of campaign contributions to be solicited from the vendors. Pawlowski also identified persons who were affiliated with politically influential

individuals in the Democratic Party, and then endeavored to arrange City contracts for those vendors so that he could solicit campaign contributions from them as well.

The pay-to-play scheme was a pervasive feature of Pawlowski's mayoralty. To facilitate it, he deployed his campaign staff, campaign manager Michael Fleck and campaign aide Sam Ruchlewicz, as his operatives. Francis Dougherty, the City's Managing Director, also worked closely with Pawlowski and assisted with Pawlowski's scheme. Pawlowski told Dougherty that Fleck and Ruchlewicz "represented him," and Dougherty thus took direction on City-related matters from them in addition to Pawlowski. By late 2013 to 2014, Pawlowski had provided Fleck and Ruchlewicz, who would otherwise have no authority to conduct official City business, with direct access to City Hall, enabling them to meet with City officials to manage the awarding of City contracts on their own.

Besides using Fleck, Ruchlewicz, and Dougherty to help execute his scheme and provide a layer of insulation between him and those he sought to engage in his scheme, Pawlowski took other steps to attempt to avoid detection. That included sweeping his office for electronic eavesdropping devices, using "burner phones," and speaking to his operatives in person to avoid being recorded.

The evidence at trial connected Pawlowski to seven particular pay-to-play schemes, involving (1) an agreement to expedite a zoning application and inspection for real estate developer Ramzi Haddad; (2) the steering of a City contract to collect delinquent real estate taxes to Northeast Revenue Service; (3) the steering of a City contract to revamp the City's street lights to The Efficiency Network; (4) the creation of a

contract to update the City's cybersecurity system, offered to CIIBER; (5) the steering of a contract to design the City's pools to Spillman Farmer Architects; (6) the steering of a street construction project to McTish, Kunkle & Associates; and (7) the extension of a contract for legal services to the law firm of Norris McLaughlin, all in exchange for campaign contributions or other items of value.

The advisory sentencing guideline range was 155-188 months imprisonment. The Court considered the physical condition of the defendant at sentencing, including the report that the defendant had had his left lung removed, and stated that the defendant had no serious medical conditions or chronic illnesses. The Court then gave meaningful consideration to all the Section 3553(a) factors, and stated that it found the defendant's offense extraordinarily serious, motivated by personal interest and ambition, striking a blow at the foundation of the law, our trust in one another, our public institutions, and the core of our democracy. The defendant "deprived the citizens of the City of Allentown of an open and fair process in the contracting process and encouraged others, in the pursuit of his ambitions, to break the law." The Court said that the sentence had to send a strong message of deterrence, and sentenced the defendant to 180 months' imprisonment.

The defendant is serving his sentence at FCI Danbury, with an anticipated release date of August 3, 2031. He has not committed any disciplinary infraction during his time in custody.

B. Request for Compassionate Release.

Before the Court is Pawlowski's Emergency Motion for Temporary Release to Home Confinement Pursuant to 18 U.S.C. § 3582(c)(1). In that motion, Pawlowski asks

the Court to release him to temporary home confinement, after which he will be returned to prison when conditions improve such that his life is no longer in danger from COVID-19.

As explained more fully below, Pawlowski is requesting that the Court do something that is impermissible under Section 3582, that is, to furlough him for a period of time.[1] Furloughs are not an option under the statute. The only permissible option for the Court under Section 3582 is a modification of sentence to a term of supervised release or probation, which effectively terminates any further imprisonment of the defendant after he has served only approximately 18 months of a 180-month sentence. Under this option, Pawlowski would serve less time in prison than co-conspirators James Hickey and Michael Fleck, both of whom were lesser actors in the fraud schemes.

Additionally, Pawlowski alleges that extraordinary and compelling reasons exist that warrant a reduction in his sentence. He cites to (1) statewide COVID-19 statistics in Connecticut; (2) CDC guidance that persons over 60 years of age, or with lung or heart disease, have a high risk of contracting COVID-19; (3) that conditions of confinement create the ideal environment for transmission of contagious diseases due to the recycling of prisoners in and out of the facility; (4) the inadequacy of health services at FCI Danbury; and (5) his health conditions, which he states are heart issues and hepatitis in the right eye. Pawlowski additionally states that he has only one lung, but does not allege any active pulmonary disease.

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[1] *See* fn. 3 *infra*.

After receiving Pawlowski's motion, the government obtained the medical records of the defendant from the Bureau of Prisons, and provided a copy to defense counsel. Those records are appended to this response, with a motion to seal. The records reveal that the defendant, who is 54 years old, has been diagnosed with hypertensive heart disease without heart failure, an eye virus, and gastritis. Pawlowski's medical records show that he has not sought medical treatment for anything significant while at FCI Danbury. His most recent clinical visit, other than an optometrist visit, occurred five months ago, on December 5, 2019, when Pawlowski complained about a sore elbow. All of his conditions appear well-controlled at this time with medication provided by the institution. The defendant otherwise is fully ambulatory and apparently engages in all normal activities of daily living.[2]

C. 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

[2] In a news story from January 9, 2020 in The Morning Call, Pawlowski stated that he had lost excess weight while in prison, lifted weights three times a week, walked around the track, engaged in Yoga and Spin classes, drummed in several bands, taught a class, and studied federal law and three separate foreign languages.

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, 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. 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.

BOP is endeavoring to regularly issue face masks to all staff and inmates, and strongly encouraged them 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, all facility staff are screened for symptoms. Staff registering a temperature of 100.4 degrees 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 at this time, 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 the 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, 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. *See* Attach. 2 (Mem. for Director of Bureau of Prisons). As of this filing, BOP has transferred 2,144 inmates to home confinement, which is an increase of 75.1% of the number who would have been eligible in the ordinary course during the same period.[3] *See* https://www.bop.gov/coronavirus/.]

BOP's efforts at FCI Danbury are consistent with the national plan. In *Martinez-Brooks, et al v. Easter*, Civil No. 2020-569, a response filed by the government in the District of Connecticut on May 6, 2020, appended as Attachment A, summarized steps that FCI Danbury has taken to address the COVID-19 crisis:

> Since first learning of COVID-19, BOP has instituted a multi-step action plan and taken extensive measures to mitigate the risks COVID-19 poses throughout its inmate population, including with respect to the inmate population at FCI Danbury. As set forth above, those measures include providing inmate and staff education; strict limitations of movement within FCI Danbury; suspension of

[3] This Court does not have authority to grant a transfer to home confinement, or review BOP's administrative decision regarding that issue. *See* 18 U.S.C. § 3621(b) (BOP's designation decision is not subject to judicial review). *See also, e.g.*, *United States v. Cruz*, 2020 WL 1904476, at *4 (M.D. Pa. Apr. 17, 2020); *United States v. Mabe*, 2020 U.S. Dist. LEXIS 66269, at *1 (E.D. Tenn. Apr. 15, 2020) ("the CARES Act places decision making authority solely within the discretion of the Attorney General and the Director of the Bureau of Prisons. . . . This Court therefore does not have power to grant relief under Section 12003 of the CARES Act."); *United States v. White*, 2020 WL 1906845, at *2 (E.D. Va. Apr. 17, 2020); *United States v. Skaff*, 2020 WL 1666469 (S.D.W. Va. Apr. 3, 2020).

> most visits to FCI Danbury; conducting inmate and staff screening; putting into place testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; ordering enhanced cleaning and medical supplies; and taking a number of other preventative measures. Additionally, FCI Danbury implemented the "modified operations" directive in a number of ways to reduce the spread of COVID-19 among inmates, including: (1) meals are brought to inmates in their respective housing dormitories; (2) providing health services within unit for routine medical issues, and allowing only inmates from the same units, who are sheltering in place together, to be in the same area for medical visits and pill lines; (3) inmates are all provided masks and are required to wear them, or be subject to discipline; and (4) extensive cleaning and sanitizing measures are taking place within FCI Danbury.[4]

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, many inmates at various institutions have become ill, and more likely will in the weeks ahead. There was one inmate death at Danbury, and recent testing suggests that dozens of inmates have tested positive. As recounted in the recent litigation, BOP has taken aggressive steps to isolate inmates who are symptomatic or test positive. All other of the 707 inmates at the FCI, including Pawlowski, are kept in their housing units, subject to the rigid procedures described above designed to mitigate the spread of the illness.

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[4] Additionally, according to the civil filing, each inmate's temperature is taken daily and all staff are monitored daily before beginning their shift. All employees wear masks, and when appropriate, personal protective equipment.

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.

II. Discussion.

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act on December 21, 2018, provides in pertinent part:

> (c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) 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 . . . .

Further, 28 U.S.C. § 994(t) provides: "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons

for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." Accordingly, the relevant policy statement of the Commission is binding on the Court. *See Dillon v. United States,* 560 U.S. 817, 827 (2010) (where 18 U.S.C. § 3582(c)(2) permits a sentencing reduction based on a retroactive guideline amendment, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," the Commission's pertinent policy statements are binding on the court).[5]

The Sentencing Guidelines policy statement appears at § 1B1.13, and provides that the Court may grant release if "extraordinary and compelling circumstances" exist, "after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable," and the Court determines that "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)."

Critically, in application note 1 to the policy statement, the Commission identifies the "extraordinary and compelling reasons" that may justify compassionate release. The note provides as follows:

> 1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2) [regarding absence of danger to the community],

[5] Prior to the passage of the First Step Act, while the Commission policy statement was binding on the Court's consideration of a motion under § 3582(c)(1)(A), such a motion could only be presented by BOP. The First Step Act added authority for an inmate himself to file a motion seeking relief, after exhausting administrative remedies, or after the passage of 30 days after presenting a request to the warden, whichever is earlier.

extraordinary and compelling reasons exist under any of the circumstances set forth below:

(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).

In general, the defendant has the burden to show circumstances meeting the test for compassionate release. *United States v. Heromin,* 2019 WL 2411311, at *2 (M.D. Fla. June 7, 2019); *United States v. Stowe,* 2019 WL 4673725, at *2 (S.D. Tex. Sept. 25, 2019). As the terminology in the statute makes clear, compassionate release is "rare" and "extraordinary." *United States v. Willis,* 2019 WL 2403192, at *3 (D.N.M. June 7, 2019) (citations omitted).

At the present time, it is apparent that, but for the COVID-19 pandemic, the defendant would present no basis for compassionate release. His medical ailments are well-controlled and do not present any impediment to his ability to provide self-care in the institution. *See, e.g., Cannon v. United States,* 2019 WL 5580233, at *3 (S.D. Ala. Oct. 29, 2019) (the 71-year-old defendant suffers from significant back and stomach issues, as well as high blood pressure, diabetes, skin irritation, loss of hearing, and various other complications, but relief is denied: "First, there is no indication that Cannon is terminally ill. Second, despite the many medical afflictions Cannon identifies, he does not state, much less provide evidence, that his conditions/impairments prevent him from providing self-care within his correctional facility. Rather, the medical records provided by Cannon show that his many conditions are being controlled with medication and there is no mention that his conditions are escalating or preventing him from being from being able to provide self-care."); *United States v. Rivernider,* 2019 WL 3816671, at *3 (D. Conn. Aug. 14, 2019) (defendant previously suffered heart attack but is stable;

compassionate release is denied); *United States v. Lynn*, 2019 WL 3082202 (S.D. Ala. July 15, 2019), *appeal dismissed*, 2019 WL 6273393 (11th Cir. Oct. 8, 2019) (compassionate release, sought on the basis of a variety of health ailments, is denied, as none affect the inmate's ability to function in a correctional environment).

The only question, then, is whether the risk of COVID-19 changes that assessment. The government acknowledges that the risk of COVID-19 presents "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," as stated in note 1(A), as, due to his comorbidities, the defendant may be less able to protect himself against an unfavorable outcome from the disease.[6]

However, the defendant is not entitled to relief. This Court must consider all pertinent circumstances, including the 3553(a) factors, and possible danger to the community. At present, his medical conditions are appropriately managed at the facility, which is also engaged in strenuous efforts to protect inmates against the spread of COVID-19, and would also act to treat any inmate who does contract COVID-19. In the meantime, the disease is sadly rampant in Lehigh County, the home of Allentown, where

[6] Accordingly, this Court need not consider the suggestion that the defendant's condition falls under the "catch-all" provision of note 1(D), as the government acknowledges that he meets the threshold test of a medical condition defined in note 1(A). This legal issue, regarding whether at present a Court has authority on its own to identify "extraordinary and compelling circumstances" apart from those described in the guideline policy statement, has recently divided courts in other compassionate release contexts. Given the government's position that the defendant's condition passes the eligibility threshold as defined by the guideline, the issue need not be reached.

the defendant says he would return to live. As of this writing, there were 3,063 cases of COVID-19 in Lehigh County, and there have been 102 deaths.[7]

The defendant also fails to demonstrate how release, 18 months into a 180-month sentence, reflects the seriousness of the offense, promotes respect for the law, and provides just punishment for the offense. *See* 18 U.S.C. § 3553(a)(2)(A). A consideration of the factors above shows that release at this point is inappropriate based on the offense of conviction, the defendant's managed medical condition, and the very substantial amount of time remaining on the defendant's sentence.

To date, courts have generally granted compassionate release based on the threat of COVID-19 where the inmate suffers from significant ailments, is serving a short sentence or has served most of a lengthier one, does not present a danger to the community, and/or is held at a facility where a notable outbreak has occurred. *See, e.g.*, *United States v. Williams*, 2020 WL 1974372 (D. Conn. Apr. 24, 2020) (defendant served 35 of 54 months for bank fraud; suffers from asthma, hypertension, and diabetes; government consents); *United States v. McCarthy*, 2020 WL 1698732 (D. Conn. Apr. 8, 2020) (defendant has 26 days remaining on sentence; "is 65 years old and suffers from a host of medical ailments, including chronic obstructive pulmonary disease ("COPD") and asthma"); *United States v. Jepsen*, 2020 WL 1640232, at *5 (D. Conn. Apr. 1, 2020) ("Mr. Jepsen is in the unique position of having less than eight weeks left to serve on his sentence, he is immunocompromised and suffers from multiple chronic conditions that

[7] *See* https://lehigh-county-covid-19-response-lehighgis.hub.arcgis.com/ (accessed May 8, 2020).

are in flux and predispose him to potentially lethal complications if he contracts COVID-19, and the Government consents to his release."); *United States v. Colvin*, 2020 WL 1613943 (D. Conn. Apr. 2, 2020) (granted with 11 days remaining on sentence, based on high blood pressure and diabetes).

The undersigneds' office has hundreds of decisions regarding compassionate release motions issued during the past month by district courts throughout the country. It has not identified a single one in which relief was granted with respect to any situation comparable to that presented here, where the inmate has served only 10% of a 15-year sentence. Such a release is plainly inappropriate.

Rather, courts have generally denied release in circumstances comparable to those presented here. *See, e.g.*, *United States v. La*, 2020 WL 2062145 (E.D. Cal. Apr. 29, 2020) (defendant is 62 and states that he "suffers from cervicalgia, or neck pain, low back pain, eczema, and bilateral shoulder pain," but he is able to self-care, and general concern about COVID-19 is not sufficient); *United States v. Cooper*, 2020 WL 2064066 (D. Nev. Apr. 29, 2020) (53-year-old with asthma and chronic sleep apnea presents no supporting records; further, BOP is making efforts to protect inmates, it is unclear that the defendant would be safer in the community, and the defendant states only generalized concerns); *United States v. Desage*, 2020 WL 1904584 (D. Nev. Apr. 17, 2020) (relief denied for inmate at the outset of 36-month sentence, given his criminal record; while he is diabetic, he will be isolated and BOP is endeavoring to keep inmates safe); *United States v. Washington*, 2020 WL 1969301 (W.D.N.Y. Apr. 24, 2020) (a "generalized claim of asthma, without more, is not a sufficiently extraordinary and compelling reason for a

sentence reduction under 18 U.S.C. § 3582(c)(1)(A)"; in addition, the defendant has served only 18 months of a 121-month sentence for drug crimes); *United States v. Feiling*, 2020 WL 1821457 (E.D. Va. Apr. 10, 2020) (71-year-old suffers from a variety of ailments putting him at risk of an adverse outcome from COVID-19, but he does not show a greater risk of contracting the disease in prison, in relation to his risk in the community); *United States v. Korn*, 2020 WL 1808213, at *6 (W.D.N.Y. Apr. 9, 2020) ("in this Court's view, the mere *possibility* of contracting a communicable disease such as COVID-19, without any showing that the Bureau of Prisons will not or cannot guard against or treat such a disease, does not constitute an extraordinary or compelling reason for a sentence reduction under the statutory scheme."); *United States v. Garza*, 2020 WL 1485782 (S.D. Cal. Mar. 27, 2020) ("issues such as Mr. Garza's medical condition, the conditions and resources at Terminal Island (including the availability of testing and treatment), and decisions as to which prisoners should be released because of the COVID-19 epidemic are better left to the Bureau of Prisons and its institutional expertise.").

To his credit, the defendant recognizes the inequity of reduction of the term of imprisonment. He instead proposes that he be released temporarily on home confinement, and then returned to prison after the danger passes. That remedy, however, is not within this Court's power. Instead, such a decision is committed to BOP's expertise and discretion.[8]

[8] This Court, if it believes such a transfer is appropriate, may recommend that to BOP. Other courts have followed this course during the current crisis. *See, e.g.*, *United*

BOP is uniquely situated to address the present crisis. It is taking strenuous efforts to protect inmates, and should it determine that a transfer of the defendant is necessary as the pandemic persists, it has full authority under 18 U.S.C. § 3621(b) (which gives BOP the power to make designation decisions) to take any appropriate step. While we fully understand the defendant's concern, this matter is appropriately committed to BOP's judgment, expertise, and discretion.

In sum, upon consideration of all pertinent factors, the motion for compassionate release should be denied.

III. No Hearing is Required.

Under the law, the inmate does not have a right to a hearing. Rule 43(b)(4) of the Federal Rules of Criminal Procedure states that a defendant need not be present where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *See United States v. Dillon,* 560 U.S. 816, 827-28 (2010) (observing

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States v. Engleson, 2020 WL 1821797 (S.D.N.Y. Apr. 10, 2020) (court denies release but recommends home confinement); *United States v. Stahl*, 2020 WL 1819986, at *2 (S.D.N.Y. Apr. 10, 2020) (same with respect to recommendation of furlough); *United States v. Daugerdas*, 2020 WL 2097653 (S.D.N.Y. May 1, 2020) (the defendant suffers from type 2 diabetes, obesity, hypertension, and high cholesterol, but he has served only 37% of a 180-month sentence for the largest tax shelter fraud in U.S. history; release is denied, but the court recommends that BOP consider a furlough); *United States v. Cruz*, 2020 WL 1904476, at *4 (M.D. Pa. Apr. 17, 2020).

that, under Rule 43(b)(4), a defendant need not be present at a proceeding under Section 3582(c)(2) regarding the imposition of a sentencing modification).

Respectfully yours,

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CERTIFICATE OF SERVICE

I hereby certify that this pleading has been served on the Filing User identified below through the Electronic Case Filing (ECF) system:

Jack McMahon, Esq.

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Dated: May 8, 2020.

ATTACHMENT A