UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

– against – No. 09-cr-581 (WHP)

PAUL M. DAUGERDAS,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PAUL M. DAUGERDAS' MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. § 3582(c)(1)(A)

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PAUL M. DAUGERDAS' MOTION FOR COMPASSIONATE RELEASE UNDER 18 U.S.C. § 3582(c)(1)(A)

Movant, Paul M. Daugerdas, age 69, through undersigned counsel, respectfully moves this Court to grant his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), and order the remainder of his sentence to be served on home confinement.[1] This motion should be granted due to the "extraordinary and compelling reasons" confronting the federal prison system by the pandemic of COVID-19 and the fact that Mr. Daugerdas, at age 69, is not a danger to the community; suffers from serious medical issues; and further because respect for the law and general deterrence, other notable Section 3553(a) factors, would not be undermined by converting the remainder of his sentence to home confinement given the cataclysmic events of the current pandemic. We respectfully ask the Court to consider this motion on an expedited basis as each day in custody brings renewed and unthinkable risk to Mr. Daugerdas' life.

BACKGROUND

Mr. Daugerdas was convicted after an eight-week jury trial in October 2013. He was convicted of tax fraud and related crimes arising out of his advice as a lawyer on sophisticated tax shelter transactions. On June 25, 2014, Mr. Daugerdas was sentenced to 180 months (or 15 years) of imprisonment. Mr. Daugerdas appealed his conviction and sentence, and the U.S. Court of Appeals for the Second Circuit affirmed. *United States v. Daugerdas*, 837 F.3d 212, 218 (2d Cir. 2016). Mr. Daugerdas has been in continuous custody since his self-surrender in 2014. He is currently incarcerated in the federal Bureau of Prisons ("BOP") facility at the satellite camp at

[1] We are not asking this Court to take unprecedented action by imposing up to a seven-year period of home detention as part of Mr. Daugerdas' extended period of supervised release. At least one other United States District Court has ordered compassionate release under the First Step Act with a lengthy term of home detention of six years or until further order of the Court. *See United States v. Rodriguez,* No. 03-cr-00271 (AB) (E.D.P.A. April 1, 2020) (Brody, A., U.S.D.J.).

USP Marion (Illinois). He has now served over five years of imprisonment. His expected date of release, as calculated by the BOP, is July 11, 2027.

On March 24, 2020, Mr. Daugerdas filed an administrative relief request with the warden at USP Marion seeking compassionate release on the same grounds as submitted herein. To date, he has not received a response. Because of the urgency and potential lethal harm of the spread of COVID-19, we respectfully ask the Court to waive the 30-day waiting period for any response by the warden. Waiting for a response could cost Mr. Daugerdas his life.

ARGUMENT

This Court never intended to sentence Mr. Daugerdas to a death sentence. Based on the BOP's current calculation of federal good-time credit (which is expected to be further revised to an earlier date based on anticipated regulations giving effect to provisions for early release of elderly inmates under the 2018 First Step Act), Mr. Daugerdas' latest possible release date would have him returning home at the age of 75. Now, however, because of the unthinkable spread of a global pandemic that is killing the elderly who have pre-existing medical conditions like Mr. Daugerdas at alarming rates of approximately 11% percent, he is faces a serious risk of dying in prison if infected. *See* "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020," Centers for Disease Control and Prevention Report (March 18, 2020).[2]

Mr. Daugerdas is just shy of his 70th birthday, and his health is fragile. He suffers from Type-II diabetes, high blood pressure, elevated cholesterol, and was a prolific former smoker (having smoked up until the day he was remanded to BOP custody). Given his age and these medical conditions, we are extremely concerned that when (and not if) the COVID-19 virus

[2] Available at: https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm.

spreads through the facility at USP Marion, it may be a death sentence for Mr. Daugerdas. *See id.* ("a majority of coronavirus disease 2019 (COVID-19) deaths have occurred among adults aged ≥60 years and among persons with serious underlying health conditions.").

This unparalleled health crisis in our country and its deadly arrival[3] in our prisons present "extraordinary and compelling reasons" to grant Mr. Daugerdas' motion. As explained below, USP Marion is already crowded, and the conditions there make it impossible for Mr. Daugerdas to exercise self-care and prevent his infection if the virus contaminates the facility. "Social distancing" is not an option for most of our federal inmates. As *The New York Times* recently explained, jails are a more dangerous place to be than even a cruise ship.[4] Indeed, the nation's greatest number of coronavirus outbreaks at a single site occurred at the Cook County jail in Chicago, which reported over 450 cases among staff and inmates: a number that startingly jumped in little more than a week.[5]

Mr. Daugerdas has informed counsel about the current conditions at USP Marion, where he is housed. There is no alcohol-based hand sanitizer available to the inmates and air circulation is very poor within the facility. Inmates also do not have the ability to disinfect frequently touched surfaces, such as phones and computer keyboards. No COVID-19 tests are being administered on-site. The only preventative measures employed at the facility to date are restrictions of inmate

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[3] *See* https://www.bop.gov/coronavirus/ (as of April 8, 2020, the BOP has reported 8 confirmed inmate deaths based on COVID-19 infection contracted within federal BOP facilities).

[4] *See* "An Epicenter of the Pandemic Will Be Jails and Prisons, If Inaction Continues," *The New York Times* (March 16, 2020), available at https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html.

[5] "Chicago Jail Reports 450 Coronavirus Cases Among Staff, Inmates," *The New York Times* (April 9, 2020), available at https://www.nytimes.com/reuters/2020/04/09/us/09reuters-health-coronavirus-usa-prison.html?searchResultPosition=10.

movement and prison staff's periodic taking of inmates' temperatures. These measures fall well below CDC-recommended guidelines for individuals within the highest-risk group for COVID-19. Thus, USP Marion presents Mr. Daugerdas with an unreasonably high risk of COVID-19 infection, and Mr. Daugerdas cannot take self-care measures to prevent his falling gravely ill or dying upon infection.

Under the amended compassionate release statute, this Court is also instructed to review the Section 3553(a) factors before determining eligibility for a modification of sentence. Mr. Daugerdas, at 69, is not a danger to the community. His crime involved the use of his law license, which he no longer has. He has served approximately six years of his sentence, which is close to 50 percent of the time he is required to serve less statutory good-time credits authorized by 18 U.S.C. § 3624. Mr. Daugerdas is aged, infirm, and unlikely to be able to return to the workforce. He simply wishes to live out his final years—under continued confinement—at his Illinois home with his wife. He poses no harm to others and can continue to be confined safely there until the end of his original term of imprisonment in 2027. Indeed, there are considerable cost savings to the federal government for an elderly inmate like Mr. Daugerdas to complete his sentence in home confinement.

Most importantly given the current health crisis, the humane and compassionate thing to do is to convert Mr. Daugerdas' sentence to home confinement for the remainder of its term. At his current age and medical condition, when COVID-19 infects USP Marion, he will certainly be battling for his life.

I. THIS COURT HAS AUTHORITY TO RESENTENCE MR. DAUGERDAS UNDER 18 U.S.C. § 3582(c)(1)(A)(i) FOR THE "EXTRAORDINARY AND COMPELLING REASONS" CREATED BY THE COVID-19 PANDEMIC AND THE PRISON CONDITIONS WHICH PREVENT SELF-CARE FOR A HIGH-RISK PATIENT

With the changes made to the compassionate release statute by the First Step Act, courts need not await a motion from the Director of BOP to resentence prisoners under 18 U.S.C. § 3582(c)(1)(A)(i) for "extraordinary and compelling reasons." Importantly, the reasons that can justify resentencing need not involve only terminal illness or urgent dependent care for minor children.

Congress first enacted the modern form of the compassionate release statute, codified at 18 U.S.C. § 3582, as part of the Comprehensive Crime Control Act of 1984. Section 3582(c) states that a sentencing court can reduce a sentence whenever "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). In 1984, Congress conditioned the reduction of sentences on the BOP Director's filing of an initial motion to the sentencing court. Absent such a motion, sentencing courts had no authority to modify a prisoner's sentence for compassionate release. *Id.*

Congress never defined what constitutes an "extraordinary and compelling reason" for resentencing under Section 3582(c). But the legislative history to the statute gives an indication of how Congress thought the statute should be employed by the federal courts. The Senate Committee stressed how some individual cases, even after the abolishment of federal parole, still may warrant a second look at resentencing:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness*, cases in which other extraordinary and compelling circumstances* justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, at 55-56 (1983) (emphasis added). Congress intended that the circumstances listed in § 3582(c) would act as "safety valves for modification of sentences," *id.* at 121, enabling judges to provide second looks for possible sentence reductions when justified by various factors that previously could have been addressed through the abolished parole system. This safety valve statute would "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' and [would allow courts] to respond to changes in the guidelines." *Id.* Noting that this approach would keep "the sentencing power in the judiciary where it belongs," rather than with a federal parole board, the statute permitted "later review of sentences in particularly *compelling situations*." *Id.* (emphasis added).

Congress initially delegated the responsibility for outlining what could qualify as "extraordinary and compelling reasons" to the U.S. Sentencing Commission ("Commission"). *See* 28 U.S.C. § 994(t) ("The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."). The Commission took considerable time to promulgate its policy in response to Congress's directive. It finally acted in 2007, almost a generation later, with the very general guidance that "extraordinary and compelling reasons" may include medical conditions, age, family circumstances, and "other reasons." U.S.S.G. § 1B1.13, app. n.1(A). However, this guidance did little to spur the BOP to file on behalf of prisoners who might have met these general standards. After a negative Department of Justice Inspector General report found that the BOP rarely invoked its authority under the statute to move for reduced sentences, the Commission felt compelled to act again. *See* U.S. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program,* I-2023-006 (Apr. 2013). The Commission amended its policy statement on "compassionate release" in November 2016. *See* U.S.S.G. § 1B1.13

Amend. (11/1/2016). In addition to broadening the eligibility guidelines for sentencing courts, the new policy statement admonished the BOP for its past failures to file motions on behalf of inmates who had met the general criteria identified in U.S.S.G. § 1B1.13. *See* U.S.S.G. § 1B1.13, n.4; *see also United States v. Dimasi*, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the history of the BOP, DOJ and Commission's interplay in developing guidance for "compassionate release" motions). Notably, the Commission concluded that reasons beyond medical illness, age, and family circumstances could qualify as "extraordinary and compelling reasons" for resentencing. *Id.,* n.1(A) (including a category for "Other Reasons," when there is "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).").[6]

The Commission's actions, however, did little to change the dearth of filings by the BOP on behalf of inmates who satisfied the Commission's general guidance. During the more than

[6] *But see United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *4 (S.D. Tex. June 17, 2019) (holding that, given the changes to the compassionate release statute by the First Step Act, U.S.S.G. § 1B1.13, application note 1(D) "no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of sentence-modification provisions under § 3582."); *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts."); *United States v. Cantu-Rivera*, No. CR H-89-204, 2019 WL 2578272, at *2 n.1 (S.D. Tex. June 24, 2019) ("Because the current version of the Guideline policy statement conflicts with the First Step Act, the newly-enacted statutory provisions must be given effect."); *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *6 (M.D.N.C. June 28, 2019) (holding that application note 1(D) is "inconsistent with the First Step Act, which was enacted to further increase the use of compassionate release and which explicitly allows courts to grant such motions even when BoP finds they are not appropriate," and courts thus may "consider whether a sentence reduction is warranted for extraordinary and compelling reasons other than those specifically identified in the application notes to the old policy statement"); *but see United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (holding that application note 1(D) governs compassionate release reductions of sentence and federal judges have no authority to create their own criteria for what constitutes an "extraordinary and compelling" reason for resentencing).

three decades during which the BOP was the exclusive gatekeeper for "compassionate release" motions, very little effort was made to implement Congress's intention to provide a safety valve to correct injustices or allow relief under extraordinary and compelling circumstances.

Finally, this changed with the passage of the First Step Act in 2018. *See* P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Section 603 of the First Step Act changed the process by which § 3582(c)(1)(A) compassionate release occurs: instead of depending upon the BOP Director to determine an extraordinary circumstance and move for release, a court can now resentence "upon motion of the defendant," after the inmate exhausted administrative remedies with the BOP, or after 30 days from the receipt of the inmate's request for compassionate release with the warden of the defendant's facility, whichever comes earlier. 18 U.S.C. § 3582(c)(1)(A).

Thus, under the First Step Act, a court may now consider the defendant's own motion to be resentenced, without waiting for it to be made by the BOP. *See also United States v. Perez*, No. 17-cr-00513 (AT), [Dkt. 98] at 2-3 (S.D.N.Y. Apr. 1, 2020) ("The provision allowing defendants to bring motions under § 3582(c) was added by the First Step Act, in order to increase the use and transparency of compassionate release.") (quotation marks, citations and modifications omitted); *United States v. Millan*, No. 91 Cr. 685 (LAP) (S.D.N.Y. Apr. 6, 2020), ECF No. 1060 (discussing courts "newfound authority" under the FSA "to reduce sentences based on 'extraordinary and compelling reasons' (even if those reasons do not relate to [factors enumerated in U.S.S.G. § 1B1.13])"); *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *4 (S.D. Tex. June 17, 2019) (holding that, given the changes to the compassionate release statute by the FSA, U.S.S.G. § 1B1.13, application note 1(D) "no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of sentence-modification provisions under § 3582").

Courts are now authorized to consider a defendant's motion, even one which the BOP opposes, and order resentencing if a resentencing court finds that "extraordinary and compelling reasons" warrant a reduction and such a reduction is consistent with the Section 3553(a) factors. *Id.* Resentencing courts are also advised that any decision to reduce a previously ordered sentence be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

Here, while the 30-day period since the warden's receipt of Mr. Daugerdas' request for compassionate release due to the threat of coronavirus infection has not yet passed, this Court can construe the exhaustion requirement as futile given the urgency of this national emergency and rapid spread of the pandemic.

II. THE COURT CAN WAIVE THE 30-DAY REQUIREMENT FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER 18 U.S.C. § 3582(c)(1)(A) BECAUSE OF THE URGENT RISK OF FATAL INFECTION

Mr. Daugerdas filed his petition with the warden on March 24, 2020, but has yet to receive a response. Under § 3582(c)(1)(A), Mr. Daugerdas would ordinarily be required to either wait 30 days following the warden's receipt of his compassionate release request, or exhaust all administrative remedies prior to approaching the Court, whichever happens earlier. *See* 18 U.S.C. § 3582(c)(1)(A). However, the Court may waive these administrative exhaustion requirements, and should do so here.

Under well-established precedent, while the Court may not waive statutory administrative exhaustion requirements that are "jurisdictional," statutory "claims processing" requirements are waivable. *See generally Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 203 (2d Cir. 2007) ("the Supreme Court has admonished lower courts to more carefully distinguish between jurisdictional rules and mandatory claims-processing rules, the latter being subject to waiver and forfeiture") (quotation marks and citations omitted). Under the Supreme Court's recent guidance, exhaustion requirements should only be treated as jurisdictional if the statute clearly

states as much: "If the Legislature clearly states that a prescription counts as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue; but when Congress does not rank a prescription as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Fort Bend Cnty., Tx. v. Davis*, 139 S. Ct. 1843, 1850 (2019) (quotation marks, citations and modifications omitted).[7] Because § 3582(c)(1)(A) is devoid of any indication that the exhaustion provisions are jurisdictional in nature, the Court should treat them as "claims processing," requirements.

The 30-day waiting period included in § 3582 authorizing judicial consideration of a compassionate release petition in the in the absence of an earlier BOP resolution, further undermines any argument that the statute's exhaustion requirement is jurisdictional in nature. Administrative exhaustion requirements are intended to further the twin goals of "protect[ing] administrative agency authority," while "promot[ing] judicial efficiency by giving an administrative agency a chance to resolve a dispute" prior to judicial intervention. *Washington v. Barr*, 925 F3d 109, 117 (2d Cir 2019). Section 3582(c)(1)(A) achieves neither as the 30-day waiting period permits the Court to make initial factual determinations regarding compassionate release requests without input from the BOP. *See, e.g., United States v. Rodriguez*, No. 03-cr-

[7] Indeed, the Supreme Court in *Fort Bend* listed a non-exhaustive litany of statutory exhaustion requirements that are merely non-jurisdictional claims processing requirements: "The Court has characterized as nonjurisdictional an array of mandatory claim-processing rules and other preconditions to relief. These include: the Copyright Act's requirement that parties register their copyrights (or receive a denial of registration from the Copyright Register) before commencing an infringement action; the Railway Labor Act's direction that, before arbitrating, parties to certain railroad labor disputes attempt settlement in conference; the Clean Air Act's instruction that, to maintain an objection in court on certain issues, one must first raise the objection with reasonable specificity during agency rulemaking, the Antiterrorism and Effective Death Penalty Act's requirement that a certificate of appealability indicate the specific issue warranting issuance of the certificate; Title VII's limitation of covered employers to those with 15 or more employees; Title VII's time limit for filing a charge with the EEOC." *Fort Bend*, 139 S. Ct. at 1849-50 (quotation marks, citations and modifications omitted).

00271, [Dkt. 135], at 10 (E.D. Pa. Apr. 1, 2020) ("Under the First Step Act, however, it is possible for inmates to file compassionate-release motions—under the 30-day lapse provision—when their warden *never* responds to their request for relief. Thus, Congress specifically envisioned situations where inmates could file direct motions in cases where nobody in the BOP *ever* decided whether the motion qualified for relief").

Thus, courts in this Circuit have held that the exhaustion requirement in § 3582(c)(1)(A) is "not absolute," and "can be waived in light of the extraordinary threat posed . . . by the COVID-19 pandemic." *United States v. Perez*, No. 17-cr-00513 (AT), [Dkt. 98] at 2-3 (S.D.N.Y. Apr. 1, 2020) (quoting *Washington*, 925 F.3d at 118); *accord United States v. Zukerman*, No. 16-cr-00194 (AT), [Dkt.116] at 4 (S.D.N.Y. Apr. 3, 2020) (same); *United States v. Colvin*, No. 3:19-CR-179 (JBA), 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) (same); *United States v. Arberry*, No. 15 Cr. 594 (JPO), [Dkt. 84] (S.D.N.Y. Nov. 12, 2019) (hearing and granting emergency compassionate release application of prisoner with cancer without prior exhaustion of administrative remedies).

Several courts considering the issue have found that the exigent circumstances of the COVID-19 pandemic justify waiving a defendant's failure to exhaust his administrative remedies: "The Court concludes that requiring him to exhaust administrative remedies, given his unique circumstances and the exigency of a rapidly advancing pandemic, would result in undue prejudice and render exhaustion of the full BOP administrative process both futile and inadequate." *Zukerman*, No. 16-cr-00194 (AT), [Dkt.116] at 6; *accord Perez*, No. 17-cr-00513 (AT), [Dkt. 98] at 6 ("the Court holds that Perez's undisputed fragile health, combined with the high risk of contracting COVID-19 in the MDC, justifies waiver of the exhaustion requirement."); *Colvin*, 2020 WL 1613943, at *2 (waiving the exhaustion requirement of Section 3582(c)(1)(A), given the

medical threats posed by COVID-19 and the difficulties defendant faced in timely exhausting her administrative remedies). Specifically, there are three specific circumstances in which "failure to exhaust may be excused,"

> First, exhaustion may be unnecessary where it would be futile. . . . Second, exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief. Third, exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice.

Zukerman, No. 16-cr-00194 (AT), [Dkt.116] at 5 (quotation marks and citations omitted).

All these exceptions apply here. Mr. Daugerdas seeks this emergency relief to avoid contracting COVID-19 at USP Marion where he has a high risk of infection. Social distancing is impossible in the crowded facility, and soap, hand sanitizer and disinfectant products are scarce. Waiting for Mr. Daugerdas to exhaust his administrative remedies would only compound his risk of exposure to COVID-19.[8] *See Colvin*, 2020 WL 1613943, at *2 (waiving the defendant's failure to exhaust administrative remedies, at least in part, because "[d]efendant would be subjected to undue prejudice—the heightened risk of severe illness—while attempting to exhaust her appeals"). Should he contract the virus while waiting for an administrative response any remedy will come too late—Mr. Daugerdas will be in mortal danger, causing him potentially irreparable physical harm, and rendering this compassionate release request utterly moot. *See Zukerman*, No. 16-cr-00194 (AT), [Dkt.116] at 6 (waiving exhaustion of administrative remedies, explaining "Here,

[8] The Court's authority to waive the administrative exhaustion requirement here—where the sheer 30-day delay in waiting for an administrative response to Mr. Daugerdas' prior request to the warden may vastly increase his chance of contracting COVID-19, and potentially render any remedy functionally unavailable—is thus consistent with the caselaw interpreting the exhaustion requirements in other statutes and analogous contexts. *See, e.g., Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) (holding, in the context of the Prison Litigation Reform Act, that "[a]n inmate need exhaust only such administrative remedies as are 'available.'"); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (statutory exhaustion requirements are singularly subject to waiver "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate . . . ").

even a few weeks' delay carries the risk of catastrophic health consequences for Zukerman."); *see also, e.g., Sorbello v. Laird*, No. 06 CV 948 (JG), 2007 WL 675798, at *3 n.8 (E.D.N.Y. Feb. 28, 2007) (refusing to dismiss petition requesting designation to halfway house "for failure to exhaust administrative remedies" where delay in processing administrative remedies would "result in the irreparable harm of late designation to community confinement"); *Pimentel v. Gonzales*, 367 F. Supp. 2d 365, 371 (E.D.N.Y. 2005) (addressing merits of request for designation to halfway house, where "not only would an administrative appeal be futile, but without immediate relief by this court, Pimentel could suffer irreparable harm," as "[w]ere Pimentel required to pursue administrative remedies prior to bringing this action . . . his request would become moot."). Given the risks that COVID-19 poses to Mr. Daugerdas, and the likelihood of exposure inherent in waiting for administrative exhaustion under § 3582(c), the Court should waive his failure to exhaust administrative remedies.

Strictly enforcing the administrative exhaustion requirement in this case would also run contrary to the purposes of the statute, which attempted to remedy "a compassionate-release system so plagued by delay that prisoners sometimes died while waiting for the BOP to make a decision." *Rodriguez*, No. 03-cr-00271, [Dkt. 135], at 10. The mere delay and attendant risk of COVID-19 exposure involved in waiting for the 30-day period to elapse, would thus undermine the statute's goal. *Perez*, No. 17-cr-00513 (AT) at 5 ("administrative exhaustion would defeat, not further, the policies underlying § 3582(c)" as "delaying release amounts to denying relief altogether.").

The Bureau of Prisons has also known for months of the impending COVID-19 crisis, creating a further reason to excuse Mr. Daugerdas' failure to exhaust all administrative remedies. The BOP has had ample opportunity to adequately prepare USP Marion for this emerging health

crisis, which would have obviated the need for Mr. Daugerdas' emergency compassionate release petition. Because the BOP was on notice of the potential dangers to inmates like him, Mr. Daugerdas should not be required to wait while the BOP takes additional time addressing his administrative request. *See, e.g., United States v. Basciano*, 369 F. Supp. 2d 344, 349 (E.D.N.Y. 2005) (despite failure to exhaust administrative remedies, because "the BOP ha[d] not addressed [his] request for relief in a timely fashion," despite "ample opportunity" to do so, the court found that "[t]he administrative appeals process would thus, in the circumstances of this case, be an empty formality that would risk exposing Basciano to irreparable harm"). Mr. Daugerdas should not be forced to bear the brunt of the facility's failure to adequately prepare for COVID-19. In these extraordinary circumstances, the Court should waive the administrative exhaustion requirement in § 3582.

III. THE COVID-19 OUTBREAK PRESENTS A COMPELLING AND EXTRAORDINARY CIRCUMSTANCE THAT WARRANTS COMPASSIONATE RELEASE FOR MR. DAUGERDAS, WHO IS A HIGH-RISK FATALITY PATIENT

On March 11, 2020, the World Health Organization ("WHO") officially classified the new strain of coronavirus, COVID-19, as a pandemic.[9] On March 13, 2020, the White House declared a national emergency, under Section 319 of the Public Health Service Act, 42 U.S.C. § 247(d)).[10] On March 16, 2020, the White House issued guidance recommending that, for the next eight

[9] "Coronavirus Map: Tracking the Global Outbreak," *New York Times* (April 10, 2020), available at: https://www.nytimes.com/interactive/2020/us/illinois-coronavirus-cases.html.

[10] The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at https://www.whitehouse.gov/presidential-actions/proclemation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

weeks, gatherings of ten persons or more be canceled or postponed.[11] On March 20, 2020, Governor J.B. Pritzker issued a "stay at home" order requiring employees of non-essential businesses to work from home.[12] These drastic measures followed the issuance of a report by British epidemiologists, concluding from emerging data that 2.2 million Americans could die without drastic intervention to slow the global spread of the deadly disease.[13]

As of April 10, 2020, COVID-19 has infected at least 1,600,000 worldwide, leading to at least 100,000 deaths.[14] In the United States, approximately 485,000 have been infected, leading to over 17,000 deaths.[15] These numbers almost certainly underrepresent the true scope of the crisis; test kits in the United States have been inadequate to meet demand.

As of April 10, 2020, there were more than 14,400 confirmed cases in Illinois, and at least 534 deaths, representing an increase of at least 7,000 new cases and 400 deaths since the previous

[11] Sheri Fink, "White House Takes New Line After Dire Report on Death Toll," *New York Times* (March 17, 2020), available at https://www.nytimes.com/2020/03/17/us/coronavirus-fatality-rate-white-house.html?action=click&module=Spotlight&pgtype=Homepage.

[12] "Gov. Pritzker Announces Statewide Stay At Home Order to Maximize COVID-19 Containment, Ensure Health Care System Remains Fully Operational," available at: https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=21288.

[13] Fink, "White House Takes New Line After Dire Report on Death Toll," *New York Times*.

[14] *Id.*

[15] *Id.*

week.[16] The number of cases could nearly triple by next week, as Illinois is feared to become one of the next "hot spots" for the virus in the United States.[17]

The Centers for Disease Control and Prevention ("CDC") have also issued guidance related to the deadly effects of COVID-19 on certain high-risk patients of the population. The CDC identified the population most at risk of death from the disease to include adults over 60 years old with chronic medical conditions, such as lung disease, heart disease, and diabetes.[18] For these individuals, the CDC warned to take immediate preventative actions, including avoiding crowded areas and staying at home as much as possible. *Id.* Mr. Daugerdas falls within this highest risk group and cannot take the self-isolating steps directed by the CDC for these most vulnerable seniors.

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[16] "Coronavirus in Illinois updates: 1,465 more known COVID-19 cases and 68 additional deaths, as 2nd CPD member who tested positive dies," deaths, *Chicago Tribune* (Apr. 10, 2020), available at: https://www.chicagotribune.com/coronavirus/ct-coronavirus-pandemic-chicago-illinois-news-20200410-waujpq55kvfbngrshwodulxf24-story.html.

[17] *See* Lisa Schencker and Joe Mahr, "Illinois might have 19,000 COVID-19 cases about a week from now, according to one analysis. But it could have been worse," (Mar. 31, 2020), available at: https://www.chicagotribune.com/coronavirus/ct-coronavirus-forecasts-hospitals-rush-20200331-v5vcjb3kyvdtjme32of6tt2j64-story.html. *See also* https://www.nytimes.com/interactive/2020/us/illinois-coronavirus-cases.html.

[18] "People At Risk for Serious Illness from COVID-19," CDC (March 12, 2020), available at https://bit.y/2vgUt1P.

IV. THE CONDITIONS OF BOP INCARCERATION FOSTER THE SPREAD OF COVID-19, AND MR. DAUGERDAS' AGE AND PREEXISTING MEDICAL CONDITIONS RENDER HIM PARTICULARLY SUSCEPTIBLE TO AN UNREASONABLE RISK OF DEATH AND AN INABILITY TO TAKE PREVENTATIVE MEASURES OR SELF-CARE RECOMMENDED BY THE CDC

With COVID-19 spreading rapidly, it is only a matter of time before the virus finds its way into USP Marion, where Mr. Daugerdas is housed. Indeed, the disease already has spread in the southern Illinois county of Williamson, where USP Marion is located.[19]

Conditions of confinement at the satellite camp at USP Marion create an optimal environment for the transmission of contagious disease.[20] People who work in the facility leave and return daily; people deliver supplies to the facility daily; inmates were having social, legal and medical visits regularly after the initial spread of the virus prior to the BOP's decision to stop visits for 30 days on March 13, 2020; and inmates were still moving freely around the facility until a 14-day lockdown was announced on or about April 1, 2020.[21]

Public health experts are unanimous in their opinion that incarcerated individuals "are at special risk of infection, given their living situations," and "may also be less able to participate in

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[19] "Coronavirus Map: Tracking the Global Outbreak," *New York Times* (April 10, 2020). Corrections officers and other staff are still traveling around the County before coming in contact with prison inmates. They also have insufficient personal protective equipment available to them inside the facility. *See also* "Illinois Gov. Pritzker says COVID-19 rules unlikely to ease by April's end," *The Southern Illinoisan*, April 9, 2020 (recognizing that even flattening the curve of new will not lead to relaxing social isolation rules possibly even through summer and fears that Illinois was reaching maximum hospital capacity).

[20] Joseph A. Bick, "Infection Control in Jails and Prisons," *Clinical Infectious Diseases* 45(8): 1047-1055 (2007), available at https://doi.org/10.1086/521910.

[21] "Federal Bureau of Prisons Covid-19 Action Plan," available at https://www.bop.gov/resources/news/20200313_covid-19.jsp.
See also "Federal Bureau of Prisons Covid-19 Action Plan – Phase V," https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

proactive measures to keep themselves safe," and "infection control is challenging in these settings."[22]

Mr. Daugerdas is powerless to take the preventative self-care measures directed by the CDC for his high-risk group to remain safe from COVID-19 infection. He cannot self-quarantine or partake in "social distancing" in his prison facility. He is housed in a community dormitory environment that beds about 225 inmates with "quad"-style cubicles, each housing two to three people, no more than three feet apart from each other, on either side of a central hallway with one common washroom on each floor that can be used by multiple inmates at a time. There are also community spaces where inmates and prison staff gather, including the dining hall, where there are tight lines and close quarters for seating, laundry facilities, barber shop, medical areas, small library and gym. The inmate telephones are clustered closely together as are the inmate computers; there is no ability for inmates to disinfect either prior to use.[23] These high-density areas are precisely the kind of spaces that have caused the alarmingly high-spread rates of COVID-19

[22] "Achieving a Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States" (March 2, 2020), at https://bit.ly/2W9V6oS.

[23] On April 1, 2020, the BOP instituted a 14-lockdown period as part of its Phase V Action Plan in response to COVID-19. Information is sparse, however, how this lockdown has been executed across facilities. Our client continues to have some access to computer monitors to tell us that enforcement is not consistent across units and there is still considerable inmate movement within the facility. What has become harder to obtain during this period, we are told, is immediate medical attention for previously diagnosed conditions, such as Mr. Daugerdas' Type-II diabetic condition and coronary artery disease. *See also* Josiah Bates, "Why Federal Prisons Are Confining Inmates for 2 Weeks to Stop the Spread for Coronavirus," *Time* (Apr. 2, 2020), https://time.com/5814735/federal-prisons-confine-inmatescoronavirus/; Anastasia Tsioulcas, "Prisoners Across U.S. Will be Confined For 14 Days to Cut Coronavirus Spread," *NPR* (Mar. 31, 2020), https://www.npr.org/sections/coronaviruslive-updates/2020/03/31/824917318/prisoners-across-country-will-be-confined-for-14-days-tocut-coronavirus-spread.

elsewhere in the country.[24] For example, hand sanitizer, an effective disinfectant recommended by the CDC to reduce transmission rates, is contraband in jails and prisons because of its alcohol content.[25] Prisons are practically "petri dishes"—ideal conditions for the virus' spread.[26] Correctional health experts worry that no matter what precautions are taken by crowded prisons, these facilities may become incubators for the COVID-19 disease.[27]

During the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases because they could not maintain the level of separation and sanitation necessary to prevent widespread infection.[28] The Prison Policy Initiative has called on American jails and prisons to release medically fragile and older adults, noting that these persons are at high risk for serious complications and even death from COVID-19.[29] Similarly, members of Congress have written

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[24] "White House Tells Travelers from New York to Isolate as City Cases Soar," *New York Times* (March 24, 2020), available at https://www.nytimes.com/2020/03/24/nyregion/coronavirus-new-york-update.html.

[25] Keri Blakinger and Beth Schwarzapfel, "How Can Prisons Contain Coronavirus When Purell is Contraband?," *ABA Journal* (March 13, 2020), available at https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus.

[26] By Timothy Williams, Benjamin Weiser and William K. Rashbaum, "'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars," *New York Times* (Mar. 30, 2020) ("e coronavirus is spreading quickly in America's jails and prisons, where social distancing is impossible and sanitizer is widely banned"), available at: https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

[27] Michael Kaste, "Prisons and Jails Worry About Becoming Coronavirus 'Incubators'," *NPR* (March 13, 2020), available at https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators.

[28] "Prisons and Jails are Vulnerable to COVID-19 Outbreaks," *The Verge* (Mar. 7, 2020), available at https://bit.ly/2TNcNZY.

[29] Peter Wagner & Emily Widra, "No Need to Wait For Pandemics: The Public Health Case for Criminal Justice Reform," *Prison Policy Initiative* (March 6, 2020), available at https://www.prisonpolicy.org/blog/2020/03/06/pandemic.

to the BOP to urge that efforts be made to allow immediate release of non-violent, elderly inmates.[30]

Given that Mr. Daugerdas is 69 years old and suffers from significant underlying health issues, including Type-II diabetes, high blood pressure, coronary artery disease, elevated cholesterol, and a history of smoking, he is exceptionally vulnerable to COVID-19. This vulnerability, combined with prison conditions at USP Marion and the inability of Mr. Daugerdas to self-care present compelling and extraordinary circumstances to support compassionate release at this unique time in our country's history. There is an urgent need to act now, before the virus spreads within the prison and Mr. Daugerdas becomes infected.

Other courts across the country already have acted to spare elderly inmates from the risk of serious or deadly infection. In this district, Judge Torres released a similarly situated elderly inmate under the compassionate release statute as amended by the FSA. *See United States v. Zukerman*, No. 16-CR-194 (AT) (S.D.N.Y. Apr. 3, 2020) (ECF Doc. No. 116). In *Zukerman,* Judge Torres granted release to a 75-year-old defendant who was serving a 70-month sentence for federal tax evasion. *Id.* The defendant in that case still had over two-and-a-half years left on his sentence. *Id.* at 1-2. The defendant there, similarly to Mr. Daugerdas, suffered from diabetes, hypertension, and obesity. *Id.* Mr. Zukerman's doctor opined that he fell within a high-risk category for contracting and possibly dying from COVID-19. *Id.* Judge Torres found that these factors weighed in favor of waiving the thirty-day exhaustion requirement in the statute, and found that the "environment at Otisville [another minimum-security camp facility like the one in

[30] Letter of Representatives Jerrold Nadler and Karen Bass (March 19, 2020) ("DOJ and BOP must also do all they can to release as many people as possible who are currently behind bars and at risk of getting sick. Pursuant to 18 U.S.C. 3582(c)(1)(A), the Director of the Bureau of Prisons may move the court to reduce an inmate's term of imprisonment for "extraordinary and compelling reasons.").

Marion], where inmates live in close quarters, share one large bathroom, with only a handful of stalls and showers, and eat elbow-to-elbow at three-foot wide tables in the dining hall . . . make controlling the spread of COVID-19 more challenging and the risk to vulnerable inmates, such as Zukerman, that much greater." *Id.* at 7. The court rejected the government's argument that it should require the defendant to exhaust his administrative remedies because he was not "within days" of release because such argument "misses the point and understates the gravity of the COVID-19 pandemic." *Id.* "*Although [defendant's] original release date may be far off, the threat of COVID-19 is at his doorstep*." *Id.* (emphases added). *See also Perez*, No. 17-cr-00513 (AT), [Dkt. 98] at 6-7 (finding that given the spread of COVID-19, where the defendant had significant health problems, was "[c]onfined to a small cell where social distancing is impossible," and thus could not "provide self-care because he cannot protect himself from the spread of a dangerous and highly contagious virus," he demonstrated "extraordinary and compelling reasons justifying his release"); *Rodriguez*, No. 03-cr-00271, [Dkt. 135], at 13 ("Mr. Rodriguez's circumstances—particularly the outbreak of COVID-19 and his underlying medical conditions that place him at a high risk should he contract the disease—present "extraordinary and compelling reasons" to reduce his sentence."); *see also United States v. Huneeus*, No. 19-cr-10117 [Dkt. 643] (D. Mass. Mar. 17, 2020) (amending judgment converting remaining two week period of incarceration to an additional term of supervised release pursuant to 3582(c)(1) based on the "national state of emergency" due to COVID-19 and the defendant's "unique health circumstances" were "extraordinary and compelling" grounds for relief).

As described in the attached declaration of Dr. Jaimie Meyer, an infectious disease specialist and Assistant Professor of Medicine at Yale School of Medicine, inmates are uniquely vulnerable:

> [t]he risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.

Exhibit A (Decl. of Dr. Meyer).[31] Dr. Meyer describes the inadequate pandemic preparedness plans in many detention facilities and the difficulty of separating infected or symptomatic inmates from others. *Id.* As described herein, these same conditions exist at USP Marion.

Granting Mr. Daugerdas' motion is also consistent with the directive that Attorney General ("AG") Bill Barr issued on March 26, 2020, ordering the BOP to "use[] home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody." Memorandum from AG William P. Barr to the Director of Bureau of Prisons re: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020).[32] The AG's memorandum outlines six criteria for determining prioritization for release to home confinement, largely focused on the danger posed by the inmate's release—Mr. Daugerdas fulfills all of them.

First, as discussed previously, Mr. Daugerdas is 69-years old with several health conditions making him particularly vulnerable to death or severe illness from COVID-19. *See id.* at 1 (instructing consideration of "the age and vulnerability of the inmate") Second, USP Marion, where Mr. Daugerdas is incarcerated, is a minimum-security camp. *Id.* at 2 ("priority given to inmates residing in low and minimum security facilities"). Third, Mr. Daugerdas has not engaged in "violent or gang-related activity in prison." *Id.* Fourth, Mr. Daugerdas' PATTERN score rates him as a "minimum risk. *See id.* (directing consideration of an "inmate's score under PATTERN,

[31] A proposed order is attached as Exhibit B.

[32] Available at: https://www.documentcloud.org/documents/6819695-AG-s-Memo-on-BOP-HomeConfinement.html. While we recognize that the Attorney General's directive is, of course, not binding on the Court, it nevertheless provides a helpful lens for assessing the equities of Mr. Daugerdas' request for compassionate release.

with inmates who have anything above a minimum score not receiving priority treatment under this Memorandum."). Fifth, should Mr. Daugerdas receive compassionate release he will serve out the remainder of his sentence in home detention at his home in a suburb of Chicago, the same residence identified in his Presentence Report (¶ 93), and where he and his wife have lived for more than 30 years. Currently, only his wife, Eleanor, resides there, so there is ample space for Mr. Daugerdas to self-quarantine for 14-days upon release. Eleanor, Mr. Daugerdas' wife, is a registered nurse and has been serving this country during this unprecedented health care crisis at a Chicago hospital serving hundreds of COVID-19 patients. She is amply able to ensure that her husband receives guidance and personal protective equipment ("PPE") to keep him and the public safe. *See id.* (inmate's "re-entry plan . . . including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility"). Sixth, Mr. Daugerdas' "crime of conviction," tax fraud, while admittedly serious, was a non-violent offense and Mr. Daugerdas—a disbarred lawyer—is not in a position to re-offend. *See id.* (directing consideration of "[t]he inmate's crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home detention. Other serious offenses should weigh more heavily against consideration for home detention.").

The guidelines outlined by the AG, as well as the risks posed by COVID-19, weigh overwhelmingly in favor of Mr. Daugerdas' compassionate release. The AG's own set of factors, indicate that Mr. Daugerdas' sentence can be completed in home confinement without doing damage to federal sentencing purposes. Mr. Daugerdas should not be subject to the extraordinary risk of contracting COVID-19 at USP Marion, where he cannot adequately protect himself,

particularly given his pre-existing health vulnerabilities increasing his chance of death from COVID-19.

V. THE RELEVANT § 3553(a) FACTORS, INCLUDING MR. DAUGERDAS' RELEASE PLAN, FAVOR RESENTENCING

When extraordinary and compelling reasons are established, the Court must consider the relevant sentencing factors in §3553(a) to determine whether a sentencing reduction is warranted. 18 U.S.C. § 3582(c)(1)(A)(i).

In this case, a review of the Section 3553(a) factors, and a release plan that includes home confinement under the direction of the United States Probation Department for the remainder of his unserved original term of imprisonment, favor granting Mr. Daugerdas' compassionate release.

First, as stated just above, Mr. Daugerdas' offense, while gravely serious, is not one that indicates a current or future threat of recidivism. Mr. Daugerdas already served more than five years in prison at an advanced age. This is already a serious punishment that gives due deference to respect for the criminal law. He will still be under home detention, another punitive measure, until July 2027: a considerable period that will allow him only to return to normal socialization at age 75. While the Probation Department should be free to determine how best to monitor Mr. Daugerdas' movement during this time, it remains real punishment and loss of liberty. All that really differs from the dormitory-style living Mr. Daugerdas currently finds himself is the ability to self-care during a time of a potentiality cyclic pandemic and to be able to see his family a lot more frequently. This lessening of his conditions of confinement is not so forgiving as to do harm to the goals of federal sentencing. They are compassionate, for certain, but do not convey a soft-on-crime message to possible future offenders. Indeed, conversion to home detention for our elderly inmates seems a lot more practical, cost-effective, and humane in a just society.

Second, Mr. Daugerdas' advancing age and medical conditions, leave him vulnerable to the COVID-19 infection. He has Type-II diabetes, coronary artery disease and hypertension. Mr. Daugerdas takes medication regularly for these chronic medical issues and is classified as a "chronic care inmate" by the BOP.

Mr. Daugerdas' age and frail health present reasons combined with the COVID-19 crisis for the Court to conclude that his current personal history and characteristics favor resentencing under the Section 3553(a) factors. Also, these conditions indicate that Mr. Daugerdas no longer poses a credible threat to the safety of the public if he were now released to home confinement.

Indeed, the only Section 3553(a) factors that might give pause to this Court as disfavoring resentencing (*i.e.,* deference to the seriousness of the offense conduct and due respect for the law) are largely overcome by the unreasonable threat of serious illness or death in Mr. Daugerdas' current conditions of confinement. There are conditions of home detention which can still provide a "sufficient but not greater than necessary" sanction of punishment. 18 U.S.C. § 3553(a). Mr. Daugerdas already has served over five years in prison at an advanced age, from years 64-69, and under poor health conditions. As the court noted in *McGraw,* "his sentence has been significantly more laborious than that served by most inmates." *United States v. McGraw*, No. 02 Cr. 18 (LJM-CMM), 2019 WL 2059488, at *5 (S.D. Ind. May 9, 2019).

While conceding that Mr. Daugerdas' offense conduct was serious and that he still has approximately seven years unserved from his original sentence, his life circumstances—since this sentence was initially imposed by this Court—have certainly changed. The government cannot dispute the serious physical danger created by the current pandemic to someone with Mr. Daugerdas' medical profile. It also cannot guarantee or provide any sense of confidence that this widespread virus will not make its way inside the doors of the federal facility in Marion. If the

virus spreads inside that prison, and this is not alarmist hyperbole, it likely will kill Mr. Daugerdas. This Court never intended to impose such a risk at the time of Mr. Daugerdas' original sentencing.

We propose here that as part of Mr. Daugerdas' continued punishment in this case that the Court convert the remaining years of his expected term of imprisonment, through July 2027, to strict home detention as a condition of supervised release. In this way, Mr. Daugerdas continues to face confinement as a measure of due punishment, but without the serious risk to his physical health. The recently amended compassionate release statute, at § 3582(c)(1)(A), authorizes the Court to extend supervised release in this way. *See* 18 U.S.C. § 3582(c)(1)(A) (the court "may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment"); *Rodriguez*, No. 03-cr-00271, [Dkt. 136] (E.D.Pa. Apr. 1, 2020) (resentencing defendant to six years of supervised release). Such a prolonged period of home confinement will meet Section 3553(a)'s purpose to give due respect for the law and to acknowledge the seriousness of the offense.

Congress's expansion of the compassionate release statute by § 603(b) of the First Step Act reflects congressional intent for courts to have greater flexibility to reduce sentences when compelling circumstances justify a later review. The title of the amendment, "Increasing the Use and Transparency of Compassionate Release," accentuates that intent. The evolving case law also demonstrates that courts have construed their discretion generously to effectuate Congressional desire to increase the use of the compassionate release statute encouraged by this amendment. Significantly, courts weighing § 3553(a) factors have granted release to defendants with convictions for serious crimes and with histories of violence, finding that changed health circumstances, aging defendants, post-offense rehabilitation, and carefully crafted conditions of supervised release ameliorate public safety concerns.

In *United States v. Bailey,* for example, the defendant was sentenced to 30 years for "an extensive racketeering scheme," including a specific finding that the defendant committed offenses relating to a murder. *Bailey,* No. 94-cr-481 (N.D. Ill. July 24, 2019) (slip op. at 1). The parties agreed that the defendant, who was almost 90 years old and suffered from multiple health issues, had satisfied the statutory requirements for compassionate release. However, the government opposed release under the Section 3553(a) factors due to the "reprehensible nature of the offense." The court acknowledged that the defendant's criminal history and serious offense conduct supported a denial of the requested reduced sentence. But the court weighed the more recent factors in the defendant's favor, including his institutional adjustment, lack of disciplinary infractions, his advanced age, and his release plan, and concluded that they "point in the opposite direction[ ]." *Id.* In weighing these more recent favorable factors over the defendant's past criminal history, the court granted the reduced sentencing request, concluding that release at this stage of the defendant's life would not minimize the severity of the offense and the defendant no longer posed any credible threat to the public. *Id.* at 2.

In a District of Oregon case, the court likewise granted compassionate release to a defendant, who also was serving a 30-year sentence for leading a "major drug conspiracy." *United States v. Spears*, No. 3:98-Cr.-208-SI-22, 2019 WL 5190877, at *4 (D. Or. Oct. 15, 2019). As explained in the court's opinion granting release, the defendant's history included crimes of violence, his performance on supervised release had been poor, and he committed the last serious offense for which he was serving imprisonment when he was in his fifties. *Id.* at *4. Despite these findings, the district court found that the defendant was now 76 years old and suffered from "multiple chronic serious medical conditions and limited life expectancy." *Id.* at *1. Although the government persisted that the defendant remained dangerous, the Court disagreed. The Court

concluded that, in light of the defendant's strong family support, the age of his prior convictions, and his diminished physical condition, "appropriate supervision conditions can mitigate any limited risk" to public safety and provide sufficient specific deterrence. *Id.* at *5.

Similarly, in *United States v. McGraw,* No. 02 Cr. 18 (LJM-CMM), 2019 WL 2059488 (S.D. Ind. May 9, 2019), the court granted compassionate release from the defendant's life sentence for a drug trafficking conspiracy based on the defendant's serious health concerns and diminished ability to provide self-care under commentary note 1(A)(ii) of U.S.S.G. § 1B1.13. The defendant, who was approximately 55 years old at the time of the offense, was 72 years old at the time of the court's release opinion and suffered from limited mobility, diabetes, and chronic kidney disease. *Id.* at *2. The government argued that the defendant remained a danger to the community because of his leadership in a notorious motorcycle gang, noting that he could continue his criminal activity with simple access to a telephone. *Id.* at *4. The court, however, concluded that given the defendant's frail health, his positive record at the institution, and the ability of the court to impose conditions that would reasonable assure the safety of the community upon release, the more flexible compassionate release statute, as amended by the First Step Act, favored granting the defendant's motion. *Id.* With respect to the Section 3553(a) factors, the court concluded that the "significant sanction" the defendant had already served was sufficient:

> But further incarceration is not needed to deter Mr. McGraw from further offenses; nor for reasons described above, is it necessary to protect the public from future crimes. Finally, Mr. McGraw has served much of his sentence while seriously ill and in physical discomfort. This means that his sentence has been significantly more laborious than that served by most inmates. It also means that further incarceration in his condition would be greater than necessary to serve the purposes of punishment set forth in § 3553(a)(2).

Id. at *5. The court imposed lifetime supervision to "continue to serve as a sanction and general deterrent, appropriately recognizing the seriousness of Mr. McGraw's conduct." *Id.* at *4.

As amplified in the cited cases above, release of an aged and infirm Mr. Daugerdas under the current extraordinary and compelling circumstances of the threat of a novel contagion contaminating the prison would not serve to diminish the seriousness of the offense of conviction, but would fulfill Congress's intent in offering courts greater flexibility to reduce sentences when changed circumstances justify a later review. Mr. Daugerdas' pre-existing health conditions, his age, and the rapidly advancing COVID-19 outbreak, together with the prison's inflexibility to give Mr. Daugerdas the ability to take self-care measures directed by the CDC to remain safe during the outbreak, warrant a reduced sentence in his case.

VI. SHOULD THE COURT DENY COMPASSIONATE RELEASE, THE COURT SHOULD ISSUE A JUDICIAL RECOMMENDATION THAT THE BOP RE-DESIGNATE MR. DAUGERDAS TO AN EXTENDED PRE-RELEASE PLACEMENT IN HOME CONFINEMENT

In the alternative, Mr. Daugerdas respectfully requests the Court to recommend to the BOP that he be designated to serve the remainder of his sentence under home confinement.

Section 3621 of Title 18 directs that the BOP "shall designate the place of the prisoner's imprisonment . . . subject to, [among other factors] recommendations of the sentencing court." 18 U.S.C. § 3621(b). The sentencing court continues to "ha[ve] discretion to make recommendations regarding an inmate's placement post-sentencing." *United States v. Shields*, No. 12 Cr. 410, 2018 WL 2728905, at *2 (N.D. Cal. June 7, 2018); *see also United States v. Bryant*, No. 12 Cr. 60175, 2020 WL 1149715, at *2 (S.D. Fla. March 10, 2020) (stating that 18 U.S.C. § 3621(b) "contains no temporal restriction" and "requir[es] the BOP to consider *any* statement by the court that imposed the sentence."); *United States v. Best,* No. 5:16-CR-236, 2019 WL 5608856, at *1 (E.D.N.C. Oct. 30, 2019) ("The court has authority to issue a post-judgment recommendation to the BOP for placement in community confinement.") (collecting cases). Under the recently-enacted CARES Act, "[d]uring the covered-emergency period, if the AG finds that emergency

conditions will materially affect the functioning of the Bureau [of Prisons], the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of Title 18, United States Code, as the Director determines appropriate." P.L. 116-136, March 27, 2020, 134 Stat. 281, 516.

Therefore, Mr. Daugerdas requests that the Court recommend that the BOP—which has "the latitude to mitigate health risk including by . . . act[ing] with acute sensitivity to [Mr. Daugerdas'] health and safety"—release him to serve a portion of his sentence in home confinement until the COVD-19 crisis passes or the sentence is complete, whichever is earlier. *United States v. Credidio*, No. 19 Cr. 111 (PAE), 2020 WL 1644010, at *3 (S.D.N.Y. April 2, 2020); *see e.g., United States v. Ahmed*, No. 1:07-CR-647, 2017 WL 5166427, at *3 (N.D. Ohio Nov. 8, 2017) (granting defendant's motion for judicial recommendation "and recommend[ing] that the Bureau of Prisons promptly end his prison confinement and transfer him to a Residential Re-entry Center to begin the process of reentry into his home community.").

This requested recommendation would be consistent with the recent directives issued by AG Barr. On March 26, 2020, the AG issued specific guidance to the BOP directing it "to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic."[33] The memo noted that "for some eligible inmates, home confinement might be more effective in protecting their health" than continued BOP confinement.[34] We earlier evaluated these factors in the section *supra* (p. 21), and all the factors support Mr. Daugerdas' release to home confinement.

[33] *Supra,* note 32.

[34] *Id.*

In short, the BOP has statutory authority to re-designate Mr. Daugerdas now, and doing so would be consistent with the directives of the AG. On April 3, 2020, AG Barr issued a second memorandum in which he underscored the growing urgency of the health crisis. "Given the speed of which this disease has spread through the general public, it is clear that time is of the essence."[35] Accordingly, as an alternative to granting compassionate release, this Court should issue a recommendation that Mr. Daugerdas be designated to serve the remaining portion of his sentence on home confinement. Doing so would protect Mr. Daugerdas' life and serve the public interest.

CONCLUSION

For the foregoing reasons, Mr. Daugerdas respectfully requests that the Court grant a reduction in his sentence to time served with an extended period of supervised release of seven years (to cover the unserved portion of his prison term), with a condition of home confinement, pursuant to 18 U.S.C. § 3582(c)(1)(A). In the alternative, the Court should recommend that the BOP use its statutory authority to re-designate Mr. Daugerdas to serve that portion of his sentence that coincides with the COVID-19 crisis on home confinement.

Dated: April 10, 2020
New York, New York

Respectfully submitted,

/S/

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[35] Memorandum of AG William P. Barr, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, Apr. 3, 2020, available at: https://www.justice.gov/file/1266661/download.