UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 13-20600

v. HON. PAUL D. BORMAN

FARID FATA,

Defendant.
_____/

UNITED STATES' COMBINED RESPONSE AND BRIEF OPPOSING THE DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(C)(1)(A)

Rather than healing or easing the suffering of cancer and hematology patients who sought his help, Farid Fata poisoned his patients for profit. Fata falsely diagnosed them with cancer and other maladies, then administered and billed for chemotherapy, cancer treatments, intravenous iron, and other dangerous chemicals they did not need. His scheme caused hundreds, and perhaps thousands, of patients to suffer permanent damage to their bodies. He pleaded guilty, and, as part of his plea, Fata admitted that he victimized 553 individuals and four health care insurance providers. Fata also admitted that he took over $17 million in fraudulent payments.

He began serving his current sentence in a Bureau of Prisons facility on August 28, 2015. Fata, a man who knows no compassion, now moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A) seeking release from prison over three decades early. His motion should be denied.

First, since January 2020, the Bureau of Prisons has been preparing for Covid-19, implementing strict precautions to minimize the virus's spread in its facilities. Following two recent directives from the Attorney General, the Bureau of Prisons is also assessing its entire prison population to determine which inmates face the most risk from Covid-19, pose the least danger to public safety, and can safely be granted home confinement. This process necessarily requires the Bureau of Prisons to identify the best candidates for release, ensure that their homes are suitable for home confinement, and arrange a way to quarantine each of them for 14 days. As of May 19, these directives have already resulted in at least 2,799 inmates being placed on home confinement. *See* BOP Covid-19 Website.

Second, Fata does not qualify for compassionate release. Because Fata has not sought compassionate release from the Bureau of Prisons based on Covid-19, as required under 18 U.S.C. § 3582(c)(1)(A), the Court does not have jurisdiction to address his Covid-19-based argument until he exhausts his administrative remedies. Nor, in any event, does Fata satisfy the statutorily mandated criteria for compassionate release. Because § 3582(c)(1)(A) requires that release be

"consistent with" the Sentencing Commission's policy statements, Fata's failure to meet the criteria in USSG § 1B1.13 alone forecloses relief. Even when Covid-19 is taken into account, Fata's age and medical conditions do not satisfy the requirements in § 1B1.13(1)(A) & cmt. n.1. Fata is not elderly at age 55, and any medical conditions he has are managed by the BOP in a facility where not one single case of the virus is present as of May 18. Fata's offenses also make him a continued danger to the community. *See* USSG § 1B1.13(2). In addition to the cruelty of his tortuous crimes, Fata now refuses to accept responsibility for his deliberate poisoning of his patients, and his pattern of lies and manipulation has continued before this Court. His utter failure to accept the physical and emotional harm he has caused thousands of victims and their families and his ongoing calculated lying means he is capable of committing further physical and emotional atrocities. And the § 3553(a) factors—which the Court must also consider under § 3582(c)(1)(A)—likewise do not support release because of the horrifying nature of his crimes.

Background

Farid Fata was a doctor who owned and operated a medical practice called Michigan Hematology Oncology. Between 2005 and 2013, the practice grew to seven locations and treated approximately 17,000 patients. Fata eventually

expanded his businesses to include a pharmacy (Vital Pharmacare) and a diagnostic testing facility (United Diagnostics). (PSR ¶¶ 28-30)

Fata used his businesses to perpetrate an almost unthinkable scheme of dosing patients with unnecessary medications, just so he could bill for them. (PSR ¶ 32). As he admitted in 2014, Fata engaged in numerous types of patient mistreatment, including:

- Unnecessary chemotherapy and other cancer treatment drugs given to patients without cancer or in remission;
- Aggressive, dangerous chemotherapy given in the office (where Fata could bill) instead of the appropriate hospital setting;
- Unnecessary "supportive" treatments, such as human growth factors, intravenous immunoglobulin, and anti-nausea medication;
- Unnecessary intravenous iron given to patients who were not iron-deficient; and
- Unnecessary positronic emission test (PET) scans, which involve the injection of radioactive material into patients.

(PSR ¶ 42-50)(R. 111: Tr., 1112-1126)

Fata pleaded guilty to 13 counts of health care fraud, one count of conspiracy to pay and receive kickbacks, and two counts of promotional money laundering. (R. 111: Tr., 1112-1131; R. 66: Fourth Superseding Indictment, 738-758). He did not have a written plea agreement. Following extensive sentencing proceedings, this Court calculated a total offense level of 42 and a guideline range

of 360 months to life. (R. 170: Tr., 2937-38). The Court sentenced Fata within that guideline range to 45 years in prison. (R. 161: Tr., 2503). Fata lost his appeal on May 25, 2016. *See United States v. Fata*, 650 Fed.Appx. 260 (2016). On May 22, 2018, Fata filed a § 2255 motion claiming he was innocent and asking that his guilty plea be withdrawn. (R. 212). Following an evidentiary hearing in July 2019, during which Fata's written and oral lies to the Court were exposed (R. 251; R. 258), Magistrate Judge Grand issued a Report and Recommendation denying Fata's § 2255 motion on February 7, 2020. (R. 258). Fata filed objections to the Report and Recommendation (R. 261), and the government filed a response to his objections (R. 262). This Court has not yet ruled on Fata's objections.

Fata began serving his sentence with the Bureau of Prisons on August 28, 2015, and he is currently incarcerated at FCI Williamsburg. The full term of his sentence does not expire until August 6, 2058.[1] *See* Exhibit 6 (Inmate Data Sheet)(filed under seal). He is only 55 years old, and his underlying medical conditions are not terminal. Any conditions he has are managed with medication and by the medical staff at Williamsburg. Nevertheless, Fata has moved for

[1]Fata's projected release date on the BOP public website is December 11, 2051, which is calculated by the automatic awarding of good conduct time at the rate of 54 days per year of sentence imposed. Good conduct time may be taken away from an inmate as a sanction imposed for violating disciplinary rules.

compassionate release, citing his medical conditions and the Covid-19 pandemic. Because Fata has not filed a request for compassionate release based upon the Covid-19 pandemic, this Court does not have jurisdiction to rule on the current motion.

Argument

I. The Bureau of Prisons has responded to Covid-19 by protecting inmates and increasing home confinement.

A. The Bureau of Prisons' precautions have mitigated the risk from Covid-19 within its facilities.

The Bureau of Prisons has reacted quickly to confront Covid-19's spread within its facilities. For over almost a decade, the Bureau of Prisons has maintained a detailed protocol for responding to a pandemic. Consistent with that protocol, the Bureau of Prisons began planning for Covid-19 in January 2020.

On March 13, 2020, the Bureau of Prisons began modifying its operations to implement its Covid-19 Action Plan and minimize the risk of Covid-19 transmission into and inside its facilities. *See* BOP Covid-19 Modified Operations Website. Since then, as the worldwide crisis has evolved, the Bureau of Prisons has repeatedly revised its plan. The current plan, which is in effect until June 30, 2020, requires that inmates in every institution be secured in their assigned cells or quarters for at least 14 days to stop the spread of the disease. Only limited group gathering is allowed, and social distancing is maximized. Staff and inmates are

issued face masks to wear in public areas. *See* BOP FAQs: Correcting Myths and Misinformation. And the movement of inmates and detainees between facilities is severely restricted, with exceptions only for medical treatment and similar exigencies.

Every newly admitted inmate is screened for Covid-19 risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are provided with medical evaluation and treatment and are isolated from other inmates until testing negative for Covid-19 or being cleared by medical staff under the CDC's criteria. In areas with sustained community transmission, all staff are screened for symptoms. Staff registering a temperature of 100.4 degrees Fahrenheit or higher are barred from the facility on that basis alone. A staff member with other symptoms can be placed on leave by a medical officer.

Other access to the facilities has likewise been restricted. Contractors are only permitted access if performing essential services, and any contractor who requires access is screened for symptoms and risk factors. Social and legal visits have been suspended to limit the number of people entering the facility and interacting with inmates. But to ensure that relationships and communication are maintained throughout this disruption, the Bureau of Prisons has increased

inmates' telephone allowance to 500 minutes per month. Legal visits are permitted on a case-by-case basis after the attorney has been screened for infection.

Like all other institutions, penal and otherwise, the Bureau of Prisons has not been able to eliminate the risks from Covid-19 completely, despite its best efforts. But the Bureau of Prisons' measures will help federal inmates remain protected from Covid-19 and ensure that they receive any required medical care during these difficult times.

B. The Bureau of Prisons is increasing the number of inmates who are granted home confinement.

The Bureau of Prisons has also responded to Covid-19 by increasing the placement of federal prisoners in home confinement. New legislation now temporarily permits the Bureau of Prisons to "lengthen the maximum amount of time for which [it] is authorized to place a prisoner in home confinement" during the Covid-19 pandemic. Coronavirus Aid, Relief, and Economic Security Act (CARES Act) § 12003(b)(2), Pub. L. No. 116-136, 134 Stat. 281, 516 (Mar. 27, 2020). The Attorney General has also issued two directives, ordering the Bureau of Prisons to use the "various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing Covid-19 pandemic." (03-26-2020 Directive to BOP, at 1; *accord* 04-03-2020 Directive to BOP, at 1). The directives require the Bureau of Prisons to identify the inmates most at risk from Covid-19 and "to consider the totality of circumstances for each individual inmate"

in deciding whether home confinement is appropriate. (03-26-2020 Directive to BOP, at 1).

The Bureau of Prisons' efforts on this point are not hypothetical. Over 2,799 federal inmates have been granted home confinement since the Covid-19 pandemic began, and that number continues to grow. BOP Coronavirus FAQs. As the Attorney General's directives have explained, these home-confinement decisions have required evaluating several criteria:

> 1) Each inmate's age and vulnerability to Covid-19;
>
> 2) Whether home confinement would increase or decrease the inmate's risk of contracting Covid-19; and
>
> 3) Whether the inmate's release into home confinement would risk public safety.

(03-26-2020 Directive to BOP; 04-03-2020 Directive to BOP).

These criteria not only make sense, but also fit the realities of the Covid-19 pandemic far better than any other solution does. The Bureau of Prisons cannot open its facilities' gates indiscriminately and unleash tens of thousands of convicted criminals, en masse. It must focus on the inmates who have the highest risk factors for Covid-19 and are least likely to engage in new criminal activity. This is true not just to protect the public generally, but to avoid the risk that a released defendant will bring Covid-19 back into the jail or prison system if he violates his terms of release or is caught committing a new crime. *See* 18 U.S.C.

§ 3624(g)(5); 34 U.S.C. § 60541(g)(2). The Bureau of Prisons' home-confinement initiative thus appropriately focuses on the inmates who will most benefit from release and whose release is least risky.

The Bureau of Prisons must also balance another important consideration: how likely is an inmate to abide by the CDC's social-distancing protocols or other Covid-19-based restrictions on release? Many inmates—particularly those who have been convicted of serious offenses or have a lengthy criminal record—have already proven unwilling to abide by society's most basic norms. It is more than reasonable to evaluate whether a particular inmate would adhere to release conditions, social-distancing protocols, and stay-at-home orders during the pandemic. And if a prisoner would be unlikely to take any Covid-19 restrictions seriously, he would also be far more likely than the general public to contract and spread Covid-19 if released.

The Bureau of Prisons also must account for the current strain on society's first responders. Police departments in many cities have stretched to their limits as officers have either contracted Covid-19 or been placed in quarantine. Some cities, including Detroit, have seen spikes in shootings and murders. Child sex predators have taken advantage of bored school-aged kids spending more time online. Covid-19-based fraud schemes have proliferated. There are real risks to public safety, and those risks will only increase if communities are faced with a sudden

influx of prisoners. That is just one reason, among many, why the Bureau of Prisons must focus on releasing inmates who are the most vulnerable to Covid-19 and whose release will least endanger the public.

Finally, the Bureau of Prisons' home-confinement initiative allows it to marshal and prioritize its limited resources for the inmates and circumstances that are most urgent. For any inmate who is a candidate for home confinement, the Bureau of Prisons must first ensure that his proposed home-confinement location is suitable for release, does not place him at an even greater risk of contracting Covid-19, and does not place members of the public at risk from him. It must assess components of the release plan, including whether the inmate will have access to health care and other resources. It must consider myriad other factors, including the limited availability of transportation right now and the probation department's reduced ability to supervise inmates who have been released. All of those decisions require channeling resources to the inmates who are the best candidates for release.

Those types of system-wide resource-allocation decisions are difficult even in normal circumstances. That is why Congress tasked the Bureau of Prisons to make them and has not subjected the decisions to judicial review. 18 U.S.C. § 3621(b) ("Notwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court."); *United*

States v. Patino, No. 18- 20451, 2020 WL 1676766, at *6 (E.D. Mich. Apr. 6, 2020) ("[A]s a general rule, the Court lacks authority to direct the operations of the Bureau of Prisons."). It is especially true now, given the Bureau of Prisons' substantial and ongoing efforts to address the Covid-19 pandemic.

II. The Court should deny Fata's motion for compassionate release.

Fata's motion for a reduced sentence should be denied. A district court has "no inherent authority . . . to modify an otherwise valid sentence." *United States v. Washington*, 584 F.3d 693, 700 (6th Cir. 2009). Quite the contrary: a district court's authority to modify a defendant's sentence is "narrowly circumscribed." *United States v. Houston*, 529 F.3d 743, 753 n.2 (6th Cir. 2008). Absent a specific statutory exception, a district court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). Those statutory exceptions are narrow. *United States v. Ross*, 245 F.3d 577, 586 (6th Cir. 2001). Compassionate release under 18 U.S.C. § 3582(c)(1)(A) is equally narrow.

First, compassionate release requires exhaustion. If a defendant moves for compassionate release, the district court may not act on the motion unless the defendant files it "after" either completing the administrative process within the Bureau of Prisons or waiting 30 days from when the warden at his facility received his request. 18 U.S.C. § 3582(c)(1)(A); *United States v. Raia*, 954 F.3d 594, 595–96 (3d Cir. 2020). Because this requirement is a statutory one and not judicially

crafted, it is mandatory. *Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 751 (6th Cir. 2019).

Second, even if a defendant exhausts, he must show "extraordinary and compelling reasons" for compassionate release, § 3582(c)(1)(A), and release must be "consistent with" the Sentencing Commission's policy statements. As with the identical language in § 3582(c)(2), compliance with the policy statements incorporated by § 3582(c)(1)(A) is mandatory. *See Dillon v. United States*, 560 U.S. 817 (2010); *United States v. Jackson*, 751 F.3d 707, 711 (6th Cir. 2014). To qualify, a defendant must have a medical condition, age-related issue, family circumstance, or other reason that satisfies the criteria in USSG § 1B1.13(1)(A) & cmt. n.1, and he must "not [be] a danger to the safety of any other person or to the community," USSG § 1B1.13(2).

Third, even if a defendant is eligible for compassionate release, the district court may not grant the motion unless the factors in 18 U.S.C. § 3553(a) support release. 18 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13. As at sentencing, those factors require the district court to consider the defendant's history and characteristics, the seriousness of the offense, the need to promote respect for the law and provide just punishment for the offense, general and specific deterrence, and the protection of the public. 18 U.S.C. § 3553(a).

A. The Court is barred from granting release because Fata has not exhausted his administrative remedies.

The Court must dismiss Fata's motion, because he has not satisfied the exhaustion requirement for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Until recently, only the Bureau of Prisons could move for compassionate release. The First Step Act of 2018 amended the statute, permitting defendants to move for it too. First Step Act § 603(b), Pub. L. No. 115-319, 132 Stat. 5194, 5239 (Dec. 21, 2018).

But the provision permitting a defendant-initiated motion includes an exhaustion requirement. *Id.* A district court may not grant a defendant's motion for compassionate release unless the defendant files it "after" the earlier of (1) the defendant "fully exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or (2) "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." 18 U.S.C. § 3582(c)(1)(A); *United States v. Raia*, 954 F.3d 594, 595 (3d Cir. 2020).

Statutory exhaustion requirements, like the one in § 3582(c)(1)(A), are mandatory. *Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016). As the Sixth Circuit has explained, there is a "sharp divide" that "separates statutory from prudential exhaustion." *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 751 (6th Cir. 2019).

Unlike judicially crafted requirements, statutory requirements may not be excused, even to account for "special circumstances." *Ross*, 136 S. Ct. at 1856–57.

Section 3582(c)(1)(A) is likely even a *jurisdictional* bar on the Court's authority to consider a motion for compassionate release. The Sixth Circuit has labeled § 3582(c)'s limitations "jurisdiction[al]." *Williams*, 607 F.3d at 1125. The statute "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994). And it delineates "when, and under what conditions," a court may exercise its "'adjudicatory authority.'" *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007) (quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005)). But even if § 3582(c)'s requirements were not considered truly jurisdictional, they would still be mandatory claim-processing rules that must be enforced when a party "properly rais[es]" them. *Eberhart*, 546 U.S. at 19 (2005). Thus, regardless of how it is labeled, § 3582(c)(1)(A)'s exhaustion requirement is mandatory. *See Ross*, 136 S. Ct. at 1856–57; *United States v. Marshall*, 954 F.3d 823, 826–29 (6th Cir. 2020).

The only court of appeals to address this question has agreed. In *United States v. Raia*, 954 F.3d 594, 595–97 (3d Cir. 2020), the Third Circuit held that the Covid-19 pandemic does not permit inmates or district judges to bypass § 3582(c)(1)(A)'s exhaustion requirement. Rather, "[g]iven BOP's shared desire for a safe and healthy prison environment, . . . strict compliance with

§ 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." *Id.* at 597.

The majority of district courts to decide this question nationwide, including many in our district, have similarly held that a "failure to exhaust" under § 3582(c)(1)(A) "cannot be excused, even in light of the Covid-19 pandemic." *United States v. Alam*, No. 15-20351, 2020 WL 1703881, at *2–*3 (E.D. Mich. Apr. 8, 2020); *accord United States v. Shah*, No. 16-20457, 2020 WL 1934930, at *2 (E.D. Mich. Apr. 22, 2020); *United States v. Mathews*, No. 14-CR-20427-02, 2020 WL 1873360, at *2–*3 (E.D. Mich. Apr. 15, 2020). As one of the those decisions has explained, the few courts that have excused exhaustion under § 3582(c)(1)(A) have mistakenly relied on cases addressing *judge-made* exhaustion requirements, not *statutory* exhaustion requirements. *Mathews*, 2020 WL 1873360, at *2–*3.

Congress's reasons for § 3582(c)(1)(A)'s exhaustion requirement apply with even greater force during the COVID-19 pandemic. The Bureau of Prisons is already responding to the pandemic—not just through heightened safety measures, but by evaluating its entire prison population for home confinement. By requiring a defendant to exhaust, § 3582(c)(1)(A) gives the Bureau of Prisons the opportunity to gather his medical documentation and other records, evaluate his request, and decide in the first instance whether it justifies either compassionate release or some

other form of relief. As the Third Circuit observed: "Given BOP's shared desire for a safe and healthy prison environment, . . . strict compliance with § 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." *Raia*, 954 F.3d at 597.

Those requirements also mean that an inmate may not seek compassionate release here on a different ground than the one he raised during the administrative process. The whole point of § 3582(c)(1)(A)'s exhaustion requirement is to ensure that the Bureau of Prisons has the opportunity to evaluate and consider an inmate's request first, while allowing the inmate to seek relief in court if the Bureau of Prisons denies or fails to act upon the request. So, an inmate's pre-pandemic request for compassionate release—which "did not mention [the] COVID-19 concerns" that "are central to this [most recent] motion"—does not satisfy § 3582(c)(1)(A)'s requirements, because "[p]roper exhaustion necessarily requires the inmate to present the same factual basis for the compassionate-release request to the warden." *United States v. Mogavero*, No. 15-00074, 2020 WL 1853754, at *2 (D. Nev. Apr. 13, 2020); *see also United States v. Jenkins*, 2020 WL 1872568, at *1 (D. Neb. Apr. 14, 2020); *United States v. Valenta*, 2020 WL 1689786, at *1 (W.D. Pa. Apr. 7, 2020). An inmate seeking relief based on Covid-19 must first make *that* request to the Bureau of Prisons before seeking relief in court. *See Hasan v. Ashcroft*, 397 F.3d 417, 419–20 (6th Cir. 2005).

Fata did not exhaust his administrative remedies. Fata has only requested compassionate release previously for non-Covid-19 related reasons. *See* Defendant's Exhibit A. Fata, therefore, has not satisfied § 3582(c)(1)(A)'s mandatory exhaustion requirement.

B. There are no extraordinary and compelling reasons to grant Fata compassionate release.

Even if Fata had exhausted his administrative remedies, compassionate release would be improper. Compassionate release must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Congress tasked the Sentencing Commission with "describe[ing] what should be considered extraordinary and compelling reasons for [a] sentence reduction" under § 3582(c)(1)(A), as well developing "the criteria to be applied and a list of specific examples" for when release is permitted. 28 U.S.C. § 994(t).

Because the Sentencing Commission has fulfilled Congress's directive in USSG § 1B1.13, that policy statement is mandatory. Section 3582(c)(1)(A)'s reliance on the Sentencing Commission's policy statements mirrors the language governing sentence reductions under 18 U.S.C. § 3582(c)(2) for retroactive guideline amendments. *Compare* § 3582(c)(1)(A) *with* § 3582(c)(2). When Congress uses the same language in the same statute, it must be interpreted in the same way. *Marshall*, 954 F.3d at 830. In both contexts, then, the Sentencing Commission's restraints "on a district court's sentence-reduction authority [are]

absolute." *United States v. Jackson*, 751 F.3d 707, 711 (6th Cir. 2014); *accord Dillon v. United States*, 560 U.S. 817, 830 (2010).

The First Step Act did not change that. It amended only *who* could move for compassionate release under § 3582(c)(1)(A). It did not amend the substantive requirements for release. *United States v. Saldana*, No. 19-7057, 2020 WL 1486892, at *2–*3 (10th Cir. Mar. 26, 2020); *United States v. Mollica*, No. 2:14-CR-329, 2020 WL 1914956, at *4 (N.D. Ala. Apr. 20, 2020). Section 1B1.13 remains binding.

Section 1B1.13 cabins compassionate release to a narrow group of defendants who are most in need. That policy statement limits "extraordinary and compelling reasons" to four categories: (1) the inmate's medical condition; (2) the inmate's age; (3) the inmate's family circumstances; and (4) other reasons "[a]s determined by the Director of the Bureau of Prisons," which the Bureau of Prisons has set forth in Program Statement 5050.50. USSG § 1B1.13 cmt. n.1. As the Tenth Circuit recently explained, a district court "lack[s] jurisdiction" to grant compassionate release when a defendant's circumstances do not fall within those categories. *Saldana*, 2020 WL 1486892, at *3.

Fata relies on his age and medical condition, but he is not eligible for compassionate release on either basis. As explained in the commentary and application notes for Section 1B1.13, the medical condition of a defendant may

serve as an "extraordinary and compelling" reason for compassionate release only if the condition is a "terminal illness" with an end of life trajectory, or the condition "substantially diminishes the ability of the defendant to provide self-care" and the defendant "is not expected to recover" from the condition. USSG § 1B1.13 cmt. n.1 (A). None of the medical conditions Fata describes meets these standards.

> Fata is 55 years old and alleges he suffers from the following conditions:
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> Type-2 diabetes with diabetic neuropathy and vision complications; immune-compromised with persistent low white blood cell count and low neutrophil count; gastro-intestinal bleeding and esophageal acid reflux with a history of H. Pylori gastritis; and mild cognitive impairment/early dementia.

Defendant's Motion at pg.7. Fata relies on these medical conditions to warrant his early release from prison; however, there is no evidence in the medical records provided by the Bureau of Prisons that his health conditions rise to the level of a terminal illness or a condition that "substantially diminishes" his ability to provide self-care within his correctional facility. *See* USSG § 1B1.13 cmt. n.1. To the contrary, the medical records show that the ailments described above are either exaggerated, mild, or managed:[2]

- Diabetes: Although Fata has adult onset (Type II) diabetes, it is "well controlled" and managed without insulin. *See* Exhibit 1 (BOP 2019 Medical Records, pg. 52, 10/31/19); Exhibit 2 (BOP 2020 Medical Records, pg. 1); Exhibit 5 (Inmate Health Summary). And, Fata's 10 year risk for ASCVD (Atherosclerotic Cardiovascular Disease)(which

[2]Exhibits 1 - 5 are medical records from the Bureau of Prisons. These exhibits have been filed under seal.

considers his diabetes diagnosis) is less than 5%. *See* Exhibit 1 (BOP 2019 Medical Records, pg. 49, 1/17/19).

- Neuropathy: Although Fata complained to the BOP of neuropathy and/or pain in his feet, the BOP medical staff repeatedly denied his requests for diabetic shoes following an examination and because he is not insulin dependent. *See* Exhibit 2 (BOP 2020 Medical Records, pg. 7: he has "Alternate Institutional Shoes" but not diabetic shoes; pg. 15: alternate institutional shoes ordered from 02/13/2020-01/31/2021; pg. 51: in response to Fata's complaints of neuropathy in his feet and a request for diabetic shoes, the request was denied following an examination of his feet); Exhibit 1 (BOP 2019 Medical Records, pg. 7: he still has pain in both feet related to DM, but Cymbalta is of benefit; pg. 17: Fata is taking 30 mg of Duloxetine; Fata self-reported on 6/3/19 that it is "helpful, can walk better and exercise"; pg. 33: on 4/23/19, Fata self-reported that "Cymbalta is a Godsend" for his neuritis; pg. 43: on 3/20/19, Fata was denied diabetic shoes because he is not on insulin and Fata self-reported that "Duloxetine is really working for him"; pg. 127: on 12/26/19, Fata was denied diabetic shoes because "his sugar is well controlled" and did not meet criteria for diabetic shoes; pg. 128: following a "Diabetic Foot Screening" on 12/17/19, Fata was denied diabetic shoes; pg. 162: on 3/26/19, Fata's request for diabetic shoes was denied because he is "not qualified")

- Vision complications: Fata wears glasses but every test for "retinopathy" due to his diabetes has been negative and his vision is within "normal limits." *See* Exhibit 2 (2020 BOP Medical Records, pgs. 5, 12); Exhibit 1 (2019 BOP Medical Records, pgs. 3, 89, 90).

- Immune compromised: If Fata's immune system is compromised in any significant manner other than by his diabetes, his BOP medical records do not contain any specific notation, concern, or special accommodations.

- Gastro-intestinal bleeding: Fata reported blood in his stool in 2019. Medical staff reported that it was likely caused by an internal hemorrhoid based upon his colonoscopy in 2016 but scheduled a consult. *See* Exhibit 1 (BOP 2019 Medical Records, pg. 22); Exhibit 4 (Gen. Surgery Consult). When Fata was transferred to FCI Milan in 2019 to appear at his evidentiary hearing, the Clinical Director at FCI Milan noted that FCI Williamsburg scheduled Fata for a consult, but

the Clinical Director determined that a repeat colonoscopy was not necessary. *See* Exhibit 3 (BOP 2019 Consultation Request); Exhibit 1 (BOP 2019 Medical Records, pgs. 17, 18).

- Acid reflux: Fata was diagnosed with "GERD" in 1997; the BOP is providing Omeprazole to treat the condition. *See* Exhibit 1 (2019 BOP Medical records, pg.17). In April 2020, Fata reported that he wanted to purchase omeprazole but it was not on the commissary list. Medical staff asked Fata for his commissary list and told him it would be approved. Fata decided he would wait and request it from commissary later. *See* Exhibit 2 (2020 BOP Medical records, pg. 9)

- Mild cognitive impairment/early dementia: Fata claimed some typical middle age memory loss to BOP medical staff in an email on 11/7/19 stating, "I have been progressively noticing that I forget to remember words in the thread of my thoughts. As example, after I prepare a cup of coffee, I even forget whether I have put sugar. Many times, I forget where I placed my ID . . . I am afraid because my mom had dementia." *See* Exhibit 1 (2019 BOP Medical Records, pg. 141). However, there is no note of "early dementia" in the medical records. Fata's score of 22 out of 30 on a "Mini-Mental State Examination" administered on 11/22/19 indicates "mild cognitive impairment" only. *See* Exhibit 1 (2019 BOP Medical Records, pg.134)

The same conclusion was reached by the Warden when Fata submitted a request for compassionate release based upon peripheral neuropathy, diabetes, esophageal reflex and memory loss. Specifically, the Warden of FCI Williamsburg wrote as follows:

> . . . medical staff have determined that you do not meet the criteria under Debilitated Medical Condition. The medical evaluation concluded that you are not capable of only limited self-care nor confined to a bed or chair more than 50 percent of waking hours.
>
> The evaluation concluded that all of your conditions are well-controlled though medication. Additionally, you are capable of

> performing activities of daily living (ADL) without assistance and are capable of carrying out self-care.

See Defendant's Exhibit B (Response to Inmate Request to Staff).

Fata is not correct in suggesting that the Covid-19 pandemic should alter this analysis here. Even assuming that a defendant's risk from Covid-19 might make the difference in his eligibility for release under § 1B1.13 due to Type II diabetes (*see* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#diabetes), Fata's particular circumstances do not satisfy that standard. Fata is incarcerated at FCI Williamsburg and, as of May 18, there is not even one case of the virus at Williamsburg. *See* https://www.bop.gov/coronavirus/index.jsp (when a facility is not present on the map, there are no confirmed cases of the virus at the facility).[3] Thus far, FCI Williamsburg's protocols have successfully managed his conditions and the pandemic. Therefore, there is no reason to release Fata based upon his current conditions. *See United States v. Austin,* 2020 WL 2507622 (E.D. Mich. May 15, 2020)*(*compassionate release denied to Devil's Disciples gang member with heart disease and Crohn's disease because, *inter alia*, there are no cases at FCI Allenwood and risk of contracting virus is higher in Michigan); *United States v. Vence-Small*, 2020 WL 2214226 (D. Conn. May 7, 2020)(52-year-old fraud

[3]The absence of any cases of the virus at FCI Williamsburg was confirmed by regional counsel for the Bureau of Prisons on May 18, 2020.

defendant has diabetes and hypertension; release was denied because there were no cases of the virus at Hazleton); *United States v. Gill*, 2020 WL 2084810 (E.D. Cal. Apr. 30, 2020)(release denied for 61-year-old who suffers from cirrhosis of the liver, which has resulted in multiple hospitalizations for hepatic encephalopathy, and also suffers from depression, anemia, esophageal reflux, lower back pain, hyperlipidemia, polyneuropathy, and Type II diabetes; these conditions are managed); *United States v. Gamble*, 2020 WL 1955338 (D. Conn. Apr. 23, 2020)(release was denied; diabetes is under control and COVID-19 risk is higher in the community); *United States v. Shah*, 2020 WL 1934930 (E.D. Mich. Apr. 22, 2020)(release denied; defendant suffers from diabetes and hypertension, but there are no cases at his facility and BOP is making efforts to protect inmates); *United States v. Wright*, 2020 WL 1922371, at *3 (S.D.N.Y. Apr. 20, 2020)(release denied for 35-year-old who has diabetes; it appears "the BOP has been successful at limiting the spread of the virus . . . That result is possibly explained by the fact that, despite the close proximity of inmates, the BOP is able to impose restrictions on visitors and restrictions on internal movements that are more difficult to impose outside prison walls. There is no reason to believe at this juncture that [the defendant] would be at any less of a risk from contracting COVID-19 if he were to be released."). Thus, Fata is not at high risk in his current place of incarceration, and Fata's speculation on this point is not enough to satisfy § 1B1.13's criteria.

The crux of Fata's claim is a generalized assertion that he could contract COVID-19 and that the virus could jeopardize his health, and that the risk of those things happening in prison is greater than the risk of them happening on release. But, Fata sidesteps an important consideration in that analysis: the possibility that he could still contract COVID-19, even if released. COVID-19 is—and will continue to be—widespread among the public for an indefinite period of time. As of May 18, 2020, FCI Williamsburg has zero cases of COVID-19. In stark contrast, as of May 18, 2020, there have been 51,915 confirmed positive COVID-19 cases and 4,915 deaths in the state of Michigan. *See* https://www.michigan.gov/coronavirus/. Heightening and complicating the danger of release even further, Fata has no trustworthy release plan to an identified location. In his 2019 pre-COVID request for compassionate release, he represented to the Warden of FCI Williamsburg that he would reside with his ex-wife and children. *See* Defendant's Exhibit A. However, Fata lied to the Warden in his attempt to seek compassionate release. Fata will not be accepted at any time by his ex-wife. *See* Exhibit 7 (5/14/20 Letter from Penny Parker, Esq.); Exhibit 8 (5/13/20 Letter from Penny Parker, Esq.)(filed under seal). Thus, at this time, Fata does not face a greater risk in prison than he would if released. *See United States v. Austin,* 2020 WL 2507622 (E.D. Mich. May 15, 2020)*(*there are no cases at FCI Allenwood and risk of contracting virus is higher in Michigan); *United States v.*

Gamble, 2020 WL 1955338 (D. Conn. Apr. 23, 2020)(diabetes is under control, COVID-19 risk is higher in the community); *United States v. Feiling*, 2020 WL 1821457 (E.D. Va. Apr. 10, 2020)(71-year-old suffers from a variety of ailments putting him at risk of an adverse outcome from COVID-19, but he does not show a greater risk of contracting the disease in prison, in relation to his risk in the community).

In addition, the Covid-19 pandemic by itself does not qualify as the type of inmate-specific reason permitting compassionate release. As the Third Circuit explained, "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 and professional efforts to curtail the virus's spread." *Raia*, 954 F.3d at 597. The Bureau of Prisons has worked diligently to implement precautionary measures reducing the risk from Covid-19 to Fata and other inmates. Nothing in the statute or USSG § 1B1.13 supports the unbounded interpretation of § 3582(c)(1)(A) that he now asks this Court to adopt. *See Raia*, 954 F.3d at 597.

Fata is also ineligible for compassionate release for another reason: he remains a danger to the community. Section 1B1.13(2) only permits release if a defendant is "not a danger to the safety of any other person or to the community." Fata's horrific crimes alone, committed solely for greed for such a long period of

time, establish his danger. As stated by a family member of one of Fata's victims, "Fata may have been convicted of fraud but he in all ways is a violent offender . . . instead of using a gun, a knife or physical intimidation, he used chemotherapeutic agents as his weapon and his education as intimidation." *See* Exhibit 9, pg. 13 (filed under seal). In addition, Fata now refuses to accept responsibility for his deliberate poisoning of his patients, and his retraction of responsibility has been riddled with lies and deception in his legal submissions to the Court and in his testimony in the courtroom. His total failure to accept the physical and emotional harm he has caused to thousands of victims and their families and his ongoing calculated lying means he is capable of committing further fraudulent mayhem and physical atrocities. This factor, therefore, forecloses eligibility and relief for Fata as well.

C. The factors in 18 U.S.C. § 3553(a) strongly weigh against compassionate release.

Even when an inmate is statutorily eligible for a sentence modification based on "extraordinary and compelling reasons," compassionate release is not necessarily appropriate. Before ordering relief, the Court must consider the factors set forth in 18 U.S.C. § 3553(a) and determine that release is still appropriate. So even if the Court were to find Fata eligible for compassionate release, the § 3553(a) factors should still disqualify him.

In order to "reflect the seriousness of the offense[s], to promote respect for the law, and to provide just punishment for the offense[s]," 18 U.S.C. § 3553(a)(2)(A), Fata cannot be released now when not even five years has passed since his sentencing in July 2015. Fata's crimes were extraordinarily evil. As illustrated by the Victim Impact Statements submitted during the sentencing proceedings (R. 135, Exhibit A: Victim Impact Statement Excerpts), the physical and emotional impact of Fata's crimes is staggering. Serving his full term of 45 years in prison appropriately recognizes the seriousness and magnitude of this scheme and the effect it had on its victims. Fata's crimes will have physical and emotional effects on his victims and their families for life. So, justice demands that Fata should be serving his life behind bars. Fata victims have placed their trust in the system of justice. Ensuring that our justice system remains steadfast in punishing Fata will, in some measure, help these victims and their families in their healing process. An unjust release of Fata would devastate his victims and their families. *See* Exhibit 9 (last names A-J), Exhibit 10 (last names K-V) and Exhibit 11(last names W-Z)(Victim Statements submitted in response to Fata's Motion for Reduction in Sentence)(filed under seal). Fata's victims and their families have involuntarily lived with and suffered through the consequences of Fata's criminal activity; so, the only just punishment is for Fata to remain in prison as a consequence of his criminal activity.

III. If the Court were to grant Fata's motion, it should stay the release order pending any appeal by the United States.

If the Court were inclined to grant Fata's motion, despite the government's arguments above, the government would request that the Court's release order include two provisions. First, the Court should order that he be subjected to a 14-day quarantine before release. Second, the Court should stay its order pending any appeal by the government to the Sixth Circuit. More specifically, the government would request that if the government files a notice of appeal before the 14-day quarantine ends, the Court's order would automatically be stayed through the completion of any appeal proceedings.

Conclusion

Fata's motion should be denied.

Respectfully submitted,

MATTHEW SCHNEIDER
United States Attorney

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Date: May 19, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing (with the exception of the Government's sealed Exhibits, to:

Jeremy Gordon
Attorney for Farid Fata

I further certify that I served a copy of the Government's sealed Exhibits, together with the motion and order to seal via secure email to:

Jeremy Gordon
Attorney for Farid Fata

s/*Sarah Resnick Cohen*
SARAH RESNICK COHEN
Assistant U.S. Attorney

Dated: May 19, 2020

KECSKES, GADD & PARKER, PC

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May 14, 2020

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VIA EMAIL AND
FIRST CLASS MAIL

Re: Farid Fata
Case No. 2:13-cr-20600

Dear Ms. Cohen,

Please be advised that I represent Samar Faraj. Ms. Faraj was previously married to Farid Fata. Their divorce was final in 2016.

We have learned that Mr. Fata has filed a motion for a sentence reduction, arguing for compassionate release due to his health and the current COVID-19 pandemic. Mr. Fata's motion includes as Exhibit A a request he previously submitted to the Warden of FCI Williamsburg on November 22, 2019, seeking compassionate release/reduction in sentence. In that form, his release plan and housing states that he "would join my family: ex-wife and 3 children." (Bottom of page 3 of this exhibit.)

I will be very clear: Mr. Fata is not welcome in Ms. Faraj's home or her life. While they may have once been married and had children together, Mr. Fata has no place with either her or the children. Any assistance proffered by Mr. Fata is neither needed nor wanted.

Mr. Fata is gravely mistaken in believing there is any place for him with Ms. Faraj or the children. Ms. Faraj divorced him with good reason and does not want him in her life. She has never given him any reason to believe otherwise.

Should you have any questions, or wish to discuss this further, please do not hesitate to contact me.

Very truly yours,

KECSKES, GADD & PARKER, P.C.

Penny A. Parker
(313) 920-3377
pparker@kgplawyers.com

PAP/eag
cc: Ms. Samar Faraj

GOVERNMENT EXHIBIT 7