UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. DAVID SIDOO, *et al.*, Defendants.	No. 19-cr-10080-NMG

GOVERNMENT'S OPPOSITION TO THE MOTIONS OF DEFENDANTS HENRIQUEZ AND JANAVS TO MODIFY THEIR SENTENCES (Dkts. 1258 & 1261)

(REDACTED)

The government respectfully submits that this Court lacks authority at this time to act on the motions of defendants Elizabeth Henriquez and Michelle Janavs for compassionate release because neither has exhausted their administrative remedies under 18 U.S.C. § 3582(c)(1)(A). Even if the Court could consider the defendants' motions now, they have not demonstrated that extraordinary and compelling circumstances warrant a reduction of their sentences in light of the relevant factors under 18 U.S.C. § 3553(a), and the fact that the Bureau of Prisons ("BOP") is working to protect the inmate population from the COVID-19 pandemic and to address the unique circumstances of individual inmates. Indeed, as set forth below, courts considering similar motions by defendants who have been sentenced but not yet incarcerated have almost uniformly extended the defendants' surrender dates rather than reduce their sentences to home confinement. And that is the appropriate outcome here. Henriquez and Janavs should not be permitted to take advantage of the current pandemic to escape meaningful punishment for their crimes—punishment that this Court only recently concluded was just and appropriate. A delay of several months, or even longer, in beginning to serve that sentence may be inconvenient, but it does not justify the relief the defendants seek. While the government is mindful of the concerns created by COVID-19, the Court should deny the defendants' motions to reduce their sentences and, instead, grant a further continuance of the defendants' respective report dates.

RELEVANT BACKGROUND

Defendants' Sentences

Both Henriquez and Janavs pled guilty to one count of conspiracy to commit mail and wire fraud and honest services mail and wire fraud, in violation of 18 U.S.C. § 1349, and one count of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h), in connection with their agreement to pay William "Rick" Singer to facilitate cheating on standardized tests (five times for

Henriquez and two times for Janavs) and to cause their children to be recruited as student athletes, thereby facilitating their admission to Georgetown University and the University of Southern California, respectively.[1] *See* Dkt. 314. On February 25, 2020, the Court sentenced Janavs to five months' imprisonment, two years of supervised release, 200 hours of community service, a $250,000 fine, and a $200 special assessment. Dkt. 922. On March 31, 2020, the Court sentenced Henriquez to seven months' imprisonment, two years of supervised release, 300 hours of community service, a $200,000 fine, and a $200 special assessment. Dkt. 1069.

At Janavs's sentencing, the Court stated: "If we condone bribery in any form or decline to punish it appropriately, we undermine the entire fabric of our society," and noted that Janavs "deserve[s] a prison sentence for deliberately corrupting the college admissions system" because her conduct was "just as onerous as bribing governmental officials." Dkt. 872 at 53-54. The Court ordered Janavs to begin serving her sentence on April 7, 2020, and later extended her report date to May 7, 2020. Dkts. 922, 946.

At Henriquez's sentencing, her counsel raised concerns about the COVID-19 pandemic, stating, "it is entirely conceivable that federal prison will not be a safe place for Elizabeth until there is a COVID-19 vaccine, which public health officials estimate is 12 to 18 months off," and argued for a sentence of home detention "in the first instance." Dkt. 1030 at 28-29. The Court rejected that argument, finding that Henriquez "deserve[s] a prison sentence for deliberately and

[1] Henriquez's contention that "the government required [her] to plead guilty to a legally specious money laundering charge," Dkt. 1264 at 12, is meritless for several reasons. *First*, Henriquez chose to plead guilty to the charges against her without a plea agreement. The government did not require her to plead to anything. *Second*, Henriquez has at all times been represented by experienced counsel from the law firm of Ropes & Gray, and her counsel stood beside her as she pled guilty to conspiracy to commit money laundering. At that time, counsel expressed no concern to the Court that the charges were "legally specious." *Third*, before accepting her plea, the Court found Henriquez's plea was "supported by an independent basis in fact containing each of the essential elements of the offenses charged." Dkt. 613 at 17.

repeatedly corrupting the college admission system . . . ." *Id.* at 32. The Court found that a sentence of imprisonment was necessary to deter Henriquez "from ever doing anything like this again but also to deter anyone else who has the gall to use his or her wealth to disparage our expectation of honest services from the testing services, teachers and coaches associated with our institutions of higher learning." *Id.* at 32-33. In concluding that imprisonment, rather than home confinement, was the appropriate sentence for Henriquez, the Court added that, "although we are, indeed, in the midst of a public health crisis, I will not forfeit the obligation of a federal judge to impose a sentence that is warranted by the defendant's conduct. In this case, that is a period of incarceration." *Id.* at 36. Nevertheless, the Court determined it appropriate to defer Henriquez's self-surrender date to June 30, 2020, and indicated it would entertain further motions if the COVID crisis had not lessened by that time. *Id.*

On April 22, 2020, Janavs moved to modify her sentence under § 3582(c)(1)(A)(i), seeking to convert her sentence of imprisonment—which she had not yet begun to serve—to a term of home confinement. *See* Dkts. 1098, 1100. On April 30, 2020, the Court denied Janavs's motion without prejudice, and extended her report date to June 30, 2020. Dkt. 1128. In denying the motion, the Court reiterated that, "notwithstanding the current public health crisis, this federal judge will not forfeit his obligation to impose a sentence that is warranted by a defendant's criminal conduct." *Id.* at 2. Nonetheless, the Court indicated it would entertain further motions if the COVID-19 crisis had not abated by Janavs's June 30 report date.

Both Henriquez and Janavs now move to modify their sentences under § 3582(c)(1)(A)(i) to reduce their term of imprisonment—which neither has yet begun to serve—to a period of home confinement. *See* Dkts. 1258, 1261, 1264. Both state that they sent letters to the wardens of the BOP facilities to which they have been designated—FCI Dublin for Henriquez and FPC Bryan for

Janavs—asking BOP to convert their prison sentences to home confinement in light of COVID-19. *Id.* Because neither is yet in BOP custody, BOP is unable to act on their requests.

BOP's Responses to the COVID-19 Pandemic

In opposing the defendants' motions, the government does not minimize the risks COVID-19 presents. Mindful of the concerns created by the virus, BOP has made and continues to make extensive efforts to stop the spread of the virus in its facilities and to move as many appropriate inmates to home confinement as possible. In a March 26, 2020 memorandum, the Attorney General instructed BOP to prioritize transferring inmates to home confinement in appropriate circumstances when those inmates are vulnerable to COVID-19 under the Centers for Disease Control and Prevention ("CDC") risk factors—particularly those at institutions where there have been COVID-19 outbreaks. Attorney General Mem. (Mar. 26, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf. Since the release of that memorandum, BOP has placed 3,889 inmates on home confinement; an increase of 136 percent. https://www.bop.gov/coronavirus/ (last accessed June 8, 2020).

In its Opposition to Janavs's initial motion to modify her sentence, the government laid out in detail the steps BOP has taken to manage the COVID-19 crisis[2], including:

(a) establishing "an agency task force" to study and coordinate its response, using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the CDC, the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the Vice President";

(b) suspending social visits, legal visits, inmate movements, official staff travel, volunteer visits, and facility tours (but increasing inmates' access to telephone calls and providing case-by-case accommodations and exceptions for legal visits and medical treatment);

(c) maximizing telework for employees and staff, restricting contractor access to BOP facilities to those performing essential services such as medical treatment, and

[2] The government incorporates this background as if fully set forth herein. *See* Dkt. 1114 at 4-8.

"implementing nationwide modified operations to maximize social distancing and limit group gatherings in [its] facilities";

(d) implementing screening protocols for both BOP staff and inmates, with staff subject to "[e]nhanced screening" and inmates subject to screening managed by BOP's infectious disease management programs, which includes screening "[a]ll newly-arriving BOP inmates . . . for COVID-19 exposure risk factors and symptoms," quarantining asymptomatic inmates with exposure risk factors and isolating and testing symptomatic inmates with exposure risk factors per local health authority protocols[3];

(e) inventorying all cleaning, sanitation, and medical supplies, making sure ample supplies were on hand and ready to be distributed or moved to any facility as deemed necessary, and placing additional orders for those supplies, in case of a protracted event;

(f) updating its quarantine and isolation procedures to require that all newly admitted inmates to BOP, whether in a sustained community transition area or not, be assessed using a screening tool and temperature check (including all new intakes, detainees, commitments, writ returns from judicial proceedings, and parole violators, regardless of their method of arrival);

(g) placing asymptomatic inmates in quarantine for a minimum of 14 days or until cleared by medical staff and placing symptomatic inmates in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation;

(h) securing inmates in every institution to their assigned cells/quarters for a 14-day period to decrease the spread of the virus and coordinating with the U.S. Marshals to significantly decrease incoming movement;

(i) offering inmates access to programs and services that are offered under normal operating procedures, such as mental health treatment and education, to the extent practicable, and affording limited group gathering to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access; and

(j) expanding its COVID-19 testing capabilities with the acquisition of Abbott ID NOW instruments for Rapid RNA testing, with the goals of rapidly testing newly symptomatic inmates to quickly confirm their diagnosis and of expanding testing on asymptomatic or pre-symptomatic inmates so that BOP can quickly isolate and quarantine sick individuals, thereby slowing transmission of the virus.[4]

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[3] As discussed *infra*, BOP now tests and quarantines all newly arrived inmates at its facilities.

[4] *See* BOP COVID-19 Action Plan, available at https://www.bop.gov/resources/news/20200313_covid-19.jsp; BOP Update on COVID-19, available at https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf; BOP COVID-19 Action Plan:

Since the government previously briefed this issue, BOP has substantially expanded its COVID-19 testing capabilities. *See* BOP, Bureau of Prisons to Expand Rapid Testing Capabilities (May 7, 2020), available at https://www.bop.gov/resources/news/pdfs/20200507_press_release_expanding_rapid_testing.pdf. Additionally, BOP has decreased internal movement by 90% compared to the same time last year, as part of its efforts to stop the spread of the virus. *Id.* BOP now tests *all* new inmates for COVID-19 to limit the introduction of the virus to its facilities. BOP, Bureau of Prisons Announces Update on Inmate Movement (May 22, 2020), available at https://www.bop.gov/resources/news/pdfs/20200527_press_release_inmate_movement.pdf.

These and other steps contradict any suggestion that BOP is failing to take meaningful steps to address the risk posed by COVID-19. They show that BOP has taken the threat seriously, is working to mitigate it, and continues to update policies and procedures in accord with the relevant facts and recommendations of experts. Further, BOP's efforts are working. Since the WHO declared COVID-19 a global pandemic nearly three months ago and as of the filing of this brief, *there still has not been a single confirmed case of COVID-19 among the inmate population at FCI Dublin or FPC Bryan, and only one confirmed staff case at FCI Dublin.*[5]

Phase Five, available at https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp; BOP, Bureau of Prisons Expands COVID-19 Testing (Apr. 24, 2020), available at https://www.bop.gov/resources/news/pdfs/20200423_press_release_covid19_testing.pdf.

[5] Henriquez argues that the situations at FCC Lompoc and FCI Terminal Island, which each experienced more widespread outbreaks of COVID-19, are emblematic of BOP's inability to contain the virus. Dkt. 1264 at 9. But this suggestion is pure speculation and undercut by BOP's effectively halting inmate and staff movement to contain the spread. Further, to respond to the outbreak at FCC Lompoc, provide expanded inmate care, and further curb the spread of the virus, BOP constructed an entire hospital care unit within FCC Lompoc in less than four weeks. BOP, Hospital Care Unit at FCC Lompoc (May 4, 2020), available at https://www.bop.gov/resources/news/pdfs/20200505_press_release_lox.pdf.

ARGUMENT

I. Neither Henriquez Nor Janavs Has Complied with the Statutory Exhaustion Requirements Under § 3582(c)(1)(A).

Under 18 U.S.C. §3582(c), a district court "may not" modify a term of imprisonment once imposed, except under limited circumstances. *See Dillon v. United States*, 560 U.S. 817, 824 (2010). One such circumstance is the so-called compassionate release provision, which provides that a district court "may reduce the term of imprisonment" if it finds "extraordinary and compelling circumstances warrant such a reduction," and that "such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The Court must also consider the "factors set forth in section 3553(a) to the extent that they are applicable." *Id*.

A motion under § 3582(c)(1)(A) may be made either by BOP or a defendant, but in the latter case only "after the defendant has fully exhausted all administrative rights to appeal a failure of [BOP] 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." *Id.* Neither Henriquez nor Janavs has satisfied this exhaustion requirement.

Defendants' contention that they have satisfied the exhaustion requirements by sending a letter to the warden of the respective institutions to which they have been designated asking to convert their respective prison sentences to home confinement, Dkt. 1264 at 3; Dkt. 1261 at 5, 10-11, ignores the plain language of the statute, which does not contemplate a motion by an individual who is not yet in BOP custody. While each may have sent a letter to a warden at a BOP facility, until she actually reports to that facility and is taken into custody, that warden is not the "warden *of the defendant's* facility." 18 U.S.C. § 3582(c)(1)(A) (emphasis added). At this stage, Henriquez and Janavs have merely been designated to a facility, but they are not in BOP custody.

As far as the government has found, every court to consider similarly situated defendants who have been sentenced but not yet incarcerated has come to the same conclusion: they are *not* eligible for relief under § 3582(c)(1)(A). *See United States v. Konny*, -- F. Supp. 3d --, No. 19-cr-00283-JGK, 2020 WL 2836783, at *2 (S.D.N.Y. May 30, 2020) (defendant not entitled to relief under § 3582(c)(1)(A) where he is not yet incarcerated); *United States v. Spruill*, No. 18-cr-00022-10-VLB, 2020 WL 2113621, at *3 (D. Conn. May 4, 2020) (defendant's § 3582(c)(1)(A) motion "premature" because he was not yet in custody); *United States v. Hoffman*, No. 14-cr-00022, 2020 WL 2495769, at *2 n.4 (E.D. La. May 14, 2020) (because defendant not in custody, he could not have exhausted his administrative remedies "at this juncture"); *cf. United States v. Nazer*, No. 18-cr-00783-2, 2020 WL 2197840, at *2 (N.D. Ill. May 6, 2020) (noting in dicta that language of § 3582(c)(1)(A) and its implementing regulations suggests that relief is unavailable to defendants sentenced but not yet incarcerated, but nevertheless finding defendant exhausted because government did not press the issue).

The court in *Konny* held that § 3582(c)(1)(A) "does not provide a basis for the Court to convert the defendant's term of imprisonment into a term of home confinement before he has self-surrendered to the BOP." 2020 WL 2836783, at *2. In so holding, the *Konny* court concluded that, "by its plain terms, [§ 3582(c)(1)(A)] applies only to those defendants who have begun serving their terms of imprisonment."[6] *See also Nazer*, 2020 WL 2197840 at *2 ("the language of the statute suggests that relief is unavailable because of the requirement that the defendant first file

[6] The *Konny* court also found that a request to convert a term of imprisonment into a term of home confinement "is not a proper request" under § 3582(c)(1)(A). *Konny*, 2020 WL at *2. Rather, "the authority to place a prisoner in home confinement rests with the BOP under 18 U.S.C. § 3624(c)(2), and the discretion to make such an order 'lies solely with the Attorney General.'" *Id.* (quoting *United States v. Logan*, No. 15-cr-00027, 2020 WL 2559955, at *2 (W.D.N.C. May 20, 2020)).

a request with his facility's warden and then await the earlier of 30 days or the exhaustion of his avenues of appeal of the Bureau of Prison's failure to bring a motion on his behalf.") Indeed, Section 603(b) of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018), which added the language permitting a defendant to move for a reduction in her sentence after exhausting her administrative remedies with BOP, is titled, "INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE." Given that neither Henriquez nor Janavs have been incarcerated yet, they cannot be "released."

BOP's regulations and policies implementing § 3582(c)(1)(A) similarly provide that relief under that section is limited to defendants who are already in custody, insofar as they refer to "inmates." *See* 28 C.F.R. § 571.60, *et seq.* ("Under 18 U.S.C. 3582(c)(1)(A), a sentencing court, on motion of the Director of [BOP], may reduce the term of imprisonment of an *inmate* sentenced under the Comprehensive Crime Control Act of 1984.") (emphasis added); BOP Program Statement 5050.50 (Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)) (rev. Jan. 17, 2019) ("In deciding whether to file a motion under . . . 18 U.S.C. § 3582, the Bureau of Prisons (BOP) should consider whether the *inmate's* release would pose a danger to the safety of any other person or the community.") (emphasis added). *See also Nazer*, 2020 WL 2197840, at *2 ("the regulations governing the process for requesting the BOP to file a motion for compassionate release contemplate that such a request will be made by an individual who is presently incarcerated, as indicated through the use of the word "inmate" to refer to the person making the request") (citing 28 C.F.R. § 571.61). Of course, neither Henriquez nor Janavs is yet an inmate.[7]

[7] Henriquez's example of a defendant who is incapacitated before self-surrendering, Dkt. 1264 at 7, is a red herring. Her contention ignores that BOP can move the court to modify the term of imprisonment without any exhaustion requirement. 18 U.S.C. § 3582(c)(1)(A). Alternately, as

Notably, all of the cases on which defendants rely in support of their argument are inapt, because they concern defendants who, unlike Henriquez and Janavs, were *already* in custody. *See United States v. Macfarlane*, No. 19-cr-10131-NMG, 2020 WL 1866311, at *1 (D. Mass. Apr. 14, 2020); *United States v. Johnson*, No. 15-cr-00125-KBJ, 2020 WL 2515856 (D.D.C. May 16, 2020); *United States v. Van Dyke*, No. 15-cr-00025-JLQ-1, 2020 WL 1811346 (E.D. Wash. Apr. 8, 2020); *United States v. Hernandez*, -- F. Supp. 3d. --, No. 18-cr-00834-04-PAE, 2020 WL 1684062 (S.D.N.Y. Apr. 1, 2020); *United States v. Gonzalez*, -- F. Supp. 3d. --, No. 18-cr-00232-TOR, 2020 WL 1536155 (E.D. Wash. Mar. 31, 2020). Unlike the defendants in these cases who were without any other remedy to pursue relief because they had started serving their terms of imprisonment at local jails or in the custody of the U.S. Marshals while awaiting a designation from BOP, Henriquez and Janavs *do* have a remedy: asking the Court to postpone their self-surrender date. And the government assents to that request. Henriquez and Janavs would simply prefer a reduced sentenced instead.

II. The Statutory Exhaustion Requirements Under § 3582(c)(1)(A) Cannot Be Waived.

The circuits are split on whether the exhaustion requirements under § 3582(c)(1)(A) are jurisdictional—such that the Court lacks subject matter jurisdiction to consider the defendants' motions absent a showing they have complied with those requirements—or constitute mandatory claims-processing rules, such that the Court must enforce the rule if not waived or forfeited by the government. *See United States v. Lugo*, No. 19-cr-00056-JAW, 2020 WL 1821010, at *2-3 (D. Me. Apr. 10, 2020) (noting that Fifth, Ninth, and Tenth Circuits have found the limitations of § 3582(c) to be jurisdictional, while the Seventh Circuit has found they are not). The First Circuit

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discussed *infra*, to the extent the exhaustion requirement is a mandatory claims-processing rule, the government can waive it.

"has not yet weighed in on the issue," but has previously quoted, with seeming approval, a now-overturned Seventh Circuit statement that § 3582(c) "'is a real jurisdictional rule rather than a case-processing requirement.'" *Id.* at *3 (quoting *United States v. Griffin*, 524 F.3d 71, 84 (1st Cir. 2008)). But the distinction is academic, because even if the exhaustion requirements in § 3582(c) are not jurisdictional, the Court "must enforce" a mandatory claims-processing rule "if a party 'properly raises it.'" *Id.* at *2 (quoting *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019)). Here, the government has done just that.[8]

Moreover, in contrast to a judge-made exhaustion doctrine, a statutorily created exhaustion requirement, such as the one in § 3582(c)(1)(A), cannot be waived. *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) ("judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions," while "statutory exhaustion provision[s] stand[] on a different footing" because "Congress sets the rules," and thus, "mandatory language means a court may not excuse a failure to exhaust, even to take [special] circumstances into account"); *see also Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). The exhaustion requirement under § 3582(c)(1)(A)—that the Court "may not" modify a term of imprisonment "except" upon a defendant's motion "after" satisfying the exhaustion requirements—is mandatory. It is, accordingly, not waivable now that the government has raised it. Thus, contrary to Janavs's alternative argument that any further attempt to exhaust her administrative remedies would be futile, Dkt. 1261 at 10-11, her failure to exhaust is not waivable.[9] *See, e.g.*, *Lugo*, 2020 WL

[8] The fact that the government objects to the defendants' failure to exhaust here is another basis on which to distinguish *Johnson*, 2020 WL 2515856, *Van Dyke*, 2020 WL 1811346, and *Hernandez*, 2020 U.S. Dist. LEXIS 58739. In each of those cases, the government did not challenge the defendant's motion on exhaustion grounds.

[9] Henriquez does not argue that the exhaustion requirement is waivable.

1821010 (denying motion for compassionate release because of COVID-19, despite defendant's kidney problems, because of defendant's failure to exhaust); *United States v. Muniz*, No. 16-cr-10170-MLW, 2020 WL 1898914, *1 (D. Mass. Apr. 16, 2020) (finding the statutory language of § 3582(c)(1)(A) is mandatory and, for the reasons explained in *Lugo*, the court did not have authority to modify defendant's sentence where he had not exhausted); *Cook v. Spaulding*, -- F. Supp. 3d --, No. 19-cr-12054-JGD, 2020 WL 231464, *2 (D. Mass. Jan. 15, 2020) (court could not address merits of petitioner's § 3582(c) claim where he had not exhausted his administrative remedies).[10] Further, the two appellate courts to consider this question have found that failure to exhaust under § 3582(c)(1)(A) is not waivable, but rather "presents a glaring roadblock foreclosing compassionate release at this point." *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (refusing to remand case to district court for decision on § 3582(c)(1)(A) motion where defendant failed to exhaust, despite district court's indication that it would have granted motion, and despite defendant's age (68 years) and medical conditions, including Parkinson's disease, diabetes, and heart issues); *see also United States v. Alam*, -- F.3d --, No. 20-1298, 2020 WL 2845694, at *2 (6th Cir. June 2, 2020) (exhaustion under § 3582(c)(1)(A) is mandatory claims-processing rule that cannot be waived or forfeited if the government objects on that basis).

Janavs cites three cases in this district in support of her position that the exhaustion requirement may be excused, but each relies on a Second Circuit decision interpreting a *judicially* created, rather than *statutory* exhaustion requirement. *See United States v. Ilarraza*, No. 18-cr-

[10] *See also United States v. Ogarro*, No. 18-cr-00373-RJS, 2020 WL 1876300, at *5 (S.D.N.Y. Apr. 14, 2020) (denying § 3582(c)(1)(A) motion for failure to exhaust, despite defendant's asthma, and finding that "nothing in the First Step Act or its history . . . suggest[s] that courts may modulate the exhaustion waiting period when they see fit," and that Congress had an opportunity to address this issue in the CARES Act of 2020); *United States v. Eberhart*, -- F. Supp. 3d --, No. 13-cr-00313-PJH, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020) (rejecting defendant's argument that exhaustion should be deemed satisfied in light of COVID-19 pandemic).

10041-RWZ (D. Mass. Apr. 29, 2020) (noting that government objected but did not address merits of exhaustion argument, and relying on *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019), even though *Barr* concerned a judicially created exhaustion requirement); *United States v. Ramirez*, No. 17-cr-10328-WGY, 2020 WL 2404858 (D. Mass. May 12, 2020) (finding exhaustion requirement not jurisdictional and relying on *United States v. Haney*, No. 19-cr-00541-JSR, 2020 WL 1821988, (S.D.N.Y. Apr. 13, 2020), which in turn relied on *Barr*, to find that exhaustion waivable); *United States v. Guzman Soto*, -- F. Supp. 3d --, No. 18-cr-10086-IT, 2020 WL 1905323 (D. Mass. Apr. 17, 2020) (finding exhaustion requirement not jurisdictional and may be waived, citing *Haney*); *see also Barr*, 925 F.3d at 119 ("The exhaustion requirement under the [Controlled Substances Act] is . . . not jurisdictional . . . [and] not mandated by the statute. Rather, it is a judicially-created administrative rule, applied by courts in their discretion").[11]

Enforcing the exhaustion requirements of § 3582(c)(1)(A) allows for "implement[ation of] an orderly system for reviewing compassionate-release applications, not one that incentivizes line jumping." *Alam*, 2020 WL 2845694, at *3. Indeed, BOP conducts an extensive assessment for such requests. *See* 28 C.F.R. § 571.62(a); BOP Program Statement 5050.50 (Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)). Particularly in the context of COVID-19, BOP is in the best position to assess not only a defendant's health circumstances, but also the situation at a facility, how the defendant compares

[11] In finding that the exhaustion requirement of § 3582(c)(1)(A) was not clearly jurisdictional, the court in *Guzman Soto* noted "the absence of 'sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements.'" 2020 WL 1905323 at *3 (quoting *Casanova v. Dubois*, 289 F.3d 142, 146 (1st Cir. 2002) (finding the exhaustion requirements of the PLRA are not jurisdictional)). Notably, however, the First Circuit decided *Griffin*, in which it favorably quoted the Seventh Circuit's statement that § 3582(c) "'is a real jurisdictional rule rather than a case-processing requirement,'" six years after *Casanova*.

to other inmates, the risks presented to the public by the defendant's release, and the adequacy of the defendant's release plan. *See, e.g.*, *id.* (exhaustion requirement "ensures that the prison administrators can prioritize the most urgent claims" and "can investigate the gravity of the conditions supporting compassionate release and the likelihood that the conditions will persist," which "are not interests we should lightly dismiss or re-prioritize"); *United States v. McCann*, No. 13-cr-00052-KKC, 2020 WL 1901089, at *2 (E.D. Ky. Apr. 17, 2020) (exhaustion requirement "recognizes that BOP is better positioned than the courts to first assess issues such as a defendant's health, the adequacy of measures taken by a particular place of incarceration to address any health risks, the risk presented to the public by defendant's release, and the adequacy of defendant's release plan").[12]

III. There Are No Extraordinary and Compelling Reasons Warranting a Reduction in the Defendants' Sentences.

Even if the defendants had exhausted their administrative remedies, their motions should be denied for the separate reason that they cannot establish "extraordinary and compelling

[12] Remarkably, the *Guzman Soto* court found that the 30-day waiting period under § 3582(c)(1)(A) did not serve the "purpose of allowing the case to be resolved administratively before proceeding to court," because the court believed a judicial order was required to modify a term of imprisonment, even if BOP moved for compassionate release. 2020 WL 1905323, at *5. This finding overlooks the broad authority BOP has to release inmates to home confinement—the very relief defendants seek here—*without* court involvement. The *Guzman Soto* court also found it could waive the 30-day exhaustion requirement because a defendant's ability to proceed without waiting for BOP to respond "suggests that Congress understood that some requests for relief may be too urgent to wait for the BOP's process." 2020 WL 1905323, at *5. But if that were true, then Congress would not have imposed a 30-day requirement at all. *See Alam*, 2020 WL 2845694, at *4 (noting that Congress made compassionate release available only to elderly prisoners and those with "extraordinary and compelling" reasons for release, for whom "time usually will be of the essence," and "would make nearly every prisoner eligible to invoke 'irreparable harm' and eligible to jump the line of applications—making the process less fair, not more fair"). *Guzman Soto* is also factually distinguishable because, upon completion of his sentence, the defendant would likely be transferred to the custody of Immigration and Customs Enforcement for removal, *id.* at *2, and would potentially spend additional time in custody as a result.

circumstances" that would justify reduced sentences under § 3582(c)(1)(A)(i), particularly where the Court has an alternate remedy available: delaying their report dates. *See United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) ("If the defendant seeks decreased punishment, he or she has the burden of showing that the circumstances warrant that decrease"); *see also United States v. Callan*, No. 19-cr-00140-VLB, 2020 WL 1969432, at *4 (D. Conn. Apr. 24, 2020) (denying § 3582(c)(1)(A) motion to reduce prison sentence to home confinement for first-time, non-violent offender with COVID-19 risks sentenced to six months' incarceration for tax fraud but not yet in custody where more reasonable approach was to extend his report date).

Neither Henriquez nor Janavs is in a COVID risk category. As relevant here, the CDC guidelines provide that individuals who are over age 65, [redacted] may be at higher risk for developing severe illness should they contract COVID-19. *See* Centers for Disease Control, "People Who Are At Higher Risk for Severe Illness" (last updated May 14, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html. Contrary to her suggestion, Henriquez's age of 57 years does *not* put her at a higher risk of severe illness from the virus. *Id.* With respect to [redacted]. Dkt. 1264, Ex. E; Henriquez PSR ¶ 128. [redacted]. Dkt. 1264, Ex. E.

With respect to Janavs, [redacted]

[redacted][13] As recently as her pre-sentence investigation—before the COVID-19 pandemic was declared—Janavs reported she was "in good physical health" and "denie[d] suffering from any current medical problems." Janavs PSR ¶ 117. At that time, the Probation Office interviewed Janavs's doctor, Amy Teresi, who submitted a letter in support of her prior § 3582(c)(1)(A) motion. Dr. Teresi told Probation that Janavs "did not need to be on these medications," including the [redacted] that she is prescribed for [redacted]. *Id.*

The BOP has instituted substantial policies and procedures to manage the pandemic and prevent the spread of infection, and as of this filing, no staff or prisoners at FPC Bryan, and only one staff member at FCI Dublin—the facilities to which the defendants have been designated—have tested positive for COVID-19. *See* https://www.bop.gov/coronavirus/. While the government is sensitive to defendants' underlying medical conditions, neither condition is a "terminal illness," or "a serious physical or medical condition, . . . a serious functional or cognitive impairment, . . . or . . . deteriorating physical or mental health because of the aging process" that qualifies as an extraordinary and compelling reason which "substantially diminish[] the ability of the defendant

[13] Janavs cites cases concerning defendants with *different* medical conditions and in *different* postures as somehow demonstrating *her* extraordinary and compelling circumstances. *See United States v. Huneeus*, No. 19-cr-10117-IT (D. Mass. Mar. 17, 2020) (unspecified "unique health circumstances"); *United States v. Ramos*, No. 18-cr-30009-FDS-KAR (D. Mass. Mar. 26, 2020) (diabetes and moderate to severe asthma and pretrial release motion); *Savino v. Souza*, -- F. Supp. 3d. --, No. 20-cv-10617-WGY, 2020 WL 1703844 (D. Mass. Apr. 8, 2020) (concerning *civil* ICE detainees not in BOP custody or held at a BOP facility).

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 app. note 1, and thus a reduction on this ground would not be consistent with the applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A). As the Third Circuit has found, "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive efforts to curtail the virus's spread." *Raia*, 954 F.3d at 597 (citation omitted); *see also United States v. Reynoso*, No. 17-cr-10350-NMG (Dkt. 77) (Apr. 21, 2020) (denying § 3582(c)(1)(A) motion where defendant's concern that the "dormitory like environment" at the FMC Devens satellite camp made social distancing impractical and staff and new arrestees arriving daily "proffers no more than speculative concern about an outbreak," and such "generalized and systemic concern regarding the virulent pandemic are insufficient to demonstrate entitlement to early release").

IV. The § 3553(a) Factors Weigh Against Reducing Defendants' Sentences.

In any event, when analyzing whether "extraordinary and compelling circumstances warrant . . . a reduction," the Court must consider the "factors set forth in section 3553(a) to the extent that they are applicable." *Id.* § 3582(c)(1)(A). The Court recently considered these factors at the defendants' respective sentencings, and determined that the failure to impose a meaningful punishment would "undermine the entire fabric of our society," and that, despite the COVID-19 pandemic, the Court would "not forfeit the obligation of a federal judge to impose a sentence that is warranted" by the defendants' conduct—that is, "a period of incarceration." Dkt. 872 at 53; Dkt. 1030 at 36. Reducing either Henriquez's or Janavs's sentences to home confinement before either has served any meaningful portion of her sentence would undermine the goals of punishment and deterrence. Their suggestion that the publicity surrounding their sentencings already achieved

the goal of deterrence is belied by the fact that any reduction in their sentences will likewise be widely publicized, thereby undermining any deterrent effect of their initial sentences.[14]

Janavs's reliance on *United States v. Pena*, -- F. Supp. 3d --, No. 16-cr-10236-MLW, 2020 WL 2798259 (D. Mass. May 29, 2020), *United States v. Young*, No. 19-cr-05055-BHS, 2020 WL 2614745 (W.D. Wash. May 22, 2020), and *Macfarlane*, 2020 WL 1866311, is misplaced. In *Pena*, Judge Wolf found that "the seven months Pena has served should be sufficient to send" a message of deterrence. 2020 WL 2798259, at *8. In *Young*, the court found that home confinement would provide just punishment *when combined with the fifteen months defendant had already served.* 2020 WL 2614745 at *4. And in *Macfarlane*, BOP had already approved defendant's release to a halfway house, after serving approximately half of his six-month sentence, two weeks of which were in isolation in a high security facility where he was confined to his cell 23 hours/day. No. 19-cr-10131 at Dkt. 349. In contrast, Henriquez and Janavs have not served *any* portions of their sentence, beyond the day of their initial arrests, and reducing their sentences to home confinement would undermine the goals of deterrence and just punishment.[15]

V. Defendants Are Not Without Recourse.

Courts considering § 3582(c)(1)(A) motions of defendants who have been sentenced but not yet surrendered to custody have almost uniformly extended their surrender dates, and none that

[14] The plea agreement in *United States v. Dameris*, No. 20-cr-10099-RGS (D. Mass. May 22, 2020), does not provide a relevant comparison for Henriquez or Janavs. Dameris agreed to plead guilty before even being arrested or charged, and his plea agreement is dated November 1, 2019—well before the current COVID-19 pandemic. Moreover, as stated therein, the government's sentencing recommendation was "due to serious documented medical conditions involving Defendant's close family members," *id.* (Dkt. 2), a situation not remotely comparable to the situation of either defendant here.

[15] Janavs further argues that, while a five-month sentence was appropriate before the onset of the COVID-19 pandemic, it is not now. This argument ignores that the Court sentenced Henriquez to seven months' incarceration after the onset of COVID-19.

the government has found reduced a prison sentence to a period of home confinement. *See United States v. Herod*, No. 18-cr-10154-DPW (D. Mass. May 27, 2020) (denying § 3582(c)(1)(A) motion and indicating court "will consider further extending the self-report date, if the conditions warrant such action"); *Konny*, 2020 WL 2836783, at *3 (delaying self-surrender to Sept. 11, 2020); *Callan*, 2020 WL 1969432, at *4 (delaying self-surrender to Sept. 14, 2020); *Nazer*, 2020 WL 2197840, at *1 (delaying self-surrender to Sept. 28, 2020); *Hoffman*, 2020 WL 2495769, at *3 (noting that court granted defendant's request to delay his self-surrender date "without opposition and without hesitation").[16] Defendants can continue to seek to delay their self-surrender dates to the extent COVID-19 continues to spread, as they have already done. *See, e.g.*, *United States v. McCoy*, No. 19-cr-00035-KDB, 2020 WL 1848057, at *1-2 (W.D.N.C. Apr. 13, 2020) (denying motion to reconsider sentence where court "expressly delayed" surrender date to Aug. 1, 2020 because of COVID and defendant's health concerns, and stating defendant "can request the Government to file a motion or move the Court to extend his report date" if health concerns persist).

Both defendants contend that delaying their report dates is causing them anxiety and they are desperate to serve their sentences and move on with their lives. But this is not a basis for reducing their sentences to home confinement. *See Callan*, 2020 WL 1969432, at *4 (rejecting defendant's unsupported contention that he was "'entitled to begin and complete his sentence within a reasonable amount of time'"). What is more, the defendants are *not* asking to serve the sentences this Court imposed. Rather, they are asking to serve *different* and *lesser* sentences, and thereby to *avoid* the prison sentences the Court imposed. In effect, they are seeking to do what much of the rest of the country is currently doing, and what at least Henriquez contends she has

[16] *But see Spruill*, 2020 WL 2113621, at *2 (declining to extend defendant's self-surrender date, despite government's assent, where defendant was arrested while awaiting report date).

already been doing: confining themselves to their homes. Home confinement is simply not just punishment for these defendants. Nor will they have to wait indefinitely to serve their sentences. Vaccine development is already in human trials and early results are promising.[17] The federal government has launched Operation Warp Speed "to accelerate the development, manufacturing, and distribution of COVID-19 vaccines, therapeutics, and diagnostics (medical countermeasures)," with the goal of having "substantial quantities of a safe and effective vaccine available for Americans by January 2021."[18] And the defendants may be able to begin to serve their sentences even before the pandemic ends should the spread of the virus subside, as it has already started to do in some areas.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny the defendants' motions to modify their sentences to home confinement.

Respectfully submitted,

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[17] Denise Grady, Moderna Coronavirus Vaccine Trial Shows Promising Early Results, N.Y. Times, May 18, 2020, available at https://www.nytimes.com/2020/05/18/health/coronavirus-vaccine-moderna.html.

[18] Dep't of Health & Human Svcs., Trump Administration Announces Framework and Leadership for 'Operation Warp Speed,' May 15, 2020, available at https://www.hhs.gov/about/news/2020/05/15/trump-administration-announces-framework-and-leadership-for-operation-warp-speed.html.

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Dated: June 8, 2020

/s/ Kristen A. Kearney
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