UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 17-10346-DPW
v.	)	
	)	
YASUNA MURAKAMI,	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION FOR COMPASSIONATE RELEASE FROM INCARCERATION

The United States of America hereby responds to the Defendant's Emergency Motion for Compassionate Release From Incarceration. ECF No. 60. The government opposes relief, and requests that the Defendant's motion be denied. This Court does not have jurisdiction to grant the relief sought, and as such, it should deny the motion without a hearing.

BACKGROUND

On January 9, 2018, the defendant pled guilty to wire fraud, in violation of 18 U.S.C. § 1343, for defrauding and stealing from clients of his investment advisory business. ECF. No. 28. Murakami's crime was a massive, multi-year fraud scheme that resulted in over $10.5 million in losses to investors. On May 3, 2018, this Court sentenced Murakami to 72 months' imprisonment followed by three years of supervised release. ECF No. 45. (Judgment & Commitment Order). The defendant was ordered to report to the Bureau of Prisons ("BOP") on June 25, 2018, *id.*, and has been in custody for the 22 months since, currently at Brooklyn Metropolitan Detention Center (MDC) in Brooklyn, New York. According to the BOP website, the defendant's projected release date with good time credit is August 3, 2023 – roughly 41 months from today.

On April 4, 2020, Murakami filed the instant motion requesting this Court modify his sentence so that he may serve the remainder of his sentence in home confinement. ECF No. 60.

The defendant's motion is based entirely on the possibility that he may become exposed to COVID-19, which because of an underlying health condition, could result in severe illness if he is infected. *Id.* Specifically, Murakami, who is 47 years old and otherwise healthy person, cites a prior high blood pressure diagnosis[1] as warranting early release. Murakami states in his motion that he first filed an administrative request for compassionate release with the warden of MDC Brooklyn on April 2, 2020 – just two days prior to the filing of the instant motion. *Id.* at 2.

The government opposes the relief sought because Murakami has not satisfied the administrative exhaustion requirements of § 3582(c)(1)(A) and because he has not shown that he meets the criteria of compassionate relief, to wit, "extraordinary and compelling reasons" that warrant a sentence reduction. Accordingly, Murakami's motion should be denied.

APPLICABLE LEGAL FRAMEWORK

Section 3582(c) begins with the principle that "a court may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). The statute, adopted as part of the Sentencing Reform Act of 1984, originally permitted judicial relief only upon a motion by the Director of Bureau of Prisons. The provision was amended by Section 603(b) of the First Step Act, effective December 21, 2018. Under the statute as amended, the court may consider a defendant's motion for compassionate release following the exhaustion of his or her administrative remedies with the BOP or 30 days after submitting a request to the appropriate Warden, whichever is sooner:

[1]The sole support provided by the defendant for his hypertension diagnosis is a reference to his Pre-Sentence Investigation Report, which noted that at the time of sentencing, Probation had received medical records indicating that he had been diagnosed with high blood pressure. Despite undersigned counsel's best efforts, as of the time of this filing, the government was unable to obtain a copy of Murakami's BOP medical file to confirm whether he still suffers from hypertension, and if so, what impact, if any, a COVID-19 infection could have on him.

> The court may not modify a term of imprisonment once it has been imposed except that, . . . the court, 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…

18 U.S.C. § 3582(c)(1)(A) (emphasis added). The First Step Act did not amend the eligibility requirements for compassionate release, which are set forth in 18 U.S.C. § 3582(c)(1)(A) and Section 1B1.13 of the United States Sentencing Guidelines. The court can only modify a sentence if, "after considering the factors set forth in section 3553(a) to the extent they are applicable," it finds that "extraordinary and compelling reasons warrant such a reduction," 18 U.S.C. § 3582(c)(1)(A)(i); or that the defendant is at least 70 years old and has served at least 30 years in prison, among other things. 18 U.S.C. § 3582(c)(1)(A)(ii). In either case, the proposed reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

The Application Notes to Section 1B1.13 describe the circumstances under which "extraordinary and compelling reasons exist." U.S.S.G. § 1B1.13 Application Note 1. These include an assessment of the defendant's medical condition, age, family circumstances, and other reasons:

> (A) Medical Condition of the Defendant.—
>
> > (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
> >
> > (ii) The defendant is—
> >
> > > (I) suffering from a serious physical or medical condition,

> > (II) suffering from a serious functional or cognitive impairment, or
> >
> > (III) experiencing deteriorating physical or mental health because of the aging process,
> >
> > 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.
>
> (B) Age of the Defendant – The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) Family Circumstances.—
>
> > (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
> >
> > (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

U.S.S.G. § 1B1.13 Application Note 1.

The policy statement is not the only source of criteria the court may apply in determining whether "extraordinary and compelling reasons" exist to justify a reduction. Application Note 1(D) permits the court to reduce a sentence where, "[a]s determined by the Director of the Bureau of Prisons, 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)." *Id.* at App. Note 1(D). Accordingly, a court may grant compassionate release not only on grounds specified by the Sentencing Commission, but also those set forth in the relevant BOP regulation governing compassionate release.

That regulation appears at BOP Program Statement 5050.50, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf. This program statement was amended

effective January 17, 2019, following passage of the First Step Act. It replaces the previous program statement, 5050.49, CN-1.

Program Statement 5050.50 contains standards that are both more extensive than and slightly different from those stated in the § 1B1.13 policy statement. As is relevant here, the program statement defines a "debilitated medical condition" as follows:

> Debilitated Medical Condition. RIS[2] consideration may also be given to inmates who have an incurable, progressive illness or who have suffered a debilitating injury from which they will not recover. The BOP should consider a RIS if the inmate is:
>
> - Completely disabled, meaning the inmate cannot carry on any self-care and is totally confined to a bed or chair; or
>
> - Capable of only limited self-care and is confined to a bed or chair more than 50% of waking hours.
>
> The BOP's review should also include any cognitive deficits of the inmate (e.g., Alzheimer's disease or traumatic brain injury that has affected the inmate's mental capacity or function). A cognitive deficit is not required in cases of severe physical impairment, but may be a factor when considering the inmate's ability or inability to reoffend.

Program Statement 5050.50 at 5.

The program statement's provisions regarding the class of inmates eligible for compassionate release is also slightly different from the related provision in Section 1B1.13. To the extent that the program statement and the policy statement conflict, it is the policy statement – *i.e.*, the source directly authorized by statute – that is binding. An interpretation in the program statement that does not contradict the policy statement, however, is entitled to some weight. *See Reno v. Koray*, 515 U.S. 50, 61 (1995) (BOP program statements, which do not require notice and

[2] RIS refers to a "reduction in sentence." Program Statement 5050.50 at 4.

comment, are entitled to "some deference" where they reflect a "permissible construction of the statute") (internal quotation marks omitted).

The defendant bears the burden of proving that he is entitled to relief under 18 U.S.C. § 3582. *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); *cf. United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013) ("[A] defendant, as the § 3582(c)(2) movant, bears the burden of establishing that a retroactive amendment has actually lowered his guidelines range in his case.").

ARGUMENT

I. Murakami's Motion is Not Properly Before the Court Because He Failed to Comply with the Statutory Exhaustion Requirements.

As noted above, and as Murakami concedes, he filed the instant motion only two days after submitting a request for compassionate release to the warden of MDC Brooklyn. *See* ECF 60 at 10. Under 18 U.S.C. § 3582(c), a district court "may not" modify a term of imprisonment once imposed, except under limited circumstances. Section 3582(c)(1)(A) conditions the Court's authority to consider a reduction of the term of a defendant's imprisonment on either (i) a motion of the Director of the Bureau of Prisons, or (ii) a 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, whichever is earlier. *Id.* Neither of these conditions precedent have been triggered. Accordingly, the Court does not presently have the authority to grant the relief Murakami seeks, and "may not" modify his term of imprisonment.

Murakami claims to have submitted the request to the Warden of MDC Brooklyn on April 2, 2020. Assuming that the receipt of that letter was made on April 2, 2020, triggering the

start of the applicable 30 day period, the BOP has until at least May 4, 2020 to respond to Murakami's request. If the BOP responds in a timely fashion and denies the request, Murakami is then required to "fully exhaust[ ] all administrative remedies," 18 U.S.C. § 3582(c)(1)(A), before this Court has the authority to consider his request. Thus, the Court presently cannot grant a modification of an imposed term of imprisonment under the statute, because the requirements under 18 U.S.C. § 3582(c) have not been met, and "there is no 'inherent authority' for a district court to modify a sentence as it pleases; indeed a district court's discretion to modify a sentence is an exception to [§ 3582's] general rule [barring modification]." *United States v. Cunningham*, 554 F.3d 703, 708 (7th Cir. 2009); *cf. United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010) (noting that 18 U.S.C. § 3582(b) "states that a district court may not modify a term of imprisonment once it has been imposed unless the Bureau of Prisons moves for a reduction, the Sentencing Commission amends the applicable Guidelines range, or another statute or Rule 35 expressly permits the court to do so.").

Where, as here, Congress has included administrative exhaustion in the relevant statute, the Supreme Court has noted that "courts have a role in creating exceptions only if Congress wants them to." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (noting that, although "judge-made exhaustion doctrines, even in flatly stated at first, remain amenable to judge-made exceptions," Congressionally enacted "mandatory exhaustion statutes like the [Prisoner Litigation Reform Act of 1995] establish mandatory exhaustion regimes, foreclosing judicial discretion"). *See also Sousa v. INS*, 226 F.3d 28, 31 (1st Cir. 2000) ("The Supreme Court regards exhaustion requirements imposed by statute as more rigid than the common law doctrine[.]") Accordingly, statutory exhaustion requirements like that in § 3582(c) are subject to very few exceptions. *United States v. Lepore*, 304 F. Supp. 2d 183, 191 (D. Mass. 2004) ("Whereas

judicially imposed exhaustion requirements are prudential and subject to a number of exceptions, statutory requirements are jurisdictional, and absent statutory specification, are subject to very few exceptions.").

Here, the plain language of the statute makes clear that a court "may not" modify a sentence unless, as relevant here, the defendant has first "fully exhausted all administrative rights." Unlike the Prison Litigation Reform Act, for example, there is no statutory qualifier that a defendant need only exhaust all "available" remedies.[3] Thus, § 3582(c)(1)(A) is a mandatory exhaustion provision. *Cf. Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 750 (2017) (statute requiring that certain types of claims "shall be exhausted" is a mandatory exhaustion provision for those types of claims).

Courts in this district and others have routinely relied on these mandatory exhaustion requirements to reject requests made under § 3582(c). *See, e.g.*, *Cook v. Spaulding*, 2020 WL 231464 (D. Mass. Jan. 15, 2020) (Dein, J.); *United States v. Monzon*, 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020) ("The BOP has not brought the current motion and Monzon has not exhausted his administrative remedies. Consequently, this Court cannot grant his motion for sentence reduction" under § 3582(c) due to the defendant's health); *United States v. Raia*, No. 20-1033, Doc. 20 (3d Cir. Apr. 3, 2020) (as to motion for compassionate release based on pandemic, section 3582(c)(1)(A)'s exhaustion requirement "presents a glaring roadblock foreclosing compassionate release at this point."); *United States v. Gileno*, 2020 WL 1307108, at *4 (D. Conn. Mar. 19, 2020) (denying motion for modification of sentence based on COVID-19 concerns "without prejudice to renewal" after exhaustion of remedies); *United States v. Oliver*,

[3] In particular, the PLRA demands that an inmate exhaust "such administrative remedies as are available," meaning that the only permissible exception to exhaustion is where the remedies are "unavailable." *Ross*, 136 S. Ct. at 1856-58.

2020 WL 1505899 (D. Md. Mar. 30, 2020) (enforcing exhaustion requirement under section 3582(c)(1)(A)); *United States v. Eberhart*, 2020 WL 1450745, at*2 (N.D. Cal. Mar. 25, 2020) (rejecting defendant's arguments that he should not be required to exhaust and concluding "the court lacks authority to grant relief under § 3582(c)(1)(A)(i)."); *United States v. Zywotko*, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020) (same); *see also United States v. Nkanga*, (S.D.N.Y. Mar. 31, 2020) (ECF No. 87) (concluding that "although the rational and right result is for Dr. Nkanga to be temporarily released from custody until circumstances improve, the Court is powerless at this point to bring about that result," and noting "Congress has given judges only limited tools, and there are many inmates—certainly those such as Dr. Nkanga who have just been sentenced, and potentially the vast majority of inmates serving sentences previously imposed—for whom judicial relief under current law may be unavailable").

Murakami contends exhaustion is not mandatory under § 3582(c) and that that the Court has the power to waive this requirement. ECF No. 60 at 10-12. He argues that because he is hypertensive and at a higher risk of serious illness if infected with COVID-19, he would be unduly prejudiced if forced to comply with the exhaustion requirements. *Id.* Even assuming that such an exception exists, the Court should decline to find a waiver and still require the defendant to pursue a full BOP review of his case, particularly whereas here the defendant seeks to rely on factual claims about his health and conditions of confinement as to which there is no fully developed record. Indeed, the BOP is uniquely positioned to assess and provide the Court with detailed information about the defendant's present health condition, the conditions of confinement, and the relative merits of the defendant's claim as opposed to the many others being made by similarly situated defendants at the same facility and across the country. Neither the Court nor the government currently has any information beyond the statements in

Murakami's motion that can serve to support his contentions regarding his health or the conditions at MDC Brooklyn.

Publicly available information illustrates the BOP's significant efforts to prepare to respond, should there in fact be any cases of COVID-19 at the facility where the defendant is housed. In particular, since at least October 2012, BOP has had a Pandemic Influenza Plan in place. *See* BOP Health Management Resources, available at https://www.bop.gov/resources/health_care_mngmt.jsp. Moreover, since approximately January 2020, BOP began to plan specifically for coronavirus/COVID-19 to ensure the health and safety of inmates and BOP personnel. *See* Federal Bureau of Prisons COVID-19 Action Plan, available at https://www.bop.gov/resources/news/20200313_covid- 19.jsp. As part of its Phase One response to coronavirus/COVID-19, BOP began to study "where the infection was occurring and best practices to mitigate transmission." *Id.* In addition, BOP stood up "an agency task force" to study and coordinate its response to coronavirus/COVID-19, including using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the [Centers for Disease Control and Prevention (CDC)], the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the Vice President. BOP's planning is structured using the Incident Command System (ICS) framework." *Id.*

On April 1, 2020, the BOP, after coordination with DOJ and the White House, implemented its Phase Five response in order to mitigate the spread of COVID-19. https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp. As part of the Phase Five response, the BOP (a) will secure inmates in their assigned quarters for a 14-day period to decrease the spread of the virus, (b) continue to provide inmates access to programs

and services that are offered under normal operating procedures, to the extent practicable, and (c) coordinate with the U.S. Marshals Service to reduce the movement of incoming inmates. The BOP will reevaluate Phase 5 after the 14-day period ends. *Id.* These steps belie any suggestion that BOP is failing to meaningfully address the risks posed by COVID-19 or take seriously the threat the pandemic poses to current inmates.

The defendant, moreover, has not demonstrated that the situation at MDC Brooklyn has even neared a crisis level, *infra.* n. 4, such that his health is at immediate risk. *See, e.g.*, *Gileno*, 2020 WL 1307108, at *4 ("With regard to the COVID-19 pandemic, Mr. Gileno has also not shown that the plan proposed by the Bureau of Prisons is inadequate to manage the pandemic within Mr. Gileno's correctional facility, or that the facility is specifically unable to adequately treat Mr. Gileno.").

Accordingly, the Court is without authority to grant the relief requested by the defendant.

II. Murakami's Medical Condition Does Not Constitute an Extraordinary and Compelling Reason to Warrant Compassionate Release.

If the Court is inclined to find a waiver and consider Murakami's compassionate release claim despite the absence of exhaustion, the Court should still deny the defendant's claim. Murakami's claim fails to set forth extraordinary and compelling reasons to justify his release from custody. First, the claim fails on its face because the risk of COVID-19 alone is not a condition that constitutes an extraordinary and compelling reason for compassionate release. Murakami has failed to make a sufficient factual showing for the relief sought. He relies on the speculative prospect of a severe COVID-19 outbreak at MDC Brooklyn, where he is currently housed.[4] He does not allege that he has COVID-19. Nor does he allege that he has been

[4] In his motion, defendant noted that as of April 4, 2020, "seven inmates and four staff members [had] tested positive for COVID-19" and suggested that the virus is "spreading through

exposed to any individuals with COVID-19. Instead, he is seeking release based solely on the possibility of becoming infected, in part because of an underlying medical condition. This is not sufficient. Indeed, if that were enough, every non-violent prisoner with any medical condition covered by the current crisis—including any respiratory issues, immune-system deficiencies and the like—could seek to have his sentence immediately suspended and ordered released. The Court should decline such an invitation.

As discussed above, the Sentencing Commission's policy statement provides that, in order for an inmate to be released because of a medical condition, that inmate must be suffering from a "terminal illness," or from "a serious physical or medical condition, […] a serious functional or cognitive impairment, […] or […] experiencing deteriorating physical or mental health because of the aging process." U.S.S.G. § 1B1.13 app. note 1. These conditions qualify as extraordinary and compelling reasons only when they "substantially diminish[] 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." *Id.* Hypertension alone does not qualify as a debilitated medical condition under the BOP program statement 5050.50, which is defined as completely disabled, meaning the inmate cannot carry one any self-care and is totally confined to a bed or chair; or capable of only limited self-care and is confined to a bed or chair more than 50% of waking hours." Program Statement 5050.50 at 5.

Accordingly, even if the Court were inclined to waive the administrative exhaustion requirements and consider Murakami's claim for compassionate release, the health condition on

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the inmate population." ECF No. 60 at 1-2; 14. Recent BOP statistics, however, show that numbers have moved in the opposite direction. As of April 6, 2020, BOP reported that only two inmates and six staff members had tested positive. *See* Federal Bureau of Prisons, *COVID-19 Coronavirus*, available at https://www.bop.gov/coronavirus/ (last accessed April 7, 2020). Exhibit A.

which he bases his claim does not constitute extraordinary and compelling reasons to warrant a sentence reduction.

CONCLUSION

For the foregoing reasons, the Court should deny Murakami's Emergency Motion for Compassionate Release from Incarceration.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

Dated: April 7, 2020

By: */s/ Jordi de Llano*
Jordi de Llano
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Jordi de Llano, hereby certify that the foregoing was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Date: April 7, 2020

/s/ *Jordi de Llano*
Assistant United States Attorney