

1 Edward W. Swanson, SBN 159859  
2 August Gugelmann, SBN 240544  
3 SWANSON & McNAMARA LLP  
4 300 Montgomery Street, Suite 1100  
5 San Francisco, California 94104  
6 Telephone: (415) 477-3800  
7 Facsimile: (415) 477-9010

8 Attorneys for Defendant  
9 MICHAEL GERARD TRENT

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 MICHAEL GERARD TRENT,

16 Defendant.

Case No. CR 16-0178 CRB

**DEFENDANT’S NOTICE AND  
EMERGENCY MOTION FOR  
COMPASSIONATE RELEASE**

17  
18 **NOTICE**

19 PLEASE TAKE NOTICE that, at a date and time convenient to the Court for a telephonic  
20 hearing, defendant Michael Trent will and hereby does move the Court for an order for his  
21 immediate release from custody. This motion is based on 18 U.S.C. § 3582, the attached  
22 memorandum of points and authorities, the concurrently-filed declaration of Edward W.  
23 Swanson, and upon such evidence and argument as may be presented at the motion. Due to the  
24 urgency of this emergency request, Mr. Trent requests a hearing at the Court’s earliest  
25 convenience.<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> On April 6, 2020, undersigned counsel contacted the United States Attorney’s Office to  
28 determine the government’s position on this request. As of the time of this filing, it appears that  
no AUSA has been assigned to the case, and the government has thus been unable to provide a  
response. Undersigned counsel is thus unaware of the availability of government counsel for a  
hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Michael Trent is 65 years old, HIV-positive, and a diabetic. His 54-month term of  
4 imprisonment is due to expire in December of this year. Counsel understands that he has  
5 petitioned the warden for compassionate release pursuant to 18 U.S.C. § 3582, and more than 30  
6 days have passed with no action from the BOP. In light of his extreme risk of complications  
7 should he contract COVID-19, and in light of the pandemic in the Bureau of Prisons and  
8 nationwide, he respectfully moves the Court for immediate release.

9 **II. History**

10 Mr. Trent pled guilty to theft of government property, identity theft, and possession and  
11 distribution of methamphetamines, and the Court sentenced him to a term of 54 months. Dkt. 98.  
12 On February 28, 2020, counsel is informed that Mr. Trent submitted an electronic request for  
13 compassionate release to the warden of FCI Lompoc. Swanson Decl. ¶ 2(a). Having heard no  
14 response, he followed up with a hardcopy request roughly two weeks ago. *Id.* Nearly six weeks  
15 since Mr. Trent’s first request, and to date the warden has not acted on it. On March 26, he  
16 therefore sent a letter to this Court seeking immediately release. Dkt. 102.

17 Mr. Trent has informed counsel that he has no history of disciplinary issues in custody  
18 and that, upon release, he intends to reside in his apartment in San Francisco, a location that was  
19 previously approved by the United States Probation Office. Swanson Decl., ¶¶ 2. Undersigned  
20 counsel has confirmed with the Probation Office that a home visit was conducted. Mr. Trent’s  
21 release date is December 14, 2020, according to the online BOP inmate locator.<sup>2</sup>

22 **III. Legal standard**

23 Under the First Step Act, courts may reduce a previously-imposed sentence where  
24 “extraordinary and compelling reasons warrant such a reduction” and where “the defendant has  
25 fully exhausted all administrative rights” to seek release through the Bureau of Prisons. 18  
26 U.S.C. § 3852(c). In determining whether release is warrant, courts are to consider “the factors  
27

28 \_\_\_\_\_  
<sup>2</sup> <https://www.bop.gov/inmateloc/>

1 set forth in section 3553(a) to the extent that they are applicable.” *Id.* Sentence reduction must  
 2 be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.*

#### 3 **IV. Argument**

##### 4 **A) There are extraordinary and compelling reasons to release Mr. Trent.**

5 The Court is well aware of the nature and scope of the coronavirus pandemic, and Mr.  
 6 Trent will not belabor those points here. It is important to note, however, that the severity of the  
 7 crisis in the prison system is evolving rapidly. On March 26, 2020 – the same day Mr. Trent  
 8 wrote his letter to the Court – the Bureau of Prisons released a statement touting its “remarkably  
 9 low” rate of COVID-19 infection, pointing out that only 10 inmates and 8 staff had tested  
 10 positive across the system and calling this “a testament to our effective planning and  
 11 execution.”<sup>3</sup> Less than two weeks later, 253 inmates and 84 staff have tested positive; eight  
 12 inmates have died.<sup>4</sup> “That’s an increase of 8,600 percent, a much steeper rate of increase than  
 13 has been recorded among the general population. And because testing has been grossly  
 14 insufficient, these numbers are almost certainly an undercount.” Lisa Freeland et al, *We’ll see*  
 15 *many more covid-19 deaths in prisons if Barr and Congress don’t act now* (Washington Post  
 16 Apr. 6, 2020).<sup>5</sup> At least one facility has simply stopped testing symptomatic inmates altogether,  
 17 because there are so many that BOP simply presumes “they are COVID-19 positive” – but such  
 18 “presumed positive” cases are not included in BOP infection tallies. Nicholas Chrastil,  
 19 *Louisiana federal prison no longer testing symptomatic inmates for coronavirus due to*  
 20 *‘sustained transmission’* (The Lens, March 31, 2020).<sup>6</sup> In other words, the true number of  
 21 infected individuals in the federal prison system is vastly greater than the number of cases  
 22 reported by the BOP. Put succinctly, the disease “has wreaked havoc on the federal prison  
 23 system.” Reuters, *Death Toll From COVID-19 at Oakdale Prison in Louisiana Continues to*

24  
 25 <sup>3</sup> [https://www.bop.gov/resources/news/20200326\\_statement\\_from\\_director.jsp](https://www.bop.gov/resources/news/20200326_statement_from_director.jsp)

26 <sup>4</sup> <https://www.bop.gov/coronavirus/>

27 <sup>5</sup> <https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders/>

28 <sup>6</sup> <https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/>

1 *Climb* (April 2, 2020).<sup>7</sup> Inmates will continue to die. *See* Luke Barr, *Federal prisons facing*  
 2 *shortages of resources amid coronavirus outbreak* (ABC News April 1, 2020).<sup>8</sup>

3 The inmates most likely to die are like Mr. Trent. Mr. Trent is 65 years old. He is HIV-  
 4 positive, with a low CD4 count. Dkt. 91 (sealed submission from medical expert). He suffers  
 5 from Type 2 diabetes; “with incarceration, his diabetes has been very poorly controlled and he is  
 6 at serious risk for [] complications.” *Id.* He has been exposed to and “probably infected” with  
 7 tuberculosis, and he “remains at risk for reinfection with TB.” *Id.* He is “is particularly prone to  
 8 heart disease given his weight, increased blood pressure, history of amphetamine abuse and low  
 9 high density lipoprotein level.” *Id.* He is “morbidly obese.” *Id.* At the time of sentencing,  
 10 “diabetes [was] his greatest risk factor” as he suffered from “poorly- controlled diabetes with  
 11 obesity, hypertension and a low HDL,” possible “diabetic neuropathy,” and apparent “early  
 12 diabetic kidney disease,” putting him at “great risk for cardiac disease or stroke.” *Id.*

13 Mr. Trent’s age and his medical conditions render him uniquely susceptible to severe and  
 14 potentially fatal complications of COVID-19. As the CDC warns, individuals at higher risk in  
 15 this pandemic include adults “65 years and older,” those with “conditions that can cause a person  
 16 to be immunocompromised” such as HIV, individuals with “severe obesity,” and those with  
 17 diabetes.<sup>9</sup> Mr. Trent falls into not just one but all of these groups. Even were he not in custody,  
 18 he would be uniquely and dangerously at risk.

19 The BOP cannot contain the spread of the disease in its facilities, and it cannot protect  
 20 vulnerable inmates like Mr. Trent. As a bipartisan group of senators noted in an open letter to  
 21 Attorney General Barr and BOP Director Michael Carvajal, BOP’s COVID-19 action plan does  
 22 not even “include any measures to protect the most vulnerable staff and inmates.”<sup>10</sup> Under these  
 23

24 <sup>7</sup> <https://www.nytimes.com/reuters/2020/04/02/us/02reuters-health-coronavirus-prisons.html>

25 <sup>8</sup> <https://abcnews.go.com/Health/federal-prisons-facing-shortages-resources-amid-coronavirus-outbreak/story?id=69920966>

26 <sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>. The risk for HIV-positive individuals is highest for those “with a low CD4 cell  
 27 count,” like Mr. Trent. *See* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/hiv.html>.

28 <sup>10</sup> <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-colleagues-press-trump-administration-to-transfer-vulnerable-inmates-to-home-confinement>

1 circumstances, there are “extraordinary and compelling reasons” to order Mr. Trent’s immediate  
2 release rather than forcing him to serve out the eight months remaining on his sentence under  
3 threat of a potentially fatal infection. *See, e.g., United States v. Perez*, CR 17-513 AT, Dkt. 98  
4 (SDNY Apr. 1, 2020) (defendant’s “medical condition, combined with the limited time  
5 remaining on his prison sentence and the high risk in the MDC posed by COVID-19,” justified  
6 release); *United States v. Rodriguez*, CR 03-0271 AB, Dkt 135 (E.D.Pa. Apr. 1, 2020) (“the  
7 outbreak of COVID-19 and underlying medical conditions that place [defendant] at a high risk  
8 should he contract the disease” justified release); *United States v. Foster*, CR 14-0324 (MD Pa.  
9 Apr. 3, 2020) (finding “no rationale is more compelling or extraordinary” than the “high  
10 likelihood of contracting COVID-19 from which he would not be expected to recover”).

11 **B) Release is consistent with Sentencing Commission policy statements and the**  
12 **section 3553(a) factors.**

13 Section 3582 directs the Court to consider applicable Sentencing Commission policy  
14 statements as well as the sentencing factors under 18 U.S.C. § 3553(a) in determining whether to  
15 exercise its authority to reduce a sentence. The applicable policy statements and sentencing  
16 factors weigh in favor of release.

17 The applicable policy statement provides that “extraordinary and compelling reasons”  
18 exist where “[t]he defendant is . . . suffering from a serious physical or medical condition . . . that  
19 substantially diminishes the ability to provide self-care within the environment of a correctional  
20 facility and from which he or she is not expected to recover.” USSG § 1B1.13, Application Note  
21 1(A). That is the case with Mr. Trent given his heightened risk to COVID-19: he suffers from a  
22 number of serious physical conditions from which he is not likely to recover and that  
23 substantially diminish his ability to protect against potentially fatal complications should become  
24 infected with the virus. Extraordinary and compelling reasons also exist where an inmate is at  
25 least 65 years old, has served 75% of his sentence, and is “experiencing a serious deterioration in  
26 physical or mental health because of the aging process.” *Id.*, Application Note 1(B). Mr. Trent  
27 has served roughly 88% of his sentence, and, due to his age, his physical health stands to  
28 deteriorate seriously if he contracts COVID-19 while in custody.

1 Second, the sentencing factors weigh in favor of release. Mr. Trent’s offense involved  
2 stealing another person’s identification information in order to fund his persistent drug addiction.  
3 PSR ¶ 18. While Mr. Trent has a history of drug- and addiction-related convictions, he has no  
4 history of violence or violent offenses. He was free on bail during the pendency of his case and  
5 was remanded only because he tested positive for drugs. *Id.* at ¶ 5. He has no history of  
6 disciplinary issues in custody. Swanson Decl., ¶ 2(b). In short, both the nature and  
7 circumstances of the offense and Mr. Trent’s history and characteristics indicate that release in  
8 April, rather than December, is appropriate. Nor would an eight-month reduction in Mr. Trent’s  
9 sentence serve to undermine the goals of general deterrence: a potential offender who is deterred  
10 by the prospect of a 54-month sentence would also be deterred by a 48-month sentence. Finally  
11 and most importantly, section 3553 requires the Court to consider the health of a defendant. 18  
12 U.S.C. § 3553(a)(2)(D) (courts must take into account the need “to provide the defendant with  
13 needed . . . medical care”). Reducing Mr. Trent’s sentence is of paramount importance to  
14 protecting his health.

15 **C) Mr. Trent has exhausted administrative remedies.**

16 The First Step Act requires that inmates exhaust administrative remedies before  
17 petitioning for release in court. Specifically, inmates may petition the court only after having  
18 “fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a  
19 motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the  
20 warden of the defendant’s facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). Mr. Trent  
21 has met these requirements. Based on speaking with Mr. Trent, undersigned counsel understands  
22 that he submitted a request for relief to the warden on February 28, 2020. Roughly two weeks  
23 ago, he resubmitted the request in another format. More than 30 days have passed since he made  
24 his initial request *and* since he made his second request. He has therefore fully exhausted his  
25 administrative remedies, and this Court can and should grant his request for relief.

26 The Court could grant this request even if Mr. Trent had not yet exhausted administrative  
27 remedies. The requirement for exhaustion is not absolute. Rather, “[i]n determining whether  
28 exhaustion is required, federal courts must balance the interest of the individual in retaining

1 prompt access to a federal judicial forum against countervailing institutional interests favoring  
2 exhaustion.” *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992); *see Washington v. Barr*, 925  
3 F.3d 109, 118 (2d Cir. 2019) (“Even where exhaustion is seemingly mandated by statute . . . , the  
4 requirement is not absolute.”) (citing *McCarthy*). The Supreme Court has recognized “at least  
5 three broad sets of circumstances” in which statutory requirements for exhaustion are waived.  
6 *McCarthy*, 503 U.S. at 146. First, exhaustion is not mandatory where a party could “suffer  
7 irreparable harm if unable to secure immediate judicial consideration of his claim.” *Id.* at 146-  
8 47. Second, exhaustion is not required where the administrative agency may be unable “to grant  
9 effective relief.” *Id.* at 147. And third, exhaustion could be futile because “the administrative  
10 body is shown to be biased or has otherwise predetermined the issue before it.” *Id.* at 148. *See*  
11 *also Washington*, 925 F.3d at 120-21 (“[U]ndue delay, if it in fact results in catastrophic health  
12 consequences, could make exhaustion futile. Moreover, the relief the agency might provide  
13 could, because of undue delay, become inadequate. And finally, and obviously, Plaintiffs could  
14 be unduly prejudiced by such delay.”); *Bowen v. City of New York*, 476 U.S. 467, 483 (1986)  
15 (holding that irreparable injury justifying the waiver of exhaustion requirements exists where  
16 “the ordeal of having to go through the administrative process may trigger a severe medical  
17 setback”) (internal quotation marks, citation, and alterations omitted).

18 Here, all three exceptions are met. First, Mr. Trent faces irreparable harm if unable to  
19 secure immediate release. BOP cannot contain the spread of the coronavirus in its facilities, and  
20 given the conditions of confinement, it is only a matter of time before Mr. Trent is exposed.  
21 Second, any relief granted by BOP will be ineffective if it comes too late to prevent Mr. Trent  
22 from contracting COVID-19. And third, the BOP has already shown that it is unequal to the task  
23 of protecting high-risk inmates like Mr. Trent, who remains in custody despite Attorney General  
24 Barr’s March 26, 2020, directive that the BOP identify and release to home confinement “at-risk  
25 inmates who are non-violent and pose minimal likelihood of recidivism.”<sup>11</sup>

26 In the context of the COVID-19 pandemic, district courts across the country have ordered  
27 compassionate release for at-risk inmates notwithstanding a failure to exhaust administrative  
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<sup>11</sup> *See* [https://www.bop.gov/resources/news/pdfs/20200405\\_covid-19\\_home\\_confinement.pdf](https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf).

1 remedies. As one court explained, “if Defendant contracts COVID-19 before her appeals are  
2 exhausted, that undue delay might cause her to endure precisely the ‘catastrophic health  
3 consequences’ she now seeks to avoid.” *United States v. Colvin*, CR 19-0179 JBA, 2020 WL  
4 1613943, \*2 (D.Conn. Apr. 2 2020); *see also United States v. Perez*, CR 17-513 AT, Dkt. 98  
5 (S.D.N.Y. Apr. 1, 2020) (finding that “requiring exhaustion . . . would be directly contrary to the  
6 purpose of identifying and releasing individuals whose circumstances are ‘extraordinary and  
7 compelling’”); *United States v. Zukerman*, CR 16-01994 AT, 2020 WL 1659880, \*3 (S.D.N.Y.  
8 Apr. 3, 2020) (same); *United States v. Powell*, CR 94-0316 ESH, Dkt. 98 (D.D.C. Mar. 28, 2020)  
9 (waiving exhaustion).

10 Thus, the Court should find that Mr. Trent has exhausted administrative remedies, or, in  
11 the alternative, that any failure to exhaust is excusable and the instant motion is properly before  
12 the Court.

13 **V. Conclusion**

14 In light of the crisis in the nation’s prison system and Mr. Trent’s unique susceptibility to  
15 COVID-19, he respectfully requests that the Court order his immediate release from BOP  
16 custody.

17  
18 Dated: April 8, 2020

Respectfully submitted,

19 \_\_\_\_\_  
20 /s/  
21 Edward W. Swanson  
22 August Gugelmann  
23 Attorneys for Defendant MICHAEL TRENT  
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1 Edward W. Swanson, SBN 159859  
August Gugelmann, SBN 240544  
2 SWANSON & McNAMARA LLP  
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Telephone: (415) 477-3800  
4 Facsimile: (415) 477-9010

5 Attorneys for Defendant  
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12 UNITED STATES OF AMERICA,

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17

Case No. CR 16-0178 CRB

**DECLARATION OF EDWARD W.  
SWANSON IN SUPPORT OF  
DEFENDANT'S EMERGENCY  
MOTION FOR COMPASSIONATE  
RELEASE**

18 I, Edward W. Swanson, declare as follows:

19 1) I am an attorney licensed to practice in the state of California and admitted to the  
20 bar of this Court. I represent defendant Michael Trent. Unless otherwise stated, I make this  
21 declaration of my own personal knowledge and could testify competently as to matters set forth  
22 herein.

23 2) On April 7, 2020, I spoke by telephone with Mr. Trent at FCI Lompoc. Mr. Trent  
24 informed me of the following:

25 a) On February 28, 2020, Mr. Trent submitted a request for compassionate  
26 release via electronic form BP-9. Having received no response, he submitted a repeat request in  
27 paper format roughly two weeks ago. As of today, the warden has not responded to either  
28 request.

