UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	
v.	**No. 19-CR-10080**
ELIZABETH HENRIQUEZ, **Defendant.**	**Leave to File Under Seal Granted, June 4, 2020 (ECF No. 1262)**

MEMORANDUM IN SUPPORT OF ELIZABETH HENRIQUEZ'S MOTION TO MODIFY HER SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

It has been nearly fifteen months since Elizabeth Henriquez was arrested for her participation in Rick Singer's college admissions fraud scheme. It has been nearly eight months since Elizabeth pled guilty to the charges against her. Elizabeth pled guilty because owning her conduct and publicly expressing her shame and remorse was more important to her than litigating the legal technicalities of the government's wire fraud and money laundering theories. Elizabeth's sentence, which the Court imposed more than two months ago, is a constant shadow hanging over her. [redacted] Elizabeth is thus desperate to begin serving her sentence without further delay, so that she can turn to the next chapter of her life.

Elizabeth understands that the COVID-19 public health crisis has not abated and that each day of incarceration at a Bureau of Prisons ("BOP") facility will put her at a significantly increased risk of contracting and experiencing dangerous complications from COVID-19.[1] But the

[1] [redacted]

alternative—indefinitely delaying the start of her sentence until a COVID-19 vaccine is available—would be [redacted]

Confronted with this Hobson's choice, Elizabeth reluctantly has decided that the lesser of these two evils is to risk her physical health in order to [redacted] She therefore has instructed us not to seek a continuation of her BOP reporting date, and she intends to report to her designated BOP facility—FCI Dublin, located in Alameda County, California—by June 30, 2020.

This Court, however, uniquely possesses the congressionally authorized power to enable Elizabeth to serve her sentence without further delay, yet without concomitantly putting her physical health in jeopardy. As amended by the First Step Act of 2018, 18 U.S.C. § 3582(c)(1)(A)(i) empowers this Court to modify Elizabeth's seven-month term of imprisonment in light of the continuing COVID-19 crisis, including by imposing a sentence of probation with a condition of home confinement (as well as any other punitive conditions the Court deems appropriate) in lieu of institutional incarceration. *See, e.g.*, *United States v. Zukerman*, No. 16-cr-194, 2020 U.S. Dist. LEXIS 59588, at *1 (S.D.N.Y. April 3, 2020) (modifying the defendant's sentence pursuant to § 3582(c)(1)(A)(i) "such that his remaining term of imprisonment is replaced by an equal period of home incarceration").

As further explained below, Elizabeth satisfies all three of § 3582(c)(1)(A)(i)'s enumerated criteria for such a sentence modification: (1) administrative exhaustion, (2) extraordinary and

[redacted]

compelling circumstances, and (3) eligibility for a sentence of home confinement consistent with the Sentencing Commission's applicable policy statements.

We therefore respectfully request that the Court modify Elizabeth's seven-month prison sentence to a sentence of seven months' probation with a condition of home confinement, in addition to whatever other conditions the Court believes would be required to make home confinement a sufficiently punitive alternative to imprisonment at FCI Dublin.

ARGUMENT

I. Elizabeth Has Satisfied the Administrative Exhaustion Requirement, Because the BOP's Legal Office Denied Her Request for an Agency-Sponsored § 3582(c)(1)(A)(i) Motion and There Is No Right to Administratively Appeal That Denial.

Before a "defendant" may file a motion pursuant to § 3582(c)(1)(A)(i), she must "fully exhaust[ ] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf . . . ." 18 U.S.C. § 3582(c)(1)(A)(i). Elizabeth has done so, and the government cannot credibly argue otherwise.

On May 20, 2020, we sent a letter to the Warden of FCI Dublin and the General Counsel of the BOP's Western Regional Office, requesting that the BOP submit a § 3582(c)(1)(A)(i) motion on Elizabeth's behalf. *See* Exh. B. The following day, the BOP's Acting Regional Counsel, Dominic Ayotte, responded that "[b]ecause Ms. Henriquez is not in BOP custody, the BOP cannot evaluate her for compassionate release and will not be seeking a motion for compassionate release on her behalf at this time." Exh. C. The BOP's regulations do not provide for any administrative appeal of the Acting Regional Counsel's decision. Elizabeth has therefore exhausted all her administrative rights to appeal the BOP's denial of her request.

Over the past six weeks, several federal district courts have held that a defendant not yet incarcerated in a BOP facility satisfies § 3582(c)(1)(A)(i)'s exhaustion requirement where the

BOP's legal office denies the defendant's written request for an agency-sponsored § 3582(c)(1)(A)(i) motion on the ground that the defendant is not in the BOP's custody. In *United States v. Gonzalez*, No. 18-CR-232, 2020 U.S. Dist. LEXIS 56422 (E.D. Wash. March 31, 2020), which appears to be the first case to address the issue, Chief Judge Rice held that a defendant who is "not yet in a designated [BOP] facility" satisfies § 3582(c)(1)(A)(i)'s exhaustion requirement by "petitioning the BOP [for an agency-sponsored] motion, giving [the BOP] notice, and being told [by the BOP] that she does not have any other administrative path or remedies she can pursue." *Id.* at *4-5.

In *United States v. Hernandez*, No. 18-cr-834, 2020 U.S. Dist. LEXIS 58739 (S.D.N.Y. April 2, 2020), the defendant made his request for an agency-sponsored motion prior to being in the BOP's custody. An Associate General Counsel of the BOP responded with a one-paragraph letter denying the defendant's request, stating that because the defendant was "not in the custody of the BOP," the BOP "'cannot evaluate him for compassionate release and will not be seeking a motion for compassionate release on his behalf at this time.'" *Id.* at *5-6 (quoting April 1, 2020 letter from BOP Associate General Counsel Zachary Kelton).[2] The district court agreed that "as a result of this denial, [the defendant] has exhausted his administrative remedies through the BOP." *Id.* (noting that the United States Attorney's Office likewise agreed that, in light of Mr. Kelton's letter, the defendant had satisfied the administrative exhaustion requirement).

The district court reached the same conclusion in *United States v. Johnson*, No. 15-cr-125, 2020 U.S. Dist. LEXIS 86309 (D.D.C. May 16, 2020), where the defendant requested an agency-sponsored § 3582(c)(1)(A)(i) motion prior to being in BOP custody and the BOP's legal office

[2] For the Court's benefit, we have included Mr. Kelton's letter as Exhibit D to this motion. The letter is essentially identical to the one that Elizabeth received from Mr. Ayotte.

denied the request on the ground that the defendant was not in BOP custody. Judge Ketanji Brown Jackson—the former Vice Chair of the United States Sentencing Commission—held that "there can be no doubt that [the defendant's] April 15, 2020, letter to the BOP seeking an agency-sponsored motion for compassionate release initiated the administrative process for purpose of section 3582(c)(1)(A)." *Id.* at *26. Judge Jackson further held that when "BOP's general counsel responded that BOP 'will not be able to consider [the defendant] . . . for compassionate release' because he is 'not currently in BOP custody,' [the defendant] unquestionably exhausted all of the administrative remedies that were available to him, as set forth in the BOP's own regulations." *Id.* at *26-27 (quoting e-mail from BOP Associate General Counsel Zachary Kelton to the defendant's counsel; internal citation omitted). Judge Jackson described as "puzzling" any suggestion that a defendant whose written request for an agency-sponsored motion "is formally and finally rejected by the [BOP] on the grounds that BOP's administrative processes do not apply to him" has failed to satisfy the statute's exhaustion requirement. *Id.* at *27 (doubting that the government could even "credibly argue" that the defendant had failed to exhaust his administrative appeal rights).

Here, the government cannot credibly argue that Elizabeth has failed to exhaust her administrative appeal rights. Through undersigned counsel, Elizabeth made a written request for an agency-sponsored motion on May 20, 2020. The BOP's legal office denied Elizabeth's request the very next day, in a letter substantively identical to the denial letter it sent to the defendant in *Hernandez* and the denial e-mail it sent to the defendant in *Johnson*. The BOP's regulations do not provide Elizabeth any opportunity to appeal the denial administratively. On these facts, Elizabeth clearly satisfies the unambiguous plain language of § 3582(c)(1)(A)(i)'s exhaustion requirement—she has "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on [her] behalf . . . ." The statute does not require anything more.

Nor can the government credibly argue that only an individual who presently is an "inmate" of a BOP facility is eligible for relief under 18 U.S.C. § 3582(c)(1)(A)(i). First, such an argument would contradict the district courts' decisions in *Gonzalez*, *Hernandez*, and *Johnson*, where the courts granted § 3582(c)(1)(A)(i) relief to defendants who indisputably were not in BOP custody. Second, such an argument would completely ignore the plain language of § 3582(c)(1)(A)(i). The statute does not refer to a motion brought by an "inmate." Rather, the statute refers to "a motion of the defendant." 18 U.S.C. § 3582(c)(1)(A)(i). Moreover, the statute does not say anything about the defendant needing to be in the BOP's custody, or even incarcerated at all, before bringing a § 3582(c)(1)(A)(i) motion. Furthermore, the statute on its face neither describes the relief provided as, nor limits the relief available to, "release" from incarceration. Rather, the statute states that the district court may "*in any case . . . reduce*" the defendant's term of imprisonment, including by imposing a "term of probation or supervised release with or without conditions" in replacement of the "unserved portion" of the defendant's "original term of imprisonment."[3] 18 U.S.C. § 3582(c)(1)(A)(i) (emphasis added).[4]

Congress expressly specified three requirements that a defendant must satisfy to be eligible for a sentence reduction under § 3582(c)(1)(A)(i)—administrative exhaustion, extraordinary and compelling circumstances, and consistency with "applicable policy statements by the Sentencing

[3] Because Elizabeth was placed in official detention on the day of her arrest, as a matter of statute she already has served one day of her term of imprisonment. *See* 18 U.S.C. § 3585(b).

[4] Notably, the statute is clear that, to be eligible for relief under § 3582(c)(1)(A)(ii), the defendant must already have served "at least 30 years in prison." This shows that Congress knew how to impose a requirement that the defendant serve some portion of his or her term of imprisonment as a condition of receiving relief. The absence of any such requirement in § 3582(c)(1)(A)(i)'s plain language must therefore be deemed a purposeful decision on Congress's part. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (noting the "usual rule" of statutory interpretation "that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'" (quoting N. Singer, Statute and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000))).

Commission." It would violate the most basic, fundamental canons of statutory construction for a district court to read in to the statute an additional "custody" requirement that is wholly absent from the statute's plain language. *See, e.g.*, *Sasen v. Spencer*, 879 F.3d 354, 362 (1st Cir. 2018) (applying the "venerable canon of statutory construction *inclusio unius est exclusio alterius*, which teaches that if one of a category is expressly included within the ambit of a statute, others of that category are implicitly excluded"); *United States v. Pitrone*, 115 F.3d 1, 6 (1st Cir. 1997) ("We decline either to read into a statute a word that Congress purposely omitted, or, on our own initiative, to rewrite Congress's language . . . .").

It makes sense why Congress did not include an additional requirement that the defendant be in BOP custody as a condition of seeking and obtaining relief under § 3582(c)(1)(A)(i). Whether the defendant is in BOP custody does not have any logical bearing on whether a modification of the defendant's otherwise final sentence is warranted based on extraordinary and compelling circumstances, and reading a custody requirement into the statute would lead to absurd results. Consider, for example, a defendant who suffers profound brain damage in a car accident that occurs after he is sentenced but before he reports to his designated BOP facility. If § 3582(c)(1)(A)(i) contained a custody requirement, the now-incapacitated defendant would be obligated to report to the prison as a burdensome, nonsensical precondition to moving for and obtaining statutory relief. There is no reason to believe that Congress, in enacting a law designed to inject additional compassion into the federal criminal justice system and to expand a district court's authority and flexibility to modify a sentence it previously imposed, intended such an absurdity.

II. The Combination of the COVID-19 Pandemic, Elizabeth's Age, and Elizabeth's Underlying Autoimmune Disease Constitutes Extraordinary and Compelling Circumstances Warranting Modification of Her Sentence.

The State of California took some of the earliest and most aggressive social distancing measures and stay-at-home orders in the country in response to COVID-19. This helped the state to "flatten the curve." But as its economy has re-opened, California is now trending toward a second spike in COVID-19 infection rates. *See* https://www.covidexitstrategy.org/. The financial and political pressure to keep the economy open will make it difficult, if not impossible, for the state to control the spread of COVID-19 in the same way it did prior to Memorial Day.

The BOP is understandably concerned by the profound threat that COVID-19 poses to the staff and inmates at its facilities. The BOP has responded to the threat by imposing on inmates a variety of restrictions that make each day of incarceration at a facility such as FCI Dublin *significantly more punitive* than usual. A quarantine period of 14 days is imposed on all newly-arriving inmates (meaning that the first two weeks of incarceration are spent in quasi-solitary conditions), all social visits have been suspended (meaning that an inmate is deprived of the opportunity to see her children and spouse), inmates are limited to three showers per week, and inmates are severely restricted in their movements within the facility (including use of outdoor spaces and common areas). *See, e.g.*, https://www.bop.gov/coronavirus/covid19_status.jsp. Thus, even if the BOP could *guarantee* Elizabeth's physical health in FCI Dublin (which it clearly cannot), the panoply of restrictions that BOP has put in to place to battle COVID-19 would make a seven-month term of imprisonment there significantly more punitive than in ordinary times.

More important, it is clear that incarceration in FCI Dublin would substantially increase Elizabeth's COVID-19 risks. "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." *United States v. Rodriguez*, No. 2:03-cr-271, 2020 U.S. Dist. LEXIS 58718, at *2 (E.D. Pa. April 1, 2020). To be sure, as of June 2, 2020, the BOP has not reported any COVID-19 positive inmates at FCI Dublin. Nevertheless, federal courts familiar with FCI Dublin have granted § 3582(c)(1)(A)(i) to the facility's inmates on COVID-19 grounds, recognizing that the absence of "confirmed [inmate] cases of COVID-19 at FCI Dublin . . . is a function of testing and most prisons and jails are only testing inmates with symptoms." *United States v. Diep Thi Vo*, No. 15-cr-310, 2020 U.S. Dist. LEXIS 81121, at *9 (N.D. Cal. May 7, 2020).

FCI Dublin is not immune to the realities of a highly infectious, novel disease. FCI Dublin cannot keep its staff in a bubble, and the facility's staff members necessarily comingle with its inmates. Just this past weekend, the BOP reported that an FCI Dublin staff member now has tested positive for COVID-19. *See* https://www.bop.gov/coronavirus/. The experiences of two other low-security federal prisons in California, FCI Lompoc and FCI Terminal Island, demonstrates how COVID-19 can spread like wildfire once it makes its way into a facility, despite the BOP's best efforts at containment. *See id.*, at *10 (noting that FCI Lompoc went from zero confirmed COVID-19 cases to over 100 confirmed cases in less than a month); *see also* https://www.bop.gov/coronavirus/ (as of June 2, 2020, reporting that nearly 900 inmates at FCI Lompoc and over 650 inmates at FCI Terminal Island have been infected, at least 10 of whom have died).[5] To quote Judge Wolf's order from last week in *United States v. Pena*, "it is probable that, despite the Warden's best efforts with the limited resources available, his good luck will not continue and an inmate at the [facility] will become infected. If and when that occurs, there is significant potential that the virus will spread at the [facility], as the CDC has recognized is a

[5] Although the BOP's statistics document how many inmates have died from COVID-19, the statistics do not convey how many "recovered" inmates are afflicted with severe or permanent physical injury (such as pulmonary fibrosis) as a result of the disease.

significant risk in prisons and jails generally." No. 16-cr-10236, ECF No. 221, at p. 9 (May 29, 2020) (finding that, although the FMC Devens Camp at which the defendant is being held has not yet reported a COVID-19 positive inmate, the at-risk defendant demonstrated "extraordinary and compelling circumstances" warranting home confinement).

This Court previously has found that the COVID-19 public health crisis is an "extraordinary and compelling circumstance" that, for particular defendants, warrants a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). *See* United States v. Toby MacFarlane, No. 19-cr-10131, ECF No. 352 (April 14, 2020) (granting relief to a 56-year-old "Varsity Blues" defendant in light of "the COVID-19 pandemic" and "the particular risk of transmission and infection in penitentiary facilities"). It is for Elizabeth. [redacted] Exh. E. Federal district courts have found that, against the backdrop of COVID-19, a defendant's [redacted] constitutes an extraordinary and compelling circumstance sufficient to warrant relief under § 3582(c)(1)(A)(i) or analogous sentencing statutes. [redacted]

III. Modifying Elizabeth's Prison Sentence to a Sentence of Probation With Conditions Including Home Confinement Is Consistent with 18 U.S.C. § 3553(a) and the Sentencing Commission's Applicable Policy Statements.

The Sentencing Guidelines provided this Court with the authority to sentence Elizabeth to probation with a condition of home confinement in the first instance. *See* U.S.S.G. § 5B1.1(a)(1). The Court sent an extremely strong message when it instead sentenced Elizabeth to a prison term of seven months, which was one month above the top of her advisory Guidelines range. Given the sentences that this Court and the other judges in this district have doled out to parents who participated in Rick Singer's fraud scheme, as well as the devastating collateral consequences of conviction, no rational citizen could think that engaging in test cheating and bribery to get their kid into a particular college is remotely worth the risk. The courts in this district have sent the deterrence message loud and clear.

Granting Elizabeth relief under § 3582(c)(1)(A)(i), on the basis of the unforeseeable COVID-19 pandemic and [redacted], will not water down the Court's general deterrence message, diminish the seriousness of Elizabeth's offense, suggest that Elizabeth is receiving unfair special treatment, or be letting Elizabeth off easy. The public is aware that the COVID-19 pandemic requires the criminal justice system to modify the way that certain non-violent, first-time offenders are sentenced and serve out their sentences. The public is aware that placing appropriate defendants in home confinement, rather than incarcerating them, does not just protect the health of those defendants, but also helps to protect prison staff and the prisons' inmates by reducing the prison's overall population. In the past two months alone, the BOP has released to home confinement thousands of non-violent, at-risk offenders due to the COVID-19 pandemic. Some of these offenders are high-profile individuals, such as Michael Cohen, Paul Manafort, and Takashi 6ix9ine. But most are ordinary citizens like Elizabeth whose offenses, though serious,

were non-violent and can effectively be punished with strict home confinement conditions. We also assume that, to help respond to the COVID-19 crisis, sentencing courts in the first instance are increasing their use of home confinement as a sentencing alternative to prison.

The public is not going to be up in arms if the Court directs Elizabeth, in the interests of protecting her health and the health of others, to serve her sentence in home confinement under punitive restrictions.[6] Elizabeth has been publicly shamed and humiliated, [redacted]. Moreover, in exchange for agreeing not to add Elizabeth to the Third Superseding Indictment, the government required Elizabeth to plead guilty to a legally specious money laundering charge—which the government did not require fashion mogul Mossimo Giannulli or Hollywood star Lori Loughlin to do last month as part of their Rule 11(c)(1)(C) pleas. Elizabeth's money laundering conviction substantially impairs her ability to engage in the simplest of financial transactions that we all take for granted, such as opening a bank account or credit card account. Elizabeth was also hit with a substantial monetary fine, which she has paid.

Furthermore, there are a variety of ways that the Court can enhance the punitive nature of home confinement, such as requiring Elizabeth to serve her home confinement in a place other than her primary residence and/or "limit[ing] the amenities available" to Elizabeth at her residence. U.S.S.G. § 5F1.2, Application Notes 2 and 3. By utilizing all the tools available to it, the Court

[6] Indeed, the government recently agreed to recommend a sentence of home confinement to Peter Demaris, a sophisticated businessman who admitted to bribing Georgetown tennis coach Gordon Ernst hundreds of thousands of dollars to help his son fraudulently obtain admission to Georgetown.

can modify Elizabeth's sentence to one of probation with a condition of home confinement without meaningfully diminishing the punishment that Elizabeth will have received for her offenses.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court modify Elizabeth's seven-month prison sentence to a sentence of seven months' probation with a condition of home confinement, in addition to whatever other conditions the Court believes are required to make home confinement a sufficiently punitive alternative to imprisonment at FCI Dublin.

DATED: June 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Aaron M. Katz, hereby certify that the foregoing document was served through the ECF system on all registered participants in this action on June 4, 2020.

/s/ Aaron M. Katz
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