UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. DOUGLAS HODGE, Defendant.	No. 19-cr-10080-NMG-11 **REDACTED**

GOVERNMENT'S OPPOSITION TO DEFENDANT DOUGLAS HODGE'S MOTION FOR A MODIFICATION OF HIS SENTENCE (Dkt. 1434)

The government respectfully opposes defendant Douglas Hodge's second successive motion to reduce his sentence on the basis of the COVID-19 pandemic. In response to Hodge's previous motion—in which Hodge sought to have his sentence reduced to home confinement on the basis that requiring him "to surrender to a federal prison in the midst of this pandemic" would "unnecessarily endanger" his life—the Court agreed to adjourn his reporting date to June 30, 2020, and to entertain further motions in the event the pandemic had not abated. Instead, Hodge reported to prison *early*—on June 23, 2020—and then filed a request for compassionate release with the Bureau of Prisons ("BOP") *the very next day*. In choosing to report to prison early, Hodge was fully aware that he would be quarantined for at least 14 days in a medium security facility. Indeed, he noted as much in his prior motion, and cited it as a basis for reducing his sentence without requiring him to report at all.[1] Hodge now cites that same fact again, this time contending that his quarantine amounted to "torture" under United Nations guidelines—an absurd and disingenuous

[1] Hodge noted in his earlier motion: "Because minimum security camps (of which Mr. Hodge's designated facility is one) do not have the capacity to implement such quarantines, Mr. Hodge would be moved to a higher security prison for the duration of the quarantine. There, Mr. Hodge would be quarantined with multiple other inmates set for release, and if any other inmate in his quarantine group were to test positive for the virus during the quarantine, the BOP would reset Mr. Hodge's fourteen-day clock—potentially more than once." Douglas Hodge's Mot'n to Modify His Sentence to Impose Home Detention (Apr. 23, 2020) (Dkt. 1102) at 14.

proposition that he invokes as a basis for seeking the very relief this Court previously denied. Hodge's latest attempt to take advantage of the pandemic to escape the punishment this Court only recently concluded was just and appropriate should, once again, be rejected.[2]

RELEVANT BACKGROUND

Hodge's Sentence

Hodge pled guilty to one count of conspiracy to commit mail and wire fraud and honest services mail and wire fraud, in violation of 18 U.S.C. § 1349, and one count of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h), in connection with his agreement to pay bribes totaling $850,000 over the course of more than a decade to secure the admission of two of his children to the University of Southern California and two of his children to Georgetown University. *See* Dkts. 314 (Second Superseding Indictment); 595 (Clerk's Notes of Rule 11 Hearing). Hodge also sought unsuccessfully to use bribes to secure the admission of a fifth child to Loyola Marymount University. *See* Dkt. 840 (Sentencing Transcript) at 63.

On February 7, 2020, the Court sentenced Hodge to nine months' imprisonment, two years of supervised release, 500 hours of community service, a $750,000 fine, and a $200 special assessment. *See* Dkt. 868 (Judgment). At the sentencing hearing, the Court stated that Hodge needed "to pay a significant and conspicuous price for unconscionable, egregious criminal conduct in order to deter [Hodge] and others who can't afford it from the blatant misuse of your good fortune." Dkt. 840 at 64.

[2] While Hodge has a pending appeal, which divests this Court of jurisdiction, the First Circuit has stayed his appeal until further order of that court, pending this Court's ruling on Hodge's motion, pursuant to 18 U.S.C. § 2255, to withdraw his plea to money laundering and be resentenced on the remaining count of conviction. The Court denied Hodge's § 2255 motion on July 2, 2020, but the First Circuit has not yet issued a further order regarding the stay of the appeal. Thus, the government does not press this jurisdictional argument here.

Before reporting to prison, Hodge moved to reduce his sentence to home confinement because of concerns related to the COVID-19 pandemic. Dkt. 1102. In so doing, he noted that "a quarantine would be all but certain" if he were to surrender to prison during the pandemic. *Id.* at 16. And, he argued, that despite such protective measures, "[s]urrendering to a BOP facility . . . would quite literally be a life-threatening endeavor." *Id.* at 19. On April 30, 2020, the Court denied Hodge's motion, noting that, "notwithstanding the current public health crisis, this federal judge will not forfeit his obligation to impose a sentence that is warranted by a defendant's criminal conduct." Dkt. 1128 at 2. The Court instead extended Hodge's self-report date to June 30, 2020, and indicated it would entertain further motions "[i]f the public health crisis has not abated by the time of the extended report date." *Id.* at 3. Hodge chose not to seek a further extension, however, instead choosing to self-surrender to FCI Otisville a week early, on June 23, 2020. The following day, his attorneys filed a request for compassionate relief with the facility's warden. Dkt. 1435, Ex. C.

BOP's Responses to the COVID-19 Pandemic

In opposing defendant's motion, the government does not minimize the risks COVID-19 presents. Mindful of the concerns created by the virus, BOP has made and continues to make extensive efforts to stop the spread of the virus in its facilities and to move as many appropriate inmates to home confinement as possible. The government has previously outlined these efforts in opposition to Hodge's initial motion to modify his sentence, as well as oppositions to similar motions filed by his co-defendants, and incorporates those descriptions as if fully set forth herein.[3]

[3] *See* Gov't's Corrected Opp'n to the Mot'ns of Defs. Janavs and Hodge to Modify Their Sentences (Dkt. 1114) at 4-8; Gov't's Opp'n to the Mot'ns of Defs. Henriquez and Janavs to Modify Their Sentences (Dkt. 1286) at 5-7.

Briefly, these efforts include: (1) transferring more than 7,000 inmates to home confinement; (2) minimizing the number of people coming into its facilities to limit potential exposure points by suspending visitors, maximizing telework, and decreasing internal movement by 90%; and (3) substantially expanding its COVID-19 testing capabilities to quickly isolate and quarantine sick individuals, thereby slowing transmission of the virus. Most notably here, to limit the introduction of the virus to its facilities, BOP has implemented a procedure under which all new inmates are tested for COVID-19 upon arrival at a BOP facility and must thereafter quarantine for 14 days to ensure they remain asymptomatic before being introduce into the main population. *See* BOP, "Correcting Myths and Misinformation about BOP and COVID-19," *available at* https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf (last accessed July 28, 2020).

At FCI Otisville, an entire unit in the medium security facility has been converted to a quarantine unit for the adjacent minimum security camp and FCI inmates. Affidavit of Robert Schreffler (Aug. 3, 2020) ("Schreffler Aff."), attached hereto as Exhibit A, ¶ 5. Inmates in quarantine are housed alone in cells in the unit, but there are other inmates quarantining in the unit. *Id.* ¶ 6. To mitigate contact between potentially infected inmates, out of cell time for inmates in quarantine is limited. *Id*. Inmates are permitted showers three times a week and use of the telephones twice a week. *Id*. They are also permitted to get fresh clothing, fill water jugs, and get ice. *Id*. In addition to access to phones and showers, inmates in quarantine have access to books, papers, mail, commissary, and their personal property. *Id*. The staff at FCI Otisville also arranged for a television to be turned on in the quarantine unit, to which inmates can tune their radio to listen. *Id*. Further, inmates in quarantine can interact with each other from their individual cells. *Id*.

Hodge's Quarantine

Hodge's 14-day quarantine began on June 23, 2020, when he arrived at FCI Otisville. Schreffler Aff. ¶ 7. At the end of that two-week period, five of the inmates with whom he was quarantined tested positive for COVID-19 (despite having tested negative upon their arrival to the facility). *Id*. Hodge and the remainder of the inmates with whom he was quarantined had to complete a second 14-day quarantine to ensure the virus had not spread to them. *Id*. Hodge was released from quarantine on July 22, 2020 and is now at the adjacent minimum security camp. *Id*. At the camp, Hodge can go outside anytime between 6 a.m. and 9 p.m. *Id.* ¶ 8.

During his quarantine period, Hodge had access to all of the conditions described above: showers, phones, commissary, television, books, papers, and interaction with other inmates. *Id.* ¶ 9. Hodge also received legal calls while he was in quarantine. *Id*.

ARGUMENT

Under 18 U.S.C. § 3582(c), a district court "may not" modify a term of imprisonment once imposed, except under limited circumstances. *See Dillon v. United States*, 560 U.S. 817, 824 (2010). One such circumstance is the so-called compassionate release provision, which provides that a district court "may reduce the term of imprisonment" if it finds "extraordinary and compelling circumstances warrant such a reduction," and that "such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The Court must also consider the "factors set forth in section 3553(a) to the extent that they are applicable." *Id*.

A motion under § 3582(c)(1)(A) may be made either by BOP or a defendant, but in the latter case only "after the defendant has fully exhausted all administrative rights to appeal a failure of [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.* Here, more

than 30 days have passed since Hodge submitted his request to Warden Petrucci of FCI Otisville on June 24, 2020.

I. There Are No Extraordinary and Compelling Reasons Warranting a Reduction in Hodge's Sentence.

Hodge cannot establish "extraordinary and compelling circumstances" that would justify a reduced sentence under § 3582(c)(1)(A)(i). *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").

First, contrary to Hodge's contentions, the ongoing pandemic and transmission risk in prisons do not amount to extraordinary and compelling circumstances under § 3582(c)(1)(A). As this Court has found, "generalized and systemic concern regarding the virulent pandemic are insufficient to demonstrate entitlement to early release." *United States v. Reynoso*, No. 17-cr-10350-NMG (Dkt. 77) (D. Mass. Apr. 21, 2020) (denying § 3582(c)(1)(A) motion where defendant's concern that the "dormitory like environment" at the FMC Devens satellite camp made social distancing impractical, and the concern about staff and new arrestees arriving daily "proffers no more than speculative concern about an outbreak"); *see also United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) ("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 efforts to curtail the virus's spread") (citation omitted). Indeed, through efforts such as the quarantine about which Hodge complains, BOP has effectively halted a potential outbreak at FCI Otisville, with just one inmate and one guard currently testing positive for COVID-19; 26 inmates and 14 guards have already recovered, including the five inmates who had tested positive during Hodge's initial quarantine period. *See* https://www.bop.gov/coronavirus/ (last accessed August 2, 2020).

Beyond his general allegations about the COVID pandemic, Hodge does not suggest he suffers from any underlying medical condition that puts him at an increased risk of serious illness for COVID-19. While, under the CDC's recently updated guidelines, Hodge faces an increased risk of severe illness from COVID-19 compared to someone in his 40s or 50s, his risk is not as great as that faced by an inmate in his 70s, nor does he fall in the "greatest risk" category among those aged 85 or older. *See* Centers for Disease Control, "Who Is at Risk for Increased Illness: Older Adults," *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last accessed July 28, 2020).

Second, Hodge's hyperbolic claim that his initial quarantine period was 29 days of "sensory isolation" amounting to torture under United Nations standards is false. Indeed, Hodge acknowledged as much in his prior motion, noting that "the majority" of inmates at the minimum-security camp at FCI Otisville were being moved into quarantine at the adjoining medium security prison in preparation for potential release or furlough. Dkt. 1102 at 7. He specifically *distinguished* such a quarantine from the isolation into which any symptomatic inmates were being placed, *id.*, and noted that he anticipated that he "would be quarantined with multiple other inmates." *Id.* at 14.[4] And that is precisely what happened. To mitigate the spread of COVID-19 at FCI Otisville, inmates are quarantined upon arrival at the facility. Hodge was *not* placed in quarantine as a punishment, but rather—as he anticipated when he surrendered—to minimize the

[4] Likewise, the Nelson Mandela Rules Hodge cites in his brief specifically provide for clinical isolation in cases where prisoners are suspected of having contagious diseases. *See* United Nations Standard Minimum Rules of Treatment of Prisoners (the "Nelson Mandela Rules"), Rule 30 ("Particular attention shall be paid to . . . [i]n cases where prisoners are suspected of having contagious diseases, providing for the clinical isolation and adequate treatment of those prisoners during the infectious period."); *see also id.*, Rules 43-45 (condemning solitary confinement—that is, confinement of prisoners for 22 hours or more a day without meaningful human contact—*as a disciplinary sanction* when used for more than 15 consecutive days).

risk that he and other inmates contract COVID-19, the very concern he raised in his prior brief, and that he raises again now in his latest attempt to avoid his prison sentence.

Further, contrary to Hodge's contention, he was never in "complete isolation." Rather, he had access to the telephone (including calls with his counsel), books, television, and other inmates who were quarantining with him. Indeed, it was precisely because he was with other inmates that Hodge's quarantine was extended when five of the inmates with whom he was quarantining tested positive for COVID-19. Moreover, Hodge's suggestion that he is *still* experiencing "severely punitive conditions" (to the extent his initial quarantine could even be considered "severely punitive") is baseless; he is now at the adjacent satellite camp where, among other things, he is living in a dormitory environment and can go outside anytime between 6 a.m. and 9 p.m. This distinguishes Hodge's situation from that of his co-defendant David Sidoo—who, because of his status as a Canadian citizen, will serve his *entire* sentence at a medium security facility and will not be eligible to serve any of it at a minimum security camp.

Hodge's attempt to liken his situation to co-defendant Toby Macfarlane is equally meritless. Macfarlane had served approximately 50 percent of his six-month sentence and was scheduled to be released to a halfway house for the remainder of his term before the COVID-19 pandemic hit and he sought any relief. *United States v. Macfarlane*, No. 19-cr-10131-NMG, 2020 WL 1866311, at *1 (D. Mass. Apr. 14, 2020). By contrast, Hodge surrendered *early*, even after this Court suggested it would consider continuing his surrender date, and then filed a compassionate release motion the next day. This was nothing more than a cynical attempt to take advantage of the pandemic to escape the sentence this Court imposed. Moreover, Macfarlane's quarantine conditions were significantly harsher than those Hodge faced. As Macfarlane's counsel reported, Macfarlane was quarantined at a *high security* facility—potentially with another

inmate—while Hodge was quarantined at a *medium security* facility, in his own cell, on a unit entirely designated for inmates undergoing quarantine. *Compare* Mem. in Supp. of Def. Macfarlane's Emergency Mot'n for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(1), *United States v. Macfarlane*, No. 19-cr-10131-NMG (D. Mass. Apr. 1, 2020) (Dkt. 349), *with* Schreffler Aff. ¶¶ 5-9. At the time of Macfarlane's motion, it was unclear whether he would be permitted to communicate with *anyone* during his quarantine—while Hodge, by contrast, had access to the telephone and mail, including calls with his counsel. *Id.* Most significantly, while the conditions of Macfarlane's quarantine were truly unforeseen—he reported to serve his sentence in early January 2020, before the World Health Organization declared a pandemic—Hodge's conditions were entirely foreseen, and served as the basis for his prior attempts to reduce his sentence to home confinement and the prior extensions of his self-report date.

Hodge's reliance on *United States v. Regas*, No. 3:91-cr-00057-MMD-NA-1, 2020 WL 2926457 (D. Nev. June 3, 2020), and *United States v. Kelly*, No. 3:13-cr-00059-CWR-LRA-2, 2020 WL 2104241 (S.D. Miss. May 1, 2020), is similarly misplaced. In *Regas*, the defendant had served 27 years of a life sentence, was 77 years old, and had been placed in actual solitary confinement (not quarantine) indefinitely to protect him from exposure to COVID-19. 2020 WL 2926457, at *1. In *Kelly*, the defendant had also served a substantial portion of his 97-month sentence, and was scheduled to be released less than three weeks from the date of the court's order. 2020 WL 2104241, at *1.[5] By contrast, Hodge had barely served a single day of his sentence when

[5] The defendant in *Kelly* was also serving his sentence at FCI Oakdale, the site of one of the worst COVID outbreaks in any BOP facility, which weighed heavily on the court's decision. 2020 WL 2104241, at *1-2 (noting that FCI Oakdale "has the highest number of prisoner deaths [from COVID] in the BOP thus far").

he sought relief from BOP, citing as a basis the very reasons this Court had previously rejected in declining to reduce his sentence to home confinement.[6]

Notably, none of the reasons Hodge puts forth for reducing his sentence constitute a "terminal illness," or "a serious physical or medical condition, . . . a serious functional or cognitive impairment, . . . or . . . deteriorating physical or mental health because of the aging process" that qualifies as an extraordinary and compelling reason which "substantially diminish[] 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 app. note 1. Thus, reducing his sentence would not be consistent with the applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A).[7]

II. The § 3553(a) Factors Weigh Against Reducing Hodge's Sentence.

When analyzing whether "extraordinary and compelling circumstances warrant . . . a reduction," the Court must also consider the "factors set forth in section 3553(a) to the extent that they are applicable." *Id.* § 3582(c)(1)(A). The Court recently considered these factors at Hodge's sentencing, and determined that he needed "to pay a significant and conspicuous price for unconscionable, egregious criminal conduct in order to deter [Hodge] and others who can't afford it from the blatant misuse of your good fortune." Dkt. 840 at 64. Any reduction in Hodge's

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[6] [redacted] Hodge did not seek to start his sentence in March 2020 (his original report date) or May 2020 (his first extended report date). Instead, he sought two adjournments of his report date and a reduction in his sentence, before choosing the alternate strategy of reporting to prison early and seeking compassionate release the next day.

[7] Hodge argues that the Court should also consider that [redacted]

sentence would be widely publicized, thereby undermining any deterrent effect of his initial sentence.

Moreover, since pleading guilty in October, Hodge has sought to evade the consequences of his crimes at every turn. He claimed to accept responsibility, before accusing the government of misconduct in a failed effort to withdraw his plea. He expressed remorse at his sentencing, then published an op-ed in *The Wall Street Journal* the next day in which he cast himself as his co-conspirator's victim. He cited [redacted] but, as soon as his sentence was imposed, requested to serve his term of imprisonment nearly 3,000 miles away from their home. Prior to reporting to prison, he moved to reduce his sentence to home confinement on the basis of the COVID-19 pandemic. He later reported early and immediately requested compassionate release. And he has filed this motion at the first opportunity. Every step has been carefully designed and executed to avoid the sentence this Court imposed. The need to promote respect for the law and just punishment weighs heavily against reducing Hodge's sentence.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny Hodge's motion to modify his sentence to home confinement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be served on all registered participants listed in the Notice of Electronic Filing (NEF).

Dated: August 3, 2020

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