UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA	*	
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	*	
v.	*	**NO. 1:17-CR-00034**
	*	
REALITY LEIGH WINNER	*	
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* *

MOTION FOR COMPASSIONATE RELEASE PURSUANT TO 18 U.S.C. § 3582 AND REQUEST FOR ORAL ARGUMENT

Defendant Reality Leigh Winner ("Reality" or the "Defendant") files this Motion for Compassionate Relief Pursuant to 18 U.S.C. § 3582 and Request for Oral Argument and respectfully asks this Court for an order releasing her based on the "extraordinary and compelling reasons" pursuant to the recently amended 18 U.S.C. § 3582(c)(1)(A)(i). Due to the exigent nature of this Motion and the various observations and limitations explained by this Honorable Court in its recent Standing Orders (MC 120-4 and MC 120-5) issued by Chief Judge Randall Hall, Reality also respectfully requests video or telephonic oral argument on this motion as soon as possible after a reasonable opportunity for the United States of America to by heard. Counsel for Defendant conferred with DOJ prior to the filing of this motion. DOJ stated they would take a position on the motion after reviewing it and seeking other information. Defendant has filed a supporting brief contemporaneously with this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record for all parties.

/s/ Joe D. Whitley
Joe D. Whitley

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BRIEF IN SUPPORT OF MOTION FOR COMPASSIONATE RELEASE PURSUANT TO 18 U.S.C. § 3582

Defendant Reality Leigh Winner ("Reality" or the "Defendant") respectfully moves this Court for an order releasing her based on the "extraordinary and compelling reasons" discussed below, pursuant to the recently amended 18 U.S.C. § 3582(c)(1)(A)(i). Due to the exigent nature of this Motion and the various observations and limitations explained by this Honorable Court in its recent Standing Orders (MC 120-4 and MC 120-5) issued by Chief Judge Randall Hall, Reality also respectfully requests that this Court address the instant Motion on an expedited basis and, if needed, counsel is available to participate in video or telephonic oral argument on this Motion after a reasonable opportunity for the United States of America to by heard.

INTRODUCTION

We are in the middle an unprecedented pandemic. American life as we know it has slowed to a near-halt, and COVID-19 has largely shut down the entire world. On March 13, 2020, President Trump declared a National Emergency concerning the novel COVID-19 disease outbreak,[1] and on the same day, Governor Abbott declared a State of Disaster in Texas – where

[1] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, The White House (Mar. 13, 2020), at

Reality is incarcerated -- due to COVID-19.[2] It is unclear when we will be able to return to any sort of normalcy. And we have been told the worst is yet to come. The disease could potentially infect and kill anywhere from 200,000 to 1.7 million Americans, depending on the intervention and precautions each municipality and individual takes.[3] As members of the general public, we are instructed to keep a minimum six-foot distance from any other human being and practice social isolation to prevent the spread of a highly contagious disease for which there is no approved cure, treatment, or vaccine to prevent. This is difficult for those of us who enjoy general freedoms; but for those incarcerated, like Reality, it is near impossible, as COVID-19 infections, as acknowledged by the Department of Justice, continue to run rampant in federal prison facilities where the conditions are not conducive to the type of "social distancing," mask wearing, or isolation that has been mandated by the White House, the Centers for Disease Control, or other governmental authorities.[4] In the end, Reality signed up to serve her sentence under the care, custody, and safety of the Bureau of Prisons – she did not agree (nor did this Court require her) to be confined to an institution that was caught unprepared for this virus (having, among other things,

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https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[2] *Governor Abbott Declares State of Disaster In Texas Due To COVID-19*, Office of the Texas Governor (Mar. 13, 2020), at https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19.

[3] Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, The N.Y. Times (Mar. 18, 2020), at https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html; *see also* Bobby Allyn, *Fauci Estimates That 100,000 To 200,000 Americans Could Die From The Coronavirus*, National Public Radio (Mar. 29, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/29/823517467/fauci-estimates-that-100-000-to-200-000-americans-could-die-from-the-coronavirus, for the original proposition that the death toll from COVID-19 would be much higher than initially anticipated.

[4] Richard Harris, *White House Announces New Social Distancing Guidelines Around Coronavirus*, National Public Radio (Mar. 16, 2020), at https://www.npr.org/2020/03/16/816658125/white-house-announces-new-social-distancing-guidelines-around-coronavirus; *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, Centers for Disease Control and Prevention (last reviewed Apr. 3, 2020), at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

run out of hand sanitizer), placed in close quarters with other inmates in a facility that has already been infested by this deadly and contagious disease, literally putting her health and life in danger.

FACTUAL AND PROCEDURAL BACKGROUND

On June 7, 2017, Reality was indicted for leaking a singular report, classified at the Top Secret / SCI level, and containing national defense information to a news outlet in violation of 18 U.S.C. § 793(e), a section of the "Espionage Act."[5] The Government returned a superseding indictment alleging the same factual conduct and legal violation on September 6, 2017.[6] Unlike almost every Espionage Act defendant before her, Reality was detained before trial,[7] and nine months after the return of the superseding indictment, she pleaded guilty to the single count charged against her.[8] To be clear, the Government presented neither an allegation of nor a shred of evidence of actual spying or treason committed by Reality.

This Honorable Court sentenced Reality on August 23, 2018.[9] Accepting the parties' Rule 11(c)(1)(C) plea agreement, this Honorable Court approved a sixty-three (63) month term of imprisonment, as set forth in the proposed plea agreement.[10] Under 18 U.S.C. § 3624(b), she will serve approximately 85% of her 63-month sentence – i.e., approximately fifty four (54) months – assuming she receives full credit for "good time" from BOP. She was 26 years old when she was sentenced, and at that time, COVID-19 did not exist.

At sentencing, Reality acknowledged and took responsibility for leaking a single document that contained national defense information, a single time, to a single news outlet.[11] As the Court

[5] *See* ECF No. 13.
[6] *See* ECF No. 72.
[7] *See* ECF Nos. 27, 115, 163.
[8] *See* ECF Nos. 315, 316.
[9] *See* ECF No. 323.
[10] *Id.*
[11] *See* ECF No. 328 at pp.13-14.

is aware, this was not a Wikileaks-like "dump" of massive amounts of sensitive data, nor was it a disclosure of military secrets to a foreign intelligence service.[12] It was, as Reality has admitted, a naive attempt to "change things," in which she abused her security clearance and ran afoul of federal law -- an act which she acknowledges was criminally wrong.[13] For her mistake, the Court sentenced Reality to the stipulated sentence of sixty-three (63) months.[14]

As of today's date, Reality has served over thirty-four (34) months of her sentence as of the filing of this motion. Under 18 U.S.C. § 3624(b), she calculates approximately twenty (20) months remain on her term. By filing this Motion, Reality respectfully requests she receive relief from the extraordinary circumstances COVID-19 presents under the recent amendments to 18 U.S.C. § 3582(c)(1)(A)(i) via the First Step Act.[15]

On or about April 8, 2020, Reality submitted a written request to the Warden of FMC Carswell in Ft. Worth, Texas, asking that he Petition the Bureau of Prisons ("BOP") for a reduction of her sentence under 18 U.S.C. § 3582(c)(1)(A)(i). As of the date of this filing, to Reality's knowledge, the Warden has not filed a Petition with the BOP on Reality's behalf nor has he responded to Reality's request.

Because of the recent amendments to Section 3582(c)(1)(A)(i), the Court has jurisdiction to consider this request and may reduce Reality's sentence, and indeed, modify it by releasing her and permitting her to finish her sentence on home confinement, for the reasons set forth below.[16] Now, by and through counsel, Reality asks this Court to commute her sentence to home confinement so that she may carry out the balance of her term under the care of her family, and

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[12] *See id.* at p.10.
[13] *Id.* at p.13-14.
[14] *See* ECF No. 327.
[15] First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).
[16] *See* P.L. 115-391, 132 Stat. 5194 § 603 (Dec. 21, 2018).

avoid the fate of so many others currently incarcerated in federal prison facilities – including FMC Carswell – that have contracted this contagious and deadly virus.

ARGUMENT

A. This Court has Jurisdiction to Decide Whether Extraordinary and Compelling Reasons Exist to Grant Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

Federal courts may reduce a prisoner's sentence under the circumstances outlined in 18 U.S.C. § 3852(c). Substantively, under § 3852(c)(1)(A)(i), a court may reduce a prisoner's sentence "if it finds that (1) "extraordinary and compelling reasons warrant such a reduction" and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission."

Procedurally, prior to 2018, only the Director of the BOP could file these kinds of "compassionate-release motions."[17] The First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP's exclusive "gatekeeper" role.[18] The amendment to § 3852(c)(1)(A) provided prisoners with two direct routes to court: (1) file a motion after fully exhausting administrative appeals of the BOP's decision not to file a motion, or (2) file a motion after "the lapse of 30 days from the receipt . . . of such a request" by the warden of the defendant's facility, "whichever is earlier." 18 U.S.C. § 3852(c)(1)(A). These changes gave the "district judge . . . the ability to grant a prisoner's motion for compassionate release even in the face of BOP opposition or its failure to respond to the

[17] *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).
[18] S*ee also United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("The First Step Act was passed against the backdrop of documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants."); 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of the First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

prisoner's compassionate release request in a timely manner."[19] The substantive criteria of § 3582(c)(1)(A)(i) remained the same.

As set forth in detail below, and as other district courts across the country have done, this Court may consider the circumstances of the instant request under the "extraordinary and compelling" rubric set forth in the applicable statute (rather than the explicitly-enumerated grounds set forth in the statute), and may further consider Reality's direct request for release (as opposed to requiring that the motion be filed by the Bureau of Prisons).

a. The Term "Extraordinary and Compelling" Is Not Limited by Those Explicitly-Listed Reasons Set Forth in the Sentencing Commission's Policy Statement.

Congress never defined the term "extraordinary and compelling reasons" in Section 3852(c), except to state that "[r]ehabilitation . . . alone" does not suffice. 18 U.S.C. § 994(t).[20] Rather, Congress directed the Sentencing Commission to define the term.[21] The Commission did so prior to the passage of the First Step Act, but it has not since updated the policy statement.[22]

Presently, the Commission is unable to update the Sentencing Guidelines because it currently lacks enough appointed commissioners to take this action.[23] However, while the application notes cite to health, age, and familial reasons as "extraordinary and compelling" grounds justifying release, the Commission also made clear that it is impossible to package all

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[19] *United States v. Young*, No. 2:00-cr-00002-1, 2020 WL 1047815, at *5 (M.D. Tenn. Mar. 3, 2020).

[20] "The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 18 U.S.C. § 994(t).

[21] *Id.*

[22] *See* U.S.S.G. §1B1.13 cmt. n.1(A)-(D).

[23] *See, e.g.*, *United States v. Maumau*, No. 08-cr-00785, 2020 WL 806121, at *1 n.3 (Feb. 18, 2020).

"extraordinary and compelling" circumstances into neat categories and thus created a non-exclusive catchall that recognized that other "compelling reasons" could exist.[24]

While a small number of courts (including this one) have concluded that the Sentencing Commission's policy statement prevents district courts from considering any "extraordinary and compelling reasons" outside of those expressly listed the policy statement,[25] most district courts have concluded the opposite.[26] Indeed, the cases which this Court previously relied on "rest upon a faulty premise that the First Step Act somehow rendered the Sentencing Commission's policy statement an inappropriate expression of policy" and thus, this Court's prior view is clearly out of step with the majority of recently-issued American First Step Act jurisprudence.[27] Therefore, while the policy statement may provide "helpful guidance," it does not limit the Court's independent assessment of whether "extraordinary and compelling reasons" exist under § 3582(c)(1)(A)(i).[28] And, as courts have recently held from across the country, and as further detailed below, the global

[24] *See United States v. Urkevich*, 2019 WL 6037391, at *3 (D. Neb. Nov. 14, 2019) (noting that §1B1.13 never "suggests that [its] list [of criteria] is exclusive"); *United States v. Beck*, --- F. Supp. 3d ----, 2019 WL 2716505, at *8 (M.D.N.C. June 28, 2019) ("Read as a whole, the application notes suggest a flexible approach . . . [and] recognize that the examples listed in the application note do not capture all extraordinary and compelling circumstances.").

[25] *See, e.g., United States v. Willingham*, No. CR113-010, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019); *United States v. Lynn,* No. 89-0072-WS, 2019 WL 3805349, at *2-*5 (S.D. Ala. Aug. 12, 2019).

[26] *United States v. Beck*, --- F. Supp. 3d ---- , No. 13-cr-186-6, 2019 WL 2716505 (M.D.N.C. June 28, 2019); *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019); *United States v. Fox*, No. 2:14-cr-03-DBH, 2019 WL 3046086 (D. Me. July 11, 2019); *United States v. Redd*, No. 1:97-cr-00006-AJT, 2020 WL 1248493 (E.D. Va. Mar. 16, 2020); *United States v. Young*, No. 2:00-cr-00002-1, 2020 WL 1047815 (M.D. Tenn. Mar. 4, 2020); *United States v. Maumau*, No. 08-cr-00785, 2020 WL 806121 (Feb. 18, 2020).

[27] *See Willingham*, 2019 WL 6733028, at *2.

[28] *See Beck*, 2019 WL 2716505, at *6; *Fox*, 2019 WL 3046086, at *3 ("I agree with the courts that have said that the Commission's existing policy statement provides helpful guidance . . . [but] is not ultimately conclusive given the statutory change.").

pandemic of COVID-19 facing the world clearly constitutes a "extraordinary and compelling" reason to grant release.[29]

b. This Court Can Consider This Request From Reality Under the Sentencing Commission's Policy Statement in Light of the First Step Act.

In earlier times, a motion for compassionate release could only reach the court through a motion made by the BOP. Indeed, the minority cases previously followed by this Court specifically require that the BOP (and not the inmate) file the request.[30] The First Step Act, however, significantly altered the landscape of compassionate-release motions and, consistent with more recent jurisprudence, permits the Court to consider inmate-filed compassionate release motions.

The rationale for this shift in jurisprudence is easy to understand, is consistent with the legislative intent and purpose of the First Step Act, and comports with fundamental fairness. In providing the catchall provision, the Commission recognized it may be impossible to predict what reasons may qualify as "extraordinary and compelling." Rather than attempt to make a definitive prediction, the Commission covered its bases by ensuring that *every motion* to reach the court would have an opportunity to be assessed under the flexible catchall provision. At the time the Commission wrote the catchall provision's BOP-focused language,[31] it accomplished that task, because prior thereto (i.e., pre-Amendment), every motion to reach the court necessarily had to be filed and approved by the BOP.

The First Step Act explicitly allows inmates to file compassionate-release motions—under the 30-day lapse provision—when their warden *never* responds to their request for relief. Thus, Congress specifically envisioned situations where inmates could file direct motions in cases where

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[29] *See infra*, Part C.
[30] *Willingham*, 2019 WL 6733028, at *2.
[31] *See* U.S.S.G. §1B1.13 cmt. n.1(D) (providing for relief if, "[a]s determined by the Director of the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

nobody in the BOP *ever decided* whether the motion qualified for relief under the catchall provision that the Commission originally sought to apply to *all* motions. It would be a strange remedy if Congress intended that prisoners whose wardens failed to respond in such a situation could only take advantage of the thirty-day lapse provision by accepting a pared-down standard of review that omitted the flexible catchall standard.

Under the minority view previously accepted by this Court, that is exactly what would happen: prisoners in this situation would never have the chance for the BOP to assess their claim under the catchall provision and would never get the chance for this kind of flexible review in this district court, since under the minority view this Court would be constrained to the specific criteria in subsections (A)-(C) of the policy statement.[32] This would have the perverse effect of *penalizing* prisoners who take advantage of the First Step Act's fast-track procedures and rewarding prisoners who endure the BOP-related delay, which is precisely what the Act sought to alleviate. Indeed, it would discriminate against prisoners like Reality who happen to be young, single, and childless (in other words, those moving under the "catchall provision"), but nonetheless, face extraordinary and compelling circumstances warranting compassionate release. For reference, the COVID-19 virus does not stop to inquire as to Reality's age, relationship status, or desire for children before invading her body; it does not discriminate on any grounds at all.

The minority view, of course, would be antithetical to the First Step Act. The First Step Act—and the critical 30-day lapse route it provided—directly responded to a compassionate-release system so plagued by delay that prisoners sometimes died while waiting for the BOP to

[32] The minority bases this view on the BOP-focused language of the policy statement's catchall provision. *See* U.S.S.G. §1B1.13 cmt. n.1(D) (asking only the BOP Director to determine if other extraordinary and compelling circumstances exist).

decide.[33] Under the minority view, Congress would have created a two-tiered system that poses a "catch-22" to prisoners with unresponsive wardens: (1) opt for quicker relief at the cost of a disadvantageous standard with no catchall; or (2) endure delay—and, possibly, complete inaction—to retain a more flexible standard. Congress sought to help, not hinder, these sorts of prisoners, and clearly did not intend to create this outcome. Nothing in the text of the old policy statement calls for it, since that statement expressly limits itself to motions filed by the BOP and was written before this situation was even possible to envision.

Continuing to subscribe to the minority view, then, would undermine the purpose of the First Step Act and create an inconsistent and unintended definition of the term "extraordinary and compelling." Because the Sentencing Commission has not yet been able to issue a policy statement addressing post-First Step Act procedures, it certainly has not mandated that courts take such an approach. Moreover, there remains a procedural gap that the Sentencing Commission—currently lacking a quorum and unable to act—has not yet had the chance to fill. Importantly, nothing in § 3852(c)(1)(A)(i) requires courts to sit on their hands in situations like these. Rather, the statute's text directly instructs courts to "find that" extraordinary circumstances exist.

Of course, the Sentencing Commission's policy statement remains informative.[34] However, it should not constrain the Court. In fact, courts have held that, in view of the Sentencing

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[33] *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); *see also* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

[34] *See, e.g.*, *Fox*, 2019 WL 3046086, at *3 ("[T]he Commission's existing policy statement provides helpful guidance on the factors that support compassionate release, although it is not ultimately conclusive . . . ."); *Beck*, 2019 WL 2716505, at *7 ("While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment . . . ."); *United States v. Lisi*, No. 15 Cr. 457 (KPF), 2020 WL 881994, at *3 (S.D.N.Y. Feb. 24, 2020) ("[T]he Court may independently evaluate whether [defendant] has raised an extraordinary and compelling

Commission's inaction in the face of the First Step Act, district courts are not limited to the express grounds contained in the old policy statements previously promulgated:

> There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. By its terms, the old policy statement applies to motions filed by the [BOP] Director and makes no mention of motions filed by defendants. . . . The Sentencing Commission has not amended or updated the old policy statement since the First Step Act was enacted, nor has it adopted a new policy statement applicable to motions filed by defendants.[35]

The introductory sentence of §1B1.13, "*[u]pon motion of the Director of the [BOP . . . the court may reduce a term of imprisonment*," limits the policy statement's scope to a procedural scheme exclusively involving the BOP that does not exist anymore. And comment 4 of §1B1.13's Application Note expressly states that "[a] reduction *under this policy statement may be granted only upon motion by the Director of the [BOP]*."

Accordingly, by its own terms, the scope of the old policy statement is clearly outdated and, at the very least, does not apply to the entire field of post-First Step Act motions. In other words, for prisoner-filed motions, there is a gap left open that no "applicable" policy statement has addressed. Because Congress intended for this Court to be able to determine whether extraordinary and compelling circumstances exist to reduce Reality's sentence, this Court may consider her direct request (as opposed to a request from the BOP).

B. Reality is Not Required to Exhaust Her Administrative Remedies Before Bringing this Motion Under 18 U.S.C. § 3582(c).

a. The Statutory Language of 18 U.S.C. § 3582(c) Does Not Mandate Exhaustion.

The Supreme Court has held that a court's power to create exceptions to a statutory exhaustion requirement depends on the language of the statute.[36] "[A] statutory exhaustion

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reason for compassionate release . . . [but §1B1.13's policy statement] remain[s] as helpful guidance to courts . . . .").

[35] *Beck*, --- F. Supp. 3d ----, 2019 WL 2716505, at *5 (citations omitted).

[36] *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016).

provision stands on a different footing [from a judicially created one]. There, Congress sets the rules — and courts have a role in creating exceptions only if Congress wants them to."[37] In the context of cases under the Prison Litigation Reform Act of 1995 ("PLRA"), for example, such as *Ross v. Blake*, 136 S. Ct. 1850 (2016), the Supreme Court ruled that courts do not have the power to create emergency exceptions to the exhaustion requirement where Congress expressly created a mandatory requirement.[38]

The Court reached this conclusion because the PLRA used mandatory language in setting out the administrative remedies exhaustion standard: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such* administrative remedies as are available are exhausted."[39] The "no action shall be brought . . . until" language in the PLRA motivated the Court's ruling in Ross. "Statutory interpretation, as we always say, begins with the text."[40]

"[T]he PLRA's text suggests no limits on an inmate's obligation to exhaust — irrespective of any 'special circumstances.'"[41] Given this mandatory language, the Court concluded "mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account."[42] In contrast, the 18 U.S.C. 3582(c)(1)(A) language has nothing akin to the type of mandatory language found by the *Ross* court to be controlling. In fact, the text of the statute simply allows for the passing of time of 30 days, regardless of progress on administrative procedures, before this Court may modify a term of imprisonment. Reality acknowledges 30-days

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[37] *Id.*
[38] *Id.* at 1856.
[39] *Ross*, 136 S. Ct. at 1856; 42 U.S.C. §1997e(a) (emphasis added).
[40] *Ross*, 136 S. Ct. at 1856 (internal citation omitted).
[41] *Id.*; *see also Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (proper exhaustion of administrative remedies is necessary).
[42] *Id.*

have not passed since she submitted her request to the Warden under 18 U.S.C. § 3582(c)(1)(A). But, based on the statutory language, this passage of time is not a mandatory pre-requisite for bringing this motion. Also, notably, 30 days *have* passed since the COVID-19 outbreak giving rise to this motion, including 30 days since the World Health Organization declared the novel coronavirus outbreak a global pandemic.[43] Therefore, whether viewed through the prism that administrative exhaustion is not required under the applicable statute, or whether that requirement has been satisfied in light of the passage of 30 days since the declaration of the COVID-19 pandemic, this Motion is timely.

b. This District Court has the Discretion to Excuse Exhaustion.

Even still, "[d]istrict courts have discretion to excuse exhaustion…"[44] "Exhaustion may be excused if a litigant can show: (1) that requiring exhaustion will result in irreparable harm; (2) that the administrative remedy is wholly inadequate; or (3) that the administrative body is biased, making recourse to the agency futile."[45]

All three of these exceptions apply here. Requiring exhausting will result in irreparable harm as exigent circumstances exist. Positive cases of COVID-19 have been reported in FMC Carswell and given the extremely contagious nature of the disease, it is only a matter of time before Reality is exposed to it. An administrative remedy would be wholly inadequate because Reality would never receive it in time. Finally, Congress's enactment of the First Step Act and decision

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[43] *See* WHO Director-General's Opening Remarks at the Media Briefing on COVID-19, Mar. 11, 2020, available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited Apr. 10, 2020).

[44] *Georgia by & through Georgia Vocational Rehab. Agency v. United States by & through Shanahan*, 398 F. Supp. 3d 1330, 1343 (S.D. Ga. 2019) (internal citation omitted) (allowing plaintiff to bring claim even though plaintiff failed to exhaust administrative remedies under federal statute).

[45] *Id.* (internal citation omitted); *see also McCarthy v. Madigan*, 503 U.S. 140, 146–47 (1992) (But [even] where Congress has not clearly required exhaustion," a court may still impose it as an act of "sound judicial discretion.).

to give prisoners the ability to petition Courts directly is evidence that a remedy from the BOP is frequently inadequate and futile.[46]

The provision allowing prisoners to bring motions under § 3582(c) was added by the First Step Act in order to "increas[e] the use and transparency of compassionate release."[47] Requiring exhaustion generally furthers that purpose, because the BOP is best situated to understand an inmate's health and circumstances relative to the rest of the prison population and identify "extraordinary and compelling reasons" for release.[48] In Reality's case, however, administrative exhaustion would defeat, not further, the policies underlying § 3582(c).

Here, delaying release amounts to denying relief altogether. Pursuing the administrative process would be a futile endeavor; Reality is unlikely to receive a final decision from the BOP, and certainly will not see 30 days lapse before COVID-19 becomes, if it has already not become, rampant in her facility. Remaining incarcerated for even a few weeks increases the risk that the other underlying conditions from which she suffers, discussed *infra*, will be aggravated and cause her greater harm. Requiring exhaustion, therefore, would be directly contrary to the purpose of identifying and releasing individuals whose circumstances are "extraordinary and compelling." Accordingly, this Court should hold that Reality's underlying health issues, combined with the high risk of contracting COVID-19, justifies waiver of the exhaustion requirement.

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[46] *See also Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (holding that irreparable injury justifying the waiver of exhaustion requirements exists where "the ordeal of having to go through the administrative process may trigger a severe medical setback" (internal quotation marks, citation, and alterations omitted)); *Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) ("[I]f the delay attending exhaustion would subject claimants to deteriorating health, . . . then waiver may be appropriate."); *New York v. Sullivan*, 906 F.2d 910, 918 (2d Cir. 1990) (holding that waiver was appropriate where "enforcement of the exhaustion requirement would cause the claimants irreparable injury" by risking "deteriorating health, and possibly even . . . death").

[47] 132 Stat. 5239.

[48] 18 U.S.C. § 3582(c)(1)(A)(i).

C. Extraordinary and Compelling Circumstances Warrant a Reduction to Reality's Sentence.

Reality's circumstances—particularly the outbreak of COVID-19 and her history of respiratory illnesses as well as eating disorders place her at a high risk should she contract the disease—present "extraordinary and compelling reasons" to reduce her sentence. Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common."[49] It defines "compelling need" as a "need so great that irreparable harm or injustice would result if it is not met." [50]

Reality has shown extraordinary and compelling reasons to reduce her sentence. First, as referenced in the materials previously provided to the Court at sentencing, she suffers from bulimia nervosa and a propensity for respiratory illnesses that render her especially vulnerable to COVID-19. Second, prison – a population dense petri dish already infested with this disease – is a particularly dangerous place for Reality at this moment. Neither of these reasons alone is extraordinary and compelling. Taken together, however, they constitute reasons for reducing her sentence "[b]eyond what is usual, customary, regular, or common," and reasons "so great that irreparable harm or injustice would result if [the relief] is not [granted]."[51]

a. Reality's Health Conditions Make Her Especially Vulnerable to COVID-19.

On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.[52] Reality suffers from depression and bulimia nervosa.[53] She copes with stress and

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[49] Extraordinary, Black's Law Dictionary (11th ed. 2019).
[50] Compelling Need, Black's Law Dictionary (11th ed. 2019).
[51] Extraordinary, Black's Law Dictionary (11th ed. 2019); Compelling Need, Black's Law Dictionary (11th ed. 2019).
[52] *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020), at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.
[53] Taylor Barnes, Reality Winner Battles an Eating Disorder Behind Bars, (Nov 24, 2018), at https://theintercept.com/2018/11/24/reality-winner-prison-eating-disorder/.

uncertainty, such as incarceration and the invasion of a novel disease, by binge eating, regurgitation, excessive exercise, or any combination thereof. For example, Reality will push herself to participate in "push up challenges" or run laps barefoot around a prison yard.[54]

> People with eating disorders have a high risk of relapsing or worsening the severity of their disorder, due to infection fears and the effect of the quarantine … Infection fears tend to increase the feeling of not being in control that, in people with eating disorders, is often managed with an increase of dietary restrictions or other extreme weight control behaviors or with binge-eating episodes.[55]

Reality's routines allow her to cope and hold the things she is unable to control together, which is monumental to her survival in an environment where she controls nothing, like prison. The COVID-19 outbreak only adds another element of her life she cannot control and threatens her overall health.[56]

Moreover, [redacted][57] Indeed, "many people with eating disorders are immunocompromised, putting them squarely in the group of people for whom COVID-19, the disease caused by the coronavirus, could be most dangerous."[58] When paired with an unknown

[54] *Id.*
[55] Riccardo Dalle Grave M.D., *Coronavirus Disease 2019 and Eating Disorders*, (Mar. 21, 2020), at https://www.psychologytoday.com/us/blog/eating-disorders-the-facts/202003/coronavirus-disease-2019-and-eating-disorders.
[56] *See, e.g.*, Addy Baird, The Coronavirus Outbreak Is "Like A Nightmare" For People With Eating Disorders, (Mar. 20, 2020), at https://www.buzzfeednews.com/article/addybaird/coronavirus-quarantines-eating-disorders-recovery.
[57] *See* Psychological Evaluation of Reality Winner by Adrienne Davis, dated July 1, 2018, attached hereto as **Exhibit 1**.
[58] *See* Fn. 56*, supra.*

virus, Reality's illness could spiral from a daily struggle that merely makes it difficult to get out of bed in the morning to a fully compromising situation from which she may never recover.

Furthermore, the federal prison system is currently under a "modified lockdown."[59] Inmates are currently locked in their cells or quarters with their movement and group gatherings "significantly decrease[d.]"[60] Normally, it is these times outside of her cell when Reality can engage in the [redacted][61] Without these routines, Reality's health is in peril. Reality has stated: [redacted][62] [redacted][63] Indeed, the people who know Reality the best attest to the importance of exercise for her self-worth and validation.[64] Reality's depleted mental and physical states -- with no way to exercise any coping mechanism for the stress of her own underlying conditions and now the added stress of battling a novel virus present in her facility -- make her particularly susceptible to COVID-19.

b. Reality Cannot Adequately Protect Herself Against Infection in Prison.

Given Reality's vulnerability to COVID-19, prison is a particularly dangerous place for her. Inmates are confined in close quarters, eat meals in large dining halls, and use communal showers and recreational facilities. These inmates are overseen by BOP employees who travel

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[59] Courtney Buble, *Federal Prison System Goes Into 'Modified Lockdown'*, *Government Executive*, (Apr. 1, 2020), at https://www.govexec.com/management/2020/04/federal-prison-system-goes-modified-lockdown/164286/.
[60] *Id.*
[61] *See* **Ex. 1**.
[62] *Id.*
[63] *Id.*
[64] *See* Letter of Support from Brittany Winner, dated July 31, 2018, attached hereto as **Exhibit 2** ("[H]er behavior is an attempt to exert control in her life where she has none."); *see also* Letter of Support from Billie Davis-Winner, dated July 29, 2018, attached hereto as **Exhibit 3** (Reality also suffers from depression, anxiety, and an eating disorder…I worry about her mental health daily, and am concerned about the stress she is under….").

back and forth between the facility and the community, potentially bringing the coronavirus inside the prison. BOP facilities also continue to transfer inmates in and out, increasing the chances for exposure.[65] As a result, experts and BOP employees regard the federal prisons as ripe breeding ground for coronavirus.[66] In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.[67] Indeed, in the past week, at least one inmate has texted positive at Reality's facility,[68] and, separate from concerns over the amount of food available for inmates when most stores are rapidly running out of sustenance, she reports FMC Carswell has recently run out of hand sanitizer, a basic need in times of rapidly-spreading infectious diseases. A prison inmate like Reality cannot "shelter-in-place" and avoid contact with others. Instead, she is stuck in a densely populated breeding ground for disease.

As of April 9, 2020, there are 283 federal inmates and 125 BOP staff who have confirmed positive test results for COVID-19 nationwide. Only 14 inmates and 7 staff have recovered. There have been 8 federal inmate deaths attributed to COVID-19 disease. FCI Oakdale, where five inmates have already died from the coronavirus, is a case study in the disease's rapid spread.[69] Now that the virus is at FMC Carswell, it is only a matter of time before the virus infiltrates the

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[65] *See* Keegan Hamilton, *Sick Staff, Inmate Transfers, and No Tests: How the U.S. Is Failing Federal Inmates as Coronavirus Hits*, *Vice News* (Mar. 24, 2020) at https://www.vice.com/en_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits.

[66] *Id.* ("Federal prison guards warn that a coronavirus outbreak is looming and could be catastrophic, causing 'mass chaos' in a correctional system responsible for more than 175,000 inmates across the United States.").

[67] Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials, Business Insider* (Feb. 21, 2020) at https://www.businessinsider.com/500-coronavirus-cases-reported-in-jails-in-china-2020-2.

[68] *See* Federal Bureau of Prisons, COVID-19 Cases, https://www.bop.gov/coronavirus/ (last accessed on April 8, 2020).

[69] Sadie Gurman, Zusha Elinson, Deanna Paul, *Coronavirus Puts a Prison Under Siege*, https://www.wsj.com/articles/inside-oakdale-prison-our-sentences-have-turned-into-death-sentences-11586191030 (updated April 6, 2020) (last accessed on April 8, 2020).

prison population like it has done at FCI Butner (44 inmates, 16 staff positive), FCI Danbury (36 inmates, 15 staff positive), FCI Oakdale (36 inmates, 14 staff positive, 5 dead), etc.[70] These are just the confirmed case numbers reported on the BOP website. Notably, and logically, they are increasing each day as additional test results come in on a delay.

The best chance that Reality has to weather this pandemic is to be released and be permitted to live with her family in rural Texas, where she can appropriately "shelter in place" and avoid interacting with others. Congress and the Department of Justice are increasingly recognizing the danger of COVID-19 outbreaks in prisons and encouraging steps to release some inmates where appropriate. Indeed, Attorney General William Barr has directly addressed the extreme vulnerability of the men and women in the federal prison system by issuing his March 26, 2020 Memorandum to the Bureau of Prisons, which specifically encourages the Bureau of Prisons to transfer inmates to home confinement, where appropriate. A true and correct copy of Attorney General William Barr's Memorandum, dated March 26, 2020, is attached hereto as **Exhibit 4**. And on April 6, 2020, he issued a Memorandum to Heads of Department Components and All United States Attorneys, mandating that while resolving pre-trial detention issues, all prosecutors must consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. A true and correct copy of Attorney General William Barr's Memorandum, dated April 6, 2020, is attached hereto as **Exhibit 5**. The Court can infer from these Memorandums that a deference should be given to home confinement, when possible and when appropriate, as it is here.

[70] *See* Federal Bureau of Prisons, COVID-19 Cases, https://www.bop.gov/coronavirus/ (last accessed on April 9, 2020).

c. Courts are Releasing Prisoners into Home Confinement on Similar Requests.

This is a rapidly developing phenomenon. The COVID-19 pandemic is extraordinary and unprecedented in modern times in this nation. It presents a clear and present danger to society for reasons that need no elaboration. It presents a heightened risk for incarcerated defendants like Ms. Winner who suffer from underlying conditions and compromised immune systems.

Federal district courts around the country are releasing prisoners like Reality into home confinement on similar requests. Attached hereto as **Composite Exhibit 6** are orders entered in a handful of similar cases within the past ten (10) days, including the cases of Daniel Hernandez (a rapper with gang ties known as Tekashi69), *United States v. Hernandez*, No. 1:18-cr-00834-PAE, ECF No. 451 (S.D.N.Y. Apr. 2, 2020), Jeremy Rodriguez (a drug offender serving a 20-year sentence), *United States v. Rodriguez*, No. 2:03-cr-00271-AB, ECF No. 135 (E.D. Pa. Apr. 1, 2020), Wilson Perez (a conspirator to kidnapping), *United States v. Wilson Perez*, No. 1:17-cr-513-AT, ECF No. 98 (S.D.N.Y. Apr. 1, 2020), and Teresa Gonzalez (a conspirator to wire and mail fraud), *United States v. Gonzalez*, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155 (E.D. Wash. Mar. 31, 2020).

Federal courts across the Country are being asked to intervene because the BOP response is insufficient, and the Sentencing Commission's policy statement and corresponding commentary give the courts this power – i.e., a court may reduce a "sentence for 'extraordinary and compelling reasons,' including where the defendant 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."[71] Like

[71] *Hernandez*, No. 1:18-cr-00834-PAE, ECF No. 451, at p.4 (*citing* 1 U.S.S.G. § 1B1.13(1)(A) & cmt. n.1(A)); *see* also *Rodriguez*, No. 2:03-cr-00271-AB, ECF No. 135 (E.D. Pa. Apr. 1, 2020) (granting compassionate release); *Perez*, No. 1:17-cr-513-AT, ECF No. 98 (same); *Gonzalez*, 2020 WL 1536155 (same); *United States v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829

the many other defendants who have been released in the face of this global health care crisis, release is appropriate here for Reality.

D. Reality is Not a Danger to Others or the Community.

The Commission's policy statement, which provides helpful guidance, provides for granting a sentence reduction only if "[t]he 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)." U.S.S.G. § 1B1.13(2).

Section 3142(g) sets out the factors courts must consider in deciding whether to release a defendant pending trial. These factors weigh both the defendant's possible danger to the community and the defendant's likelihood to appear at trial. Only the former is relevant here. The factors that weigh danger to the community include "the nature and circumstances of the offense charged," "the history and characteristics of the person," including "the person's character, physical and mental condition, family ties, . . . community ties, past conduct, history relating to drug or alcohol abuse, [and] criminal history," and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."[72]

Reality has briefed the Court at length regarding the various reasons she is not a danger to the community in the context of her pre-trial detention.[73] Years removed from that briefing, having

(S.D.N.Y. Mar. 27, 2020) (same); *United States v. Williams*, No. 3:04-cr-00095-MCR-CJK, ECF No. 91 (N.D. Fl. Apr. 1, 2020) (same); *United States v. Garcia*, No. 2:95-cr-00142-JPS, ECF No. 196 (E.D. Wi. Mar. 27, 2020) (same); *United States v. Edwards*, No. 6:17-cv-3-NKM, ECF No. 134 (W.D. Va. Apr. 2, 2020) (same); *United States v. West*, No. 1:17-cr-00390-AT; ECF No. 53 (N.D. Ga. Mar. 30, 2020) (same); *United States v. Powell*, No. 1:94-cr-00316-ESH (D.D.C. Mar. 28, 2020) (same); *United States v. Copeland*, No. 2:05-cr-00135-DCN, ECF No. 662 (D.S.C. Mar. 24, 2020) (same); *United States v. Huneeus*, No. 1:19-cr-10117-IT, ECF No. 642 (D. Ma. Mar 17, 2020) (same); *United States v. Resnick*, No. 1:12-cr-00152-CM, ECF No. 461 (S.D.N.Y. Apr. 2, 2020) (same); *United States v. Hernandez*, No. 1:16-cr-20091-KMW, ECF No. 561 (S.D. Fl. Apr. 3, 2020) (same); *United States v. Barkman*, No. 3:19-cr-00052-RCJ-WGC, ECF No. 21 (D. Nv. Mar. 17, 2020) (same).

[72] 18 U.S.C. § 3142(g).

[73] *See* ECF No. 128, 156, 176, *et al.*

accepted responsibility for her conduct, and having served nearly three (3) years of her sentence, any risk to the community that may have existed previously no longer exists.

Importantly, Reality has been evaluated by several physicians, who have all concluded that Reality is not a danger to herself or others.[74] Notes from every single visit/evaluation received by counsel confirm that Reality's physicians have never been concerned about danger to herself or the community.[75] Indeed, this is consistent with the comprehensive psychological evaluation and report of Dr. Adrienne Davis.[76]

Moreover, in both the pre-trial detention context and at sentencing, people close to Reality have reiterated these points to the Court and that Reality will have incredible support upon her release. For example, below are excerpts taken from letters of support submitted to this Honorable Court:

> **Brittany Winner (Reality's Sister):**
> "She calls me almost every day and we write to each other often. I am a huge part of her support system, and she is a huge part of mine. I will continue to support her during the transition to this new chapter of her life, and I am wholeheartedly prepared to take on a much larger role if necessary in the future."
>
> **Billie Davis Winner (Reality's Mother):**
> "Those who know her know that she is not a danger in any way to anyone….We have rearranged everything in our lives to support her and we will continue to do so. My husband and I have already begun planning to build or move a small home unto a section of our property here in Texas, for her to live upon release. Our family and friends continue to be very supportive and will always assist Reality in any way possible."

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[74] *See e.g.*, true and correct copies of [redacted], attached hereto as **Exhibit 7** [redacted]

[75] *Id.*

[76] *See* **Ex. 1** [redacted]

> **Indira Garcia:**
> "Reality is a good person with a strong sense of doing what is right. She has a strong support system from her family and friends. Her parents have been positive role models and have the proper support. I cannot say enough positive things about Billie and Gary and their dedication and commitment to their children. Reality is their life and they do anything to guide and support her."
>
> **Shani Messerschmidt**
> "As family, Reality will always have our support, whether that means providing her continued emotional support through continuous contact or a place to stay upon her release."[77]

Notably, the Letters of Support also emphasize the importance of a healthy diet, a stringent exercise routine, and access to medical treatment for Reality's overall well-being.[78] Of course, these are all things that are currently being deprived under the current COVID-19 lock down protocols, which increases her susceptibility to the deadly disease, discussed *supra*.

E. The Sentence Reduction is Consistent with the Section 3553(a) Factors.

Finally, the Court must "consider[] the [sentencing] factors set forth in section 3553(a) to the extent that they are applicable."[79] The applicable sentencing factors warrant a sentence reduction for Reality. Because section 3553(a) establishes factors to consider in initially imposing a sentence, not every factor applies here. The applicable factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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[77] *See* **Exs. 2, 3**; *see also* Letter of Support of Indira Garcia, undated, attached hereto as **Exhibit 8**; *see also* Letter of Support of Shani Messerschmidt, dated July 20, 2018, attached hereto as **Exhibit 9**.
[78] *See id.*
[79] 18 U.S.C. § 3582(c)(1)(A).

> . . . [and]
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.][80]

The statute also mandates: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)."[81]

Reality's Sentencing Memorandum, ECF No. 321, addressed Section 3553's factors at length. For sake of brevity, she will summarize the application of those factors here. But, she attaches the complete discussion from her Sentencing Memorandum hereto as **Exhibit 10**, should the Court wish to revisit that analysis in full.

The first factor is "the nature and circumstances of the offense and the history and characteristics of the defendant."[82] As stated above, Reality's singular offense was an unfortunate act in an otherwise commendable life of service. While her offense did involve a matter of national security, it was non-violent and involved a single document of classified material, not a disclosure analogous in size to the Pentagon Papers or Wiki Leaks. She has shown good conduct over the course of serving her sentence and while in service to her country. Those nearest her vouch for her character.

The second factor is the need for the sentence imposed to serve the enumerated purposes of punishment.[83] The court should "impose a sentence sufficient, but not greater than necessary, to comply with [these] purposes."[84] Reality has served nearly three years of her five years sentence, most of the original sentence imposed. Three years is a long time—long enough to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of Reality. Indeed, a three

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[80] 18 U.S.C. § 3553(a).
[81] *Id.*
[82] *Id.* § 3553(a)(1).
[83] *Id.* at § 3553(a)(2).
[84] *Id.* at § 3553(a).

year term is longer than every or almost every other case cited in her Sentencing Memorandum.[85] Her continued incarceration during the COVID-19 pandemic may induce irreparable harm to her health. To prolong her incarceration further would be to impose a sentence "greater than necessary" to comply with the statutory purposes of punishment.

The final relevant factor is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[86] Reality has served the majority of her mandatory sentence and is approximately two years away from release. Granting this Motion would resolve the sentence disparities between her and similarly situated defendants because her prison term was more than many prior Espionage Act prosecutions from the start – including those with arguably *worse* conduct.[87] A reduction in sentence and commuting her sentence to home confinement would correct – not create -- any disparity.[88]

CONCLUSION

For the foregoing reasons, this Court should grant Reality Compassionate Release under 18 U.S.C. § 3583(c)(1)(A) and allow her to serve the remainder of her sentence at home with her family in light of the COVID-19 pandemic.

Respectfully submitted,

BY: */s/ Joe D. Whitley*
Joe D. Whitley (Bar No. 756150)
Admitted *Pro Hac Vice*
Brett A. Switzer (Bar No. 554141)
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[85] *See* ECF No. 321 at Section V(B)(4).
[86] 18 U.S.C. § 3553(a)(6).
[87] *See* ECF No. 321 at pp. 16-17.
[88] *See, e.g.*, Reality Winner, Former N.S.A. Translator, Gets More Than 5 Years in Leak of Russian Hacking Report, N.Y. Times (Aug. 23, 2018), at https://www.nytimes.com/2018/08/23/us/reality-winner-nsa-sentence.html. (confirming Reality received the harshest sentence in the history of the Espionage Act at the time for a journalist leak).

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ATTORNEYS FOR DEFENDANT REALITY LEIGH WINNER

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record for all parties.

/s/ Joe D. Whitley
Joe D. Whitley

EXHIBIT 1
FILED UNDER SEAL

EXHIBIT 2

July 31, 2018

Honorable J. Randal Hall
Chief Judge
Southern District of Georgia

RE: Reality Winner

My name is Brittany Winner, PhD, a postdoctoral research associate at the United States Army Medical Research Institute of Chemical Defense in Gunpowder, Maryland. I am the elder sister of Reality Winner by approximately 15 months, an age gap that practically guaranteed our extremely close relationship. We grew up in the same household and lived together for 18 years, after which I left to go to college. We maintained close contact since then via texting and phone calls. I have known her my whole life and can confidently say that I know her better than anyone else.

Growing up, Reality and I were very close despite a normal dose of inevitable sibling rivalry. We both excelled academically and competed for better grades, securing places at the top of our respective classes. Our world came crashing down when our parents divorced: I was 10 and my sister was 8. The divorce devastated our family, even though my sister and I now recognize how necessary it was—our father was addicted to opioid painkillers and refused to acknowledge his addiction or seek help. Still, the destabilizing effect of the divorce on our family took its toll and we had to grow up quickly. We both emerged from it scarred, but we supported each other during this time, and it set the stage for us to always support each other through tough times.

I remember being surprised to hear that Reality was planning to join the Air Force rather than go to college like all the rest of her classmates (or like me), but when she told me she wanted to study linguistics, suddenly everything made sense. She wanted to make a difference and help people in a unique, challenging way—and to serve her country by doing so. She looked up to our older stepbrother Cole Davis who is also an Air Force linguist and was inspired by him to take a similar path. In addition, Reality has great appreciation for other cultures and worldviews, which lead her to want to learn languages predominantly spoken in Middle Eastern countries such as Iran and Afghanistan. She has always cared so much about less fortunate people in war-torn and impoverished regions of the world. Her dream job, she once confided to me, was to work with the charity Samaritan's Purse and volunteer to help women and children in Afghanistan. One year, she asked me to donate money to a charity to build an orphanage rather than buy her a Christmas present. In addition, like clockwork each year, she always put together shoeboxes of toys and goods for children in other countries through Operation Christmas Child and vigorously encouraged everyone around her to do the same. Time and time again, my sister has demonstrated her dedication to helping people less fortunate than her by eschewing personal comfort and material possessions. These acts of selflessness demonstrate the type of person she is.

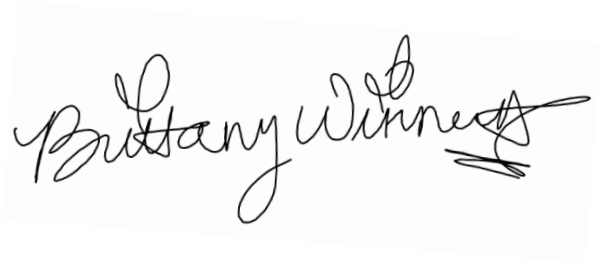
Although Reality has so much compassion for complete strangers, she is also deeply committed to her family. She has a close relationship with our mother and stepfather and had a close relationship with our late father, who passed away in December 2016. His death hit her

particularly hard. He was one of the great pillars of her life, and his passing was sudden and unexpected. She told me she cried every single day for six months after he died, and her trip to Belize was a tribute to his memory. She still talks about Dad and how much she misses him, and whether he would still be proud of her. I know he would, because he loved her dearly. Recently, my sister experienced a new loss: when she learned I was pregnant, she cried because she so desperately wanted to be there for me but was also extremely happy and elated to be an aunt. Two weeks ago, when she heard that I lost my baby at 20 weeks, she was devastated that she couldn't come to the hospital when I had to deliver my dead child. In addition to these recent distressing losses, my sister suffers from mental illness. I know that she has an eating disorder, but beyond that, I do not know of any other formal diagnoses. She has struggled with body image issues most of her adult life and it appears to manifest itself in extreme choosiness about food types and obsession with exercise. Clearly, her behavior is an attempt to exert control in her life where she has none. She requires mental health support would benefit from therapy in an adequate environment suited to meet her needs.

My sister Reality is a complex and frequently misunderstood individual: intelligent yet compassionate; meticulous yet generous; seemingly irreverent yet sincere; at times, frustrating, but ultimately endearing. She is, admittedly, not the easiest person to get to know or to understand. As her big sister, I know her better than anyone else and feel responsibility to always care for her, watch over her, and love her. Now, after all we've been through, my relationship with Reality is closer than ever. She calls me almost every day and we write to each other often. I am a huge part of her support system, and she is a huge part of mine. I will continue to support her during the transition to this new chapter of her life, and I am wholeheartedly prepared to take on a much larger role if necessary in the future.

I respectfully ask that you consider her plea deal and any recommendations from her attorneys.

Sincerely,



Brittany Michele Winner, PhD

EXHIBIT 3

Billie J. Winner-Davis
420 East County Road 2190
361/522-7816

07/29/2018

Honorable J. Randal Hall, Chief Judge
US District Court-Southern District of Georgia
600 James Brown Blvd
Augusta, GA 30901

Dear Honorable J. Randal Hall, Chief Judge,

I am writing you today as a mother, asking for your consideration for my daughter, Reality Leigh Winner. Reality has plead guilty to one charge of willful retention and transmission of national security information, an extremely serious charge, and she accepts responsibility and consequences for this. As her mother, I ask that you consider her age, character, history, service to America, medical and mental health needs, and her importance to me and our family as you decide on her case and fate.

Reality is my youngest child, and will always be considered my Baby Girl. She has always been extremely intelligent, strong willed, and loving. She is talented and artistic. She is deeply compassionate and giving. I am so very proud of her and the things she chooses to do, such as her volunteer work with Athletes Serving Athletes, Samaritan's Purse, Veterans Groups, and Hands to Paws Dog Rescue, to name a few. She was raised in a home in which volunteering and serving others was valued, and she has exceeded my expectations many times over. I know of no other person her age who has such compassion and selflessness and who has gone out of her way to help the world and others. I also know of no other person that exhibits such love for others. She sacrifices herself, to give to others, to make sure others feel loved and valued. She has always been sentimental and the most wonderful, giving daughter I can imagine having.

While the prosecution presented information that portrayed Reality as a person who hates America and is sinister, I ask that you look at her actions and accomplishments and who she is as a human being, a daughter, and a humanitarian. Reality was in the top ten club in High School, and took many AP and dual credit courses. She volunteered in the community, excelled in sports and art, and was loved by her teachers, neighbors, and friends. She was never in trouble and required no discipline or correction.

Although Reality was offered a scholarship from Texas A&M University Kingsville, she chose to join the Air Force. She wanted to be a linguist like her older step-brother, and wanted to make a difference for our country. Reality served honorably in the US Air Force for 6 years, earning a medal of commendation for going above and beyond. She protected this country many times over and was fiercely loyal and valuable. She had no infractions that I am aware of and has never had any criminal behavior.

Reality has volunteered and given to every community she has ever lived in and donated to organizations to help and protect others. She took college courses while in the military, and also

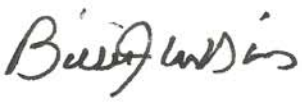
studied subjects such as religion, meditation, and PTSD on her own. She succeeded in completion of training and certification in Spinning and Yoga, and truly loved being able to help others achieve fitness and life goals. She is loved and respected by many and those who know her know that she is good, honest, and loyal to her community and country. Those who know her know that she is not a danger in any way to anyone.

Reality also suffers from depression, anxiety, and an eating disorder. Growing up, she exhibited many signs of obsessive compulsive disorder and anxiety, but she always found ways to manage these issues. I worry about her mental health daily, and am concerned about the stress she is under and whether she will receive treatment needed to keep her healthy and safe. She was deeply impacted by her father's death, as they were extremely close and she relied on him for advice and emotional strength. She hides her pain and struggles from me, as she has always taken on the role of caretaker for me. Throughout this entire situation, she has focused on making sure that I am ok and taken care of.

Reality's arrest and charges have impacted me and our family greatly. Having her in jail has been the hardest thing we as a family have had to deal with, and it has changed us in every way possible. We have rearranged everything in our lives to support her and we will continue to do so. My husband and I have already begun planning to build or move a small home unto a section of our property here in Texas, for her to live upon release. Our family and friends continue to be very supportive and will always assist Reality in any way possible.

Again, I ask that you consider Reality's age, service, character, history, and actions when making a determination for her sentence and future. I ask that you remember that she is a young woman, a sister, and a daughter. I ask that you see the good in her and her actions. I pray that there will be justice and that her sentence and punishment be fair when all things are considered. I thank you for your time, service, and consideration.

Respectfully



Billie J. Winner-Davis

EXHIBIT 4

Office of the Attorney General
Washington, D. C. 20530

March 26, 2020

MEMORANDUM FOR DIRECTOR OF BUREAU PRISONS

FROM: THE ATTORNEY GENERAL

SUBJECT: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic

Thank you for your tremendous service to our nation during the present crisis. The current situation is challenging for us all, but I have great confidence in the ability of the Bureau of Prisons (BOP) to perform its critical mission during these difficult times. We have some of the best-run prisons in the world and I am confident in our ability to keep inmates in our prisons as safe as possible from the pandemic currently sweeping across the globe. At the same time, there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities. I am issuing this Memorandum to ensure that we utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody.

I. TRANSFER OF INMATES TO HOME CONFINEMENT WHERE APPROPRIATE TO DECREASE THE RISKS TO THEIR HEALTH

One of BOP's tools to manage the prison population and keep inmates safe is the ability to grant certain eligible prisoners home confinement in certain circumstances. I am hereby directing you to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. Many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.

In assessing which inmates should be granted home confinement pursuant to this Memorandum, you are to consider the totality of circumstances for each individual inmate, the statutory requirements for home confinement, and the following non-exhaustive list of discretionary factors:

- The age and vulnerability of the inmate to COVID-19, in accordance with the Centers for Disease Control and Prevention (CDC) guidelines;

- The security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities;

- The inmate's conduct in prison, with inmates who have engaged in violent or gang-related activity in prison or who have incurred a BOP violation within the last year not receiving priority treatment under this Memorandum;

- The inmate's score under PATTERN, with inmates who have anything above a minimum score not receiving priority treatment under this Memorandum;

- Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility;

- The inmate's crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home detention. Other serious offenses should weigh more heavily against consideration for home detention.

In addition to considering these factors, before granting any inmate discretionary release, the BOP Medical Director, or someone he designates, will, based on CDC guidance, make an assessment of the inmate's risk factors for severe COVID-19 illness, risks of COVID-19 at the inmate's prison facility, as well as the risks of COVID-19 at the location in which the inmate seeks home confinement. We should not grant home confinement to inmates when doing so is likely to increase their risk of contracting COVID-19. You should grant home confinement only when BOP has determined—based on the totality of the circumstances for each individual inmate—that transfer to home confinement is likely not to increase the inmate's risk of contracting COVID-19.

II. PROTECTING THE PUBLIC

While we have an obligation to protect BOP personnel and the people in BOP custody, we also have an obligation to protect the public. That means we cannot take any risk of transferring inmates to home confinement that will contribute to the spread of COVID-19, or put the public at risk in other ways. I am therefore directing you to place any inmate to whom you grant home confinement in a mandatory 14-day quarantine period before that inmate is discharged from a BOP facility to home confinement. Inmates transferred to home confinement under this prioritized process should also be subject to location monitoring services and, where a court order is entered, be subject to supervised release.

We must do the best we can to minimize the risk of COVID-19 to those in our custody, while also minimizing the risk to the public. I thank you for your service to the country and assistance in implementing this Memorandum.

EXHIBIT 5

Office of the Attorney General
Washington, D. C. 20530

April 6, 2020

MEMORANDUM FOR ALL HEADS OF DEPARTMENT COMPONENTS AND
ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic

The mission of the Department of Justice is to enforce our nation's laws and to ensure the safe and fair administration of justice. We have an obligation to maintain public safety and to protect victims and witnesses from threats and retaliation, and we must also safeguard the health and safety of those remanded to our custody. As always, controlling weight should be given to public safety, and under no circumstance should those who present a risk to any person or the community be released. But the current COVID-19 pandemic requires that we also ensure we are giving appropriate weight to the potential risks facing certain individuals from being remanded to federal custody. Each case must be evaluated on its own and, where appropriate, the risks the pandemic presents should be part of your analysis, as elaborated further below.

First, the Bail Reform Act ("BRA") remains the governing statute for pretrial detention issues and you are to continue enforcing that provision according to its terms. As you know, the BRA provides that a defendant must be detained pending trial where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

For certain crimes, it is presumed that "no condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). We should continue applying the BRA's factors and that presumption according to their terms. We simply cannot agree to anything that will put the public at risk. COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free. When you believe a defendant poses a risk to the safety of any person or the community at large, you should continue to seek remand as zealously today as you would have before the pandemic began, in accordance with the BRA's plain terms. Protecting the public from criminals is our paramount obligation.

Second, in applying the familiar BRA analysis, which already includes some consideration of the defendant's "physical and mental condition," *id*., you should now consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein. It also presents risk to the individual being remanded into custody—risk that is particularly acute for individuals who are vulnerable to a serious infection under the Centers for Disease Control and Prevention ("CDC") Guidelines.

We have an obligation to minimize these risks to the extent possible while remaining faithful to the BRA's text and discharging our overriding obligation to protect the public. That means you should consider not seeking detention to the same degree we would under normal circumstances—specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines. In this analysis, the risk of flight and seriousness of the offense must be weighed against the defendant's vulnerability to COVID-19. Accordingly, we should continue to seek detention for defendants who are charged with serious crimes and who pose a substantial risk of flight, or for defendants who would normally warrant detention under the BRA and who are not vulnerable to COVID-19 under CDC Guidelines.

Third, these same considerations should govern your litigation of motions filed by detained defendants seeking release in light of the pandemic. In these cases, the Court has already made a finding based on the evidence presented that a defendant posed a risk of flight or a danger to the community and should therefore be remanded pending trial. In assessing whether it is appropriate to revisit that determination, you should also consider the potential risk that the defendant will spread COVID-19 in his or her community upon release. At the same time that the defendant's risk from COVID-19 should be a significant factor in your analysis, you should also consider any risk that releasing the defendant would pose to the public. This consideration will depend on the facts and circumstances of each defendant and the facility where he or she is being held, and you should factor this consideration into your analysis as appropriate. Our duty to protect the public extends to protecting it from contagion spread by someone released from our custody.

* * *

The factors and considerations discussed herein should guide your analysis of pretrial detention issues while the pandemic is ongoing, but what position to take in each particular case is ultimately your decision. We must adapt to the current difficult circumstances, while also ensuring that we never deviate from our duty to keep the public safe from dangerous criminals. Please exercise your discretion appropriately.

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -v- DANIEL HERNANDEZ, Defendant.	18 Cr. 834-04 (PAE) ORDER

PAUL A. ENGELMAYER, District Judge:

WHEREAS on December 18, 2019, the Court imposed sentence on the defendant as set forth in a Judgment, dated December 20, 2019 (ECF No. 398);

WHEREAS on March 22, 2020, the defendant moved this Court for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (ECF No. 437);

WHEREAS on March 25, 2020, the Court denied the defendant's motion for failure to exhaust the administrative remedies set forth in 18 U.S.C. § 3582(c)(1)(A)(i) (ECF No. 440);

WHEREAS on March 31, 2020, now having exhausted his administrative remedies, the defendant renewed his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (ECF No. 445);

NOW THEREFORE IT IS HEREBY ORDERED that, for the reasons set forth in an accompanying Opinion and Order, the Court grants the defendant's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i);

IT IS FURTHER ORDERED that pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), the Court hereby reduces the defendant's term of incarceration such that he is released from the custody of the Bureau of Prisons effective immediately;

IT IS FURTHER ORDERED that the defendant is hereby placed on supervised release and the Court re-imposes the terms and conditions of supervised release as set forth in the December 20, 2019 Judgment (ECF No. 398) with the following amendments:

1. The defendant shall serve the first four months of supervised release on home incarceration, to be enforced by GPS monitoring, at an address approved by the defendant's probation officer;
2. In light of the COVID-19 pandemic, the defendant must remain at his residence except to seek any necessary medical treatment or to visit his attorney, in each instance with prior notice and approval by the Probation Department; and
3. In the event the Probation Department is unable to implement GPS monitoring upon the defendant's release, the defendant is ordered to have daily contact with the defendant's probation officer through videoconferencing technology until GPS monitoring is implemented.

IT IS FURTHER ORDERED that the Court grants the Government's request that the docketing of this Order be delayed, such that this Order and the Court's accompanying Opinion and Order are not to be docketed until 4 p.m. on April 2, 2020.

SO ORDERED.

Paul A. Engelmayer

PAUL A. ENGELMAYER
United States District Judge

Dated: April 1, 2020
New York, New York

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES v. JEREMY RODRIGUEZ	Criminal Action No. 2:03-cr-00271-AB-1

MEMORANDUM

We are in the midst of an unprecedented pandemic. COVID-19 has paralyzed the entire world. The disease has spread exponentially, shutting down schools, jobs, professional sports seasons, and life as we know it. It may kill 200,000 Americans and infect millions more.[1] At this point, there is no approved cure, treatment, or vaccine to prevent it.[2] People with pre-existing medical conditions—like petitioner Jeremy Rodriguez—face a particularly high risk of dying or suffering severe health effects should they contract the disease.

Mr. Rodriguez is an inmate at the federal detention center in Elkton, Ohio. He is in year seventeen of a twenty-year, mandatory-minimum sentence for drug distribution and unlawful firearm possession, and is one year away from becoming eligible for home confinement. Mr. Rodriguez has diabetes, high blood pressure, and liver abnormalities. He has shown significant rehabilitation in prison, earning his GED and bettering himself with numerous classes. He moves for a reduction of his prison sentence and immediate release under the "compassionate release"

[1] Bobby Allyn, *Fauci Estimates That 100,000 To 200,000 Americans Could Die From The Coronavirus*, National Public Radio (Mar. 29, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/29/823517467/fauci-estimates-that-100-000-to-200-000-americans-could-die-from-the-coronavirus.

[2] *See* Pien Huang, *How the Novel Coronavirus and the Flu Are Alike . . . And Different*, National Public Radio (Mar. 20, 2020), https://www.npr.org/sections/goatsandsoda/2020/03/20/815408287/how-the-novel-coronavirus-and-the-flu-are-alike-and-different.

statute, 18 U.S.C. § 3582(c)(1)(A). He argues that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. §3582(c)(1)(A)(i).

For Mr. Rodriguez, nothing could be more extraordinary and compelling than this pandemic. Early research shows that diabetes patients, like Mr. Rodriguez, have mortality rates that are more than twice as high as overall mortality rates.[3] One recent report revealed: "Among 784 patients with diabetes, half were hospitalized, including 148 (18.8%) in intensive care. That compares with 2.2% of those with no underlying conditions needing ICU treatment."[4]

These statistics—which focus on the non-prison population—become even more concerning when considered in the prison context. Prisons are tinderboxes for infectious disease. The question whether the government can protect inmates from COVID-19 is being answered every day, as outbreaks appear in new facilities. Two inmates have already tested positive for COVID-19 in the federal detention center in Elkton—the place of Rodriguez's incarceration.[5] After examining the law, holding oral argument, and evaluating all the evidence that has been presented, I reach the inescapable conclusion that Mr. Rodriguez must be granted "compassionate release."

I. DISCUSSION

18 U.S.C. § 3852(c)(1)(A)(i) allows a court to reduce an inmate's sentence if the court finds that (1) "extraordinary and compelling reasons" warrant a reduction, (2) the reduction

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[3] *See Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 24, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf.

[4] Tom Avril, *How much diabetes, smoking, and other risk factors worsen your coronavirus odds*, Phialdelphia Inquirer (Mar. 31, 2020), https://www.inquirer.com/health/coronavirus/coronavirus-underlying-conditions-heart-lung-kidney-cdc-20200331.html.

[5] *COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 31, 2020), https://www.bop.gov/coronavirus/index.jsp.

would be "consistent with any applicable policy statements issued by the Sentencing Commission," and (3) the applicable sentencing factors under § 3553(a) warrant a reduction.[6] Congress has not defined the term "extraordinary and compelling," but the Sentencing Commission ("Commission") has issued a policy statement defining the term. The policy statement lists three specific examples of "extraordinary and compelling reasons," none of which apply to Mr. Rodriguez. U.S.S.G. § 1B1.13 cmt. n.1(A)-(C). It also provides a fourth "catchall" provision if the Director of the Bureau of Prisons determines that "there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described." *Id.* § 1B1.13, cmt. n.1(D). Mr. Rodriguez argues that, in light of the First Step Act, the Court is no longer bound by the policy statement. Therefore, he argues, the Court can and should exercise its discretion to determine that "extraordinary and compelling reasons" exist for his release. The government argues that Rodriguez does not meet any of the enumerated criteria in the policy statement, and that the Court cannot independently assess whether other extraordinary and compelling reasons exist that warrant a sentence reduction.

I conclude that (1) the Court may independently assess whether "extraordinary and compelling reasons" exist; (2) the COVID-19 pandemic—in combination with Mr. Rodriguez's underlying health conditions, proximity to his release date, and rehabilitation—constitute "extraordinary and compelling reasons" that warrant a reduction; (3) Mr. Rodriguez is not a danger to his community; and (4) the factors under § 3553(a) favor reducing Mr. Rodriguez's sentence. Therefore, I will grant the motion.

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[6] The government agrees that Rodriguez's motion is properly before the Court because he has complied with § 3582(c)(1)(A)'s 30-day lapse provision. *See* 18 U.S.C. § 3582(c)(1)(A) (providing that a prisoner can file a motion with the court upon the "lapse of 30 days from the receipt of [a request for compassionate release] by the warden of the defendant's facility.").

A. The Court may decide whether "extraordinary and compelling reasons" exist

Federal courts may reduce a prisoner's sentence under the circumstances outlined in 18 U.S.C. § 3852(c). Under § 3852(c)(1)(A)(i), a court may reduce a prisoner's sentence "if it finds that" (1) "extraordinary and compelling reasons warrant such a reduction" and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." Prior to 2018 only the Director of the Bureau of Prisons ("BOP") could file these kinds of "compassionate-release motions." *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019).

The BOP rarely did so. The BOP was first authorized to file compassionate-release motions in 1984. From 1984 to 2013, an average of only 24 inmates were released each year through BOP-filed motions. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice). According to a 2013 report from the Office of the Inspector General, these low numbers resulted, in part, because the BOP's "compassionate release program had been poorly managed and implemented inconsistently, . . . resulting in eligible inmates . . . not being considered for release, and terminally ill inmates dying before their requests were decided." *Id.* The report also found that the BOP "did not have clear standards as to when compassionate release is warranted and . . . BOP staff therefore had varied and inconsistent understandings of the circumstances that warrant consideration for compassionate release." *Id.*

Against this backdrop, Congress passed and President Trump signed the First Step Act in 2018, a landmark piece of criminal-justice reform legislation that "amend[ed] numerous portions of the U.S. Code to promote rehabilitation of prisoners and unwind decades of mass incarceration." *Brown*, 411 F. Supp. 3d at 448 (citing Cong. Research Serv., R45558, *The First*

Step Act of 2018: An Overview 1 (2019)). In an effort to improve and increase the use of the compassionate-release process, the First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP's exclusive "gatekeeper" role.[7] Congress made this change in § 603(b) of the First Step Act. Section 603(b)'s purpose is enshrined in its title: "Increasing the Use and Transparency of Compassionate Release." Section 603(b) was initially a standalone bill that "explicitly sought to 'improve the compassionate release process of the Bureau of Prisons.'" *Brown*, 411 F. Supp. 3d at 451 (quoting Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong. (2018)).

The amendment to § 3852(c)(1)(A) provided prisoners with two direct routes to court: (1) file a motion after fully exhausting administrative appeals of the BOP's decision not to file a motion, or (2) file a motion after "the lapse of 30 days from the receipt . . . of such a request" by the warden of the defendant's facility, "whichever is earlier." 18 U.S.C. § 3852(c)(1)(A). These changes gave the "district judge . . . the ability to grant a prisoner's motion for compassionate release even in the face of BOP opposition or its failure to respond to the prisoner's compassionate release request in a timely manner." *United States v. Young*, 2020 WL 1047815, at *5 (M.D. Tenn. Mar. 3, 2020). The substantive criteria of § 3582(c)(1)(A)(i) remained the same.

Congress never defined the term "extraordinary and compelling reasons," except to state that "[r]ehabilitation . . . alone" does not suffice. 18 U.S.C. § 994(t). Rather, Congress directed the Sentencing Commission to define the term. *Id.* The Commission did so prior to the passage

[7] S*ee also United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("The First Step Act was passed against the backdrop of documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants."); 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of the First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

of the First Step Act, but has not since updated the policy statement. *See* U.S.S.G. §1B1.13 cmt. n.1(A)-(D). In subsections (A)-(C) of an Application Note to U.S.S.G. §1B1.13, the Commission enumerated three specific "reasons" that qualify as "extraordinary and compelling": (A) terminal illness diagnoses or serious medical, physical or mental impairments from which a defendant is unlikely to recover, and which "substantially diminish" the defendant's capacity for self-care in prison; (B) aging-related health decline where a defendant is over 65 years old and has served at least ten years or 75% of his sentence; or (C) two family related circumstances: (i) death/incapacitation of the only caregiver for the inmate's children or (ii) incapacitation of an inmate's spouse, if the inmate is the spouse's only caregiver. *See id.* cmt. n.1(A)-(C). The policy statement also added a catchall provision that gave the Director of the BOP the authority to determine if "there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with" the other three categories. *Id.* cmt. n.1(D).

Thus, implicitly recognizing that it is impossible to package all "extraordinary and compelling" circumstances into three neat boxes, the Commission made subsections (A)-(C) non-exclusive by creating a catchall that recognized that other "compelling reasons" could exist. *See United States v. Urkevich*, 2019 WL 6037391, at *3 (D. Neb. Nov. 14, 2019) (noting that §1B1.13 never "suggests that [its] list [of criteria] is exclusive"); *United States v. Beck*, --- F. Supp. 3d ----, 2019 WL 2716505, at *8 (M.D.N.C. June 28, 2019) ("Read as a whole, the application notes suggest a flexible approach . . . [and] recognize that the examples listed in the application note do not capture all extraordinary and compelling circumstances.").

The Commission has not updated its policy statement to account for the changes imposed by the First Step Act,[8] and the policy statement is now clearly outdated. The very first sentence of §1B1.13 constrains the entire policy statement to motions filed solely by the BOP. And an Application Note also explicitly confines the policy statement to such motions. *See* U.S.S.G. §1B1.13 ("Upon motion of the Director of the [BOP] . . . the court may reduce a term of imprisonment . . . ."); *id.* at cmt n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the [BOP]."); *see also Brown* at 449 (describing the old policy statement as "outdated," adding that the Commission "has not made the policy statement for the old [statutory] regime applicable to the new one."); *United States v. Ebbers*, --- F. Supp. 3d ----, 2020 WL 91399, at *4 (S.D.N.Y. 2020) (describing the old policy statement as "at least partly anachronistic").

Accordingly, a majority of district courts have concluded that the "old policy statement provides helpful guidance, [but] . . . does not constrain [a court's] independent assessment of whether 'extraordinary and compelling reasons' warrant a sentence reduction under § 3852(c)(1)(A)." *United States v. Beck*, --- F. Supp. 3d ---- , No. 13-cr-186-6, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019); *see also Brown*, 411 F. Supp. 3d at 451 ("[T]he most natural reading of the amended § 3582(c) . . . is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it."); *United States v. Fox*, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("[D]eference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role."); *United States v. Redd*, 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) ("Application Note 1(D)'s

[8] As several courts have recognized, the Commission is unable to update the Sentencing Guidelines because, at the moment, it lacks a sufficient number of appointed commissioners to take this action. *See, e.g.*, *United States v. Maumau*, No. 08-cr-00785, 2020 WL 806121, at *1 n.3 (Feb. 18, 2020).

prefatory language, which requires a [catchall] determination by the BOP Director, is, in substance, part and parcel of the eliminated requirement that relief must be sought by the BOP Director in the first instance. . . . [R]estricting the Court to those reasons set forth in §1B1.13 cmt. n.1(A)-(C) would effectively preserve to a large extent the BOP's role as exclusive gatekeeper, which the First Step Act substantially eliminated . . . ."); *United States v. Young*, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) ("[T]he dependence on the BOP to determine the existence of an extraordinary and compelling reason, like the requirement for a motion by the BOP Director, is a relic of the prior procedure that is inconsistent with the amendments implemented by the First Step Act."); *Maumau*, 2020 WL at *2-*3 (D. Utah Feb. 18, 2020) (collecting cases).

A smaller number of courts have concluded that the Sentencing Commission's policy statement prevents district courts from considering any "extraordinary and compelling reasons" outside of those listed in subsections (A)-(C) of the policy statement. *See, e.g., United States v. Lynn,* 2019 WL 3805349, at *2-*5 (S.D. Ala. Aug. 12, 2019); *United States v. Shields*, 2019 WL 2359231, at *4 (N.D. Cal. June 4, 2019); *United States v. Willingham*, 2019 WL 6733028, at *2 (S.D. Ga. Dec. 10, 2019). The government urges this Court to follow these minority decisions.

The conclusion reached by the majority of courts is more persuasive. It is true that §3852(c)(1)(A) requires courts to act consistently with *applicable* policy statements under the Sentencing Guidelines, but the Sentencing Commission simply has not issued a policy statement that addresses prisoner-filed motions post-First Step Act:

> There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. By its terms, the old policy statement applies to motions filed by the [BOP] Director and makes no mention of motions filed by defendants. . . . The Sentencing Commission has not amended or updated the old policy statement since the First Step Act was enacted, nor has it adopted a new policy statement applicable to motions filed by defendants.

Beck, --- F. Supp. 3d ----, 2019 WL 2716505, at *5 (citations omitted). The introductory sentence of §1B1.13, "*[u]pon motion of the Director of the [BOP . . . the court may reduce a term of imprisonment*," limits the policy statement's scope to a procedural scheme exclusively involving the BOP that does not exist anymore. And comment 4 of §1B1.13's Application Note expressly states that "[a] reduction *under this policy statement may be granted only upon motion by the Director of the [BOP]*." Accordingly, by its own terms, the scope of the old policy statement is clearly outdated and, at the very least, does not apply to the entire field of post-First Step Act motions. In other words, for prisoner-filed motions, there is a gap left open that no "applicable" policy statement has addressed. Therefore, the policy statement may provide "helpful guidance" but does not limit the Court's independent assessment of whether "extraordinary and compelling reasons" exist under § 3582(c)(1)(A)(i). *See Beck* at *6; *Fox*, 2019 WL 3046086, at *3 ("I agree with the courts that have said that the Commission's existing policy statement provides helpful guidance . . . [but] is not ultimately conclusive given the statutory change.").

Minority cases like *Lynn* attempt to refute this point by minimizing the impact of the First Step Act's changes. *See Lynn*, 2019 WL 38505349, at *4 n.5 ("While Section 1B1.13 and application note 4 reference motions brought by BOP, this merely restates the restriction on proper movants [that existed] prior to the [First Step] Act . . . ."). The First Step Act, however, significantly altered the landscape of compassionate-release motions and created a procedural gap that the Sentencing Commission's policy statement never had a chance to address.

When the Commission wrote its policy statement, a motion could reach the court only through the BOP. By providing the catchall provision, the Commission recognized that it may be impossible to definitively predict what reasons may qualify as "extraordinary and

compelling." Rather than attempt to make a definitive prediction, the Commission covered all of its bases by ensuring that *every motion* to reach the court would have an opportunity to be assessed under the flexible catchall provision. At the time the Commission wrote, the catchall provision's BOP-focused language[9] accomplished that task, because every motion to reach the court necessarily had to be filed and approved by the BOP.

Under the First Step Act, however, it is possible for inmates to file compassionate-release motions—under the 30-day lapse provision—when their warden *never* responds to their request for relief. Thus, Congress specifically envisioned situations where inmates could file direct motions in cases where nobody in the BOP *ever* decided whether the motion qualified for relief under the catchall provision that the Commission originally sought to apply to *all* motions.

It would be a strange remedy indeed if Congress provided that prisoners whose wardens failed to respond in such a situation could only take advantage of the thirty-day lapse provision by accepting a pared-down standard of review that omitted the flexible catchall standard. But under the minority view, that is exactly what would happen: prisoners in this situation would never have the chance for the BOP to assess their claim under the catchall provision and would never get the chance for this kind of flexible review in the district court, since under the minority view, the court would be constrained to the specific criteria in subsections (A)-(C) of the policy statement.[10] This would have the perverse effect of *penalizing* prisoners who take advantage of

[9] *See* U.S.S.G. §1B1.13 cmt. n.1(D) (providing for relief if, "[a]s determined by the Director of the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").

[10] The minority bases this view on the BOP-focused language of the policy statement's catchall provision. *See* U.S.S.G. §1B1.13 cmt. n.1(D) (asking only the BOP Director to determine if other extraordinary and compelling circumstances exist).

the First Step Act's fast-track procedures and rewarding prisoners who endure the BOP-related delay that the Act sought to alleviate.

That would be antithetical to the First Step Act. The First Step Act—and the critical 30-day lapse route it provided—directly responded to a compassionate-release system so plagued by delay that prisoners sometimes died while waiting for the BOP to make a decision. *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); *see also* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications."). Under the minority view, Congress would have created a two-tiered system that poses a Sophie's Choice to prisoners with unresponsive wardens: (1) opt for quicker relief at the cost of a disadvantageous standard with no catchall; or (2) endure delay—and, possibly, complete inaction—to retain a more flexible standard. Congress sought to help, not hinder, these sorts of prisoners, and clearly did not intend to create this outcome. Nothing in the text of the old policy statement calls for it, since that statement expressly limits itself to motions filed by the BOP and was written before this situation was even possible to envision.

Adopting the minority view, then, would undermine the purpose of the First Step Act and create an inconsistent and shifting definition of the term "extraordinary and compelling." Because the Sentencing Commission has not issued a policy statement addressing post-First Step Act procedures, it certainly has not mandated that courts take such an approach. Accordingly, as a result of the First Step Act, there is simply a procedural gap that the Sentencing Commission—currently lacking a quorum and unable to act—has not yet had the chance to fill. Nothing in

§ 3852(c)(1)(A)(i) requires courts to sit on their hands in situations like these. Rather, the statute's text directly instructs *courts* to "find that" extraordinary circumstances exist.[11]

Therefore, this Court has discretion to assess whether Mr. Rodriguez presents "extraordinary and compelling reasons" for his release outside of those listed in the non-exclusive criteria of subsections (A)-(C) of the old policy statement.[12] Of course, this policy statement remains informative in guiding my determination. *See, e.g.*, *Fox*, 2019 WL 3046086, at *3 ("[T]he Commission's existing policy statement provides helpful guidance on the factors that support compassionate release, although it is not ultimately conclusive . . . ."); *Beck*, 2019 WL 2716505, at *7 ("While the old policy statement provides helpful guidance, it does not constrain the Court's independent assessment . . . ."); *United States v. Lisi*, 2020 WL 881994, at *3 (S.D.N.Y. Feb. 24, 2020) ("[T]he Court may independently evaluate whether [defendant] has

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[11] Indeed, the compassionate-release provision was first introduced in 1984—with the same "consistent with applicable policy statements" requirement—but the Sentencing Commission did not issue a policy statement until 2006. *See Young*, 2020 WL 1047815, at *3-*4 (providing history of the compassionate-release statute and the Commission's policy statement). Surely courts were not required to refrain from assessing "extraordinary and compelling circumstances" in that interim period. Until the Commission updates its policy statement in light of the First Step Act, the same point applies here.

[12] Accepting the minority view—which appears to treat the BOP's internal guidance on the catchall provision as definitive—also ignores the point that courts "do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency." *Chao v. Community Tr. Co.*, 474 F.3d 75, 85 (3d Cir. 2007) (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003)). While it is true that Congress provides that courts must act consistently with the Sentencing Commission's policy statements, Congress never delegated any authority to the BOP to define the term "extraordinary and compelling," nor did it ever instruct courts to act consistently with the BOP's internal guidance. *Accord United States v. Ebbers*, --- F. Supp. 3d ----, 2020 WL 91399, at *4 n.6 (S.D.N.Y. 2020) ("[N]o statute directs the Court to consult the BOP's rules or guidelines, and no statute delegates authority to the BOP to define the requirements for compassionate release. . . . Moreover, the First Step Act reduced the BOP's control over compassionate release and vested greater discretion with the courts. Deferring to the BOP would seem to frustrate that purpose."); *cf. U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so."); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) (same).

raised an extraordinary and compelling reason for compassionate release . . . [but §1B1.13's policy statement] remain[s] as helpful guidance to courts . . . .").

B. Extraordinary and compelling reasons exist here

Mr. Rodriguez's circumstances—particularly the outbreak of COVID-19 and his underlying medical conditions that place him at a high risk should he contract the disease—present "extraordinary and compelling reasons" to reduce his sentence. Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common." *Extraordinary*, Black's Law Dictionary (11th ed. 2019). It defines "compelling need" as a "need so great that irreparable harm or injustice would result if it is not met." *Compelling Need*, Black's Law Dictionary (11th ed. 2019).

Mr. Rodriguez has shown extraordinary and compelling reasons to reduce his sentence. First, he suffers from underlying health conditions that render him especially vulnerable to COVID-19. Second, prison is a particularly dangerous place for Mr. Rodriguez at this moment. Third, he has served almost all of his sentence and has shown commendable rehabilitation while in prison. None of these reasons *alone* is extraordinary and compelling. Taken together, however, they constitute reasons for reducing his sentence "[b]eyond what is usual, customary, regular, or common," and reasons "so great that irreparable harm or injustice would result if [the relief] is not [granted]." *Extraordinary*, Black's Law Dictionary (11th ed. 2019); *Compelling Need*, Black's Law Dictionary (11th ed. 2019).

i. Mr. Rodriguez's Health Conditions Make Him Especially Vulnerable to COVID-19

Mr. Rodriguez's health conditions put him at high risk of grave illness or death if he gets infected with coronavirus. Dr. Cameron Baston, Assistant Professor of Clinical Medicine at the University of Pennsylvania Perelman School of Medicine, reviewed Mr. Rodriguez's medical

records from 2018 to 2020 and found that Mr. Rodriguez is in the "higher risk category" for developing more serious disease. Baston Decl. ¶¶ 14-17, Def. Reply Br. Ex. B, ECF No. 134-2. Mr. Rodriguez has Type 2 diabetes mellitus with diabetic neuropathy, essential hypertension, obesity, and "abnormal liver enzymes in a pattern most consistent with non-alcoholic fatty liver disease." *Id.* ¶ 15. Dr. Baston explained that "Mr. Rodriguez is in the higher risk category as a result of the immunosuppression from his preexisting condition, Type 2 Diabetes." *Id.* ¶ 16. Further, "[w]ere he to contract the virus, he would be at a higher risk of morbidity and mortality due to his liver abnormalities, obesity, and hypertension" and "would also be at a higher risk to require more advanced support such as ventilation and oxygenation." *Id.* ¶¶ 17-18.

Preliminary research has borne out Dr. Baston's professional opinion. An early World Health Organization report on COVID-19 found that "[i]ndividuals at highest risk for severe disease and death include people . . . with underlying conditions such as hypertension [and] diabetes."[13] While the preliminary overall fatality rate in the report was 3.8%, the fatality rate for people with diabetes was 9.2%.[14] The fatality rate for people with hypertension was 8.4%.[15] The

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[13] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 24, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf.

[14] *Id.* The report noted that these figures represented the "crude fatality ratio." The Joint Mission acknowledged the challenges of reporting crude fatality ratio early in an epidemic. The overall fatality rate in the report is higher than current global estimates, but these numbers nonetheless show that fatality rates for people with diabetes and hypertension are elevated.

[15] *Id.* The relationship between hypertension and elevated risk from COVID-19 is not fully understood. Some experts say that high blood pressure alone is not a risk factor, but that it may be a risk factor when combined with another underlying health condition. *See* Rob Stein, *High Blood Pressure Not Seen As Major Independent Risk For COVID-19*, National Public Radio (Mar. 20, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818986656/high-blood-pressure-not-seen-as-major-independent-risk-for-covid-19. Other experts believe that COVID-19 strains the heart, making people with hypertension more vulnerable to the disease. *See* Anna Medaris Miller et al., *10 common health conditions that may increase risk of death from the coronavirus, including diabetes and heart disease*, Business Insider (Mar. 23, 2020), https://www.businessinsider.com/hypertension-diabetes-conditions-that-make-coronavirus-more-deadly-2020-3 (noting that 76% of people in Italy who died from

Centers for Disease Control and Prevention also explains that "[p]eople of any age" with "certain underlying medical conditions" are at high risk of severe illness from COVID-19.[16] It names diabetes as one such condition.

The government argues that Mr. Rodriguez's "conditions are not unusual" and notes that the BOP classifies him in its lowest medical care level, for "inmates who are generally healthy with limited needs for clinician evaluation and monitoring." Resp. in Opp'n to Mot. Reduce Sentence 8-9, ECF No. 129 ("Resp. Br."). In the absence of a deadly pandemic that is deadlier to those with Mr. Rodriguez's underlying conditions, these conditions would not constitute "extraordinary and compelling reasons." It is the confluence of COVID-19 and Mr. Rodriguez's health conditions that makes this circumstance extraordinary and compelling.

ii. Mr. Rodriguez Cannot Adequately Protect Himself Against Infection in Prison

Given Mr. Rodriguez's vulnerability to COVID-19, prison is a particularly dangerous place for him. COVID-19 is now inside FCI Elkton. Many of the recommended measures to prevent infection are impossible or unfeasible in prison. The government's assurances that the BOP's "extraordinary actions" can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease at the facility where Mr. Rodriguez is housed. *See* Resp. Br. 10. Indeed, Congress and the Department of Justice are increasingly recognizing the danger of COVID-19 outbreaks in prison and encouraging steps to release some inmates. *See infra* at 18.

COVID-19 had hypertension). Mr. Rodriguez has hypertension and diabetes, so hypertension is probably a risk factor for him in either case.

[16] *People who are at higher risk for severe illness*, Centers for Disease Control & Prevention (Mar. 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

Prisons are ill-equipped to prevent the spread of COVID-19. Public health experts recommend containing the virus through measures such as social distancing, frequently disinfecting shared surfaces, and frequently washing hands or using hand sanitizer.[17] Joseph J. Amon, an infectious disease epidemiologist and Director of Global Health and Clinical Professor in the department of Community Health and Prevention at the Drexel Dornsife School of Public Health, has studied infectious diseases in detention settings and states:

> Detention facilities have even greater risk of infectious spread because of conditions of crowding, the proportion of vulnerable people detained, and often scant medical care. People live in close quarters and are also subject to security measures which prohibit successful "social distancing" that is needed to effectively prevent the spread of COVID-19. Toilets, sinks, and showers are shared, without disinfection between use. Food preparation and food service is communal, with little opportunity for surface disinfection. The crowded conditions, in both sleeping areas and social areas, and the shared objects (bathrooms, sinks, etc.) will facilitate transmission.

Amon Decl. ¶ 20, Def. Reply Br. Ex. A, ECF No. 134-1. Some jails and prisons have already become COVID-19 hotspots. For instance, the infection rate in New York City jails is far outpacing the infection rate in the city as a whole.[18] FCI Oakdale, a BOP facility in Louisiana, recently "exploded with coronavirus" cases, leading to the death of an inmate and positive test

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[17] *See, e.g.*, *How to Protect Yourself*, Centers for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html; Dr. Asaf Bitton, *Social distancing in the coronavirus pandemic — maintaining public health by staying apart*, Boston Globe (Mar. 14, 2020), https://www.bostonglobe.com/2020/03/14/opinion/social-distancing-coronavirus-pandemic-maintaining-public-health-by-staying-apart/.

[18] *See* Elizabeth Weill-Greenberg, *New York City Jails Have an Alarmingly High Infection Rate, According to an Analysis by the Legal Aid Society*, The Appeal (Mar. 26, 2020), https://theappeal.org/new-york-city-jails-coronavirus-covid-19-legal-aid-society/.

results for thirty other inmates and staff.[19] As of March 31, 2020, the BOP has reported that two inmates at FCI Elkton—Rodriguez's facility—have tested positive for COVID-19.[20]

The BOP cannot adequately protect Mr. Rodriguez from infection, especially in light of his vulnerability and the presence of COVID-19 in FCI Elkton.

The BOP's containment measures have already proven insufficient to prevent the spread of COVID-19. As of March 26, the BOP reported eighteen known cases of COVID-19 among inmates and staff.[21] Just four days later, the BOP reported fifty-two cases, an inmate had died, and COVID-19 had reached FCI Elkton.[22] The BOP's reported cases are rapidly growing and almost certainly underestimate the true number of infections. For instance, as of March 29, the BOP only listed eight COVID-19 cases at FCI Oakdale, while the Washington Post reported thirty-one.[23] Testing is also scarce throughout the country.[24] Within the BOP, not all inmates with symptoms are being tested or quarantined.[25] Further, the BOP's protocols for screening inmates and staff depend on documented risk of exposure. Preliminary research indicates that

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[19] Kimberly Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, Washington Post (Mar. 29 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html.

[20] *COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 31, 2020), https://www.bop.gov/coronavirus/index.jsp.

[21] *Id.* (accessed Mar. 26, 2020).

[22] *Id.* (accessed Mar. 30, 2020); *Inmate Death at FCI Oakdale I*, Bureau of Prisons (Mar. 28, 2020), https://www.bop.gov/resources/news/pdfs/20200328_press_release_oak_death.pdf

[23] *Compare* Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, *supra* note 19, *with COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (accessed Mar. 29, 2020), https://www.bop.gov/coronavirus/index.jsp.

[24] *See, e.g.*, Robert P. Baird, *Why Widespread Coronavirus Testing Isn't Coming Anytime Soon*, New Yorker (Mar. 24, 2020), https://www.newyorker.com/news/news-desk/why-widespread-coronavirus-testing-isnt-coming-anytime-soon.

[25] *See* Michael Balsamo & Michael R. Sisak, *Federal prisons struggle to combat growing COVID-19 fears*, AP (Mar. 27, 2020), https://apnews.com/724ee94ac5ba37b4df33c417f2bf78a2.

undocumented cases of coronavirus, including those of people who have not yet begun to show symptoms, are responsible for a significant portion of the virus's transmission.[26]

The situation at FCI Elkton in particular is alarming. The first cases of COVID-19 appeared there *after* the government assured the Court that the BOP was taking aggressive action to contain the disease. Elkton is filled to capacity and appears to have few tests.[27] Mr. Rodriguez represents that inmates at Elkton do not have adequate soap or disinfectant, are still housed together in large groups, and share a thermometer without sanitization, against critical public health recommendations. Reply Br. 1. These representations are consistent with reports of conditions in federal prisons, including at Elkton.[28] At Elkton, prisoners themselves are responsible for cleaning and sanitation.[29]

Recognizing the risk of COVID-19 outbreaks in prisons, Congress, the President, and the Department of Justice have begun encouraging steps to release some prisoners to safer home environments. The coronavirus relief bill enacted on March 27 allows the Attorney General to

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[26] *See* Ruiyun Li et al., *Substantial undocumented infection facilitates the rapid dissemination of novel coronavirus (SARS-CoV2)*, Science (Mar. 16, 2020), https://doi.org/10.1126/science.abb3221 (86% of Chinese cases before January 23 were undocumented, and undocumented cases were the infection source for 79% of documented cases); Zhanwei Du et al., *Serial Interval of COVID-19 among Publicly Reported Confirmed Cases*, 26 Emerging Infectious Diseases (Mar. 19, 2020), https://doi.org/10.3201/eid2606.200357 (as of February 8, 12.6% of reported infections in China were caused by pre-symptomatic transmission).

[27] *See* Deanne Johnson, *Two positive tests reported at Elkton prison*, Morning Journal (Mar. 31, 2020), https://www.morningjournalnews.com/news/local-news/2020/03/two-positive-tests-reported-at-elkton-prison/; Stan Boney, *Union president wants change after 2 Elkton prison inmates test positive for COVID-19*, WKBN (Mar. 30, 2020), https://www.wkbn.com/news/coronavirus/2-positive-cases-of-covid-19-confirmed-at-columbiana-county-prison/.

[28] *See* Michael Balsamo & Michael R. Sisak, *Federal prisons struggle to combat growing COVID-19 fears*, *supra* note 25; Deanne Johnson, *Two positive tests reported at Elkton prison*, *supra* note 27; Kindy, *An explosion of coronavirus cases cripples a federal prison in Louisiana*, *supra* note 19; Danielle Ivory, *'We Are Not a Hospital': A Prison Braces for the Coronavirus*, New York Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html.

[29] *See Inmate Information Handbook*, *Federal Bureau of Prisons FCI Elkton, Ohio* at 9, Bureau of Prisons (2012), https://www.bop.gov/locations/institutions/elk/ELK_aohandbook.pdf.

expand the BOP's ability to move prisoners to home confinement. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 12003(b)(2) (2020). This congressional action came after Attorney General William Barr sent a memo to the Director of the BOP recognizing that "there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities."[30] Attorney General Barr accordingly requested that the BOP use its statutory authority to release certain inmates to home confinement.[31] *Id.* While he also expressed confidence in the BOP's "ability to keep inmates in our prisons as safe as possible from the pandemic sweeping across the globe," the situation has changed swiftly since he wrote the memo and the BOP's reported COVID-19 cases have since tripled.

iii. Mr. Rodriguez is Close to His Release Date and has Demonstrated Rehabilitation

Mr. Rodriguez has served the vast majority of his sentence, seventeen years. He is a year and a half away from his release date, assuming continued good behavior. He is a year away from eligibility for home confinement. Keeping him in prison for one more year makes a marginal difference to his punishment. But the difference to his health could be profound. That is why being so close to his release date in a long sentence adds to the extraordinary and compelling reasons to reduce his punishment.

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[30] Memo. from Attorney Gen. William Barr to Director of BOP, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), at https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000.

[31] Mr. Rodriguez will not be statutorily eligible to be released to home confinement for about a year. Therefore, he is not among those who could be released under Attorney General Barr's memo. I note, however, that Mr. Rodriguez meets many of the discretionary factors outlined in the memo for good candidates for release. He is particularly vulnerable to COVID-19; he is housed in a low-security facility; he has shown overall good conduct and no violent conduct in prison; he has a reentry plan that will maximize public safety; and I find below that he does not pose a danger to others or the community. *See id.*

He has also shown rehabilitation in prison. While serving his sentence, Mr. Rodriguez took GED classes and earned his GED. *See* U.S. Probation Office Memo (Mar. 31, 2020). In 2019, he completed an apprenticeship in computer operations. He has also taken classes about fitness and nutrition, anger management, parenting, financial education, decision-making, and hobbies. Furthermore, Mr. Rodriguez has had only two infractions in seventeen years of incarceration, one for alcohol and one for having a cell phone. Neither were violent or raise concerns about recidivism.

The government objects that rehabilitation is not an appropriate basis for granting compassionate release. It cites Congress's directive to the Sentencing Commission that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). Mr. Rodriguez's rehabilitation *alone* would not constitute an extraordinary and compelling reason. But the qualifier "alone" implies that rehabilitation can contribute to extraordinary and compelling reasons. That is how the Commission has understood the statute. *See* U.S.S.G. § 1B1.13 cmt. n.3 ("Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, *by itself*, an extraordinary and compelling reason for purposes of this policy statement.") (emphasis added); *Brown*, 411 F. Supp. 3d at 449 ("[T]he Commission implies that rehabilitation may be considered with other factors."). I consider rehabilitation in conjunction with the other reasons outlined here.[32]

[32] I do not find the purported changes in Department of Justice (DOJ) policy to be extraordinary and compelling reasons. Whether or not this could be an appropriate basis for compassionate release, Mr. Rodriguez has not demonstrated that he would be charged differently today. He presents no evidence that any official DOJ policy would have made a difference to his designation under the Armed Career Criminal Act, the law that made his prior state drug convictions the predicate for a fifteen-year mandatory minimum sentence. He also fails to show that under current DOJ policy he would not have been charged with violating 18 U.S.C. § 924(c).

Indeed, no single reason would provide a basis for reducing Mr. Rodriguez's sentence. Without the COVID-19 pandemic—an undeniably extraordinary event—Mr. Rodriguez's health problems, proximity to his release date, and rehabilitation would not present extraordinary and compelling reasons to reduce his sentence. But taken together, they warrant reducing his sentence.

C. Mr. Rodriguez is not a danger to others or the community

The Commission's policy statement, which provides helpful guidance, provides for granting a sentence reduction only if "[t]he 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)." U.S.S.G. § 1B1.13(2).

Mr. Rodriguez is not a danger to the safety of others or to the community under the factors listed in in 18 U.S.C. § 3142(g). Section 3142(g) sets out the factors courts must consider in deciding whether to release a defendant pending trial. These factors weigh both the defendant's possible danger to the community and the defendant's likelihood to appear at trial. Only the former is relevant here. The factors that weigh danger to the community include "the nature and circumstances of the offense charged," "the history and characteristics of the person," including "the person's character, physical and mental condition, family ties, . . . community ties, past conduct, history relating to drug or alcohol abuse, [and] criminal history," and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g).

Mr. Rodriguez's criminal history involves a series of convictions for drug dealing as well as the firearm offenses in this case. While this history is serious, I find that Mr. Rodriguez does not pose a danger to others. Nothing in his record suggests that he has been violent. The firearms charges related to a gun Mr. Rodriguez disclosed to police officers when they were executing a

search warrant on his home. While he pleaded guilty to possessing a firearm in furtherance of a drug offense, there was no evidence that he used the gun during the drug transactions or at any other time. *See Beck*, 2019 WL 2716505, at *10 (noting in similar circumstances that "there was no evidence or indication that [defendant] ever used or pointed a gun at anyone or that she threatened anyone with a firearm"). His history of drug dealing is seventeen years behind him, and nothing in his prison record raises concerns about violence or drug dealing.

I also find that Mr. Rodriguez is not a danger to the community during this pandemic because he has a home to return to—where he can self-quarantine—and an adequate reentry plan, as verified by the Probation Office.

D. The sentence reduction is consistent with the Section 3553(a) factors

Finally, the Court must "consider[] the [sentencing] factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). The applicable sentencing factors warrant a sentence reduction for Mr. Rodriguez. Because section 3553(a) establishes factors to consider in initially imposing a sentence, not every factor applies here. The applicable factors are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> . . . [and]
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

18 U.S.C. § 3553(a). The statute also mandates: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)." *Id.*

The first factor is "the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a)(1). As described above, Mr. Rodriguez's extensive criminal history is mostly composed of low-level drug dealing. The predicate offenses to his mandatory minimum sentences were non-violent. He has shown rehabilitation and good conduct over the past seventeen years.

The second factor is the need for the sentence imposed to serve the enumerated purposes of punishment. *Id.* § 3553(a)(2). The court should "impose a sentence sufficient, but not greater than necessary, to comply with [these] purposes." *Id.* § 3553(a). Mr. Rodriguez has served seventeen years, most of the original sentence imposed. Seventeen years is a long time—long enough to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of Mr. Rodriguez. Rather than being long enough to provide Mr. Rodriguez with needed medical care, it may interfere with his ability to get needed medical care. To prolong his incarceration further would be to impose a sentence "greater than necessary" to comply with the statutory purposes of punishment.

The final relevant factor is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). Because Mr. Rodriguez has served the vast majority of his mandatory minimum sentence and is a year and a half away from release, granting his motion sufficiently minimizes sentence disparities between him and similarly situated defendants.

II. CONCLUSION

Mr. Rodriguez has now served the lion's share of his sentence. But his sentence did not include incurring a great and unforeseen risk of severe illness or death. For this reason, I will

grant Mr. Rodriguez's motion for a sentence reduction. I will sentence him to time served, six years of supervised release, and a supervised release condition that he must remain in home quarantine for at least 14 days and until further order of the Court.

S/ANITA B. BRODY, J.
ANITA B. BRODY, J.

Copies **VIA ECF** on 04/01/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

WILSON PEREZ,

Defendant.

17 Cr. 513-3 (AT)

ORDER

ANALISA TORRES, District Judge:

Wilson Perez, a prisoner serving his sentence at the Metropolitan Detention Center (the "MDC"), moves for a reduction of his term of imprisonment under the federal compassionate release statute, codified at 18 U.S.C. § 3582(c)(1)(A). Def. Letter, ECF No. 92. For the reasons stated below, Perez's motion is GRANTED.

BACKGROUND

On October 21, 2019, Perez pleaded guilty to kidnapping and conspiracy in violation of 18 U.S.C. § 1201. ECF No. 85. On January 2, 2020, the Court sentenced him to three years of imprisonment and two years of supervised release. ECF No. 89. "Perez has a well-documented history of medical complications which stem from injuries suffered during his incarceration." Gov't Letter at 3, ECF No. 95. While housed at the Metropolitan Correctional Center, he was the victim of two vicious beatings, resulting in a broken jaw and shattered bones around his eye socket; both attacks sent him to the hospital and necessitated reconstructive surgeries of his face, with the second surgery requiring metal implants. *See* Sentencing Tr. 9:8–18, ECF No. 74. Although Perez's physicians directed that he receive follow-up care, such care was repeatedly delayed or difficult to obtain. *See id.* 10:22–12:17. He continues to suffer from pain and persistent vision problems. Because Perez has been detained since his arrest on September 27, 2017, ECF No. 17, his prison sentence is set to terminate on April 17, 2020, Def. Letter at 1.

Perez requests release in advance of that date because he is at risk of contracting, and experiencing serious complications from, COVID-19 if he remains at the MDC. *Id.* at 1–2. He spends most of each day with a cellmate in a small cell "that is barely large enough for a single occupant," where he is "breathing recirculated air" and "unable to practice proper hygiene." *Id.* at 1. Additionally, Perez "is in pain and not receiving pain medication." *Id.* The Federal Bureau of Prisons (the "BOP") acknowledges that COVID-19 is present within the MDC. *See* COVID-19 Tested Positive Cases, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/. The Government does not object to Perez's release on the merits, conceding that Perez has a "heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues," and that "he has less than a month remaining on his sentence." Gov't Letter at 3. But the Government questions the Court's authority to act on Perez's application, arguing that he has not exhausted the administrative remedies under § 3582(c)(1)(A), which requires that a defendant seeking compassionate release present his application to the BOP and then either (1) administratively appeal an adverse result if the BOP does not agree that his sentence should be modified, or (2) wait for 30 days to pass. Gov't Letter at 3–4.

On March 26, 2020, Perez submitted to the BOP his application for a sentence modification. ECF No. 96 at 4. To date, the BOP has not acted on that request. The Court holds, however, that Perez's exhaustion of the administrative process can be waived in light of the extraordinary threat posed—in his unique circumstances—by the COVID-19 pandemic. And the Court agrees with the parties that this threat also constitutes an extraordinary and compelling reason to reduce Perez's sentence to time served. Accordingly, Perez's motion is GRANTED.

DISCUSSION

As amended by the First Step Act, 18 U.S.C. § 3582(c)(1)(A) authorizes courts to modify terms of imprisonment as follows:

> The court may not modify a term of imprisonment once it has been imposed except that—in any case—the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Accordingly, in order to be entitled to relief under 18 U.S.C. § 3582(c)(1)(A)(i), Perez must both meet the exhaustion requirement and demonstrate that "extraordinary and compelling reasons" warrant a reduction of his sentence. The Court addresses these requirements in turn.

I. Exhaustion

Section 3582(c)(1)(A) imposes "a statutory exhaustion requirement" that "must be strictly enforced." *United States v. Monzon*, No. 99 Cr. 157, 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020) (citing *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (2d Cir. 2004) (internal quotation marks and alterations omitted)).[1] The Court may waive that requirement only if one of the recognized exceptions to exhaustion applies.

"Even where exhaustion is seemingly mandated by statute . . . , the requirement is not absolute." *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) (citing *McCarthy v. Madigan*, 503

[1] The Court need not decide whether § 3582(c)'s exhaustion requirement is a jurisdictional requirement or merely a mandatory claim-processing rule. *See Monzon*, 2020 WL 550220, at *2 (describing split between courts on that question).

U.S. 140, 146–47 (1992)).[2] There are three circumstances where failure to exhaust may be excused. "First, exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue." *Id.* Second, "exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief." *Id.* at 119. Third, "exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice." *Id.*

All three of these exceptions apply here. "[U]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile. Moreover, the relief the agency might provide could, because of undue delay, become inadequate. Finally, and obviously, [Perez] could be unduly prejudiced by such delay." *Washington*, 925 F.3d at 120–21; *see also Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (holding that irreparable injury justifying the waiver of exhaustion requirements exists where "the ordeal of having to go through the administrative process may trigger a severe medical setback" (internal quotation marks, citation, and alterations omitted)); *Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) ("[I]f the delay attending exhaustion would subject claimants to deteriorating health, . . . then waiver may be appropriate."); *New York v. Sullivan*, 906 F.2d 910, 918 (2d Cir. 1990) (holding that waiver was appropriate where "enforcement of the exhaustion requirement would cause the claimants irreparable injury" by risking "deteriorating health, and possibly even . . . death"). Here, even a few weeks' delay carries the risk of catastrophic health consequences for Perez. The Court concludes that requiring him to exhaust administrative

[2] The Supreme Court has stressed that for "a statutory exhaustion provision . . . Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Even when faced with statutory exhaustion requirements, however, the Supreme Court has allowed claims to proceed notwithstanding a party's failure to complete the administrative review process established by the agency "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate," so long as the party presented the claim to the agency. *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). That reasoning explains the Second Circuit's holding that even statutory exhaustion requirements are "not absolute." *Washington*, 925 F.3d at 118. Perez has presented his claim to the BOP, *see* ECF No. 96 at 1, so the situation here is analogous.

remedies, given his unique circumstances and the exigency of a rapidly advancing pandemic, would result in undue prejudice and render exhaustion of the full BOP administrative process both futile and inadequate.

To be sure, "the policies favoring exhaustion are most strongly implicated" by challenges to the application of existing regulations to particular individuals. *Pavano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996) (internal quotation marks, citation, and alterations omitted). Ordinarily, requests for a sentence reduction under § 3582(c) would fall squarely into that category. But "courts should be flexible in determining whether exhaustion should be excused," *id.* at 151, and "[t]he ultimate decision of whether to waive exhaustion . . . should also be guided by the policies underlying the exhaustion requirement." *Bowen*, 476 U.S. at 484. The provision allowing defendants to bring motions under § 3582(c) was added by the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), in order to "increas[e] the use and transparency of compassionate release." 132 Stat. 5239. Requiring exhaustion generally furthers that purpose, because the BOP is best situated to understand an inmate's health and circumstances relative to the rest of the prison population and identify "extraordinary and compelling reasons" for release. 18 U.S.C. § 3582(c)(1)(A)(i). In Perez's case, however, administrative exhaustion would defeat, not further, the policies underlying § 3582(c).

Here, delaying release amounts to denying relief altogether. Perez has less than three weeks remaining on his sentence, and pursuing the administrative process would be a futile endeavor; he is unlikely to receive a final decision from the BOP, and certainly will not see 30 days lapse before his release date. Perez asks that his sentence be modified so that he can be released now, and not on April 17, 2020, because remaining incarcerated for even a few weeks increases the risk that he will contract COVID-19. He has had two surgeries while incarcerated, and continues to suffer severe side effects such as ongoing pain and persistent vision problems. ECF No. 96 at 4. As the Government

concedes, Perez faces a "heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues." Gov't Letter at 3. Requiring exhaustion, therefore, would be directly contrary to the purpose of identifying and releasing individuals whose circumstances are "extraordinary and compelling."

Accordingly, the Court holds that Perez's undisputed fragile health, combined with the high risk of contracting COVID-19 in the MDC, justifies waiver of the exhaustion requirement.[3]

II. Extraordinary and Compelling Reasons for Release

The Court also finds that Perez has set forth "extraordinary and compelling reasons" to reduce his sentence to time served. 18 U.S.C. § 3582(c)(1)(A)(i). The Government does not dispute that Perez has done so. Gov't Letter at 3. And Perez's medical condition, combined with the limited time remaining on his prison sentence and the high risk in the MDC posed by COVID-19, clears the high bar set by § 3582(c)(1)(A)(i).

The authority to define "extraordinary and compelling reasons" has been granted to the United States Sentencing Commission, which has defined that term at U.S.S.G. § 1B1.13, comment n.1. *See United States v. Ebbers*, No. 02 Cr. 11443, 2020 WL 91399, at *4–5 (S.D.N.Y. Jan. 8, 2020). Two components of the definition are relevant. First, extraordinary and compelling reasons for modification exist where "[t]he defendant is . . . suffering from a serious physical or medical condition . . . that substantially diminishes the ability 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

[3] A number of courts have denied applications for sentence modification under § 3582(c)(1)(A) brought on the basis of the risk posed by COVID-19 on the ground that the defendants failed to exhaust administrative remedies. *See, e.g., United States v. Zywotko*, No. 2:19 Cr. 113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020); *United States v. Garza*, No. 18 Cr. 1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020); *United States v. Eberhart*, No. 13 Cr. 00313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020); *United States v. Hernandez*, No. 19 Cr. 834, 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020); *United States v. Gileno*, No. 19 Cr. 161, 2020 WL 1307108, at *3 (D. Conn. Mar. 19, 2020). But in several of those cases, the defendant was not in a facility where COVID-19 was spreading, and in none of them did the defendant present compelling evidence that his medical condition put him at particular risk of experiencing deadly complications from COVID-19. In this case, unlike those, Perez has established that enforcing the exhaustion requirement carries the real risk of inflicting severe and irreparable harm to his health.

comment n.1(A)(ii). Perez's recent surgeries, and his persistent pain and vision complications, satisfy that requirement. Confined to a small cell where social distancing is impossible, Perez cannot provide self-care because he cannot protect himself from the spread of a dangerous and highly contagious virus. And although he may recover in the future from the surgeries and their complications, there is no defined timeline for that recovery; certainly, he is not expected to recover within the remainder of his sentence.

The Honorable Lorna G. Schofield recently granted an application for sentence reduction under § 3582(c) under similar circumstances. *See United States v. Campagna*, No. 16 Cr. 78-01, 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020). Judge Schofield approved the request of a defendant confined to the Brooklyn Residential Reentry Center (the "RCC") stating that his "compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and compelling reason to modify [d]efendant's sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the environment of the RCC." *Id.* at *3 (citing U.S.S.G. § 1B1.13 comment. n.1(A)). The same justifications apply here.

Second, U.S.S.G. § 1B1.13 comment. n.1(D) authorizes release based on "an extraordinary and compelling reason other than, or in combination with, the [other] reasons described." Perez meets this requirement as well, because he has weeks left on his sentence, is in weakened health, and faces the threat of a potentially fatal virus. The benefits of keeping him in prison for the remainder of his sentence are minimal, and the potential consequences of doing so are extraordinarily grave.

Accordingly, the Court finds that Perez has demonstrated extraordinary and compelling reasons justifying his release.

CONCLUSION

For the reasons stated above, Perez's motion for a reduction of his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(A) is GRANTED. Perez's term of imprisonment is reduced to time served. It is ORDERED that Perez be released immediately to begin his two-year term of supervised release.

The Clerk of Court is directed to terminate the motion at ECF No. 92.

SO ORDERED.

Dated: April 1, 2020
New York, New York

ANALISA TORRES
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. TERESA ANN GONZALEZ, Defendant.	NO. 2:18-CR-0232-TOR-15 ORDER GRANTING DEFENDANT'S MOTION TO REDUCE SENTENCE

BEFORE THE COURT are Defendant's Motion for Reduction of Sentence and Motion to Expedite the same. ECF Nos. 829, 830. These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein, the completed briefing, and is fully informed. For the reasons discussed below, Defendant's Motion for Sentence Reduction is granted.

BACKGROUND

On December 18, 2018, an indictment was filed charging Defendant with nine counts of mail fraud and conspiracy to commit mail and wire fraud, in

violation of 18 U.S.C. §§ 1341, 1343, 1346. ECF No. 1. On June 13, 2019, Defendant pleaded guilty to Count 73, conspiracy to commit mail and wire fraud. ECF Nos. 443, 444. On January 21, 2020, this Court sentenced Defendant to ten months imprisonment, followed by a three-year term of supervised release. ECF No. 777. On February 19, 2020, Defendant began serving her term of imprisonment by reporting to the Spokane County Jail, pending Bureau of Prisons' designation and transfer. ECF No. 829 at 1. Defendant's projected release date is December 18, 2020.

On March 23, 2020, Defendant's counsel contacted the Bureau of Prisons to determine which office could process her compassionate release request based on her medical condition. The Bureau of Prisons communicated that because Defendant was not yet in a designated facility, there was no one able to process her request. The Bureau of Prisons' employee indicated that the exhaustion of administrative appeals process was no applicable or possible and suggested contacting the sentencing Court for relief.

Defendant argues that she should be granted compassionate release based on her chronic medical conditions, the nature of the medical care she has received at the Spokane County Jail, and the risk of exposure and death from the COVID-19 pandemic.

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The government opposes Defendant's motion for compassionate release reduction because she has not exhausted administrative remedies and she does not present circumstances justifying such extraordinary relief. ECF No. 831.

DISCUSSION

A. Eligibility for Compassionate Release

Federal courts have the statutory authority to modify an imposed term of imprisonment for two reasons: compassionate release under 18 U.S.C. § 3582(c)(1) or based on a change in the sentencing guidelines under 18 U.S.C. § 3582(c)(2). Until recently, motions for compassionate release could only be brought to the Court by the Director of the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A) (2002). However, after the December 2018 passage of the First Step Act, defendants may now bring their own motions for compassionate release after exhausting administrative remedies within the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A) (2018).

The Court finds that Defendant has effectively exhausted her administrative remedies by petitioning the BOP, giving them notice, and being told she does not have any other administrative path or remedies she can pursue. Any further attempt to exhaust administrative remedies at this time would be futile. Accordingly, the Defendant's motion for reduction of sentence is properly before the Court.

A defendant may be eligible for compassionate release: (1) if the Court finds "extraordinary or compelling reasons" to warrant a sentence reduction; or (2) if the defendant is at least 70 years old, has served at least 30 years in prison pursuant to a sentence imposed for the offense for which the defendant is currently imprisoned, and the defendant is determined not to pose a risk of danger to the community. 18 U.S.C. § 3582(c)(1)(A). Under either eligibility prong, the Court must also find that a sentence reduction is "consistent with applicable policy statements issued by the [United States] Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The Sentencing Guidelines instruct that the Court should consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when deciding a motion for compassionate release, and that the Court should not grant a sentence reduction if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act. U.S.S.G. § 1B1.13.

B. Extraordinary and Compelling Reasons

Defendant moves for compassionate release on the grounds that "extraordinary and compelling reasons" justify a sentence reduction. ECF No. 829 at 13-21. The First Step Act did not define what "extraordinary and compelling reasons" warrant a sentence reduction, but the compassionate release statute directs the Court to consider the Sentencing Commission's policy statements when deciding compassionate release motions. 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Commission's policy statement on sentence reduction mirrors the language of the compassionate release statute, but it has not yet been updated to reflect the procedural changes implemented by the First Step Act. U.S.S.G. § 1B1.13. "While that particular policy statement has not yet been updated to reflect that defendants (and not just the [Bureau of Prisons ("BOP")]) may move for compassionate release, courts have universally turned to U.S.S.G. § 1B1.13 to provide guidance on the 'extraordinary and compelling reasons' that may warrant a sentence reduction." *United States v. McGraw*, No. 2:02-cr-00018-LJM-CMM, 2019 WL 2059488, at *2 (S.D. Ind. May 9, 2019) (gathering cases). The sentence reduction policy statement outlines four categories of circumstances that may constitute "extraordinary and compelling reasons" for a sentence reduction: (1) the defendant suffers from a medical condition that is terminal or substantially diminishes the defendant's ability to provide self-care in a correctional environment; (2) the defendant is at least 65 years old, is experiencing a serious deterioration in health due to the aging process, and has served at least 10 years or 75% of his or her term of imprisonment; (3) family circumstances involving the death or incapacitation of the caregiver of the defendant's minor child or the incapacitation of the defendant's spouse or registered partner; or (4) other reasons, other than or in combination with the other listed circumstances, that are extraordinary and compelling. U.S.S.G. § 1B1.13, Application Note 1.

Here, Defendant moves for compassionate release on the grounds that her multiple chronic illnesses and difficulty treating them while in custody constitute "extraordinary and compelling reasons" for a sentence reduction. ECF No. 829. Because Defendant does not allege that her present conditions are terminal or diminish her ability to provide self-care while in custody, her motion for compassionate release is best addressed under the "other reasons" category.

Defendant, age 64, has chronic obstructive pulmonary disease (COPD), including significant emphysema. ECF Nos. 762 (sealed medical records), 700 at 19 (sealed Presentence Investigation Report). Defendant alleges that her medical conditions have worsened while incarcerated without her prescribed inhaler and that she struggles to breathe daily. ECF No. 829 at 18. Because she is housed in a local jail facility where most inmates are recently arrested and in pretrial confinement, there is constant and significant turnover of new people coming in and out of the facility from off the streets. *Id*. at 19. Because it is impossible to practice social distancing or isolation in a jail setting, the pandemic will be devastating when it reaches jail populations.

Defendant is the most susceptible to the devastating effects of COVID-19. She is in the most susceptible age category (over 60 years of age) and her COPD and emphysema make her particularly vulnerable.

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C. Sentencing Commission Policy Statements

The Sentencing Guidelines instruct that the Court should consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when deciding a motion for compassionate release, and that the Court should not grant a sentence reduction if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act. U.S.S.G. § 1B1.13.

Defendant does not present a risk of danger to the community as articulated in 18 U.S.C. § 3142(g). On January 14, 2019, Defendant was released pending trial without incurring any violations through sentencing. The underlying criminal conduct was not a crime of violence, but rather white-collar fraud. The Court has reviewed all the factors to be considered in imposing a sentence, 18 U.S.C. § 3553(a), and does not find any one factor or combination of factors to preclude the remedy here.

That other Defendants received home detention does not impact the Court's decision here. Each Defendant presents with an individualized level of culpability, life circumstances and personal background that warrants individualized sentences.

The Court was aware of Defendant's underlying medical condition and took that into consideration at the time of sentencing. In normal times, Defendant's condition would be manageable. These are not normal times, however.

The Court will exercise its discretion to reduce Defendant's sentence because extraordinary and compelling reasons warrant such a reduction.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant's Motion to Expedite, ECF No. 830, is **GRANTED**.
2. Defendant's Motion for Reduction of Sentence, ECF No. 829, is **GRANTED.**
3. Simultaneously herewith, the Court will enter an AMENDED Judgment imposing a sentence of "time served" and converting the remaining term of incarceration into eight (8) months of home detention as an additional condition of supervised release.
4. The United States Marshal Service and/or the United States Bureau of Prisons shall promptly release Defendant from custody.

The District Court Executive is directed to enter this Order and furnish copies to counsel, the United States Marshal Service, and the Probation Office.

DATED March 31, 2020.

THOMAS O. RICE
Chief United States District Judge

EXHIBIT 7
FILED UNDER SEAL

EXHIBIT 8

The Honorable J. Randal Hall
Chief Judge, US District Court – Southern District Georgia
600 James Brown Blvd
Augusta, Georgia 30901

Honorable Randal Hall,

I am writing to you as a character witness to the Winner-Davis family.

I have known Billie Winner-Davis since September 1998. I have known Billie as a strong, moral, ethical, Christian woman. Throughout the years, she has been a strong advocate of children and families through her work and life endeavors. I have also known Reality and Brittany for just as long. Gary Davis, I met and have known him since 2000 and feel the same way for Gary. He too has been a strong family man with great work ethics, working with youths and families.

Reality has had a very solid upbringing by her parents with strong Christian roots attending private Christian school as a young child and integrated into the small rural school where we live and everyone knows your name and family. This small community school is unique in that it only has Pre-K to 8th grade and just about all the kids know each other from the youngest to the oldest and they look out for each other and are accountable to each other. It is those values that continue in life for Reality, her sibling and the family.

I have been a neighbor for about 15 years. During that time, I have witnessed Reality and her family to be good people. Billie and Gary are well respected members in our community and in the communities in which they work and have worked. They are model citizens doing what is right. Billie has served on Boards such as Child Advocacy, Parent Teacher Organizations, Band Boosters, liaison between Women's Shelters, Police Department, etc. (One extra example is that in amidst all of that, she was even willing to give my son a ride to and from daycare for over a month during a time that I was needing assistance around 15 years ago.) Gary has been a member of the local volunteer fire department when he had the time. He also drafted a friend to help him coach Reality's soccer team when there were no other parent volunteers. Gary has always been willing to lend a helping hand to assist with a anything from water leak, identify burning wire smell (a skunk that got too close) in my garage, and anything else and whatever time.

Reality is a well-rounded person. When she was in school, she always did her part participating in activities representing her school and community and volunteered appropriately. She is a sweet person who loves people, life and animals. Reality is someone I have welcomed into my home without hesitation. She has a beautiful spirit and is always kind. Although, work and career opportunities have put miles between family members, they are a tight knit family.

I can recall when Reality graduated from High School; she was excited to serve our country. As she had witnessed other family members be linguist, she chose a language to study so she could serve our country. I witnessed her get physically ready just the same. I would see her exercise a prescribed regimen, from her recruiter, up and down our country road. She was preparing mentally and physically to serve our country with pride.

Reality is a good person with a strong sense of doing what is right. She has a strong support system from her family and friends. Her parents have been positive role models and have the proper support. I cannot say enough positive things about Billie and Gary and their dedication and commitment to their children. Reality is their life and they do anything to guide and support her.

Sincerely,

Indira Garcia

Indira Garcia
436 E. County Road 2190
Kingsville, Texas 78363

(361) 219-8522

EXHIBIT 9

July 20, 2018

The Honorable J. Randal Hall
Chief Judge
US District Court - Southern District of Georgia
600 James Brown Blvd
Augusta, GA 30901

Dear Chief Judge Honorable J. Randal Hall,

This letter is in reference to the character of defendant, Reality Winner. My name is Shani Messerschmidt and I married Reality's cousin, Mathew Messerschmidt. I have known her for 16 years and we have become great friends. Since our first meet, I've known how unique and special Reality is. She is one of the most driven, compassionate, and caring people I know.

Her persistence, drive, and abilities both academically and physically allowed her to pursue her passion of becoming not only a linguist, but a compassionate linguistic for the Air Force. She was able to use this ability to do what I've always known her to do best, help others. Her service record alone shows her dedication to help fellow service members and her country, but what it doesn't show is that this is only a small part of the dedication to help others.

Outside of her career, Reality's selflessness continued through her willingness to help others, which has never faltered. She has used fitness as an outlet to touch others lives. She became a personal trainer and cycling instructor after struggling through her own health related concerns. Remaining physically fit and maintaining a nutritious diet became a priority for her, and she used it as an avenue to provide guidance to others in that area. This outlet also allowed her to pursue another passion, working with children. She volunteered for the various organizations, including "Athletes Serving Atheletes", through which she was able to touch the lives of children and help them discover and pursue their own passion.

Despite what the bias of media and other outlets may report, I know personally the love and caring heart of Reality. Being extended family 1000+ miles from her hometown, her visits with us mattered. It didn't matter if she would travel north to us or if we traveled to her, our time together was never taken for granted. She always made sure she gave everyone their time, especially the children. Whether it was drawing chalk on the sidewalks, listening to silly stories, or simply sitting around a table or campfire, she was always sincere. Even as her dreams and passions took across various distances of this great

country and increased their demands of her, Reality always made time for her family and closest friends. After struggling for several years to start a family, Mat and I lost our first child through miscarriage. For us, it was devastating and we struggled to understand it. Yet, during this dark time, Reality took the time to write a simple but meaningful letter that helped us move on. She also sent me a gift, a pendant of healing. One that I still wear daily. In a time when so many people remain silent because they don't know what to do or say, Reality reached out and gave us a prayer of healing. In the following years, we were blessed with our son. Even before she was able to meet him in person, Reality blessed his life through letters of compassion and gifts. After meeting, their bond has become unique and a gift for all, so much so that we wished Reality to become Godmother of him. Unfortunately due to these current circumstances, we have yet to make it official. Regardless, her blessings and well wishes to us and our son have remained unfailing and as ours are to her. Reality always has had and always will have our support.

With her unfailing service to our great country supported by her glowing service record, honorable discharge, and Commendation Medal, it's often overlooked or unknown of the struggles that Reality has faced. To me, however, I noticed her visits or even letters were often haunted by the unknown, as if she was carrying the weight of the world on her shoulders. Although she would never discuss the details of any missions or work she had done, upon her visits she would struggle to let go of the previous week's encounters. Her subtle comments indicated she felt an obligation to those assignments, and she struggled to move past them, especially when they didn't go well. Reality was never one to complain, whine, or even ask for help from us when she was hurting or needed help of her own. Often news of her personal struggles came afterward. As selfless as she was to others, she never wanted to be helpless. Although I know she knew she didn't have to go through these things on her own, I don't know that she knows how to ask for help without that feeling overwhelming her. So instead, she attempted to refocus her struggle into her fitness. By far her biggest struggle was the loss of her father. Although she didn't talk much of him to me, it was apparent that many times he disappointed her. Despite the constant disappointment, when he passed this was a part of Reality's life that was now permanently gone. She dealt with it the best way she knew how, but I know she still struggles with it today.

Reality is someone who I've never known to shy away from a challenge or not take responsibility for her actions. Despite unpleasant circumstances, she always tries to make the best of things. I hope you recognize by her recent plea that Reality is ready to take full responsibility for her actions, move forward with her life, and try to help others along the way. I also hope that despite this one action that you and the court can recognize her dedication to this country, and are willing to help repay that dedication with a plan to help support her physically, mentally, and emotionally from her various struggles she has faced.

As family, Reality will always have our support, whether that means providing her continued emotional support through continuous contact or a place to stay upon her release. As a veteran, we hope that she can receive necessary placements and supports to allow her to work through her continued struggles from both personal and career experiences.

Thank you for your time and consideration of this matter.

Sincerely,

Shani Messerschmidt

EXHIBIT 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA	*	
	*	
Plaintiffs,	*	
	*	
v.	*	**1:17-CR-0034 (BKE)**
	*	
REALITY LEIGH WINNER	*	
	*	
Defendant.	*	
	*	
* * * * * * * * * * * * * * * * * * *	*	

DEFENDANT'S SENTENCING MEMORANDUM

NOW INTO COURT, through undersigned counsel, comes Defendant Reality Leigh Winner ("Ms. Winner," "Reality," or the "Defendant"), who respectfully submits this Sentencing Memorandum and requests that the Court accept the stipulated sentence, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, agreed upon by the parties after lengthy and extensive negotiations. As set forth in more detail below, the stipulated sentence agreed upon by the parties is a sufficient, but not greater than necessary, sentence to achieve the ends of justice and all the goals of sentencing. Indeed, the agreed upon sentence is on the higher end of prior Espionage Act cases prosecuted by the United States and, given Ms. Winner's characteristics as an honorably discharged veteran, a first-time offender, and someone who is unlikely to ever commit another crime again, represents a reasonable disposition to this case.

I. INTRODUCTION & SUMMARY OF ARGUMENT

This matter is now before the Court at sentencing pursuant to a Rule 11(c)(1)(C) plea agreement negotiated by the parties. As detailed below, the plea agreement and its stipulated sentence should be accepted by the Court in light of all the pertinent sentencing factors

applicable to this case. To begin with, Rule 11(c)(1)(C) plea agreements are commonplace in the context of "leak" prosecutions. This case was charged under the Espionage Act, a law passed over 100 years ago that was intended to apply to the offense for which it was named. The plea agreement reached by the parties is particularly appropriate to remedy what would otherwise be overly-severe penalties imposed by the Act and the sentencing guideline recommendations that were drafted with actual espionage -- selling government secrets to foreign adversaries, usually for monetary gain -- in mind. It is for this precise reason that the vast majority of "leak" prosecutions, as demonstrated below, are resolved like this one, through a Rule 11(c)(1)(C) plea agreement.

Additionally, the conduct at issue supports the stipulated agreement reached by the parties. While the charged conduct is no doubt serious, there is no allegation or evidence of actual spying or treason on the part of Reality Winner; instead, she has acknowledged leaking a single document that contained national defense information, a single time, to a single news outlet. This was not a WikiLeaks-like "dump" of massive amounts of sensitive data, nor was it a disclosure of military secrets to a foreign intelligence service. It was, as Reality has admitted, a naive attempt to "change things," in which she abused her security clearance and ran afoul of federal law -- an act which she acknowledges was criminally wrong. Despite her singular criminal act, as set forth below, the stipulated sentence of 63 months is in *excess* of many prior Espionage Act cases where the Government has prosecuted "leakers" of national defense information, including cases where the factual conduct, and information leaked, was arguably worse.

Finally, the personal history and circumstances of Reality justifies the stipulated sentence agreed to by the parties. As discussed below, and as demonstrated in the presentence

investigation report dated August 7, 2018, Reality is far from the monster she has been portrayed to be; she is a loving and caring daughter, step-daughter, and sibling; a veteran who honorably served her country for 6 years; and an extremely bright human being with a strong spirit of service. With the good, Reality also suffered through the bad -- parents who divorced when she was very young, a biological father who was jobless and an addict, and mental and emotional health issues that ensued, which Reality has struggled with for years. Despite difficulties, and notwithstanding this single offense, Reality has led a life of public service. Reality is not in need of deterrence, nor does the general public have any reason to fear Reality as a recidivist. After putting this chapter behind her, Reality will likely return to the successful, selfless life she previously enjoyed. The plea agreement negotiated by the parties, and its accompanying stipulated sentence, should be accepted by this Court.

II. PROCEDURAL HISTORY

On June 7, 2017, Ms. Winner was indicted for leaking a singular report, classified at the Top Secret / SCI level, that contained national defense information, to a news outlet, in violation of 18 U.S.C. § 793(e).[1] A superseding indictment, alleging the same factual conduct and legal violation, was returned on September 6, 2017.[2] Reality was detained before trial[3] and, nine months after the return of the superseding indictment, she pled guilty to the single count charged against her.[4] The final presentence investigation report ("PSR") was completed on August 7, 2018,[5] and sentencing is set for August 23, 2018 at 10:00 a.m.[6]

[1] *See* Rec. Doc. No. 13.
[2] *See* Rec. Doc. No. 72.
[3] *See* Rec. Doc. Nos. 27, 115, 163.
[4] *See* Rec. Doc. Nos. 315, 316.
[5] *See* Final Presentence Investigation Report, dated Aug. 7, 2018 (confidentially submitted to the parties).
[6] *See* Rec. Doc. No. 319.

III. MS. WINNER'S PERSONAL HISTORY AND CHARACTERISTICS[7]

Reality was born to Billie and Ronald Winner on December 4, 1991 in Alice, Texas, but grew up in Kingsville, Texas, a town 100 miles north of the Mexican border. Reality's mother, Billie, worked for Texas Child Protective Services; her father, Ronald, was intellectually engaging (having received at least three separate academic degrees in psychology, sociology, and theology), but was never consistently employed. Reality was particularly close to both her parents, as well as her older, biological sister, Brittany.

In or around 1998, when Reality was approximately 6 years old, her parents separated and the following year, divorced. Despite the split, Reality remained close to both her mother, who remarried Gary Davis in 2000, as well as her father, who moved to Harlingen, Texas, approximately 95 miles away from the home where Reality lived with Billie and Gary Davis. Reality stayed with the Davis' because, although she loved her biological father, he was regularly addicted to and often under the influence of prescription drugs, placing a significant burden on his ability to effectively parent his two daughters.

In high school, Reality succeeded academically and developed strong humanitarian characteristics. In regards to the latter, as a teenager, Reality spent hours of her time doing volunteer work. Among other things, she regularly volunteered for the Kleberg County Child Welfare Board, participating in community events for child abuse prevention. Every Thanksgiving, through a church program, Reality distributed food baskets to needy families. Reality spent hours fixing up homes and yards of elderly citizens of her small town through a program that is akin to a local chapter of Habitat for Humanity. In the aftermath of Hurricane Katrina, with the onslaught of displaced individuals from the Gulf South seeking homes in South Texas, she donated hours setting up and maintaining shelters for refugees.

[7] Many of the factual statements made in this section come directly from the PSR at pages 13-19 (Part C).

In 2010, Reality earned her high school diploma, graduating in the top ten of her class. Later that year, Reality turned down a full engineering scholarship at Texas A&M-Kingsville to enlist in the military. The events of September 11, 2001, had an enormous impact on Reality who, driven by her mother's own humanitarianism, sought to make a difference in the world.

Based on Reality's test scores, and in light of her interest of Arabic history and culture, which she began studying at age 17 outside of school given world events and her father's encouragement of understanding and appreciating different cultures, the U.S. Air Force selected Reality to be a cryptologist and linguist where she spent the next two years becoming fluent in Dari and Farsi, and another year in intelligence training. After her three years of military training and education, Reality was sent to Maryland's Fort Meade, and was admitted to a third language program in which she would eventually become fluent in Pashto.

Despite exhausting, stressful, and long 12-hour work days translating foreign communications, including conversations by suspected terrorists thousands of miles away, Reality made time for hobbies and volunteer work during her time in Maryland. Reality spent hours volunteering at a local animal shelter. She also participated in the non-profit "Soccer Without Borders" program in which she spent time working with inner-city youths in Baltimore. Reality has been and is an avid runner, and she enjoyed giving of her time to push wheelchair-bound children through half-marathons with an organization called Athletes Serving Athletes. Reality also donated what little money she had to "White Helmets," a volunteer organization performing search-and-rescue missions in Syria, as well as to the Red Cross. Every Christmas, she helped prepare and distribute shoe boxes of toys to needy families around the world through the Christian International Relief organization "Samaritan's Purse". Reality also participated in

"adopting" low-income families in Maryland at the holidays each year, helping provide them with gifts and food. And the list goes on.

Despite her amazing dedication to volunteer work and placing a smile on other people's faces, it was during this time period and continuing through to the present, that Reality has suffered with, among other things, depression, anxiety, and discontent. According to Dr. Adrienne Davis, a psychologist Reality has been seeing regularly for the past few months since her detention, these underlying emotions have manifested themselves in numerous ways, some of which have been severely detrimental to Reality's health. For example, Reality has been diagnosed with a serious eating disorder, Bulimia, which negatively impacts her both physically and cognitively, leading to impaired judgment and decision-making, as evidenced by significant decisions Reality has made in her young life as detailed in the PSR. All the while, on the surface, Reality's six-year military career was nothing short of successful.

In each of Reality's six years in the U.S. Air Force, she received the highest evaluation score possible. As late as October 2016, Reality received a commendation from the military for, among other things, removing hundreds of enemies from the battlefield and aiding in the capture of hundreds more enemies. Reality was honorably discharged from the Service in November 2016 and thereafter sought work in her field of expertise, ultimately being hired by Pluribus International Corporation, a government contractor, in Augusta, Georgia, a location she was familiar with and where she felt at home.

Reality kept up with her humanitarian efforts in Augusta while working at Pluribus. She exercised regularly, taught yoga at a local studio, participated in armed forces fundraising events, and again, volunteered her time for various causes, including working at the local animal shelter. Reality also kept up her engagement with political issues, which would have been encouraged by

her biological father who was a strong advocate of political awareness. She arranged, for example, a 30-minute meeting with the staff of U.S. Senator Purdue to discuss climate change and the Dakota Access Pipeline. Reality traveled to Belize, a place where her biological father had always wanted to go, to see the ruins. Although her political and philosophical views, her travel to Belize, and her interest in the affairs in the Middle East (which was, after all, part of her job) have been negatively portrayed throughout this case in connection with her sustained pretrial detention, it is the intellectual engagement of these topics that maintained her and even sustained her during the difficult months she spent translating thousands of conversations half a world away by suspected terrorists for the Government she willingly and voluntarily chose to serve.

During the months of November and December 2016, two significant events occurred that had a profound impact on Reality, coupled with her ongoing health struggles. First, like many other Americans, Reality was swept up by the political fervor surrounding the 2016 presidential election, including persistent public pronouncements by the President on matters of national security that were arguably inaccurate -- which frustrated her so much so that it, in part, led to her ill-conceived, woefully amateurish act that resulted in the offense at issue. The following month, on December 21, 2016, Reality's biological father, Ronald Winner, died, a loss that affected her deeply. The loss of her father was particularly relevant to this case because he was an intellectually-engaging parent with whom Reality spent many hours discussing geopolitical events. Without her father's proverbial sounding board of reason, Reality did not have the customary checks and balances that her father had provided to her down through the years.

At the time of the offense, Reality was an impetuous twenty-five year old, in her first full-time "real" job since being honorably discharged from the military. She acknowledges responsibility for her singular and serious act, recognizes the severity of it, and is prepared to accept her punishment. But, Reality is not a terrorist. Despite the rhetoric that has flowed freely throughout this case, she is not a hater of her country or its people -- she is quite the opposite. At the conclusion of this chapter of her life, Reality hopes to seek employment with humanitarian organizations, where she can put her language skills to good use, benefitting long-suffering foreign individuals.

This single offense has had an enormous impact on Reality and her family. Putting aside the substantial amount of prison time she will serve (which, as set forth below, is extraordinarily high relative to other Espionage Act prosecutions), Reality is well aware that, as a federal felon, it will be difficult, if not impossible, to achieve long-lasting gainful employment or live the successful life to the fullest extent she had hoped. Reality understands that a federal conviction comes with collateral consequences that will significantly impair her rights as a U.S. citizen. And, perhaps saddest of all, Reality knows that her family has suffered greatly, and will continue to suffer with her because of her singular act of passion. Her family has spent thousands of dollars traveling back-and-forth to support Reality during her detention. They have suffered serious health consequences of their own as a result of the stress associated with the offense. And perhaps worst of all, is the emotional toll this offense has wrought -- given Reality's pretrial detention. She has been able to hug or even touch and console her mother, stepfather, or sister in over a year.

The plea negotiated between the parties should be accepted by this Court as a sufficient, but not greater than necessary. Importantly, and in accordance with the work done by Joel

Sickler, Defendant's prison facilities expert, Reality requests that this Court make a recommendation to the Federal Bureau of Prisons for placement at FMC Carswell, a medical security facility, located near Fort Worth, Texas, so that she may be able to see her family regularly, receive the adequate medical care she needs, and in an effort to further her humanitarian objectives be in a position to provide assistance to other inmates with debilitating illnesses.[8]

IV. GOVERNING LAW

The sentence imposed on the defendant should be driven by the "overarching" command of 18 U.S.C. § 3553(a), which instructs district courts to "'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing."[9] As the Court knows, the U.S. Sentencing Guidelines are merely advisory[10] and, while they generally provide the starting point for sentencing,[11] a sentencing court may not presume that a within-guidelines sentence is reasonable, or that only "extraordinary circumstances… justify a sentence outside the Guidelines range."[12] In every sentencing, the court "must make an individualized assessment based on the facts presented."[13] This individualized assessment is undertaken pursuant to the long-standing principle that "the punishment should fit the offender and not merely the crime."[14] As the Supreme Court has explained, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and

[8] *See* Declaration of Joel A. Sicker (attached as Exhibit A).
[9] *Kimbrough v. United States*, 552 U.S. 85, 89 (2007) (quoting *Gall v. United States*, 552 U.S. 38, 56 (2007)).
[10] *See United States v. Booker*, 542 U.S. 220 (2005).
[11] *Kimbrough*, 552 U.S. at 109 (citation omitted).
[12] *Gall v. United States*, 552 U.S. 38, 47, 50 (2007).
[13] *Gall*, 552 U.S. at 50.
[14] *Pepper v. United States*, 562 U.S. 476, 487-88 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

the punishment to ensue."[15] Indeed, it is the district court that is uniquely situated to have greater familiarity with the individual defendant and individual case than the U.S. Sentencing Commission.[16]

Accordingly, after calculating the applicable guideline range, the sentencing court should then consider all of the factors set forth in 18 U.S.C. § 3553(a) to determine whether the requested sentence is "sufficient, but not greater than necessary"[17] to accomplish the goals of sentencing or whether a variance is warranted.[18] The factors to be considered under 18 U.S.C. § 3553(a) are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed to promote the goals of sentencing, including to (a) reflect the seriousness of the offense, (b) promote respect for the law, (c) provide just punishment for the offense, (d) afford adequate deterrence; (e) protect the public from further crimes; and (f) provide the defendant with needed training, medical care, or other treatment;
> (3) the kinds of sentences available;
> (4) the Sentencing Guidelines range;
> (5) the pertinent policy statements of the Sentencing Commission;
> (6) the need to avoid unwarranted disparities; and
> (7) the need to provide restitution to victims.[19]

As set forth below, the agreed-upon sentence of 63 months of imprisonment and 3 years of supervised release is *more than sufficient* to satisfy the goals of sentencing, including all of the factors set forth in 18 U.S.C. § 3553(a).

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[15] *Pepper*, 562 U.S. at 487 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).
[16] *Kimbrough*, 552 U.S. at 574.
[17] 18 U.S.C. § 3553(a).
[18] *See Gall*, 552 U.S. at 50.
[19] 18 U.S.C. § 3553(a)(1)-(7).

V. THE PARTIES' STIPULATED SENTENCE OF 63 MONTHS IS SUFFICIENT, BUT NOT GREATER THAN NECESSARY, IN THIS CASE.

A. The Sentencing Guidelines Calculation

The PSR prepared by the U.S. Probation Officer mirrors the guideline calculations undertaken by the parties in the Rule 11(c)(1)(C) plea agreement applicable to this matter:[20]

Enhancement	Sentencing Guidelines Provision	Points
Transmitting National Defense Information (Base Offense Level)	U.S.S.G. § 2M3.3(a) (Top Secret information)	+29
Abuse of Trust	U.S.S.G. § 3B1.3	+2
Acceptance of Responsibility	U.S.S.G. § 3E1.1	(-2)[21]
TOTAL OFFENSE LEVEL	---	29 (87-108 months imprisonment w/ Criminal History Category I)

B. A Downward Variance Is Appropriate.

Though the guidelines calculation calls for a term of imprisonment for 87-108 months, this case warrants the reduction the parties have agreed, particularly in view of the 18 U.S.C. § 3553(a) factors.

1. Nature and Circumstances of the Offense

While the offense at issue was no doubt serious, there are several characteristics that distinguish it from much more severe offenses, justifying the sentence reached by the parties.

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[20] *See* Plea Agreement at pp. 7-8; PSR at p. 12.

[21] Ms. Winner submits that she is entitled to an additional reduction of one point under Section 3E1.1(b) of the U.S. Sentencing Guidelines because she "timely notif[ied] authorities of [her] intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently…" U.S.S.G. § 3E1.1(b). Ms. Winner recognizes that the additional one-point reduction requires government consent (which the government here has advised it will not do), but believes she should qualify for this reduction, having pled guilty four months prior to trial and only weeks after receiving, for the first time, the Government's expert reports on the specific information in the disclosed document that it believes qualifies as "national defense information" under 18 U.S.C. § 793(e). In other words, upon receiving the most material of discovery four months prior to trial, Ms. Winner was finally able to properly evaluate the case and made the decision to plead guilty -- in plenty of time to conserve government resources that she should qualify for the third point reduction under Section 3E1.1(b) of the U.S. Sentencing Guidelines. With the inclusion of this additional point, her guidelines calculation would be reduced to a total offense level of 28, which yields a range of 78-97 months imprisonment. *See* U.S.S.G. § 5A.

First, to be sure, despite the title of the statute, Ms. Winner did not engage in *actual* espionage as that phrase is commonly understood -- the true reason the Espionage Act, a statute passed in 1917, was enacted into law.[22] Instead, Reality leaked a single document, a single time, to a single news outlet (not a foreign adversary), that contained within it some national defense information,[23] the disclosure of which could have harmed national security.[24] This case is thus far from other Espionage Act prosecutions, where defendants engaged in actual espionage.[25]

Second, the offense here involved the disclosure of one document to one news outlet, done on one occasion. The offense did not involve the disclosure of a massive amount of information, *i.e*. it was not the result of a Wikileaks-like "dump" of thousands of pages of

[22] *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 936-42 (1973).

[23] While the Government claims Reality's disclosure was the "calculated culmination of a series of acts," such an assertion is simply its creative interpretation on the facts. *See* Rec. Doc. No. 320 at p. 5. While Ms. Winner does not dispute some of the factual episodes listed by the Government in its sentencing memorandum (*see* Rec. Doc. No. 320 at pp. 5-7), many of those factual episodes, as previously briefed and argued, have innocent explanations and/or are taken out of context. *See, e.g.* Rec. Doc. No. 96-1 at pp. 7 (addressing allegations regarding thumb drive insertion), 13 (same); Rec. Doc. No. 111 at p. 2 (addressing TOR browser, thumb drive insertion); Rec. Doc. No. 128 at pp. 7-8 (addressing thumb drive insertion), pp. 9-10. Reality's unlawful conduct, as agreed to by the parties, involved the physical printing and mailing of a single document to a single news outlet. *See* Plea Agreement pp. 2-4; PSR at p. 6 (¶ 17).

[24] *See* Plea Agreement at pp. 2-4. While the Government asserts that the disclosure of the information in the document at issue *did* cause damage to the national security of the United States, *see* PSR at p. 7 (¶ 22), Reality is able only to acknowledge that the disclosure would be *potentially* damaging to national security. *See* Plea Agreement at p. 4. The Government has not produced evidence, nor does the defense have independent access to evidence, to confirm or deny the Government's assertion regarding actual harm. This lack of evidence is the case with a number of assertions made by the Government described in the classified and unclassified conduct summaries. The defense submits that these few factual disputes are immaterial to sentencing and therefore, do not need to be resolved by this Court. *See* FED. R. CRIM. PROC. 32(i)(3)(B) (stating that a sentencing court may determine that any factual disputes between the parties may not require a ruling if the matter will not affect sentencing).

[25] *See, e.g. United States v. Hoffman*, No. 2:12-CR-184 (E.D. Va. 2012) (prosecution of former naval officer for passing information to purported foreign intelligence members); *United States v. Abu-Jihaad*, No. 3:07-CR-57 (D. Conn. 2009) (prosecution of former naval signalman for transmitting classified information concerning the movement of naval ships destined for the Persian Gulf to unauthorized persons supportive of *jihad*); *United States v. Regan*, No. 01-CR-405 (E.D. Va. 2002) (prosecution of former Air Force sergeant for attempting to sell classified information to Iran, Iraq, Libya, and China).

sensitive materials. As with prior Espionage Act prosecutions, the fact that the volume of materials disclosed is less counsels in favor of the stipulated sentence agreed to by the parties.[26]

Third, Reality did not profit or obtain any gain from the offense at issue. She did not sell the information to a reporter or foreign adversary for money, nor did she seek out the fame and fortune as a result of the offense. As she states in her personal statement accepting responsibility for her single offense, she willfully undertook this act to try and "change things."[27] While such an action is misguided, it was not motivated by greed or personal gain.

Fourth, unlike other Espionage Act cases, Reality did not disclose the names of covert agents, putting lives, particularly American lives, in danger.[28] Instead, as admitted during the re-arraignment, Reality leaked a single document that could have potentially caused harm to the United States.

None of the above facts are intended to minimize Reality's offense. As Reality has acknowledged, it was, indeed, serious. Rather, the defense sets forth the above to point out that this case falls outside of the "heartland" of classic Espionage Act cases and to explain why a Rule 11(c)(1)(C) plea and its stipulated sentence is appropriate here. The Statement of Offense contained in the plea agreement confirms that Reality was not a spy leaking information to a foreign intelligence service nor was she a mercenary leaking information for personal gain or financial wealth. Instead, Reality was a dedicated public servant and veteran who made a poor decision on this one occasion and she has taken full responsibility for that unfortunate decision. But this case bears little resemblance to classic espionage cases and, for the above reasons (as

[26] *See, e.g. United States v. Kim*, No. 10-CR-225 (D.D.C. 2010) (defendant who discussed singular report containing national defense information on one occasion sentenced to thirteen months' imprisonment pursuant to Rule 11(c)(1)(C) plea agreement).
[27] PSR at p. 10.
[28] *See United States v. John Kiriakou*, No. 1:12-CR-127 (E.D. Va. 2012) (prosecution of former CIA intelligence officer who disclosed, among other things, identities of covert agents).

well as those set forth below), the stipulated sentence reached by the parties should be accepted by the Court.

2. History and Characteristics of the Defendant

As set forth above, Reality is not the monster she has been portrayed to be by the Government during the course of this case; she is quite the contrary. She is a caring sister, a loving daughter and stepdaughter, a veteran who served her country for six years, and Reality is an extraordinarily bright human being who will be an asset to others in the long life she has ahead of her. Reality is a first-time offender who is highly unlikely to ever appear in a criminal court again. Indeed, the evidence is overwhelming that offenders who are Criminal History Category I, like Reality, are unlikely to be recidivists.[29] In particular, defendants with *zero* criminal history categories points have a re-arrest rate of just 30.2 percent, the lowest of all offenders surveyed by the U.S. Sentencing Commission.[30] Even more, offenders who qualify as Criminal History Category I, but have had no prior contact with the criminal justice system -- as is the case with Reality -- are 11.7% less likely to be recidivists.[31] It is no stretch to say that, after this case is resolved, Reality will almost certainly never be in a court for a criminal matter again.

And what has Reality lost as a result of this offense? Reality Leigh Winner has lost a good bit of her life. Reality will spend the remainder of her 20's -- a time in life when many of us are coming of age, determining what to do with the rest of our life, getting married, having children, etc. -- incarcerated. Reality will now be a felon, which will have a substantial impact on her ability to obtain future employment, and she will suffer from innumerable collateral

[29] *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, U.S. Sentencing Commission, March 2017 at pp. 6-9.
[30] *See id.*
[31] *See id.*

consequences as a result of her felony conviction.[32] Reality will lose her security clearance, and her career in the military or as a contractor for our government is now over. Reality's health has likewise deteriorated. As detailed in the PSR, her bulimia has significantly worsened.[33] Likewise, Reality's family has suffered from the offense. Her mother, Billie, retired as a state worker for Child Protective Services so she could focus full-time on supporting her daughter. The family has spent what little money they have traveling back-and-forth to visit and support their incarcerated daughter, who has been locked up since her arrest over 1 year and 2 months ago in June of 2017. And, Reality is not the only individual who has suffered health problems from the offense. Members of her family have suffered substantial health problems during the pendency of this case, no doubt the result of the stress of dealing with the offense.

In sum, the history and circumstances of the defendant counsel in favor of the substantial penalty negotiated by the parties here. There is simply no need for a harsher sentence.

3. Need for Sentence Imposed to Satisfy Sentencing Goals (Reflect Seriousness of Offense, Promote Respect for the Law, Provide Just Punishment, Afford Deterrence, Protect Public)

The sentencing goals contained in 18 U.S.C. § 3553(a)(2) -- the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford deterrence, and protect the public -- are also satisfied by the plea resolution worked out by the parties. Specific deterrence of Ms. Winner is certainly unnecessary in this case. The offense conduct was situation-specific and extremely narrow in scope and, with her conviction, Reality will no longer possess a security clearance, nor will she be employed by the federal government

[32] *See United States v. Nesbeth*, No. 15-CR-18 (E.D.N.Y. May 25, 2016) (ECF No. 43) (sentencing opinion discussing, at length, severe collateral consequences associated with federal convictions, and stating that such consequences rise to the level of a "civil death" in our society); Nat'l Assoc. of Criminal Defense Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime* (May 2014), available at https://www.nacdl.org/restoration/roadmapreport/ (last visited July 13, 2018).

[33] *See* PSR at pp. 15-16.

to provide her access to sensitive materials. The crime at issue was "particularly adapted to [her] chosen career" and "[t]hat career is over."[34] Likewise, Reality's well-publicized arrest, indictment, and conviction, coupled with any incarceration, completely satisfies general deterrent interests. Those in sensitive positions within our government are certainly on notice that engaging in the offense conduct may subject them to criminal process and prison.[35] In terms of incarceration, there is no evidence that the term of imprisonment called for by the guidelines will have any greater deterrent effect than the agreed-upon sentence of 63 months.[36] Indeed, the 63-month term of imprisonment agreed to by both parties is in *excess* of many prior Espionage Act prosecutions, including those with arguably *worse* conduct -- providing the necessary deterrence.[37] Finally, as a first-time offender, Reality is unlikely to ever commit another crime again, and there is simply no need to protect the public from her. Reality's singular offense was an unfortunate act in an otherwise commendable life of service.

4. Need to Avoid Unwarranted Sentencing Disparities and Promote Consistency in Sentencing

One of the most persuasive reasons for approving the agreed-upon sentence of 63 months is the need for consistency in sentencing. The 63-month sentence agreed to by the parties appears to be in excess of the average sentence for charges under the Espionage Act (including so-called "leak" prosecutions), and is one of the higher sentences undersigned counsel could

[34] *United States v. Emmenegger*, 329 F. Supp. 2d 416, 428 (S.D.N.Y. 2004) (finding no chance of recidivism because defendant's career was over) (alterations not in original).
[35] Separate and apart from the multitudes of prior prosecutions for leaking sensitive information, *see, e.g. infra* Part V.B.4, leak prosecutions have engendered substantial news coverage. *See, e.g. Trump Administration Escalates War on Leakers*, NBC News, Aug. 4, 2017, available at https://www.nbcnews.com/nightly-news/video/trump-administration-escalates-war-on-leakers-1017778755654 (last visited July 5, 2018); *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, The New York Times, June 7, 2018, available at https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html (last visited July 5, 2018).
[36] *See United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006) ("there is considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders") (citations omitted).
[37] *See infra*, Part V.B.4.

locate for defendants convicted of similar conduct. For example, all of the following cases, prosecuted by the United States, resulted in *lesser* sentences despite the conduct in some of these matters arguably being *worse*:

- *United States v. David Petraeus*, No. 3:15-CR-47 (W.D.N.C. 2015): Four-star general prosecuted for providing eight notebooks of classified materials (including code word materials, identities of covert officers, information about war strategy, and deliberative discussions with National Security Council) to his paramour reporter. *See Petraeus*, No. 3:15-CR-47 (W.D.N.C. 2015) (ECF Nos. 1, 3). General Petraeus ultimately pled guilty to misdemeanor violation of mishandling of classified information and was sentenced to two years' probation and $100,000 fine. *See id.* (ECF Nos. 2, 24).

- *United States v. Thomas Drake*, No. 1:10-CR-181 (D. Md. 2010): NSA employee originally charged with Espionage Act violations for improperly retaining and disclosing classified information subsequently pled guilty to exceeding authorized access to NSA computer and providing NSA information to someone not authorized to receive it. *See Drake*, 1:10-CR-181 (D. Md. 2010) (ECF No. 1 at pp. 1-14; ECF No. 158 at pp. 7-9). Drake was sentenced to 1 year of probation plus 240 hours of community service on misdemeanor count. *See id.* (ECF No. 169).

- *United States v. Stephen Jin-Woo Kim*, No. 1:10-CR-225 (D.D.C. 2010): Senior Advisor and Assistant Secretary of State leaked contents of an intelligence report to a news organization relating to military capabilities and preparedness of North Korea. *See Kim*, No. 1:10-CR-225 (D.D.C. 2010) (ECF Nos. 1, 273). Kim pled guilty to felony count of Unauthorized Disclosure of National Defense Information and was sentenced, pursuant to Rule 11(c)(1)(C) plea agreement with Government, to a term of imprisonment of 13 months and 1 year of supervised release. *See id.* (ECF Nos. 274, 291).

- *United States v. Shamai Leibowitz*, No. 8:09-CR-632 (D. Md. 2009): FBI contract linguist acknowledged improperly transmitting five documents classified at the "Secret" level to a media member/blogger. *See Leibowitz*, No. 8:09-CR-632 (D. Md. 2009) (ECF No. 1; ECF Nos. 6, 6-1). Leibowitz was sentenced, pursuant to Rule 11(c)(1)(C) plea agreement, to 20 months in prison and 3 years of supervised release. *See id.* (ECF Nos. 6 at p. 5; ECF No. 25 at pp. 2-3).

- *United States v. John Kiriakou*, No. 1:12-CR-127 (E.D. Va. 2012): CIA Intelligence Officer leaked information concerning the identity of covert agents and classified techniques in connection with counterterrorism operations to a reporter. *See Kiriakou*, No. 1:12-CR-127 (E.D. Va. 2012) (ECF Nos. 22, 115). Kiriakou pled guilty to unlawful disclosure of identity of CIA agent and was sentenced, pursuant to Rule 11(c)(1)(C) plea agreement with Government, to 30 months in jail and 3 years of supervised release. *See id.* (ECF No. 114, 128).

Other Espionage Act cases, where sentences were *higher* than the stipulated 63 months, generally had distinguishable conduct or characteristics.[38]

The Eleventh Circuit has found this factor particularly persuasive and has even reversed sentences where the need to prevent disparities across similarly situated defendants was not adequately taken into account by the sentencing court. As an illustration, in *United States v. Killeen*, No. 15-15001, 2018 WL 1560050 (11th Cir. Mar. 29, 2018) (unpublished), the Eleventh Circuit reversed a 139-year prison sentence against a defendant charged with possession, production, and distribution of child pornography in large measure because other defendants, charged with similar (or arguably worse) conduct, were treated much less harshly.[39] Here, Reality is subjected to a severe punishment of 63 months, a significant upward departure from prior negotiated pleas by the Department of Justice in similar "leak" cases. The need for consistency in sentencing counsels in favor of acceptance of the plea agreement.

5. Other Sentencing Factors

The U.S. Sentencing Guidelines calculation applicable to this case, another sentencing factor listed in 18 U.S.C. § 3553(a), is addressed above.[40] While the guidelines provide for a higher sentence than what the parties have agreed to, as previously stated, that is the circumstance with nearly every case charged under the Espionage Act. For example, in *United States v. Kim*, No. 10-CR-225 (D.D.C. 2010), the Sentencing Guidelines called for a term of imprisonment of approximately 121-151 months, but the parties there agreed to a term of

[38] For example, in *United States v. Christopher Glenn*, No. 14-CR-80031 (S.D. Fla. 2014),the defendant received a ten-year sentence for Espionage Act charges but that sentence ran concurrent to charges in a related case against this same defendant for child pornography and sex trafficking, for which Mr. Glenn received life imprisonment. *See United States v. Glenn*, No. 14-CR-80031 (S.D. Fla. 2014) (ECF No. 142 - Judgment); *United States v. Glenn*, No. 1:15-CR-20632 (S.D. Fla. 2015) (ECF No. 424 - Judgment).

[39] *See United States v. Killeen*, No. 15-15001, 2018 WL 1560050, at *10-11 (11th Cir. Mar. 29, 2018) (unpublished).

[40] *See supra*, Part V.A.

imprisonment of 13 months pursuant to Rule 11(c)(1)(C).[41] In *United States v. Donald Sachtleben,* No. 13-CR-200 (S.D. Ind. 2013), a defendant, a former FBI agent, was charged with two separate groups of criminal charges: child pornography charges and national security charges, more particularly, unauthorized disclosure of national defense information and unauthorized possession of the same.[42] As to the national security counts, with a three-level reduction for pleading guilty, the defendant in *Sachtleben* faced a guideline range of 87-108 months for the unauthorized disclosure count,[43] notably the same range faced by Ms. Winner. Notwithstanding this guideline range, the Government and the defendant agreed in that case to a Rule 11(c)(1)(C) plea agreement to 43 months imprisonment.[44] The same disparity is present in *United States v. Shamai Leibowitz*, No. 8:09-CR-632 (D. Md. 2009). In that case, the defendant was convicted with disclosure of classified information in violation of 18 U.S.C. § 798(a), and faced a guideline range of 46-57 months imprisonment.[45] Despite the guidelines calculation, the defendant and the Government agreed to a sentence of twenty months imprisonment, pursuant to Rule 11(c)(1)(C).[46]

There are no victims in need of restitution, another sentencing factor,[47] and all pertinent policy statements associated with the U.S. Sentencing Guidelines are addressed below in the context of a potential departure.[48] No other sentencing factors appear applicable to this matter.

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[41] *See Kim*, No. 10-CR-225 (D.D.C. 2010) (ECF No. 285) (Government's Sentencing Memorandum at pp. 1, 6-8).
[42] *See United States v. Sachtleben*, No. 13-CR-200 (S.D. Ind. 2013) (ECF No. 20 - Government's Sentencing Memorandum at pp. 4-17).
[43] *See id.* at p. 18 (reflecting total offense level for disclosure of national defense information charge of 32).
[44] *See id.* at pp. 19-20. The 43-month term of imprisonment agreed to by the Government and the defendant was consecutive to the defendant's more severe punishment for the child pornography charges. *See id.* at pp. 18-20.
[45] *See United States v. Leibowitz*, No. 8:09-CR-632 (D.Md. 2009) (ECF No. 6 - Plea Agreement at pp. 1, 4).
[46] *See id.* at p. 5.
[47] 18 U.S.C. § 3553(a)(7).
[48] 18 U.S.C. § 3553(a)(5).

C. A Downward Departure Is Also Warranted.

Separate from a variance under 18 U.S.C. § 3553(a), a sentencing court may *depart* from the guidelines calculation where, like here, "a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm…"[49] As set forth above, Reality's service to her country, in combination with her youth, employment record, and lack of criminal history, justifies a downward departure.[50] The conduct at issue here is a far cry from traditional espionage (the original intent behind the Espionage Act), and involved a single disclosure, a single time, to a single news outlet.[51] Reality, a veteran who has spent almost all her life in service to others,[52] has accepted responsibility and has been (and will be) punished severely. A departure to the stipulated sentence -- which is still in excess of many similar cases prosecuted by the Government against so-called "leakers"[53] -- is thus warranted under pertinent guideline policy statements.[54]

D. The PSR's Identified Ground For An Upward Departure Should Be Rejected.

The PSR identified a singular ground as potentially applicable for an upward departure -- "Public Welfare," as set forth in Section 5K2.14 of the U.S. Sentencing Guidelines,[55] which allows the court to depart "[i]f national security, public health, or safety was significantly endangered…"[56] However, as set forth below, that departure ground should not apply here

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[49] U.S.S.G. Ch. 1, Pt. A § 4(b).
[50] *See* U.S.S.G. §§ 5H1.1 ("Age (including youth) may be relevant in determining whether a departure is warranted…"); 5H1.3 ("Mental and emotional conditions may be relevant in determining whether a departure is warranted…"); 5H1.11 ("Military service may be relevant in determining whether a departure is warranted…").
[51] *See supra*, Part V.B.1.
[52] *See supra*, Part V.B.2.
[53] *See supra*, Part V.B.4.
[54] *See* U.S.S.G. §§ 5H1.1 (Age may be one factor for a sentencing departure); 5H1.3 (mental and emotional conditions may be relevant for a departure); 5H1.11 (military service may be relevant in determine whether a departure is warranted).
[55] *See* PSR at p. 22 (¶ 81).
[56] U.S.S.G. § 5K2.14.

because it would constitute impermissible "double-counting," as the offense conduct, its applicable sentencing guideline, and the charged statute already takes into account any harm or potential harm caused to the national security.[57] As it relates to the charged statute, potential harm to the national security of the United States is *an element* of the offense[58] and therefore, including it as a ground for departure would be impermissible double-counting. The guideline provision at issue, U.S.S.G. § 2M3.3, also takes into account the creation of risk of harm and thus, the enhancement's inclusion constitutes impermissible double-counting.[59] In *United States v. Todd*, 909 F.2d 395 (9th Cir. 1990), a defendant who pled guilty to possession of document-making implements in connection with fake armed forces identification cards (among other things) was sentenced to 48 months imprisonment, which represented a significant upward departure from the applicable guideline range.[60] In upwardly departing, the sentencing court held that the activity at issue in that case posed a grave danger to the national security of the United States.[61] On appeal, the Ninth Circuit affirmed the applicability of the enhancement, stating that the offense conduct at issue there (illegally possessing document-making implements) did *not* take into account the potential danger to national defense, which is the purpose of Section 5K2.14 of the Guidelines.[62] Importantly, however, the Ninth Circuit distinguished the conduct in *Todd* from traditional national security offenses like the one charged in this case:

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[57] *See United States v. Kapordelis*, 569 F.3d 1291, 1315 (11th Cir. 2009) (defining impermissible double-counting); PSR at pp. 4-7 (¶¶ 5-22); *see also* U.S.S.G. § 1B1.3 (upward departure may be warranted if "the creation of risk is not adequately taken into account by the applicable offense guideline.").
[58] *See United States v. Rosen*, 445 F. Supp. 2d 602, 622 (E.D. Va. 2006); *accord United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988).
[59] *See* U.S.S.G. § 2M3.3, Application Note 1 & U.S.S.G. § 2M3.1, Application Note 2.
[60] *See United States v. Todd*, 909 F.2d 395, 396-98 (9th Cir. 1990).
[61] *See id.* at 397-98.
[62] *See id.*

> Offenses which involve national security have a much higher offense levels. *See, e.g.* 18 U.S.C. § 793(e) []. That section recognizes the potential harm of having documents in the unauthorized possession of a person who has reason to believe such documents could be used to the injury of the United States and to the advantage of a foreign nation.[63]

Here, Reality has been charged with 18 U.S.C. § 793(e);[64] as set forth in *Todd*, that statute and the guideline provision applicable to that offense already does take into account harm to the national security.[65] As a result, applying this enhancement even as a potential ground for a departure would be impermissible "double-counting."[66]

VI. CONCLUSION

The 63-month sentence stipulated by the parties is "sufficient, but not greater than necessary" to accomplish all pertinent sentencing goals. For the reasons set forth above, Ms. Winner respectfully requests that this Court accept the plea agreement negotiated between the parties and sentence her in accordance with the terms contained therein, and grant such additional relief as is warranted.

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[63] *Id.* at 398 n.5 (alternation not in original).
[64] *See* PSR at p. 4 (¶¶ 2-3).
[65] *See Todd*, 909 F.2d at 397-98.
[66] *See Kapordelis*, 569 F.3d at 1315.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record for all parties.

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