

1 DAVID L. ANDERSON (CABN 149604)
United States Attorney

2 HALLIE HOFFMAN (CABN 210020)
3 Chief, Criminal Division

4 ROBERT S. LEACH (CABN 196191)
ADAM A. REEVES (NYBN 2363877)
5 WILLIAM FRENTZEN (LABN 24421)
Assistant United States Attorneys

6 450 Golden Gate Avenue, Box 36055
7 San Francisco, California 94102-3495
Telephone: (415) 436-6959
8 Fax: (415) 436-6753
William.frentzen@usdoj.gov

9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 UNITED STATES OF AMERICA,) Case No. CASE NO. CR 16-462 CRB
15 Plaintiff,)
16 v.) UNITED STATES' OPPOSITION TO MOTION
17 SUSHOVAN TAREQUE HUSSAIN,) FOR RESENTENCING [ECF NO. 624]
18 Defendant.) Date: October 7, 2020
Time: 1:00 p.m.
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INTRODUCTION

1
2 Following a trial, the jury found defendant Hussain guilty of 16 felony counts related to his \$11
3 billion fraud. The Court upheld the jury's verdict and sentenced Hussain to 60 months' imprisonment.¹
4 Hussain appealed. The Court ordered Hussain to begin serving the sentence, finding that Hussain raised
5 no substantial issues for appeal. Hussain appealed that decision too, and the Ninth Circuit Court of
6 Appeals ultimately granted Hussain's request for bail. ECF No. 616. The Ninth Circuit then upheld the
7 jury's verdict as well as the Court's rulings before and during trial. Now, pretending that he has been
8 punished sufficiently by staying in a penthouse apartment in Nob Hill by his own choice, Hussain asks
9 the Court to commit legal error by resentencing him.

10 By all accounts, including his own, Hussain is "a fitness and health fanatic" and "generally in
11 good physical health." See ECF No. 533 at 20; Presentence Investigation Report ("PSR") ¶ 77. But in
12 an act of unrivaled and privileged opportunism, Hussain insists that he be ordered to report to serve his
13 sentence while simultaneously claiming that he requires compassionate release due to the dangers of
14 COVID-19. Because Hussain cannot show his "mild asthma" (the words of the PSR) puts him at an
15 increased risk of serious illness from COVID-19, because he has not served a single day of his sentence,
16 and because he cannot otherwise meet his heavy burden to show "extraordinary and compelling reasons"
17 warranting a sentence reduction, the Court should deny Hussain's motion. The Court should order
18 Hussain to surrender to the Bureau of Prisons ("BOP") to serve his sentence as he now demands. To the
19 extent the Court finds Hussain's mild asthma is a basis for relief, the Court should allow Hussain to
20 continue to live in his penthouse (as paid for by Mike Lynch and Invoke Capital) and to report to BOP
21 when the COVID-19 situation is controlled. In all events, the Court should not reward Hussain's
22 obvious ploy to gain a personal advantage from the ongoing pandemic.

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27 ¹ The 60-month sentence was below the recommendation of the advisory Guidelines as determined
28 by the Court (87 to 108 months). The Court varied downward because of a concern that Hussain would
serve his sentence at a low-security facility rather than a minimum-security camp, unlike similarly
situated offenders. ECF No. 562 at 51-52.

ARGUMENT

A. Legal standard

The Court has significant experience with the standards for compassionate release. *See, e.g., United States v. Johnson*, No. 16-cr-00430-CRB-1, 2020 WL 5702123 (N.D. Cal. Sept. 24, 2020); *United States v. Flores*, No. 17-cr-00373-CRB-2, 2020 WL 5630263 (N.D. Cal. Sept. 21, 2020); *United States v. Makela*, No. 19-cr-00215-CRB-1, 2020 WL 3892865 (N.D. Cal. Jul. 10, 2020); *United States v. Kelley*, No. 15-cr-00444-CRB-2, 2020 WL 2747887 (N.D. Cal. May 27, 2020); *United States v. House*, No. 14-cr-00196-CRB-1, 2020 WL 2557031 (N.D. Cal. May 20, 2020). The government will not repeat them other than to note the following.

First, asthma alone does not increase one’s risk for severe illness from COVID-19. According to the Centers for Disease Control and Prevention (“CDC”), “[h]aving *moderate-to-severe* asthma may increase your risk for severe illness from COVID-19.” *See* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (emphasis added) (lasted visited Sept. 30, 2020). The CDC distinguishes moderate-to-severe asthma from other conditions like cancer, chronic kidney disease, and Type 2 diabetes mellitus *known* to increase risk for severe illness from COVID-19. *Id.*² Accordingly, dozens of courts across the country have denied compassionate release to defendants like Hussain who fail to show their asthma is severe or moderate and not controllable. *See United States v. Evans*, No. 4:17-CR-00355, 2020 WL 4700699, at *3 (M.D. Pa. Aug. 13, 2020) (“These rather unremarkable records demonstrate that Evans’ asthma is well-controlled, the Court therefore concludes

² Additionally, there is evolving science around which conditions render a person most susceptible to COVID-19, and some recent sources suggest the CDC’s identification of moderate-to-severe asthma may not be warranted. *See* Molly Walker, *Asthma and COVID-19 Risk: Good, Bad, or Indifferent? – CDC says condition increases risk of severe outcomes; emerging evidence suggests otherwise*, MEDPAGE TODAY, May 5, 2020 (“[R]esearch indicates asthma patients with COVID-19 do not appear to have a higher rate of hospitalization or mortality compared with other COVID-19 patients”), available at <https://www.medpagetoday.com/infectiousdisease/covid19/86323>; Danny Hakim, *Asthma Is Absent Among Top Covid-19 Risk Factors, Early Data Shows*, N.Y. TIMES, available at <https://www.nytimes.com/2020/04/16/health/coronavirus-asthma-risk.html> (last updated Apr. 20, 2020). While a recent study found that young patients with asthma who developed severe respiratory symptoms “needed a ventilator to help with breathing five days longer than patients without asthma,” the study also found that asthma “wasn’t linked with a greater risk of premature death or with acute respiratory distress syndrome.” Steven Reinberg, *Asthma Ups Ventilator Needs of Younger Adults with COVID-19: Study*, HEALTHDAY NEWS, available at <https://consumer.healthday.com/senior-citizen-information-31/age-health-news-7/asthma-ups-ventilator-needs-of-younger-adults-with-covid-19-study-757804.html> (last updated May 20, 2020).

1 that Evans has not shown that she suffers from moderate or severe asthma, as is her burden.”); *United*
 2 *States v. Pomales*, No. 16-CR-826-LTS, 2020 WL 4677596, at *2 (S.D.N.Y. Aug. 12, 2020) (denying
 3 release and stating “while the severity of [defendant’s] asthma fluctuates and the frequency of his use of
 4 Albuterol varies from once a week or less to several times per week or more, he has generally been able
 5 to manage his condition with his inhaler and other preventative measures, and he has never been
 6 hospitalized or intubated on account of his asthma” (citations omitted)); *United States v. Alexander*, No.
 7 6:18-cr-124, 2020 WL 4345326, at *2 (M.D. Fla. Jul. 29, 2020) (“Nothing in [defendant’s] medical
 8 records or Motion demonstrates she suffers daily symptoms or that her asthma interferes with her daily
 9 activities, which could show her asthma is ‘moderate to severe.’”); *United States v. Miles*, No. 2:17-cr-
 10 0127-KJM, 2020 WL 3256923, at *3 (E.D. Cal. Jun. 16, 2020) (“While defendant presents evidence to
 11 support the conclusion his asthma is chronic and something he has lived with since childhood, he does
 12 not present evidence or argument his condition is ‘moderate to severe.’ BOP’s clinical practice
 13 guidelines suggest those suffering from ‘moderate persistent’ to ‘severe persistent’ asthma conditions
 14 exhibit, at a minimum, daily symptoms, nighttime awakenings, some limitation or interference with
 15 normal activity and varying degrees of lung functionality. . . . [T]he records suggest his condition is not
 16 ‘moderate to severe,’ in part because he only recently requested treatment. Even assuming without
 17 deciding his asthma rises to the level of ‘moderate to severe,’ defendant provides no explanation as to
 18 how his condition is responding to any treatment he may have received, a factor relevant to his
 19 allegations of heightened risk.” (citation omitted)); *Woolem v. United States*, No. 13-00471 SOM, 2020
 20 WL 2820140, at *5 (D. Haw. May 29, 2020) (“While there is no dispute that Woolem has asthma, the
 21 court cannot discern from the record the severity of his asthma. . . . And the court does need to consider
 22 how well even moderate or severe asthma is or is not being controlled by medication or other treatment,
 23 as well as any effect the treatment might have on complications arising from COVID-19.”).³

24 Second, courts of appeal have affirmed the denial of compassionate release to inmates who have
 25 not served significant portions of their sentence but who nonetheless meet the high burden of showing
 26 “exceptional and compelling reasons” for a reduction. See *United States v. Pawlowski*, 967 F.3d 327 (3d

28 ³ See also Appendix A.

1 Cir. 2020); *United States v. Chambliss*, 948 F.3d 691, 693-694 (5th Cir. 2020). For example, in
 2 *Pawlowski*, the Third Circuit affirmed the denial of compassionate release for a defendant who had
 3 served less than two years of his 15-year sentence, but whose medical conditions (hypertensive heart
 4 disease, chronic obstructive pulmonary disease, and more) placed him at increased risk should he
 5 contract COVID-19. 967 F.3d at 328-29. In *Chambliss*, the Fifth Circuit affirmed the denial of
 6 compassionate release for a terminally ill defendant who had served less than half of a 30-year sentence.
 7 948 F.3d at 693-694.

8 These principles provide no basis for the resentencing Hussain seeks.

9 **B. Hussain is not an appropriate candidate for compassionate release**

10 Hussain is basically a very healthy individual. At sentencing, Hussain’s own letters of support
 11 presented a healthy, active athlete:

- 12 • “[Hussain] would often go running before work. He is very health conscious and always
 13 remarks on his balanced diet and exercise. He would compete with the employees in the
 14 office on running times for half marathons.” ECF No. 533 at 141.
- 15 • “[Hussain] is a fitness and health fanatic who would offer help and guidance to me on my
 16 diet and keeping healthy whilst in the sedentary job that I do.” *Id.* at 20.
- 17 • “[Hussain] is an avid runner. Fitness and a healthy lifestyle is important to him. We
 18 have conversations about exercising quite often since I myself like to be active. . . . He
 19 doesn’t hesitate to try new things, even if it is as unusual as ice fishing and cross country
 20 skiing.” ECF No. 532 at 151-52.
- 21 • “[Hussain] has always been a keen runner, setting himself challenging training targets
 22 and achieving these. In 1994 [he] entered the London Marathon [T]he British
 23 weather was truly freezing, but [he] persevered, covered the 26.2 miles and FINISHED in
 24 a very respectable time.” *Id.* at 145.
- 25 • “[Hussain] is a very busy person but likes whenever possible to relax by taking a long
 26 run/jog as regularly as he is able, he claims that running is like eating to many of us, as he
 27 finds it hard to function efficiently if he cannot partake regularly!” *Id.* at 217.
- 28 • “He has a never-ending supply of energy in both physical terms (an avid runner) and in
 ensuring that business opportunities are not missed, dropped or lost.” ECF No. 533 at
 217.
- “10 years my senior I also admire his energy levels outside work where he frequently
 runs 10km at a very competitive pace.” *Id.* at 79.
- “When not working or engaged in family activities, [Hussain] can, without fail, be found
 jogging for hours, a great pastime of his, which he is passionate about.” ECF No. 532 at
 229.

- 1 • “Despite the stress of [Hussain’s] legal travails, which have lasted years, he has shown remarkable resilience and continued interest in life. He continued to run, including a recent half marathon” *Id.* at 130.
- 2
- 3 • “[H]e is infinitely more likely to boast about having run a 5-minute mile than [his upbringing].” ECF No. 533 at 175.
- 4
- 5 • “He often got up at the crack of dawn to run several miles before the work day started.” ECF No. 532 at 207.
- 6
- 7 • “My bond with [Hussain] formed quickly based on our passion for outdoor sports conditioning. For [Hussain], this is cross-country running while my sport of choice is cycling.” *Id.* at 231.
- 8
- 9 • “Jogging and exercise continues to be a shared pastime.” *Id.* at 11.
- 10 • “When work was done and even on his days off he runs and always encouraged me to do the same. We still run together virtually throughout the week and share our progress with one another.” ECF No. 533 at 45.

11 In his sentencing brief, Hussain himself argued he “has hewed so closely to his bail conditions that when
12 he runs along the Embarcadero, he crosses to the west side of the street to steer clear of the port.” ECF
13 No. 536 at 5:13-14. Neither the sentencing brief nor Hussain’s letters of support comment on asthma.

14 The PSR states:

15 The defendant advised he is generally in good physical health, but does have a few
16 ailments. He suffers from *mild asthma*, for which he *has* an inhaler, and for which he
17 takes Salbutamol *when* he has difficulty breathing. The defendant is an active long-
18 distance runner He is currently in physiotherapy for his ankle pains. The defendant
19 also has elevated LDL cholesterol, although he currently does not take any medication for
20 it. . . . [With respect to his mental and emotional health, Hussain] advised his main
21 coping mechanism has been actively running and relying on his friends and family for
22 support.

23 PSR ¶¶ 77-78 (emphasis added).

24 In his motion, Hussain himself cannot muster the chutzpah to claim he has severe-to-moderate
25 asthma. The most he can say is he “suffers from asthma *severe enough* to require use of a Salbutamol
26 inhaler.” ECF No. 624 at 11:7-8 (emphasis added). The sole basis Hussain gives for the Court to find
27 his condition rises to the level of a “terminal illness,” or a medical condition “that substantially
28 diminishes [his] ability . . . to provide self-care [in prison] . . . from which he . . . is not expected to
recover,” is (1) an unexplained, one-page medical record from 2016 prescribing medication, apparently
to be taken “as required” and “as directed” and (2) a file titled “Sept 2020 Letter from Doctor re
Asthma_v2.pdf” with a one-paragraph note from a doctor at One Medical dated September 4, 2020.

1 This evidence falls far short of meeting Hussain’s heavy burden to show extraordinary and
 2 compelling circumstances to modify this Court’s judgment. Hussain’s one-paragraph doctor’s note
 3 raises more questions than it answers. Where is v1? Why did Hussain see a doctor on September 4,
 4 2020, *after* the Ninth Circuit affirmed the conviction on August 26, 2020, and two days *after* he moved
 5 to extend the time to file his petition for rehearing *en banc*? How often has he seen the doctor? How
 6 often does Husain actually use an inhaler? How does the average peak flow cited by the doctor compare
 7 to prior readings over time? Are there prior readings? Why does the doctor write Hussain was seen to
 8 evaluate “his conditions which include moderate asthma”? Is that the doctor’s opinion? Was he told to
 9 write that? What records exist between 2016 and 2020? Did Hussain regularly renew his medications?
 10 What other doctors has Hussain seen? Does the doctor believe Hussain suffers from a “terminal
 11 illness,” or a condition “that substantially diminishes [his] ability . . . to provide self-care [in prison] . . .
 12 from which he . . . is not expected to recover?” Nothing in the records suggest Hussain has daily
 13 symptoms, nighttime awakenings, symptoms that interfere with daily activities, or symptoms that would
 14 otherwise indicate severe or moderate asthma.

15 Such questions aside, Hussain’s doctor’s note confirms that Hussain’s mild asthma is
 16 controllable. *See* Exhibit B to Declaration of Jan Nielsen Little in Support of Motion to Order U.S.
 17 Probation to Transmit Medical Records to the Bureau of Prisons (“[H]e is taking two inhalers to help
 18 *control* . . . this condition. . . . I am recommending that he continue these medications to *control* any
 19 exacerbation of his asthma.”) (emphasis added). “Chronic conditions that can be managed in prison are
 20 not a sufficient basis for compassionate release.” *See United States v. Luck*, No. 5:12-cr-00888-EJD-2,
 21 2020 WL 3050762, at *2 (N.D. Cal. Jun. 8, 2020); *United States v. Ayon-Nunez*, No. 1:16-cr-00130-
 22 DAD, 2020 WL 704785, at *3 (E.D. Cal. Feb. 12, 2020). Hussain has put forth no facts to suggest that
 23 his mild asthma cannot be treated and managed in BOP, or that his condition and symptoms approach
 24 those in comparable cases where severe asthma was found to warrant relief.⁴ Put simply, a “mild”

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 26 ⁴ In *United States v. Burton*, No. 18-cr-00094 JSW-1, 2020 WL 4035067 (N.D. Cal. Jul. 7, 2020),
 27 the defendant suffered from congestive heart failure, obesity, and asthma and had contracted COVID-19.
 28 The Court found he did not appear to be receiving adequate care at the facility. *Id.* at *2. In *United*
States v. Fabris, No. 17-cr-386-VC, 2020 WL 3481708, at *1 (N.D. Cal. Jun. 25, 2020), the Court
 found, with no apparent dispute or analysis, that Fabris suffered from severe asthma. In *United States v.*
Fowler, No. 17-cr-412-VC, 2020 WL 3034714, at *1 (N.D. Cal. Jun. 6, 2020), the government conceded
 on the facts there were extraordinary and compelling reasons warranting release, and there was no

1 “control[led]” medical condition in an otherwise healthy marathon runner is not an extraordinary and
2 compelling reason to upend this Court’s judgment. The claim appears to be overstated and ginned up
3 for the benefit of this motion.

4 Hussain also notes he is in his mid-50s, but Hussain’s age does not place him in the category that
5 the CDC has delineated as high risk from COVID-19. *See, e.g., United States v. Ocon*, No. 13-cr-2530-
6 JAH, 2020 WL 5106667, at *3 (S.D. Cal. Aug. 31, 2020) (denying relief to defendant with “mild
7 intermittent” asthma and stating “Defendant is only 50 years old and is not in a high risk age group that
8 would make him more vulnerable to contracting COVID-19”). The CDC states: “8 out of 10 COVID-
9 19 related deaths reported in the United States have been among adults aged 65 years and older.”
10 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Sept.
11 30, 2020). Hussain’s age is not a basis for compassionate release.

12 Hussain’s efforts to overplay his asthma should be rejected by the Court. Certainly, that claim
13 should not be the basis to wipe away a well-deserved 60-month sentence for committing one of the
14 largest frauds in the history of the Northern District of California. In the event that the Court believes
15 that Hussain’s mild asthma is enough to warrant anything other than commitment to BOP to serve his
16 sentence, the government would request additional time to 1) have Hussain examined by a neutral
17 physician of the government’s choosing, 2) opportunity to cross-examine Hussain’s physician, and 3) to
18 have a full hearing about what Hussain’s condition would mean in terms of COVID-19 exposure in
19 custody and out of custody.

20 In short, there is nothing here to show that Hussain is not a perfectly healthy individual who is at
21 no heightened risk from exposure to COVID-19 as compared to other defendants. Hussain has certainly

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24 meaningful analysis of the defendant’s conditions. In *United States v. Lee*, 445 F. Supp. 3d 272, 273
25 (N.D. Cal. 2020) (Illston, J.), the defendant declared under oath he had been hospitalized for asthma and
26 “experiences wheezing every day, significant shortness of breath from time to time, and that he suffers
27 breathing problems, shortness of breath and airway obstruction almost every night.” The Court was
28 “very troubled by the fact that defendant has not had access to his inhaler for the last several weeks.” *Id.*
at 274. Lee had served eight months of his one-year sentence and was two months from release. *Id.* at
273. In *United States v. Simpson*, No. 11-cr-00832-SI-3, 2020 WL 2323055 (N.D. Cal. May 11, 2020),
the defendant had diabetes, had served 80% of her sentence, and was 62. In *United States v. Hernandez*,
451 F. Supp. 3d 301 (S.D.N.Y. Apr. 2, 2020), the request was unopposed, there was no analysis of the
defendant’s symptoms, and he had four months remaining on the sentence.

1 not demonstrated the “extraordinary and compelling reasons” to wipe away a criminal sentence as
2 required by the statute.

3 **C. Compassionate release cannot be ordered for a defendant who has not surrendered to BOP**

4 A sentencing court’s authority to modify an already imposed sentence is limited to those
5 circumstances that are permitted by statute, and there are very few of those. *Dillon v. United States*, 560
6 U.S. 817, 824 (2010). Here, Hussain can only attempt to shoehorn his situation into 18 U.S.C. § 3582.
7 But Hussain’s argument fails since he is not a candidate for compassionate release.

8 Reducing Hussain’s 60-month sentence to 60 months of home confinement does not reduce an
9 already served sentence, it eliminates it. A reduction of sentence is all that § 3582(c)(1)(A) permits by
10 its plain language. Further, § 3582(c)(1)(A) was designed for inmates already serving a sentence, not
11 defendants who have never served any time.

12 That statute requires first that the Court find “extraordinary and compelling reasons [that]
13 warrant . . . a reduction” to a sentence. 18 U.S.C. § 3582(c)(1)(A). As described above, Hussain has no
14 such reasons. But even if he did, his current request would invite error. Section 3582(c)(1)(A)(i) allows
15 a court to “**reduce the term of imprisonment** (and . . . impose a term of probation or supervised release
16 with or without conditions that does not exceed the unserved portion of the original term of
17 imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are
18 applicable.” (emphasis added). A term of imprisonment is not the original sentence, it is the serving of
19 the sentence through incarceration and a reduction of a term goes to the service of that sentence, not to
20 the sentence’s original severity. Section 3582(c)(1)(A)(i) “by its plain terms . . . applies only to those
21 defendants who have begun serving their term of imprisonment at a BOP facility.” *United States v.*
22 *Konny*, No. 19-cr-283 (JGK), 2020 WL 2836783 at *2 (S.D.N.Y. 2020).

23 Hussain’s request is also foreclosed by the decision in *Dillon*. In *Dillon*, the statute at issue was
24 § 3582(c)(2) rather than § 3582(c)(1)(A), but the Court interpreted the same language of “reduce the
25 term of imprisonment.” There, the Court held that could not be interpreted as authorizing “a plenary
26 resentencing.” *Dillon*, 560 U.S. at 826. A plenary resentencing is exactly what Hussain is requesting of
27 this Court and to do so would both be unwarranted and erroneous. Hussain’s argument is not that he
28 should be permitted release from or a reduction in the term of imprisonment but that he receive a

1 complete resentencing in which his sentence is reduced to only home confinement – home confinement
 2 in luxurious accommodations that most people never get to experience. The Court should deny
 3 Hussain’s motion for that reason alone.

4 Similarly, Hussain completely ignores the role Congress intended for the Bureau of Prisons to
 5 make in these decisions. While the First Step Act empowered courts to intervene where compassionate
 6 release was appropriate, it also retained the role of the Bureau of Prisons in making the first
 7 determination regarding whether release from a term of imprisonment was appropriate. The BOP
 8 obviously can only serve that function when reviewing a particular inmate’s situation and condition in
 9 light of the current incarceration of that inmate. Hussain cynically made a demand of BOP for
 10 compassionate release prior to even showing up to a BOP facility. Hussain then claims the email which
 11 he, of course, received from BOP indicating that they could do no such thing for someone who was not
 12 an inmate as “exhausting” his remedies through BOP. The Court should not award this type of illegal
 13 gamesmanship on the part of Hussain. Congress intended that this remedy would only be available for
 14 actual inmates and that the BOP would continue to serve its role as the initial gatekeeper of motions to
 15 reduce sentence on the basis of compassionate release. The Court should give full meaning to both of
 16 those requirements. Hussain’s current motion, therefore, must be denied.

17 **D. Hussain’s additional arguments fail**

18 Perhaps recognizing that mild asthma is not a basis to upend a federal criminal judgment after a
 19 fair trial and a fair appeal, Hussain repeatedly asks the Court to “reconsider,” “reevaluate,” “revisit,” and
 20 “take a fresh look [at]” the sentence. ECF No. 624 at 1:7-8, 2:18-19, 7:1-2, 8:15-18. These words lay
 21 bare what Hussain wants: a do-over.⁵ That is not what compassionate release is for. “Compassionate
 22 release . . . gives courts . . . the ability to account for the tragically unforeseeable: terminal illness,
 23 disability, the deaths of spouses and partners, and the deterioration of mental and physical health due to
 24 age.” *United States v. Osorto*, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020) (Breyer, J.); *id.* (“The
 25 unthinkable happens every day, albeit on a personal rather than global scale. A terminal diagnosis. The
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27 ⁵ The sentencing proceedings here were extensive. Hussain filed four briefs in advance of
 28 sentencing. ECF Nos. 486, 487, 507, 509. The Court held an evidentiary hearing on the Guidelines, and
 received at least three additional briefs in connection with that. ECF Nos. 516, 520, 521. Both sides
 filed lengthy sentencing memoranda and replies. ECF Nos. 535, 536, 539, 540, 542.

1 death of a parent caring for his or her children alone while their other parent is imprisoned. An accident
2 that renders a person unable to feed, bathe, or move without assistance. Compassionate release exists to
3 address these calamities as well.”). None of those conditions exists here. Hussain is “a fitness and
4 health fanatic” and “generally in good physical health.” There is no reason to think he is exceptionally
5 vulnerable to severe illness from COVID-19 or that BOP will be unable to care for him.

6 Hussain argues “prison will also be much, much harder” today than it would have been at the
7 time of sentencing. ECF No. 624 at 1:18-19. Hussain overstates matters, but in any event, they have
8 nothing to do with compassionate release. If an initial quarantine and temporary limits on showers,
9 work, educational programs, and visitation rise to the level of extraordinary and compelling reasons for
10 compassionate release, “reconsider[ing],” “reevaluat[ing],” “revisit[ing],” and “tak[ing] a fresh look
11 [at]” every sentence imposed by federal courts before the onset of COVID-19 would be necessary.
12 Hussain’s argument proves way too much.

13 Hussain also describes the toll on his family. Obviously those consequences are deeply
14 unfortunate, as this Court recognized at sentencing. ECF No. 562 at 45 (“Every defendant who comes
15 before me, the tragedy of their conduct is what I call the unintended consequences of their conduct; that
16 is, that it has an enormous impact on those people who need, find support, and love the person who is
17 about to be sentenced, and that, indeed, is a fact of life [I]f I could give a sentence that just
18 addresses you without consequences to members of your family, your friends, your community, I would.
19 It’s not my intention to punish them but, indeed, they are punished by a sentence.”). But the Court
20 recently rejected the claim that family circumstances not set forth by Sentencing Commission suffice as
21 a basis for “extraordinary and compelling circumstances.” *Flores*, 2020 WL 5630263 at *2. More
22 fundamentally, those are consequences of *Hussain’s* choices. Hussain chose to commit his crimes.
23 Hussain chose to request bail pending appeal. When it was denied, he chose to appeal it to the Ninth
24 Circuit.

25 Finally, absent from Hussain’s motion is any acknowledgement of why we are here: the serious
26 crimes he committed, the significant loss he inflicted, and the victims, who have waited years for justice
27 to be served. Granting compassionate release to a “fitness and health fanatic,” or otherwise reducing the
28 sentence, based on mild asthma would promote disrespect for the law and not provide for just

1 punishment, nor would a reduction reflect the seriousness of the offense, one of the largest frauds in the
2 history of the Northern District.

3 **E. If Hussain is truly at risk the Court may order him to report when COVID-19 is**
4 **sufficiently controlled**

5 It is the height of gamesmanship for Hussain to claim that he has already been punished and that
6 he should be allowed to report to serve his sentence immediately. Both the government and the Court
7 gave Hussain that opportunity when the government moved for his commitment to BOP pending appeal
8 and the Court agreed. Instead of reporting, Hussain moved for release pending appeal and then appealed
9 the Court's decision. As a result, Hussain was left free to reside in a rent-free penthouse on Nob Hill
10 during the full pendency of the appeal. That was Hussain's decision.

11 Now, Hussain is pretending that he has already been sufficiently punished by his state of release.
12 He suddenly demands that he must be ordered to report immediately. The truth is that Hussain could
13 have served a substantial portion of his sentence already if that was actually what he wanted. Instead, he
14 calculated that he can play a game of chicken with the Court by demanding to report to BOP while the
15 pandemic is still in its current state. The Court should either order Hussain to report immediately or, in
16 the event that the Court is actually concerned that Hussain's mild asthma makes him more susceptible to
17 severe illness from COVID-19 than the other defendants who are ordered to report (or simply detained)
18 daily, the Court may allow Hussain to have a later report date.

19 **CONCLUSION**

20 The government firmly believes that Hussain should report immediately to BOP and serve his
21 entire 60-month sentence. In the event that the Court disagrees because of Hussain's mild asthma, the
22 government requests that the Court simply allow Hussain to remain on bail until he can be made to
23 report under conditions that the Court finds appropriate. Otherwise, this Court will have allowed
24 Hussain to falsely and cynically use the pandemic and the deaths of others for his own gain.

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DATED: September 30, 2020

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

/s/

ROBERT S. LEACH
ADAM A. REEVES
WILLIAM FRENTZEN
Assistant United States Attorneys

United States v. Hussain, CR 16-462 CRB
Appendix A to Opposition to Motion for Resentencing

- *United States v. Ramirez*, No. 2:11-CR-00190-MCE, 2020 WL 553450, at *2 (E.D. Cal. Sep. 15, 2020) (denying relief where “Defendant has failed to demonstrate that his asthma substantially diminishes his ability to provide self-care. Although he was hospitalized as a child, Defendant himself states . . . that he ‘presently controls his flare-ups with an inhaler.’”)
- *United States v. Freedland*, No. 15-175-1, 2020 WL 4926542, at *4 (E.D. Pa. Aug. 21, 2020) (“[Defendant is] an active 37-year old who prioritizes a dynamic lifestyle and whose asthma is well managed. In light of the CDC’s recommendation that asthma may only possibly increase a person’s risk of severe illness from COVID-19 and [defendant’s] active lifestyle and general lack of asthma-related life impairments, the Court concludes that [his] asthma does not present an extraordinary and compelling reason to reduce his sentence.”)
- *United States v. Daniels*, No. 15-127, 2020 WL 4674125, at *3 (E.D. Pa. Aug. 12, 2020) (“Although [defendant] uses an inhaler, his asthma appears under control. His medical records indicate normal lung volumes and clear lungs and his Albuterol inhaler prescription specifically instructs him not to use it daily, but only as needed to prevent or relieve an asthma attack. [Defendant] was seen by a doctor in April of 2020 because he reported having asthma problems and shortness of breath at night. But his medical records offer no evidence of distress or diagnosis of severe asthma.”)
- *United States v. Slone*, No. 16-400, 2020 WL 3542196, at *6 (E.D. Pa. June 30, 2020) (asthma is mild; “Mr. Slone does not have daily asthma symptoms, use his inhaler daily, or have abnormal lung function. . . . [H]is chest x-ray showed no pulmonary complications” (citations omitted))
- *United States v. Torres*, No. 18-414, 2020 WL 3498156, at *9-10 (E.D. Pa. Jun. 29, 2020) (lengthy assessment of medical records concludes asthma is mild and controlled by medication)
- *United States v. Anguiera*, No. 11-CR-116S (1), 2020 WL 3424530, at *5-6 (W.D.N.Y. Jun. 23, 2020) (“intermittent asthma” is not sufficient)
- *United States v. Gaston*, No. 19-20313, 2020 WL 3287977, at *3 (E.D. Mich. Jun. 18, 2020) (lengthy explanation that records do not show moderate to severe asthma)
- *United States v. Favreau*, No. 2:15-cr-00116-NT, 2020 WL 3104046, at *3 (D. Me. Jun. 11, 2020) (“Compassionate release is an extraordinary remedy that has been historically reserved primarily for those who are very ill, very old, or some combination of the two. [Defendant] is a 36-year-old man with no exceptional family circumstances who has had asthma which requires occasional use of medication. . . . I am not convinced that [defendant] is so compromised that he should qualify for early release.”)

- *United States v. Abram*, No. 15-20656, 2020 WL 3097259, at *1-2 (E.D. Mich. Jun. 11, 2020) (“Abram’s asthma is well-documented, but his medical records also note that the condition is ‘well controlled,’ and that he has been prescribed an Albuterol Inhaler to be used as needed.”)
- *United States v. Mascuzzio*, No. 16 Cr. 576 (JFK), 2020 WL 3050549, at *3 (S.D.N.Y. Jun. 8, 2020) (denying relief where asthma is not moderate to severe; defendant has not had to use an Albuterol inhaler in several months despite “heavy workouts,” and no wheezing, cough, shortness of breath, night time symptoms of asthma or exercise induced asthma)
- *United States v. Towel*, No. 17-519-6, 2020 WL 2992528, at *4 (E.D. Pa. Jun. 4, 2020) (denying relief; finding mild, exercise-induced asthma not a risk factor and limited Albuterol use, results of respiratory tests, and absence of daily symptoms show he does not have what is defined as “moderate to severe asthma”)
- *United States v. Flores*, No. 17 Cr. 449-17 (KPF), 2020 WL 2907549, at *4 (S.D.N.Y. Jun. 3, 2020) (“Mr. Flores’s current rumination that his childhood asthma condition might relapse now that he is in his 30s . . . is far too slender a reed on which to predicate the extraordinary relief of release from his federal sentence one year early.”)
- *United States v. Hernandez*, No. 10-CR-249 AWI, 2020 WL 2745697 (E.D. Cal. May 27, 2020) (lengthy review of medical records supports conclusion that asthma is not moderate to severe)
- *United States v. Wheeler*, No. 19-cr-00085, 2020 WL 2801289, at *3 (D.D.C. May 29, 2020) (release denied where asthma is mild and well controlled with an inhaler)
- *United States v. Brown*, No. 19-20202, 2020 WL 2812776, at *4 (E.D. Mich. May 29, 2020) (concluding, based on extensive analysis, that defendant does not have moderate to severe asthma: “All of this evidence is inconsistent with a ‘moderate asthma’ diagnosis, which would require evidence that Defendant experiences daily symptoms, weekly nighttime awakenings, daily use of medication, or limitation with respect to normal activity”)
- *United States v. Donovan*, No. 10-cr-40054-JES-JAG-2, 2020 WL 2732364, at *4 (C.D. Ill. May 26, 2020) (last asthma attack was in 2015 and inhaler use is infrequent, thus no extraordinary circumstance)
- *United States v. David*, No. CR 17-04, 2020 WL 2526568, at *3 (W.D. Wash. May 18, 2020) (defendant does not show that asthma is more than mild and controlled with an inhaler)

- *United States v. Shkreli*, __ F. Supp. 3d __, 2020 WL 2513521, at *3 (E.D.N.Y. May 16, 2020) (denying relief where defendant has seasonal allergies and childhood hospital visit for asthma but no documented current diagnosis or treatment)
- *United States v. Murphy*, No. 15-20411, 2020 WL 2507619 (E.D. Mich. May 15, 2020) (denying relief where defendant “is generally in good health. His asthma . . . appears to be managed by his prescribed inhaler. There is no indication that [defendant’s] asthma can be considered a ‘terminal illness (i.e., a serious and advanced illness with an end of life trajectory)’ or that it can be considered a ‘serious physical or medical condition’ that “substantially diminishes [his ability] to provide self-care within the environment of a correctional facility and from which he . . . is not expected to recover.” (second alteration and second ellipsis in original))
- *United States v. Davis*, No. 18-cr-10013-JES-JEH, 2020 WL 2488574, at *4 (C.D. Ill. May 14, 2020) (“Defendant does not allege his condition is particularly severe or not controlled with medication. In fact, Defendant submits he uses an inhaler to manage his asthma symptoms.”)
- *United States v. Godofsky*, No. 5:16-59-KKC-1, 2020 WL 2188047, at *2 (E.D. Ky May 6, 2020) (denying relief to 63-year-old defendant with asthma and other conditions).
- *United States v. Miller*, No. 18-cr-30034, 2020 WL 2093370, at *3 (C.D. Ill. May 1, 2020) (defendant had served 2 months of 15-month term for health care fraud; asthma is not “controlled with medication” and “moderate or severe”)
- *United States v. Washington*, No. 14-CR-215, 2020 WL 1969301, at *4 (W.D.N.Y. Apr. 24, 2020) (holding 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)”))
- *United States v. Rodriguez*, __ F. Supp. 3d __, 2020 WL 1866040, at *4 (S.D.N.Y. Apr. 14, 2020) (denying relief where asthmatic defendant had “been prescribed an albuterol inhaler by the BOP for use as needed” and asthma did “not appear to prevent him from participating in vigorous activities” including competitive handball: “All he has done is to note that he has asthma, he is in prison, and there is a COVID-19 outbreak nationwide. That is not enough.”)
- *United States v. Ramos*, No. 14 Cr. 484 (LGS), 2020 WL 1685812, at *2 (S.D.N.Y. Apr. 7, 2020) (denying relief where asthma was being treated by BOP)