UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA CRIM NO. 3:12CR238 (JBA)

v.

LAWRENCE HOSKINS September 18, 2020

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR REDUCTION IN SENTENCE

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The Government opposes defendant Lawrence Hoskins's motion for reduction in—or, more aptly, elimination of—sentence under 18 U.S.C. § 3582(c)(1)(A). This Court sentenced Hoskins to a term of 15 months' imprisonment for his significant role in a years-long scheme to bribe Indonesian officials to award a lucrative power plant contract to Alstom Power Inc. ("API") of Windsor, Connecticut. He is scheduled to serve less than half of the term of co-defendant Frederic Pierucci, who served much of his prison time at the Wyatt Detention Facility, which lacks most of the programs that will be available to Hoskins at FCI Allenwood Low. Now, a month away from his reporting date, Hoskins entreats this Court to commute his entire punishment in this matter and to "sentence" him to home confinement with credit for the time he has spent in Dallas during the pandemic. Hoskins's request should be denied. First, he is ineligible for relief under the First Step Act, as he is not currently serving his term of imprisonment, and he has not yet made an application to the Bureau of Prisons. Second, his "medical condition" does not qualify as an extraordinary and compelling reason that warrants resentencing, and he is scheduled to report to a facility with no current cases of COVID-19 and only one since the pandemic began. And third, resentencing would seriously undermine the purposes of sentencing as codified in 18 U.S.C. § 3553(a). At bottom, in addition to a desire to avoid prison, Hoskins's application reflects his continued belief, delivered at trial and at sentencing, that he has done nothing wrong—or, at most, was simply following orders. In truth, and as the Court is well aware, the evidence in this case paints a starkly different picture, that of a well-compensated senior executive who was responsible for ensuring Alstom's ethical business practices, but who nonetheless himself was a protagonist in Alstom's culture of corruption and engaged in a U.S. money laundering scheme to promote that corruption. He should serve the sentence that the Court imposed.

I. Introduction and Background

A. Factual Background

The Court is well familiar with the factual background of this case. In short, Hoskins helped to bribe Indonesian officials to award a $118 million power plant project to API and its consortium partners. PSR ¶¶ 21, 24. His efforts began at least as early as 2002, when he was involved in the selection and approval of a consultant whose primary function it would be to bribe Emir Moeis, an influential member of the Indonesian parliament. PSR ¶¶ 30-35. After other options were rejected, API hired Pirooz Sharafi for this task, and Hoskins signed off on key components of the agreement knowing that Sharafi's principal function was to bribe Moeis. *Id*. Hoskins also understood that Sharafi would have to bribe working-level officials at PLN, the state-owned utility and ultimate owner of the power plant. PSR ¶ 33.

Indeed, when it became clear that Sharafi could not effectively gain PLN's trust—they were concerned his promises of payoffs were empty—Hoskins helped API replace Sharafi with another consultant. PSR ¶¶ 36-42. Hoskins led the meeting where he carried out API's instructions to replace Sharafi with Azmin Aulia to pay off PLN officials. PSR ¶ 39. Following the change in consultants, Hoskins helped conclude new consultancy agreements with Sharafi and Aulia, and approved agreements that included anti-bribery provisions that Hoskins knew would be violated. PSR ¶¶ 40-42. Hoskins was also involved, on behalf of API, in negotiating terms of payment for the agreement between API and Aulia's company, PT Gajendra, and acceding to a faster payment schedule to account for Aulia's obligations to pay bribes quickly. PSR ¶¶ 43-46. API and its consortium ultimately won the bid for Tarahan and paid out some of its revenues to Indonesian officials as promised. PSR ¶¶ 54-79. Hoskins left Alstom, but not until the Tarahan project was won. PSR ¶¶ 48-49.

The evidence also showed that Hoskins's corrupt actions were not isolated to Tarahan, but that he was involved in other bribery during his time at Alston. First, the PSR discusses the extensive evidence of Hoskins's involvement in bribery on other Indonesian projects such as Muara Tawar. PSR ¶¶ 83-90. Beyond that, there is evidence of his involvement in discussions about bribery on various other projects in India and Malaysia. PSR ¶¶ 91-103.

B. Procedural History

On July 30, 2013, a grand jury in New Haven, Connecticut, initially charged Hoskins in a twelve-count Second Superseding Indictment with conspiring to violate the Foreign Corrupt Practices Act ("FCPA"), pursuant to 18 U.S.C. § 371 (Count 1), substantive violations of the FCPA, pursuant to 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2 (Counts 2-7), conspiring to launder money, pursuant to 18 U.S.C. § 1956(h) (Count 8), and substantive money laundering, pursuant to 18 U.S.C. § 1956(a)(2)(A) and 18 U.S.C. § 2 (Counts 9-12).

On April 23, 2014, Hoskins was arrested upon his arrival into the United States Virgin Islands ("USVI"). He was presented before the United States District Court on the same day, waived an identity hearing, any preliminary hearing, and any detention hearing, in favor of those hearings being held in this district. An order of removal to this District was issued on April 24, 2014. Subsequently, Hoskins was transported from the USVI to Puerto Rico as part of the normal transportation process for a defendant arrested in the USVI, with the understanding that he would be further moved to Oklahoma City—the location of the transportation hub for the United States Marshal Service ("USMS")—before arriving in Connecticut. However, because of delays in the transfer, the Government requested, and the Court ordered, the defendant's release from custody on May 19, 2014 so that he could travel from Puerto Rico (in the custody of his counsel or the

FBI) to court in Connecticut. The defendant appeared before the Hon. William I. Garfinkel on May 19, 2014, and was released on a bond.

On April 15, 2015 the grand jury returned a Third Superseding Indictment with the same charges, but removing William Pomponi, who had pleaded guilty on July 17, 2014. On November 8, 2019, following a two-week jury trial, the defendant was convicted on Counts 1-10 and 12 of the Third Superseding Indictment.

On February 26, 2020, the Court granted the defendant's motion for acquittal as to Counts 1-7, holding that there was insufficient evidence that the defendant was an agent of API, and denied the motion as to Counts 8-10 and 12. Doc. 617. The Court conditionally granted a new trial as to Counts 1-7, and denied a motion for a new trial as to Counts 8-10 and 12. The government filed a timely notice of appeal from the Court's order of acquittal and new trial on March 9, 2020.

On March 6, 2020, the Court sentenced Hoskins principally to 15 months' imprisonment, with no supervised release. In advance of sentencing, Hoskins argued that his medical condition (polymyalgia rheumatica) would make his incarceration more difficult, *see* Defendant's Sentencing Memo ("Def. Sen. Mem") (Doc. 615) at 42, which the Court accounted for in its sentence, Sen. Tr. at 80. Hoskins also claimed—based on the declaration of an alleged expert—that he would "very likely face additional hardship because of a Bureau of Prisons ("BOP") policy to designate foreign citizens to for-profit prisons." Def. Sen. Mem. at 41. Hoskins went on at length about the many challenges he expected to face in such a private facility, including more lockdowns, lack of oversight by BOP, solitary confinement for new arrivals, and lack of services. *Id*. at 41. He then claimed that he would be subject to further lengthy incarceration at an ICE detention facility before being deported. *Id*. at 42. After the Court pronounced its sentence,

explicitly accounting for the supposedly harsher conditions and ICE detention claimed by Hoskins's "expert," *see* Sen. Tr. at 81, Hoskins then asked the Court to recommend FCI Allenwood Low, Sen. Tr. at 86. Notwithstanding his earlier arguments, Hoskins's counsel claimed that such a recommendation would make it less likely that he would be designated to a private facility, and less likely that he would have to serve additional time in ICE detention. Sen. Tr. at 86. Significantly, these facts were omitted from the expert's lengthy declaration. The Court agreed to recommend Allenwood. Sen. Tr. at 87.

Judgment entered on the money laundering counts on May 12, 2020. Hoskins and the Government filed timely notices of appeal from the judgment.

The Government filed its opening appellate brief on July 13, 2020. Hoskins's opening brief is due on October 13, 2020. Hoskins is currently released on bond, and his reporting date has been delayed, without objection, until October 19, 2020. Should the Court of Appeals reverse this Court's grant of acquittal, the Court would be required to resentence Hoskins *de novo*. *See United States v. Rigas*, 583 F.3d 108, 117 (2d Cir. 2009); *United States v. Desnoyers*, 708 F.3d 378, 386-87 (2d Cir. 2013). Consistent with the Court's recommendation, Hoskins has been designated to FCI Allenwood's low security facility ("FCI Allenwood Low").

II. Legal Standard

It is well established that once a district court has pronounced sentence and the sentence becomes final, a court has no inherent authority to reconsider or alter that sentence. Rather, it may do so only pursuant to statutory authorization. *See, e.g., United States v. Addonizio*, 442 U.S. 178, 189 & n.16 (1979); *United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008); *United States v. Smartt*, 129 F.3d 539, 540 (10th Cir. 1997) ("A district court does not have inherent authority

to modify a previously imposed sentence; it may do so only pursuant to statutory authorization.") (internal quotation marks omitted).

Under 18 U.S.C. § 3582(c)(1)(A), this Court may, in certain circumstances, grant a defendant's motion to reduce his or her term of imprisonment. Before filing that motion, however, the defendant must first request that BOP file such a motion on his or her behalf. Section 3582(c)(1)(A). A court may grant the defendant's own motion for a reduction in his sentence only if the motion was filed "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 after 30 days have passed "from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.*

If that exhaustion requirement is met, a court may reduce the defendant's term of imprisonment "after considering the factors set forth in [18 U.S.C. § 3553(a)]" if the Court finds, as relevant here, that (i) "extraordinary and compelling reasons warrant such a reduction" and (ii) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i). As the movant, the defendant bears the burden to establish that he is eligible for a sentence reduction. *United States v. Ebbers*, 432 F.Supp.3d 421, 426 (S.D.N.Y. 2020); *see also United States v. Jones*, 836 F.3d 896, 899 (8th Cir. 2016); *United States v. Green*, 764 F.3d 1352, 1356 (11th Cir. 2014).

The Sentencing Commission has issued a policy statement addressing reduction of sentences under § 3582(c)(1)(A). As relevant here, the policy statement provides that a court may reduce the term of imprisonment after considering the § 3553(a) factors if the Court finds that (i) "extraordinary and compelling reasons warrant the reduction;" (ii) "the defendant is not a

danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g);" and (iii) "the reduction is consistent with this policy statement." USSG § 1B1.13.[1]

The policy statement includes an application note that specifies the types of medical conditions that qualify as "extraordinary and compelling reasons." First, that standard is met if the defendant is "suffering from a terminal illness," such as "metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, [or] advanced dementia." USSG § 1B1.13, cmt. n.1(A)(i). Second, the standard is met if 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.

USSG § 1B1.13, cmt. n.1(A)(ii). The application note also sets out other conditions and characteristics that qualify as "extraordinary and compelling reasons" related to the defendant's age and family circumstances. USSG § 1B1.13, cmt. n.1(B)-(C). Finally, the note recognizes the possibility that BOP could identify other grounds that amount to "extraordinary and compelling reasons." USSG § 1B1.13, cmt. n.1(D).

In ruling on a motion for compassionate release, a court's "task is not to second guess or to reconsider whether the original sentence was just, but to assess whether the defendant's circumstances are so changed that it would be inequitable to continue the confinement of the

[1] The policy statement refers only to motions filed by the BOP Director. That is because the policy statement was last amended on November 1, 2018, and until the enactment of the First Step Act on December 21, 2018, defendants were not entitled to file motions under § 3582(c). *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239; *cf.* 18 U.S.C. § 3582(c) (2012). In light of the statutory command that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," § 3582(c)(1)(A)(ii), and the lack of any plausible reason to treat motions filed by defendants differently from motions filed by BOP, the policy statement applies to motions filed by defendants as well.

prisoner." *United States v. Anton*, 3:17CR263 (MPS), 2020 WL 3430187, at *3 (D. Conn. June 23, 2020) (quoting *Ebbers*, 432 F. Supp. 3d at 429-30) (alterations and quotation marks omitted)). Given the enduring importance of the § 3553(a) factors, courts have denied compassionate release motions based on the § 3553(a) factors, even where extraordinary and compelling reasons exist. *See United States v. Webster*, -- F. Supp. 3d --, No. 3:91CR138 (DJN), 2020 WL 618828, at *6-8 (E.D. Va. Feb. 10, 2020) (denying compassionate release to defendant with terminal cancer even though court found extraordinary and compelling reasons because § 3553(a) factors weighed strongly against relief).

III. Argument

A. The Statute Does Not Contemplate Resentencing Prior to the Commencement of Imprisonment

Hoskins's motion should first be rejected because the statute was not intended to cover defendants who are not currently serving a sentence of imprisonment.

Since the beginning of the coronavirus pandemic, courts have repeatedly held that Section § 3582(c)(1)(A)(i), "by its plain terms . . . applies only to those defendants who have begun serving their term of imprisonment at a BOP facility" or are otherwise in exclusive Federal criminal custody. *United States v. Konny*, Crim. No. 19-283, 2020 WL 2836783, at *2 (S.D.N.Y. May 30, 2020); *see also United States v. Jordan*, ---- F. Supp.3d ----, 2020 WL 4195353 (S.D.N.Y. July 16, 2020) (rejecting compassionate release where defendant has not yet reported to a BOP facility); *United States v. Spruill*, No. 3:18-cr-0022-10 (VLB), 2020 WL 2113621, at *3 (D. Conn. May 4, 2020); *United States v. Underwood*, No. 8:18-cr-00201 (TDC), ECF No. 193 at 2 (D. Md. August 3, 2020) (holding that the defendant's motion for compassionate release was premature because

the defendant had not yet reported to BOP custody and thus could not initiate the exhaustion process).

These cases are consistent with the statutory language and legislative history of § 3582, which have from the outset contemplated involvement by the Bureau of Prisons in compassionate release motions, and that such motions would relate to prisoners in BOP's custody. Prior to the First Step Act of 2018, a court could *only* grant compassionate release "upon motion of the Director of the Bureau of Prisons." *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1998 (1984). Congress contemplated that § 3582(c) would act as a "safety valve" in the "unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to *continue* the confinement of the *prisoner*." S. Rep. 98-225, 1983 WL 25404 at *121 (emphasis added). In such a case, the "Director of the Bureau of Prisons could petition the court for a reduction in the sentence" for extraordinary and compelling reasons, consistent with Sentencing Commission policy statements. *Id*. That the statute mandated involvement of the BOP and the Senate Report referred explicitly to "continued confinement of the prisoner" is clear evidence that compassionate release was limited to those currently serving a federal sentence in BOP custody.

The First Step Act's revision to § 3582(c)(1)(A) reinforced Congress's intent that the statute be limited to prisoners serving sentences. Now, in addition to giving BOP the authority to move for release, the First Step Act enabled a defendant himself to make the motion 30 days after the receipt "by the warden of the defendant's facility" of his request for BOP to make a motion on his behalf. *See* 18 U.S.C. § 3582(c)(1)(A). This express reference to the "defendant's facility" again suggests that Congress intended compassionate release to reduce a sentence being served,

not to eliminate one before it commences. Moreover, nothing in the First Step Act otherwise undermined the congressional intent in the original statute to address claims of prisoners with the involvement of BOP. "Congress in fact only expanded access to the courts; it did not change the standard." *Ebbers*, 432 F.Supp.3d at 427.

Hoskins, ignoring the statutory language, legislative history, and four cases that have rejected relief under the same factual scenario, mistakenly seeks support from *United States v. Austin*, --- F.Supp.3d---, 2020 WL 3447521 (June 22, 2020). *See* Def. Mem. at 12-13. In fact, *Austin* plainly supports the Government's position that, generally, compassionate release only applies to those in custody. In *Austin*, the defendant had already served 11 years of a 15-year sentence when he was released on a *habeas* ruling, only to have that ruling reversed on appeal and the sentence reinstated. *See* 2020 WL 3447521 at *1. Far from holding that compassionate release should generally apply to defendants not in custody, the court explicitly acknowledged that the statute indicated "a role for the BOP in evaluating [compassionate release] motions, one which is theoretically undermined by allowing a defendant not in custody to petition for this form of relief." *Id*. at 2. The court recognized that *Spruill* and *Konny* had previously held that relief under Section 3582(c) "is usually inappropriate for defendants who are not in BOP custody." *Id*. at 2. The court then distinguished Austin from the more typical pre-reporting defendants in *Spruill* and *Konny*. Whereas Austin had been in a facility (FCI Allenwood) for ten years and had actually made a compassionate release request to BOP, the defendants in *Spruill* and *Konny* (like Hoskins) "had been sentenced by their respective courts but had not yet surrendered to federal custody" and had not made such a request. *Id*. That the *Austin* court explicitly distinguished Austin from other defendants like Hoskins who had never reported to BOP custody demonstrates that Hoskins's

attempt to compare his case to Austin's based on his reporting date is illusory. He is free to make a further request to delay reporting, which given the pending appeal would likely be granted. In other words, the imminence of his reporting date is borne of his own choice.

Finally, Hoskins's reference to several other cases in which defendants were allowed to make compassionate release motions, and dispense with the exhaustion requirement, from outside formal BOP custody is equally misplaced. Def, Mem. at 10-11. In all of those cases, the defendants were serving federal sentences, but for various reasons were temporarily moved to non-BOP facilities. *See United States v. Barajas*, No. 18-CR-736-04 (NSR), 2020 WL 3976991 (S.D.N.Y. July 13, 2020) (excusing exhaustion where defendant was temporarily housed at a county facility on behalf of BOP); *United States v. Levy*, No. 16-cr-270 (ARR), 2020 WL 2393837, at *1 (E.D.N.Y. May 12, 2020) (excusing exhaustion where defendant temporarily housed at a local facility for the purpose of appearing in court); *United States v. Sanchez*, No. 18-CR-833 (VSB), 2020 WL 2787654, at *1 n.2 (S.D.N.Y. May 29, 2020) (excusing exhaustion where defendant was "serving his federal sentence in a state facility"). In all of these cases, the defendants were actually sentenced prisoners serving their federal sentences, unlike Hoskins, whose sentence has not yet commenced.[2] Moreover, at least in *Levy* and *Barajas*, the defendant had spent time in BOP facilities.

[2] Nor can Hoskins argue any significance to his brief period of pre-trial confinement. "A sentence to a term of imprisonment" only commences "on the date" a defendant "is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which [his] sentence is to be served." 18 U.S.C. § 3585(a). For someone like Hoskins, who remains on bail, § 3585(a)'s plain language means the term of imprisonment has not begun. *See, e.g.*, *United States v. Labeille–Soto*, 163 F.3d 93, 98 (2d Cir. 1998); *United States v. Pungitore*, 910 F.2d 1084, 1118–19 (3d Cir. 1990). That he has served some pre-trial confinement will affect his release date, but does not impact the commencement of his sentence. *See Lopez v. Terrell*, 654 F.3d 176, 183–84 (2d Cir. 2011) ("[b]ecause a § 3585(b) credit is awarded after sentencing, the credit has no effect on the sentence imposed by the district court; the BOP simply advances the ultimate date of release by subtracting from that date the period of time the defendant spent in presentence custody").

Because the statute on its face does not appear to cover a defendant like Hoskins, who has not reported to prison, the Court need not engage in the separate inquiry of whether to excuse the exhaustion requirement. *See* Def. Mem. at 9-10. In truth, there is no binding precedent that would authorize ignoring a statutorily created exhaustion provision. While judicially created exhaustion requirements may sometimes be excused, it is well settled that a court may not ignore a statutory command such as that presented in § 3582(c)(1)(A). Indeed, the Supreme Court recently reaffirmed that principle in *Ross v. Blake*, 136 S. Ct. 1850 (2016), in which it rejected a judicially created "'special circumstances'" exception to a statutory exhaustion requirement. Rejecting the "freewheeling approach" adopted by some courts of appeals, under which some prisoners were permitted to pursue litigation even when they had failed to exhaust available administrative remedies, *Ross*, 136 S. Ct. at 1855, the Court demanded fidelity to the statutory text, explaining that the "mandatory language" of the exhaustion requirement "means a court may not excuse a failure to exhaust" even to accommodate exceptional circumstances, *id.* at 1856.

Hoskins's reliance on *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) is misplaced. *See* Def. Mem. at 9. Contrary to Hoskins's claim, *Barr* concerned exceptions for a judicially created exhaustion requirement, unlike the mandatory statutory exhaustion in § 3582(c)(1)(A). There is no evidence in the text of the statute that Congress intended to impose a "futility" exception, as Hoskins contends. That said, even if such a carve-out existed, Hoskins cannot show that a request to BOP, once he is a sentenced prisoner, would necessarily be futile. Unlike in this Court's ruling in *United States v. Colvin*, --- F.Supp.3d---, 2020 WL 1613943, at *1 (D. Conn. Apr. 2, 2020), Hoskins has far more than 11 days left in his sentence. Indeed, Hoskins has not yet

served a day in prison, and BOP is entitled to consider his request before he may avail himself of the federal courts.

B. There Are No Extraordinary And Compelling Reasons To Reduce The Defendant's Sentence

Even if the compassionate release statute contemplated relief for a defendant in Hoskins's position, Hoskins cannot show "extraordinary and compelling reasons" to entirely eliminate his sentence before it begins. First, he is not "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 cmt. n. 1(A)(ii)(I). His polymyalgia rheumetica ("PMR"), a form of joint inflammation, is not referenced as a risk factor by the CDC, and the studies Hoskins cites are inconclusive at best. Moreover, there has been *one* case of COVID-19 among FCI Allenwood Low prisoners since the beginning of the pandemic (and no active cases now), and thus the risk of contracting the disease there is minimal, and certainly not greater than his proposed home confinement in Texas.

1. The defendant's condition does not qualify as a serious medical condition warranting release.

Hoskins has not sustained his burden to show that he is "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 cmt. n. 1(A)(ii)(I). Aside from his age, Hoskins's application rests solely on his history of PMR, a condition that does not warrant release under these circumstances.

First, the record is woefully thin regarding the seriousness of Hoskins's condition. Hoskins has submitted no medical records, no detailed medical history, and no letter from a treating

physician explaining the extent of Hoskins's condition and its potential interaction with COVID-19. Instead, the relevant record consists of one paragraph of the PSR (¶ 140), which in turn is limited to Hoskins's ambiguous self-reporting of his condition. He does not explain how often the condition occurred, how long it lasted, and when he last took medication. Moreover, while he claims it is "treated via Prednisolone, a steroid," he does not indicate how frequently he takes the medication and in what doses. PSR ¶ 140. While perhaps Hoskins's self-reporting was sufficient for § 3553 purposes at sentencing (essentially, that arthritis would make prison more difficult), Hoskins now bears the burden to show that he is entitled to compassionate release, and the Court cannot simply rely on vague generalities in its analysis. Indeed, experience through this pandemic has shown that medical records are critical to assessing the existence and/or seriousness of a particular condition. *See, e.g.*, *United States v. Elliott*, 2020 WL 4381810 at *4 (July 31, 2020) ("Elliott's medical records do not support some of Elliott's claims about his health."); *United States v. Bouyagian*, No. 18 Cr. 0099 (NRB), 2020 WL 5077405 at *1 (S.D.N.Y. August 27, 2020) ("However, defendant has failed to provide any evidence to substantiate that he suffers from these conditions."); *United States v. Garrison*, No. 12 Cr. 214 (ER), 2020 WL 5253219 at *3 (S.D.N.Y. Sept. 3, 2020) ("Although Garrison asserts that he suffers from sleep apnea and hypertension, his medical records do not reflect either medical condition."). Indeed, even Hoskins's letter to the Court does not reference his condition, suggesting that his PMR is less a concern to him that a general aversion to incarceration.

Second, PMR is not recognized by the CDC as a condition that places Hoskins at increased risk from COVID-19. *See People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-

precautions/people-with-medical-conditions.html (last updated September 11, 2020). Courts have generally looked to the CDC's guidance to assess the risk to prisoners. *See, e.g., United States v. Howell*, No. 3:17-cr-151 (SRU), 2020 WL 2475640 at *3 (D. Conn. May 12, 2020) ("Because the CDC has identified only moderate to severe asthma as a comorbidity that elevates the likelihood of serious illness from COVID-19, Howell's failure to specify the extent of his condition is fatal to his motion."); *Bouyagian*, 2020 WL 5077405 at *1 ("none of these medical conditions are identified by the CDC as risk factors for severe illness from COVID-19"); *United States v. Ferraioli*, No. 3:18-cr-27 (JAM), 2020 WL 4284560 at *3 (D. Conn. July 27, 2020) ("thrombosis is not included in the CDC's list" of risk factors for COVID-19); *United States v. Hull*, No. 3:17-cr-132 (SRU), 2020 WL 2475639, at *2 (D. Conn. May 13, 2020) ("The CDC, however, does not identify regular hypertension as a comorbidity that elevates the likelihood of serious illness from COVID-19."); *United States v. Davis*, No. 12-Cr-712 (SHS), 2020 WL 4573029, at *1 (S.D.N.Y. Aug. 7, 2020) ("Given that a G6PD-related affliction does not appear on the Centers for Disease Control and Prevention's list of high-risk conditions, the Court cannot find that Davis's claimed condition establishes an extraordinary and compelling reason for a sentence reduction."); *United States v. Cerda*, No. 08 Cr. 857-4, 2020 WL 4751824, at *2 (S.D.N.Y. Aug. 17, 2020) ("According to the CDC, neither of Defendant's conditions definitively places Defendant at increased risk of suffering severe illness from COVID-19.").

The CDC does recognize that an "Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines," *might* produce an increased risk, based on limited

available data. *See, supra*, *People with Certain Medical Conditions*.[3] However, several courts have refused to find that this newly created "might" category—first unveiled by the CDC on July 17, 2020—is sufficient to show a "serious medical condition" warranting release. *See United States v. Carter*, No CR 107-076, 2020 WL 4194014, at *2 (S.D. Ga. July 21, 2020) (hypertension is not sufficient; "at this point, the Court cannot conclude that the 'might' category qualifies an illness as sufficiently serious to warrant compassionate release in and of itself."); *United States v. Wilson*, No. 2:18-cr-00132-RAJ, 2020 WL 4901714, at *5 (W.D. Wash. Aug. 20, 2020) ("As to Mr. Wilson's hypertension claim, at best, the CDC has only concluded to date that it might be a risk factor. This contention alone is not sufficient to justify or warrant conclusion that Mr. Wilson's risks of COVID-19 warrant an extraordinary and compelling reason for early termination of his sentence."); *United States v. Holman*, No. 16-cr-30052 (SEM), 2020 WL 3971502, at *2 (C.D. Ill. July 14, 2020) (history of smoking, which only appears on the "might" list, does not suffice; "There is no other evidence that Defendant faces an increased risk of severe illness or death from COVID-19.").

Even if there was clear evidence that the use of corticosteroids posed an increased risk, it is not at all obvious that such risk would apply to Hoskins. While the PSR notes that he was treated with Prednisolone, it does not reveal whether he is currently taking such medication and, if so, in what doses. Nor does Hoskins explain why he could not take other non-steroidal medications should his PMR flare up while incarcerated. Moreover, Hoskins offers no evidence that the dose he has taken has, in fact, affected his ability to fight infection to a degree that would necessitate compassionate release. *See United States v. Claude*, Crim. No. 12-33-01, 2020 WL 5039448 at

[3] Hoskins appears to rely on guidance from the CDC from May 14, 2020, prior to its acknowledgement in July that data is inconclusive regarding risk from immunosuppressant medications. *See* Def. Mem. at 29.

*3 (E.D. Pa. August 26, 2020) ("The Court first notes that the CDC reports there is only "mixed evidence" that the use of corticosteroids as treatment for systemic diseases is a risk factor for COVID-19. . . . More significantly, pro se defendant has presented no evidence that he has a weakened immune system.").

Unable to rely on any CDC guidance, Hoskins points to two studies—one from Massachusetts General Hospital physicians and the other from Spain—that do not conclusively show an increased risk from COVID-19 to people with PMR. Def. Mem. at 28-29. First, Hoskins ignores significant limitations of the Massachusetts General Hospital study. *See* D'Silva et al., *Clinical characteristics and outcomes of patients with coronavirus disease 2019 (COVID-19) and rheumatic disease: a comparative cohort study from a US 'hot spot,'* Annals of Rheumatic Disease (May 26, 2020), *available at* https://ard.bmj.com/content/annrheumdis/79/9/1156.full.pdf (last visited September 17, 2020). That study compared 52 patients with rheumatic disease and COVID-19 with 104 control COVID-19 positive patients without rheumatic disease. Overall both the rheumatic patients and the control participants had similar symptoms, similar odds of hospitalization, and similar mortality rates. However, the rheumatic patients were more likely to be admitted to ICU or receive mechanical ventilation. However, the authors of the study also noted that among the patients with rheumatic disease, those hospitalized had a higher number of other diseases or medical conditions (2 versus 1), and more frequently had diabetes (39% versus 14%). Hoskins does not have any other medical condition except PMR and is not a diabetic. Indeed, Hoskins describes himself as "pretty lucky" as to his physical health. PSR ¶ 140. Moreover, the study recognized that one of its limitations was that it only included patients who had tested positive for COVID-19 "thus excluding patients who may have been

asymptomatic, had milder disease or may not have qualified for testing given the ongoing testing shortages in the USA," which calls into significant question whether the study's results can be generalized to all individuals with a rheumatic disease.

The Spanish study is equally inconclusive. *See* Jose L. Pablos, et al., *Prevalence of hospital PCR-confirmed COVID-19 cases in patients with chronic inflammatory and autoimmune rheumatic diseases*, Annals of the Rheumatic Diseases (June 12, 2020), *available at* . https://ard.bmj.com/content/annrheumdis/early/2020/06/12/annrheumdis-2020-217763.full.pdf (last visited September 17, 2020). Like the Mass General study, it is limited to "an exploratory analysis of the relative prevalence of hospital-diagnosed COVID-19" in rheumatic patients, and is not based on "methodologically rigorous data." Thus, again it is difficult to extrapolate to the general population. Moreover, the median age of patients with PMR in the study (84) was far older than the reference population (55) and Hoskins (70), and the study does not look at other comorbidities that may have led to the patient's hospitalization. Nor does the Spanish study look at the relative severity of COVID-19 in the patients, which would require "future serological testing." Infection risk may be a function of the particular therapy employed, and the study suggests that treatments can be adjusted to account for COVID-19. The study concluded by stating "Ongoing studies of the specific factors potentially involved in the observed differences will hopefully contribute to understand the impact of the SARS-CoV-2 pandemic in different risk groups."

Nor are these studies the only word on the state of medical knowledge on PMR and COVID-19. According to the American College of Rheumatology, "there is currently no evidence identifying risk factors for poor outcome with COVID-19 that are specific to rheumatic disease."

Mikulus et. al., *American College of Rheumatology Guidance for the Management of Rheumatic Disease in Adult Patients During the COVID-19 Pandemic: Version 1*, Arthritis and Rheumatology, Vol. 72 Issue 8 (August 2020), *available at* https://onlinelibrary.wiley.com/doi/10.1002/art.41301 (last visited September 17, 2020).

In short, limited studies with inconclusive results do not help Hoskins meet his burden to show a "serious medical condition" that warrants compassionate release. Instead, there is no compelling evidence that Hoskins is at an increased risk from COVID-19 infection.

Absent any evidence that PMR or its treatment exposes Hoskins to an increase risk of severe illness from COVID-19, he is left only with his age. The CDC no longer assigns a cut-off for high risk, but instead reports generally that "the risk for severe illness from COVID-19 increases with age, with older adults at highest risk." *See Older Adults*, Ctrs. for Disease Control & Prevention, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last updated September 11, 2020). The "greatest risk for severe illness from COVID-19 is among those 85 or older," though those in their 60s and 70s are at higher risk than those in their 50s. Of course, older individuals are also at a relatively higher risk for other risk-enhancing co-morbidities which may account to some degree for increased hospitalizations. Courts have generally denied release based purely on age-based risks. *See United States v. Haney*, 2020 WL 1821988, at *5 (S.D.N.Y. Apr. 13, 2020) ("if Haney's age alone were a sufficient factor to grant compassionate release in these circumstances, it follows that every federal inmate in the country above the age of 60 should be forthwith released from detention, a result that does not remotely comply with the limited scope of compassionate release ..."); *United States v. Rabuffo*,

No. 16-CR-148 (ADS), 2020 WL 2523053 (E.D.N.Y May 14, 2020) (rejecting release for a 61-year-old otherwise in fine health).

2. Hoskins's risk of contracting COVID-19 while in BOP custody is minimal

Not only does Hoskins fail to present a significant or unique health risk should he be infected, he has also not shown that he is at an unusually high risk of becoming infected once he reports to BOP. "[T]he 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." *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020). "[I]n the absence of evidence to show that COVID-19 has infiltrated the facility at which a prisoner is located, there are no 'extraordinary and compelling reasons' for a court to grant a motion for a sentence reduction." *United States v. Vence-Small*, No. 3:18-cr-00031(JAM), 2020 WL 2214226 (D. Conn. May 7, 2020). Here, Hoskins cannot show more than a negligible risk because his designated facility has no current COVID-19 cases, has only ever had one positive test, and the facility follows BOP's extensive prophylactic measures.

Hoskins has been designated to FCI Allenwood Low, a low security facility in Pennsylvania. Since the beginning of the pandemic, there has been only one inmate at FCI Allenwood Low who tested positive for COVID-19. That inmate, who tested positive at intake, has since recovered, and there have been no other positive tests among inmates before or since. As of September 14, 2020, there have been 131 inmate COVID-19 tests at FCI Allenwood Low, in line with BOP protocols (for example, at intake, transfer, release, and where clinically indicated). Thus, the positivity rate at FCI Allenwood Low is approximately .76%. FCI Allenwood Low has as a current population of 1,003 inmates (*see*

https://www.bop.gov/locations/institutions/alf/index.jsp), which is well below its capacity of 1,411 beds. In other words, it is only at 71% capacity.

FCI Allenwood Low follows all of the BOP "Phase 9" protocols to minimize the risk of COVID-19 exposure. That 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. All staff and inmates have been and will continue to be issued face masks and strongly encouraged to wear an appropriate face covering when in public areas when social distancing cannot be achieved.

Every newly admitted inmate is screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. In addition, in areas with sustained community transmission, 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 are 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, 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 ("CARES") Act, enacted on March 27, 2020, BOP may "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement" if the Attorney General finds that emergency conditions will materially affect the functioning of BOP. Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (to be codified at 18 U.S.C. § 3621 note). On April 3, 2020, the Attorney General gave the Director of BOP the authority to exercise this discretion, beginning at the facilities that thus far have seen the greatest incidence of coronavirus transmission. As of September 17, 2020, BOP has transferred 7,646 inmates to home confinement since March 2020. *See* Federal Bureau of Prisons, *COVID-19 Home Confinement Information*, *at* https://www.bop.gov/coronavirus/.

Taken together, all of these measures are designed to—and for FCI Allenwood Low, among others, have succeeded to—mitigate sharply the risks of COVID-19 transmission in BOP institutions.

While Hoskins ascribes FCI Allenwood's low numbers to lack of testing, it appears far more likely to a result of successful mitigation strategies. *See Vence-Small*, 2020 WL 2214226 at *3 (finding that BOP's prevention efforts "make it more likely that the explanation for why there are no positive test results is because of the absence of the COVID-19 virus at FCC Hazelton rather than because it is present but has gone undetected for lack of testing."). Moreover, Hoskins presents "no other reliable evidence of sickness among staff or inmates" that "is likely attributable to the COVID-19 virus." *See id*. Put differently, there is no evidence that BOP is in engaged in a massive cover-up of COVID-19 cases as Allenwood.[4]

[4] Moreover, BOP's testing procedures are consistent with CDC guidance. *See United States v. Gore*, No. 3:10-cr-00250-PGS-1. 2020 WL 3962269, at *4 (D.N.J. July 13, 2020) ("CDC's guidelines do not require global testing of inmates; instead, the CDC describes certain practices that correctional facilities should administer to prevent and

Several courts have indeed recognized the FCI Allenwood facilities' success (both the low and medium security facilities) in preventing the spread of COVID-19. *See, e.g., United States v. Gregor*, No. 3:19-CR-64-VLB-11, 2020 WL 4696597, at *2–3 (D. Conn. Aug. 13, 2020) ("Mr. Gregor has not given the Court any positive evidence to believe that COVID-19 is spreading in [FCI Allenwood Medium]"); *Spruill*, 2020 WL 2113621 at *5 (denying compassionate release, and noting "the absence of any confirmed inmate cases at FCI Allenwood (Medium)") (internal citation omitted); *United States v. Redance*, No. 17-CR-6120L, 2020 WL 4353693, at *2 (W.D.N.Y. July 30, 2020) ("the Allenwood [Low] facility at this point has no COVID-19 cases involving either staff or inmates. It is a relatively small facility and staff there appear to be taking appropriate steps to prevent spread of the virus."); *United States v. Bouyagian*, No. 18 CR. 0099 (NRB), 2020 WL 5077405, at *1 (S.D.N.Y. Aug. 27, 2020) ("the BOP online record indicates that, as of today, there is only one confirmed active COVID-19 case in FCI Allenwood Medium out of over a thousand inmates. This data significantly undermines the defendant's suggestion that he is at an unjustifiably high risk of contracting the disease" (citation omitted)); *United States v. Cooper*, No. 16-CR-567-3 (JSR), 2020 WL 4937477, at *2 (S.D.N.Y. Aug. 24, 2020) ("while Cooper is undoubtedly correct that close quarters and other prison conditions increase COVID-19 transmission risk, thus far the FCI Allenwood Low facility appears to have effectively contained the virus. Since Cooper drafted his motion, the one inmate there with a known active infection has recovered, and there are presently no known COVID-19 cases at Allenwood Low."); *United States v. Absher*, No. 5:00-CR-00005-KDB-3, 2020 WL 5412488, at *2 (W.D.N.C. Sept. 9, 2020) ("With

manage the virus, which sometimes includes testing and quarantining of symptomatic individuals as well as quarantining of asymptomatic individuals.")

no current case amongst the inmate population at FCI Allenwood Medium, requiring Defendant to exhaust his administrative remedies within the BOP before petitioning this Court would not result in any 'catastrophic health consequences' or unduly prejudice Defendant. Generalized concerns regarding the possible spread of COVID-19 to the inmate population at FCI Allenwood Medium are not enough for this Court to excuse the exhaustion requirement, especially considering the BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread at FCI Allenwood Medium."); *United States v. Sinks*, No. 2:16-CR-00104-2-JRG, 2020 WL 5520940, at *2 (E.D. Tenn. Sept. 14, 2020) ("COVID-19 has not affected FCI Allenwood Low to the same degree as other federal facilities throughout the country. The Federal Bureau of Prisons ("BOP"), in fact, reports zero active cases among the prison population and staff at FCI Allenwood Low. Under these circumstances, Mr. Sinks is not entitled to compassionate release."); *United States v. Walker*, No. 04-CR-6082-FPG, 2020 WL 4227040, at *1 (W.D.N.Y. July 23, 2020) ("A reasonable inference to draw from the BOP's data is that the measures at Defendant's facility appear to be working and keeping inmates safe. Defendant offers no persuasive reason why the Court should be skeptical of the data or should draw a contrary inference. The Court concurs with other courts that have concluded that the 'low-to-nonexistent infection rate at Allenwood' militates against a finding that the circumstances are extraordinary and compelling. "); *United States v. Daniels*, Case No. 15-1272020 WL 4674125, at *3 (E.D. Pa. Aug. 12, 2020) (Allenwood Low had no cases; "This lack of viral presence where Daniels is located weighs against compassionate release.").

In short, while the defendant cites some early-pandemic cases that warn of the possibility of rapid spread of COVID-19 through Allenwood, that fear has simply not materialized. If

anything, courts have increasingly recognized that Allenwood has been effective in mitigating the threat, and that COVID-19 does not currently provide a basis for compassionate release for inmates at Allenwood.

That is particularly true where Hoskins would be released to a community with actual evidence of COVID-19 spread. *See, e.g.*, *United States v. Johnson*, No. 2:19-CR00-81-TOR, 2020 WL 2114357, at *2 (E.D. Wash. May 4, 2020) ("[W]here is Defendant safer from the threat—in a facility with no known cases, or in public with thousands of confirmed cases? Fear of the virus does not warrant immediate release."). Here, Hoskins proposes to live either in Dallas, Texas—where he currently resides—or in England.[5] As of September 17, 2020, there were 6,851 *active* cases in Dallas County alone, and there were more than eight thousand active cases just a week ago. *See* Texas COVID-19 Data, *available at* https://dshs.texas.gov/coronavirus/additionaldata.aspx (last visited September 17, 2020). The United Kingdom reported 3,991 new cases on September 16, a 134% increase compared to 14 days earlier. *See* United Kingdom Covid Map and Case Count, *available at* https://www.nytimes.com/interactive/2020/world/europe/united-kingdom-coronavirus-cases.html (last visited September 17, 2020). Thus, the defendant's incarceration does not pose a greater risk to him than that found in the community. *See Ferraioli*, 2020 WL 4284560 at *4 ("Furthermore, there have been no reported cases of COVID-19 at FCI Petersburg Low. By way of contrast, the hamlet of Blue Point, which is where Ferraioli seeks to be released, is located in Suffolk County, New York, which has had more than 42,000 confirmed cases of COVID-19 and more than 2,000 deaths as of July 25, 2020."); *United States v. Seng*, 2020 WL 2301202, at *6-7 (S.D.N.Y. May 8,

[5] As was argued at sentencing, the Court lacks authority to enforce a sentence of home detention in a foreign country.

2020) ("statistics support the inference that Ng would be more at risk of contracting COVID-19 where he released and required to stay in his apartment in Manhattan than he would be by remaining in FCI Allenwood Low," which had no cases).

C. The § 3553(a) Factors Militate Against Commuting Hoskins's Sentence Before It Begins

Even if Hoskins were able to show some small increase in COVID-19-related risk from his medical history, and even if he could show that he would be at greater risk within his BOP facility, the sentencing factors in 18 U.S.C.§ 3553(a)—in particular the seriousness of the offense, promoting respect for the law, and providing just punishment for the offense—militate strongly toward the defendant serving his well-deserved sentence. *See* 18 U.S.C. § 3582(c) (requiring consideration of § 3553(a) factors).

1. The sentencing factors have not changed since the sentence was imposed.

The Government has already presented the Court with its position on the § 3553(a) factors at length, and it will not restate those arguments in full here. *See* Government's Sentencing Memorandum ("Gov. Sen. Mem.") (Doc. 620) at 21-31, Sen. Tr. at 60-65. In brief, Hoskins was a critical piece of a multi-year conspiracy by which Alstom and Marubeni bribed their way into a $118 million contract that was vitally important to Alstom's success. He did so from a perch as a senior executive in a part of Alstom whose very function was to ensure compliance with laws and regulations around the world. But not only did Hoskins fail to ensure compliance, he took an active role in furthering the bribery scheme. While Alstom was certainly beset by corruption during Hoskins's tenure, it was in large part a result of the corruption of its executives, including Hoskins. Indeed, Tarahan was not an aberration; the evidence showed Hoskins's participation in bribery schemes on other Indonesian projects and in other countries under his supervision. And

Hoskins's crimes came at the expense of the citizens of the countries in which he worked, who were robbed of the honest services of their public officials; they encouraged a system that made it impossible for honest and ethical businesses to compete for work; and they undermined confidence in public institutions in the countries in which Hoskins operated.

Consistent with the Government's arguments, the Court acknowledged the seriousness of Hoskins's crime before pronouncing sentence:

> Although Mr. Hoskins was only at Alstom for three years in his role, he assumed responsibility for Alstom's purported antibribery policies, and his activities should have been aimed at carrying out those policies, not defeating them. As an executive who turned a blind eye to the rampant bribery which violated Alstom's own policies as well as the law, he made no protest against it, he accepted the culture of corruption which was widespread at Alstom at that time and which can be clearly seen in the blatant transfers of funds to Mr. Sharafi for payment to Indonesian officials. This was not a momentary lapse in judgment but rather a three-year decision not to abide by his company's written policies, instead to facilitate and enable blatant violations of those policies rendering them a sham.

Sent. Tr. 78-79. Moreover, while Hoskins was sentenced shortly prior to the pandemic, the Court did take note of difficult conditions Hoskins may face in prison, including from PMR, and including conditions he will not now face since he has been designated to FCI Allenwood Low instead of the private contract facility that Hoskins's expert deemed likely. Sen. Tr. 80.

The Court's 15-month sentence was, in its considered judgment, "only that which is necessary to achieve the goals of sentencing." Sen. Tr. 83. None of those § 3553(a) factors have changed since the sentence was imposed such that a reduction in the sentence, which is already less than half of co-defendant Frederic Pierucci, would be warranted. If anything, at least two factors used by the Court to reduce the sentence have vanished—the defendant was *not* designated to a private facility, and he *will* be able to minimize any additional ICE detention by beginning deportation proceedings while serving his sentence. Sen. Tr. 86. In fact, Hoskins's expert was

apparently well aware that a designation to Allenwood would enable parallel deportation proceedings, but chose to withhold that information from the Court. It was only after the Court pronounced sentence that this fact was revealed. While the Government chose not to ask for resentencing at that point, it appears likely that the sentence was affected by this sleight of hand.

2. COVID-19 does not warrant elimination of the sentence.

In essence, Hoskins contends that the mere existence of the COVID-19 pandemic eliminates the need to achieve any of the goals of sentencing, and instead necessitates elimination of his sentence entirely. Hoskins can find no case that has gone that far. Instead, he relies on cases in which the defendants had already served substantial portions of their sentences at the time of compassionate release. *See* Def. Mem. at 16. In *United States v. Zukerman*, 2020 WL 1659880, at *6 (S.D.N.Y. Apr. 3, 2020), the defendant served almost half his sentence, and in *United States v. Williams-Bethea*, 2020 WL 2848098 (S.D.N.Y. June 2, 2020), the defendant had served more than 25% of her sentence. Hoskins then conflates BOP's use of its home confinement power with compassionate release, pointing to the *Cohen* and *Manafort* cases, in which BOP designated the defendants to home confinement after serving less than half of their sentences. Def. Mem. at 17-18. But BOP's authority to designate a prisoner to home confinement is an entirely separate process, and one that involves the BOP's discretion rather than the Court's.

Compassionate "release" before a sentence even starts would entirely undermine the purposes of sentencing and inject unfairness into the sentencing process. *See Rabuffo*, 2020 WL 2523043 at *4 ("The Court further holds that to release Rabuffo so early on in her sentence would contravene the goals of her sentence itself."); *cf. United States v. Patel*, No. 3:17cr164(JBA), 2020 WL 3187980, at *3 (D. Conn. June 15, 2020) ("Finally, Defendant's compassionate release is consistent with the 28 U.S.C. § 3553(a)(1) sentencing factors. Defendant has completed nearly

two-thirds of his sentence… . He is a month away from home confinement, minimizing any sentencing disparities between him and similarly situated defendants."). Many courts have found similarly, that compassionate release is not appropriate under § 3553(a) where a defendant has not served a significant portion of his sentence. *See, e.g.*, *United States v. Pawlowski*, 967 F.3d 327 (3d Cir. 2020) (affirming denial of compassionate release from a 15-year sentence after less than two years); *United States v. Brady*, No. S2 18 Cr. 316 (PAC), 2020 WL 2512100 (S.D.N.Y. May 15, 2020) (court will not give "windfall" and reduce 36-month drug sentence after 8 months; will reevaluate if situation at prison changes); *United States v. Carter*, No. 18 Cr. 390 (PAE), 2020 WL 3051357, at *3 (S.D.N.Y. June 8, 2020) (case in which the defendant had only served 24 months of 75-month drug sentence "stands in sharp contrast to those in which the Court has ordered the release of heightened-risk inmates," where an inmate has "served most of his or her term of incarceration"); *United States v. Zubiate*, No. 18-cr-442 (AJN), 2020 WL 3127881 (S.D.N.Y. June 12, 2020) (defendant presents risk factor of severe obesity, but release after only 26.5 months of 102-month sentence for major drug offenses "would substantially undermine the § 3553(a) factors").

Hoskins hyperbolically claims that a prison sentence under the current conditions is akin to a death sentence, and that the Court should consider that in the context of the § 3553(a) factors. Def. Mem. at 34-35. Yet Hoskins has shown nothing of the sort—at best, the evidence shows a negligible risk of contracting COVID-19 at FCI Allenwood (far less than in the community), and no evidence that Hoskins himself is uniquely vulnerable to a severe reaction to the virus. On the record before the Court, Hoskins can serve his sentence—as he claims to desire—with minimal risk from the pandemic.

3. Resentencing to supervised release with home confinement distorts the purposes of supervised release.

Hoskins's solution to his concerns over his impending incarceration, that he "serve" his sentence on home confinement as a condition of supervised release, misunderstands the purpose of supervised release. According to the Supreme Court, "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). Thus, "[s]upervised release is not, fundamentally, part of the punishment; rather, its focus is rehabilitation." *United States v. Aldeen*, 792 F.3d 247, 252 (2d Cir. 2015). Indeed, while under § 3553(a)(2)(A) a court is obliged to impose a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," the supervised release statute explicitly *excludes* consideration of those factors. *See* 18 U.S.C. § 3583(c) (listing factors to be considered and excluding 18 U.S.C. § 3553(a)(2)(A)). Likewise, any restriction on liberty as condition of supervised release—for example, home confinement—must be "no greater . . . than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)," again excluding the "just punishment" provision of section (a)(2)(A). 18 U.S.C. § 3583(d)(2). The Sentencing Guidelines instruct that no supervised release should be ordered where it "is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." U.S.S.G. § 5D1.1(c). Indeed, supervised release is unnecessary in that circumstance since reentry into the community is not a consideration where the defendant is to be deported. The commentary explains that, notwithstanding that guideline, "[t]he court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and

circumstances of a particular case." U.S.S.G. § 5D1.1 cmt. n. 5. Again, there is no reference to supervised release serving a retributive purpose.

Here, the Court did not order supervised release for good reason. Hoskins is an alien who will be deported upon completion of his sentence, and thus does not need assistance in transitioning into society, and will likely be deported anyway. *See* Sen. Tr. at 42-43, 84. The rehabilitative and deterrent purposes of sentencing, permitted to be considered for supervised release, are not present here, and did not factor into the Court's sentence. Sen. Tr. 82. Moreover, none of those factors have changed since the Court imposed sentence. In short, both the statute and the Guidelines suggest that supervised release is inappropriate in this case.

Converting Hoskins' sentence to supervised release amounts to nothing more than jury-rigging the supervised release process to serve a function that is otherwise designated to the Bureau of Prisons. Even after the First Step Act, Second Chance Act, and CARES Act, the Bureau of Prisons has sole discretion over the place of incarceration and, as a result, whether to order transfer to home confinement. *See, e.g.*, *United States v. Arena*, No. 18 CR 14 (VM), 2020 WL 5439979, at *1 (S.D.N.Y. Sept. 9, 2020) ("[Home confinement] is committed by statute to the discretion of the Bureau of Prisons and the Court lacks authority to order such a transfer."); *Sclafani v. Kane*, No. 20-cv-0463, 2020 WL 4676414, at *3 (E.D.N.Y. August 12, 2020) ("The [Second Chance Act] the Act did not alter the BOP's discretion and did not give prisoners an enforceable liberty interest to pre-release home confinement."); *United States v. Ogarro*, No. 18-CR-373-9 (RJS), 2020 WL 1876300, at *6 (S.D.N.Y. Apr. 14, 2020) ("[T]he authority the CARES Act and the Attorney General have given to the BOP to permit prisoners to finish the remainder of their sentence in home confinement" under 18 U.S.C. § 3624(c)(2) is "exclusively within the discretion

of the BOP; the Court lacks authority to order" home confinement"). While 18 U.S.C.§ 3582(c)(1)(A) allows a court reducing a sentence to impose an additional period of supervised release to the extent of the unserved portion of the original sentence, it does not enable the court to do so for reasons other than those permitted by law. In other words, imposing additional supervised release (with or without home confinement) may assuage a judge's discomfort with releasing a defendant into society who might still need additional deterrence or rehabilitation, but the statute does not authorize imposing home confinement as a form of punishment, as Hoskins now proposes. Instead, Hoskins is free to apply to the BOP for home confinement once he is incarcerated, and the BOP will apply its own standards—expanded as they are under the CARES Act—to determine his eligibility. Hoskins should receive no greater consideration than every other defendant who would rather not be incarcerated, but must follow the rules in requesting home confinement as part of a retributive sentence.

4. Hoskins's concerns may be addressed through delayed reporting.

Instead, if Hoskins does not want to surrender to the Bureau of Prisons, he has a much more obvious option, and one that is contemplated by the law. Should Hoskins wish to delay his incarceration out of fear from the pandemic, he may again move under 18 U.S.C. § 3143(a)(1) without objection from the Government. While this may separate him from his family for longer than he may otherwise wish, that is a burden that is no greater than—and in many cases much less than—other American and British citizens during these trying times. But he should not be permitted to simply abdicate responsibility for his crime altogether and sail back to England never having served a day in prison.

Nor should his time spent on release—now or in the future—be factored into any analysis. While Hoskins characterizes his current situation as home confinement, that is not actually a

condition of his release. The Court determined that he is required to remain in the United States pending his incarceration, but Hoskins was free to dictate where he would live and with whom. That he feels hemmed in by his living situation does not mean he has been serving prison time. Even if he were on home confinement as a condition of bail, that exists as an alternative to detention and has nothing to do with service of a sentence of imprisonment. *See United States v. Traitz*, 807 F.2d 322, 325 (3d Cir. 1986) (examining detention versus other conditions of bail); *United States v. Zackular*, 945 F.2d 423, 425 (1st Cir. 1991) (that home confinement is included as a condition of probation, not as a substitute for incarceration, shows Congress considered home confinement does not "come within the ambit of 'official detention'"). Hoskins should not get credit for taking precautions that he believes are necessary to avoid contracting COVID-19. Moreover, Hoskins's COVID-19 precautions are no greater than those being taken by responsible citizens around the world, and Hoskins deserves no greater recognition or sympathy for living under the same difficult circumstances as most others (and likely less difficult than so many others).

IV. Conclusion

For the reasons set forth above, the Government respectfully requests that the Court deny Hoskins's motion for elimination of his sentence.

Respectfully Submitted,

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/s/

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CERTIFICATE OF SERVICE

This is to certify that on September 18, 2020, a copy of the foregoing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail on anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

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