

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 2:13-cr-20600
)	
FARID FATA,)	Hon. Paul D. Borman
)	
Defendant.)	

**REPLY TO UNITED STATES’ RESPONSE TO MOTION
FOR REDUCTION OF SENTENCE PURSUANT TO
18 U.S.C. § 3582(c)(1)(A)**

Farid Fata (“Fata”), by and through the undersigned counsel, respectfully submits this Reply to the United States’ Response in Opposition to Fata’s Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A). In support thereof, Fata offers the following:

A. *Fata Has Exhausted His Administrative Appeals Consistent with Statute*

As a threshold matter, the Government asserts that Fata has not fully exhausted his administrative appeals because the compassionate release request he submitted to the warden on November 22, 2019, did not reference COVID-19. Of course,

COVID-19 was not known to exist at the time Fata submitted his original request for compassionate release. Nonetheless, Fata has exhausted his administrative appeals and there is nothing that precludes the Court from considering the impact of COVID-19 on the merits of Fata's compassionate release request.

Per statute, a defendant may bring a motion for modification of sentence after either "exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from receipt of such a request by the warden on the defendant's facility, whichever is earlier[.]" 18 U.S.C. § 3582(c)(1)(A). Under the second provision, this Court has proper jurisdiction because more than 30 days have lapsed since the warden received Fata's request. *See United States v. Montez*, No. 15-CR-122-FPG, 2020 WL 2183093, at *2 (W.D.N.Y. May 5, 2020) ("Section 3582(c)(1)(A)'s language is clear: the only exception to the exhaustion requirement is the thirty-day backstop."); *United States v. Kelly*, No. 3:13-CR-59-CWR-LRA-2, 2020 WL 2104241, at *5 (S.D. Miss. May 1, 2020) (the defendant may "bypass the administrative process' by filing a request with the warden and waiting 30 days.").

Moreover, other courts have acknowledged that failure to cite COVID-19 in a request for compassionate release to the BOP does not equate to failure to exhaust one's administrative remedies:

Defendant argues, and the Government agrees, that Defendant has exhausted her administrative remedies based on her February 17, 2020 request for compassionate release. The Court agrees. *While the February 17, 2020 request did not cite COVID-19, the Court finds that Defendant has exhausted her administrative remedies because more than thirty days have lapsed since she petitioned the warden for a commutation or reduction in sentence.*

United States v. Diep Thi Vo, No. 15-CR-00310-BLF-2, 2020 WL 2300101, at *2 (N.D. Cal. May 7, 2020); *see also United States v. Gil*, No. 90-CR-306 (KMW), 2020 WL 2611872, at *2 (S.D.N.Y. May 22, 2020) (“Defendant’s motion is properly before the Court because Defendant has exhausted his administrative remedies with the BOP. The Court takes into account the argument, raised in Defendant’s supplemental submission to the Court, that Defendant’s age and medical conditions place him at serious risk from the COVID-19 pandemic”).

Accordingly, Fata has fully exhausted his administrative remedies, and the Court may consider the impact of COVID-19 on

the merits of Fata's request for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A).

B. *The Guidelines Do Not Foreclose Fata's Motion*

The Government next argues that “[e]ven 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.” (DE 272 at 3). However, in *United States v. Etzel*, the district court noted—as other courts have found—that:

§ 1B1.13, as currently written, would not constrain this Court’s ability to find extraordinary and compelling reasons here. As the Sentencing Commission’s policy statement was not amended after enactment of the FSA “a growing number of district courts have concluded the Commission lacks an applicable policy statement regarding when a judge can grant compassionate release” ... “because the Commission never harmonized its policy statement with the FSA.” *United States v. Mondaca*, 2020 WL 1029024, at *3 (S.D. Cal. Mar. 3, 2020); (citing *Brown*, 411 F. Supp. 3d at 447, 499 (canvassing district court decisions)); see also *United States v. Redd*, 2020 WL 1248493, at *6 (E.D. Va. Mar. 16, 2020) (“[T]here does not currently exist, for the purposes of satisfying the [“FSA’s”] ‘consistency’ requirement, an ‘applicable policy statement.’”)

The Court is persuaded by the reasoning of numerous other district courts and holds that it is ‘not constrained by the BOP Director’s determination of what constitutes extraordinary and compelling reasons for a sentence reduction.’ *United States v. Young*, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020); See also *United States v. Perez*, 2020 WL 1180719, at *2 (D. Kan. Mar. 11, 2020) (“[A]

majority of federal courts have found that the most natural reading of the amended § 3582(c) and § 994(t) is that the district court assumes the same discretion as the BOP director when it considers a compassionate release motion properly before it.”)

United States v. Etzel, No. 6:17-CR-00001-AA, 2020 WL 2096423, at *3 (D. Or. May 1, 2020). Accordingly, this Court can find “extraordinary and compelling” reasons under U.S.S.G. § 1B1.13, cmt. n. 1(D).

C. *Fata Has Established Extraordinary and Compelling Reasons*

In *Diep Thi Vo*, the district court concluded that:

[I]t is undisputed that Defendant suffers from hypertension, and it is well documented that hypertension is associated with increased risk of infection and worse outcomes in lung injury mortality. *See* Center for Disease Control, Groups at Higher Risk for Severe Illness (April 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precuations/groups-at-higher-risk.html>;... *And while there are no confirmed cases of COVID-19 at FCI Dublin, where Defendant is incarcerated, the Court notes that this figure is a function of testing and most prisons and jails are only testing inmates with symptoms.*

United States v. Diep Thi Vo, No. 15-CR-00310-BLF-2, 2020 WL 2300101, at *2 (N.D. Cal. May 7, 2020). (emphasis added).

Like hypertension, the Center for Disease Control also lists Diabetes as a condition that creates a greater risk of serious

illness from COVID-19. (*See* Exhibit A). Further, numerous courts across the country have found such instances of increased risk constitutes “extraordinary and compelling” circumstances within the meaning of 18 U.S.C. § 3582(c)(1)(A). And as the district court in *Diep Thi Vo* noted, the actual number of inmates with COVID-19, whether symptomatic or not, is far likely greater than the numbers currently reported.

Additionally, the Government purports that Fata is safer in South Carolina than Michigan given Michigan’s number of COVID-19 cases. However, Michigan has seen a steady decline since April 2020.¹ Conversely, the rate in South Carolina has rapidly increased over the past month.²

D. *Fata Does Not Present A Danger to the Safety of Any Person or the Community*

Lastly, Fata submits that the 18 U.S.C. § 3553(a) factors demonstrate his rehabilitation efforts and that he is not a danger to the safety of any person or the community. U.S.S.G. § 1B1.13(2). *See* DE 265, at 11; DE 265-4. And finally, although

¹ <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

² <https://www.scdhec.gov/infectious-diseases/viruses/coronavirus-disease-2019-covid-19/sc-testing-data-projections-covid-19>.

Fata's compassionate release—which was originally submitted in November—stated he would reside with his ex-wife and children, Fata has since made new release plans. *See* Exhibit B & C (filed under seal).

Accordingly, Fata respectfully prays that the Court will grant his motion pursuant to 18 U.S.C. § 3582(c)(1)(A).

Respectfully submitted,

/s/ Jeremy Gordon

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served on all counsel of record via the Court's CM/ECF system this 2nd day of June 2020.

/s/ Jeremy Gordon