UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v. -	:	
	:	09 Cr. 414 (RJS)
JAMES NICHOLSON,	:	
Defendant.	:	

THE GOVERNMENT'S OPPOSITION TO THE DEFENDANT'S MOTION FOR RELEASE

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

James Nicholson perpetrated a years-long fraud against victims he selected for their unquestioning trust and lack of sophistication. Drawn from members of his own extended family and others who happened to cross his life's path, Nicholson's victims received his personal assurances that he could safeguard and grow their typically modest investments with little risk and the promise of enormous reward. But his investment firm—founded immediately after he was kicked out of two jobs for misappropriating customers' funds—was a fraud from its inception, funded largely with new investors' contributions washing out old investors' exits and with tens of millions of stolen dollars funneled into Nicholson's own pockets.

On account of the unusually personal nature of Nicholson's fraud and the devastation it wrought on vulnerable victims, this Court sentenced him principally to 40 years' imprisonment in October 2010. That sentence was five years short of the statutory maximum, a grace that the Court said was intended to give Nicholson the chance to finish his life in freedom. After seeking to avoid this sentence through collateral attack and direct appeal, Nicholson now moves for the early termination of his sentence and his immediate release.

Nicholson's motion fails to provide the "extraordinary and compelling" reasons needed to grant early release. But it is extraordinary: it purports to seek Nicholson's release in "the interests of victims." Def. Mot. at 5. The bulk of its effort, however, goes to relitigating arguments that were made and rejected at Nicholson's sentencing, on habeas, and on appeal. The motion should be denied.

BACKGROUND

A. Offense Conduct

James Nicholson swindled more than $100 million from victims selected largely for the trust they placed in him as a member of his family or social circle. The grift lasted for nearly a decade, as Nicholson used new investors' funds to pay out older investors' redemption requests. Along the way, Nicholson pocketed tens of millions of stolen funds for himself and his immediate family's benefit, converting the hard-earned savings of his victims into beachside mansions and private jet travel.

Nicholson founded Westgate Capital in 1999, and ran the firm for the entirety of its fraudulent existence. *See* PSR ¶¶ 9–10; *see also id.* ¶ 73 n.2 (noting that after initially denying it in his presentence interview, "[t]he defendant has since acknowledged that he began fudging the numbers in 1999"). Nicholson never told his investors that he started Westgate after being fired from two consecutive jobs following substantiated allegations of stealing customers' money and lying to cover it up. Nor did Nicholson tell his investors that, because of this prior misconduct, he was banned from the securities industry by the NASD and prohibited from holding himself out as an investment adviser by the New York Attorney General. *See* PSR ¶¶ 94–97, 139 & nn.5–7.

Nicholson never found enduring legitimate success in finance. In his own lawyer's words, Nicholson "had a completely misguided and wrong view of his ability to run a hedge fund . . . [A]lmost from the get-go, Your Honor, he was terrible. Investments began losing money. So what did he do? Rather than the right thing, disclosing the losses to investors and making clear what happened, he begins . . . a cycle of deceiving the investors as to how their investments were actually doing, ultimately starting up new funds, losing more money, and doing it all again and again." Sent'g Tr. 13:15-24. Nicholson's funds lost money from inception and every year thereafter. *See* Gov't Sent'g Mem., Dkt. 72 at 7–8. To cover up the losses and induce additional investments,

Nicholson distributed false reports and phony account statements. *See id.* at 5. He told investors that his funds' financials were audited, but the purportedly independent firm was a shell company that Nicholson created to perpetuate his fraud. *See id.* at 5–6.

Many of Nicholson's victims fit a particular profile: they put special trust in Nicholson as a member of his extended family, and asked him to help grow their modest savings during moments of great need. K.F. was just one example of many.[1] *See* Sent'g Tr. 37:7–38:11. In June of 2008, K.F.'s 30-year-old husband died in a car accident, leaving her with their two children and little more than a $200,000 life insurance payout with which to raise them. *Id.* She approached Nicholson—married to her mother's cousin—"to put the money in an investment and make sure that the children are taken care of," as her father explained at Nicholson's sentencing. *Id.* As K.F. wrote to the Court, during an August 2008 phone call, Nicholson "explained he knew exactly what to do with the money stating that the investment was 99% guaranteed to make money, and rarely ever lost money." Dkt. 36-12 at 1–2. In December 2008—four months after taking what he knew to be a young widow's life insurance payment—Nicholson bought a Hamptons mansion for $27 million. *See* PSR ¶ 139. Three months later, he was arrested and K.F. found out that the money she was counting on to raise her two young children was gone. Outside of his extended family, Nicholson found other victims who placed special trust in his assurances that their money would be safe in his hands. J.S. was the maid of honor at Nicholson's wedding. *See* Sent'g Tr. 51:24-25. She invested all of her son's college fund, and all of her own retirement savings, with Nicholson. *Id.* at 52:1-13. She followed that up with the entirety of her 89-year-old mother's modest life savings. *Id.* at 52:16–53:6. Nicholson stole it all. As described below, this Court heard dozens and

[1] The names of victims referenced in this memorandum appear in full elsewhere on the public docket, but are referred to by their initials in this filing to provide a measure of privacy.

dozens more stories along similar lines, both in letters and from victims who came to speak at Nicholson's sentencing hearing.

Nicholson's scheme took in more than $218 million in cash from deceived investors. *See* Gov't Sent'g Mem., Dkt. 72 at 6. Nearly half, or 43%, of those funds were used to meet previous investors' redemption requests and perpetuate the fraud. *Id.* Another third, or 35%, vanished as trading losses. *Id.* More than $36 million of his investors' money was cruelly converted to his personal use, *id.*, fueling a lavish lifestyle of beach houses and private jets underwritten by the retirement accounts and college funds of those who trusted him to safeguard their savings.

B. Procedural History

1. Charges and Conviction

On April 23, 2009, Nicholson was indicted for securities fraud, investment adviser fraud, mail fraud, and structuring of certain bank withdrawals. On December 11, 2009, he pleaded guilty to the three fraud counts, pursuant to a plea agreement that carved out a dispute about the loss amount attributable to his scheme.

After his arrest, Nicholson demonstrated an inability or unwillingness to acknowledge the full scope of his crimes. During his presentence interview, Nicholson insisted that Westgate was a legitimate business for its first five years, only to acknowledge, after being confronted with contradictory evidence, "that he began fudging the numbers in 1999," the firm's first year. PSR at 44–45. Nicholson also wrote self-serving purported apology letters to certain of his victims that the Probation Office described as "less than stellar in both understanding and accepting responsibility for his wrongful conduct," *id.* at 44, and that one victim told this Court reflected "the gall of this man," Sent'g Tr. at 58:1-7.

2. Sentencing

This Court conducted extensive sentencing proceedings. On May 28, 2010, following an evidentiary hearing, the Court found that losses to Nicholson's investors exceeded $100 million. Between March 4 and June 24, 2010, more than one hundred victims sent letters to the Court describing the financial, mental, and physical harms they had endured from Nicholson's crimes. *See* Dkts. 36, 38, 39, 41, 46, 49, 52, 61. Nicholson's counsel submitted four sentencing memoranda, *see* Dkts. 44, 48, 51, 70, which extensively criticized the loss enhancement in fraud cases and sought a sentence "substantially below" the Guidelines range of 360 to 540 months' imprisonment, *see* Dkt. 70 at 7–13, 16.

On October 29, 2010, the Court conducted a two-hour sentencing hearing. Nine victims attested to their experiences and described the personal nature of Nicholson's frauds against them and their loved ones. *See* Sent'g Tr. 34:9–68:17. Nicholson's counsel reiterated the argument that "the resulting sentencing guidelines, so driven by that loss number, substantially overstate the nature of the conduct." *Id.* at 15:21–23. And Nicholson himself addressed the Court and his victims, stating, among other things, that "Westgate Capital did not start with a criminal purpose" and "[m]y intentions were good but unfortunately, when we suffered losses, my actions became criminal." *Id.* at 69:5–8.

The Court described at length its decision to impose a 40-year sentence, five years short of the statutory maximum that capped the Guidelines range. *See* Sent'g Tr. 69:14–77:22. After analyzing the Section 3553(a) factors, the Court agreed with defense counsel that the Guidelines are only "a crude measure" of culpability and acknowledged the impact of a lengthy sentence on Nicholson and his family. *Id.* at 69:15–72:25. The Court also recognized that some victims wished to see a maximum 45-year sentence, but stated that it was "resisting that because I think a 40-year

sentence allows Mr. Nicholson at least the hope of living the last years of his life as a free man." *Id.* at 76:2–6.

C. Nicholson's Previous Efforts to Vacate or Reduce His Sentence

1. Habeas Petition and Direct Appeal

In June 2011, Nicholson filed a petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. *Nicholson v. United States*, 11 Cv. 3835 (RJS), 2014 WL 4693615, at *3 (S.D.N.Y. Sept. 22, 2014). In denying Nicholson's petition, this Court noted that "it would have imposed the same sentence of forty years' imprisonment even if counsel had made, and preserved, every argument raised in [the habeas petition]. Indeed, the forty-year sentence was not the result of a mechanical application of the Guidelines. It was, instead, a careful assessment and balancing of the various factors identified by Congress and the Supreme Court as relevant to the calculation of a criminal sentence." *Id.* at *10.

The Second Circuit later affirmed this Court's sentence and judgment of conviction and its denial of Nicholson's habeas petition. *United States v. Nicholson*, 638 F. App'x 40 (2d Cir. 2016) (summary order). The Circuit reiterated that Nicholson's 40-year sentence was not a function of simple deference to the Guidelines. This Court, it found, "did not rely only on the $100 million total loss that triggered Nicholson's Guidelines enhancement, but also on its review of hundreds of victims' letters, and on the in-court statements of nine victims. It was this case-specific information that put Nicholson's crime in context, revealing the identified loss to have been sustained by hundreds of individuals of modest means, many of whom lost their life savings." *Nicholson*, 638 F. App'x at 42.

2. Previous Application for a Reduction in Sentence

Nicholson submitted a letter dated June 19, 2020, to Warden James Petrucci at FCI Otisville, "seeking compassionate release in order to provide for my children and care for my

mother." Ex. A (the "2020 Application"). The 2020 Application described, among other things, the Nicholson family's loss of Nicholson's father's public pensions upon his passing, and stated that Nicholson's son's "ability to pay for college is also in doubt." 2020 Application at 2. Nicholson told Warden Petrucci that his moving for a sentence reduction "would allow me to reunite with my children [and] support them financially." *Id.* Nicholson's 2020 Application also repeatedly characterized his crime—stealing more than $100 million from hundreds of vulnerable, small-time investors—as "a poor choice . . . not [to] disclose the losses." *See* 2020 Application at 10; *see also id.* at 3–4 (describing offense as never "find[ing] the courage to disclose the losses" and as "a visceral reaction to Lehman's undoing"). Nicholson's 2020 Application was denied on July 22, 2020. *See* Ex. B. According to BOP records, Nicholson never appealed the denial of his 2020 Application.

D. Instant Motion

Nicholson filed the instant motion for a sentence reduction on June 21, 2023. Dkt. 114.[2] The motion seeks to reduce Nicholson's sentence from 40 years' imprisonment to roughly 14.5 years of time served.[3] It advances several overlapping grounds. Nicholson starts by invoking "the

[2] In a letter dated July 17, 2023, Nicholson seeks to supplement his motion with reference to Part I of the appellant's brief in *United States v. Gonzalez*, Second Circuit Case No. 23-6243-cr. (Dkt. 117). In *Gonzalez*, the appellant argues that the practice of sitting by designation is unconstitutional and that the designation order authorizing the Court to sit in the district court to complete unfinished business does not comport with the statute authorizing designation, 28 U.S.C. 291(b). This Court recently considered and rejected those arguments in another case. *United States v. Feagins*, 17 Cr. 377 (RJS), 2023 WL 5274670 (S.D.N.Y. Aug. 16, 2023). Just as in *Feagins*, Nicholson's motion (and the appellant's brief in *Gonzalez*) does not cite any authority for the proposition that the practice of a circuit court judge sitting by designation in the district court is unconstitutional. For the reasons explained in *Feagins*, the designation orders here are in the interest of judicial efficiency and contain a meaningful time limitation, and are in keeping with the "longstanding and routine practice in this Circuit." 2023 WL 5274670, at *1.

[3] Nicholson's motion states that "his time in custody, accounting for good time credits, is the equivalent of 21 years, more than half the term imposed." Def. Mot. at 3–4. That is wrong. Nicholson has been in custody since on or about February 25, 2009, and has therefore served

support of this motion by victims of Mr. Nicholson's crime," Def. Mot. at 3, and argues that his early release less than halfway through his sentence "would tangibly serve the interests of Mr. Nicholson's victims," *id.* at 4. Nicholson next offers his "truly extraordinary" rehabilitation, *see id.*at 9–18, his "background and family support," *see id.* at 18–21, "the failing health of his elderly mother," *see id.* at 21–24, his "custody during the entire sweep of the pandemic," *see id.* at 24–25, that "fourteen years is not an insignificant sentence," *see id.* at 25–30, his "extraordinary commitment to paying more restitution," *see id.* at 31–32, and "the factors of section 3553(a)," *see id.* at 32–36.

E. Current Custody Status

Nicholson is currently incarcerated at FCI Danbury, and his projected release date is April 7, 2042. He received at least two doses of the Pfizer vaccine against COVID-19 in April 2021 and April 2022. *See* Ex. C (Nicholson Medical Records) at 55, 151, 153–54. His BOP medical records reflect his receipt of medical care for ordinary ailments and certain chronic conditions. *See generally id.*

ARGUMENT

I. Applicable Law

As amended by the First Step Act, 18 U.S.C. § 3582 provides that a court "may not modify a term of imprisonment once it has been imposed," except that:

> [T]he court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility,

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approximately 14.5 years in prison. Federal prisoners may earn up to 54 days of good-time credit for each year of their sentence imposed by the court. 18 U.S.C. § 3624(b)(1). 14.5 years of time served is therefore equivalent to an imposed sentence of 17 years with the receipt of full good-time credits—far less than half of the 40-year sentence this Court imposed, not "21 years, more than half the term imposed," as Nicholson's motion wrongly asserts.

> whichever is earlier, may reduce the term of imprisonment (and 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), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3582(c)(1)(A)(i). Prior to the First Step Act's amendment of Section 3582, the Sentencing Commission promulgated a policy statement on sentence reductions at U.S.S.G. § 1B1.13. While this policy statement does not bind courts considering motions for sentence reductions brought by defendants (as opposed to those brought by the BOP), *see United States v. Brooker*, 976 F.3d 228, 234–36 (2d Cir. 2020), courts may "look[] to § 1B1.13 for guidance in the exercise of [their] discretion" while considering "'the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release.'" *United States v. Rodriguez*, 16 Cr. 07 (AJN), 2020 WL 7640539, at *3 (S.D.N.Y. Dec. 23, 2020) (quoting *Brooker*, 976 F.3d at 237).

If a defendant has exhausted his administrative remedies and properly moves the court for early release, he must meet two requirements to qualify for relief. First, the court must find that "extraordinary and compelling reasons" warrant a reduction of the original sentence. *Id.* § 3582(c)(1)(A)(i). Even where this high bar is met, it is just "[t]he threshold question." *United States v. Daugerdas*, 613 F. Supp. 3d 807, 809–10 (S.D.N.Y. 2020). The court must next consider the factors set forth in 18 U.S.C. § 3553(a) and determine that any reduced term of imprisonment would result in a sentence that was sufficient to accomplish the law's mandate to, among other things, "provide just punishment for the offense." As the movant, the defendant bears the burden of proving that he is entitled to the relief he seeks. *See, e.g.*, *United States v. Ebbers*, 432 F. Supp. 3d 421, 426 (S.D.N.Y. 2020) ("The defendant has the burden to show he is entitled to a sentence reduction.").

II. Discussion

A. The Court Should Consider, and Deny, Nicholson's Motion

On December 20, 2022, Nicholson petitioned Warden J.L. Jamison for a reduction in his sentence. *See* Dkt. 114-1 at 2. On March 24, 2023, 94 days later, Warden Jamison denied Nicholson's administrative petition. *See* Dkt. 114-1 at 1. According to BOP records, Nicholson did not appeal Warden Jamison's denial.

In *United States v. Samuels*, 08 Cr. 789, 2020 WL 7696004 (S.D.N.Y. Dec. 28, 2020), this Court held that "a court may only grant a motion for compassionate release if the defendant 'has fully exhausted all administrative rights *to appeal* a failure of the [BOP] to bring a motion on the defendant's behalf' or waited 30 days from the Warden's receipt of his request for compassionate release *without receiving a response*." *Id.* at *3 (citing 18 U.S.C. § 3582(c)(1)(A) (second emphasis added)). Other courts in this District have held that an inmate may "simply . . . wait 30 days after serving his petition on the warden of his facility before filing a motion in court." *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020). The Second Circuit has acknowledged these divergent approaches without deciding which one should prevail. *See United States v. Saladino*, 7 F.4th 120, 123–24 (2d Cir. 2021) (comparing *Samuels* and *Haney* while ultimately holding that exhaustion was waived in that case). No court appears to have addressed whether an inmate may move a court for early release when, as here, an inmate did not appeal a warden's denial that came *more* than 30 days after the inmate's petition.

Section 3582(c)(1)(A)'s text, as interpreted by this Court in *Samuels*, suggests that Nicholson became eligible to file his motion in this Court on or after January 19, 2023—30 days after his December 20, 2020, administrative petition—because the warden to whom the administrative petition was directed did not respond by that date. *See* 18 U.S.C. § 3582(c)(1)(A) (permitting inmate to file motion in court "after the defendant has fully exhausted all

administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier"); *Samuels*, 2020 WL 7696004, at *3 (holding that a court may consider an inmate's Section 3582 motion "if the defendant . . . waited 30 days from the Warden's receipt of his request without receiving a response").

Accordingly, the Government does not contest Nicholson's assertion that he "has exhausted administrative remedies," Def. Mot. at 5, even if his reasoning—that "[h]is application for administrative compassionate release was made and denied"—is incorrect under this Court's interpretation of Section 3582. *See Samuels*, 2020 WL 7696004, at *3 ("[A] denial from the Warden, alone, is insufficient to establish exhaustion"). Instead, the material fact under *Samuels* appears to be that Nicholson's application was denied more than 30 days after it was made—that is, he "waited 30 days from the Warden's receipt of his request without receiving a response." *Samuels*, 2020 WL 7696004, at *3. In all events, as explained below, Nicholson's application was properly denied by the BOP—and should be denied by this Court—because it fails to offer any "extraordinary and compelling reasons" to reduce his sentence or explain how the Section 3553(a) factors call for his early release.

B. Nicholson Provides No Extraordinary and Compelling Reasons for Early Release

Nicholson divides his argument into eight parts. Four of these appear to be attempts at articulating the "extraordinary and compelling reasons" that are necessary (but not sufficient) for a court to grant a sentence reduction. None of them, independently or in combination, is either extraordinary or compelling.

First, Nicholson's motion opens by invoking his victims and claiming their "support." Def. Mot. at 3. He characterizes his early release as necessary to "help his victims recoup more of their

losses," *id.*, and urges this Court to "yield to the desire of victims to receive more restitution," *id.* at 6. Nicholson doubles back to this argument in his motion's seventh part, where he argues that being "deeply committed to his restitution order" is "a [c]ompelling [r]eason for a [s]entence [r]eduction." Def. Mot. at 31. To substantiate the purported support of his victims, Nicholson offers letters from nine of them—three of whom are from within his immediate family. *See* Dkt. 114-6 (letter from Carl D'Antonio, described here solely as "a victim of Jim's crime" but identified in the PSR as "the defendant's brother-in-law," *see* PSR ¶ 121); Dkt. 114-7 (letter from Donna D'Antonio, Nicholson's sister); Dkt. 114-29 (letter from Frances Sotire, described here solely as "one of the victims of Jim's crime," but identified in Nicholson's 2010 sentencing submission as his aunt and godmother, *see* Dkt. 70 at 45). Notably, two of these nine letters from victims supporting Nicholson's early release come from immediate family who wrote in support of leniency *before* this Court sentenced Nicholson in 2010. *See* Dkt. 70 at 45 (letter from Frances Sotire), *id.* at 47 (letter from Donna D'Antonio). It is understandable, but not extraordinary or compelling, that Nicholson's immediate family urges his release.

Even setting aside doubts that the six non-family victims who wrote in support of Nicholson's early release are remotely representative of the more than 500 victims in this case, Nicholson cites no law (other than "*Brooker*'s broad sweep," Def. Mot. at 6) for his proposition that early release is justified by his "resolve to help his victims recoup more of their losses" that he caused. That absence of authority makes good sense. For one thing, Nicholson's proposal is impractical. He currently owes more than *$123 million* in restitution. His motion does not explain how he expects to make a meaningful contribution toward that awesome debt "work[ing] remotely from home as a researcher," see Def. Mot. at 23 n.4, while simultaneously providing his mother with "care in most aspects of her daily living," see id. at 22. But most fundamentally, Nicholson's

proposal is unjust. In effect, it calls for Nicholson to buy an early termination of his sentence in exchange for giving his victims less than pennies on the more than hundred million dollars he owes them. Nicholson's argument cynically uses the losses of people he defrauded in service of his own interests. He converts an obligation incurred by his crimes (this Court's restitution order) into a purported reason for lenity. The rationale would support the early release of every fraudster who had an ongoing legal duty to repay his victims, and who could not satisfy that obligation in whole by the forfeiture of his ill-gotten gains. The Court should reject it.

Second, Nicholson cites his "[f]ull and [c]omplete" rehabilitation. Def. Mot. at 9. Evidence of this "truly extraordinary" transformation includes "subject[ing] himself to exhaustive self-analysis of his own thinking and writing, writing notes and filling binders," "research[ing] numerous ethicists," and "delv[ing] deeply into the psychology of morality and integrity." *Id.* Nicholson also describes the educational activities he led and partook in during his incarceration, "all on his own time." *Id.* at 10.

While Nicholson appears to have built a productive life for himself and contributed meaningfully to the lives of his fellow inmates, that is one of the ordinary purposes of incarceration—not an extraordinary development unforeseeable at sentencing. Indeed, Nicholson's conduct in prison appears to meet this Court's expectations as set out at sentencing: "I also believe," the Court stated while imposing its 40-year sentence, "that even in prison a person can redeem themselves and can restore relationships and make a positive contribution, even in prison." Sent'g Tr. 76:8–11; *see also, e.g.*, *United States v. Saleh*, 93 Cr. 181 (WHP), 2020 WL 3839626, at *4 (S.D.N.Y. July 8, 2020) (denying relief while observing that "every inmate should strive for a productive institutional record while incarcerated because that is what is expected").

Third, Nicholson seeks early release to care for his ailing mother. Def. Mot. at 21–24. This case is replete with family tragedies—hundreds of them. And Nicholson's separation from his mother during a time of need is surely among those tragedies. But the law recognizes that people sentenced to prison for crimes have brought harm not only to their victims but to themselves and their families. *See, e.g.*, *United States v. John*, No. 15 Cr. 208 (CM), 2020 WL 6581217, at *2 (S.D.N.Y. Nov. 10, 2020) (denying compassionate release and noting that "[b]eing separated from your wife and children and unavailable to care for aging parents are but two of the sad and inevitable consequences of incarceration"). For this reason, a defendant's suitability to provide care for a loved one is categorically insufficient to justify early release absent a clear demonstration of extraordinary facts. Courts "generally require a showing of evidence from several sources indicating that the defendant is *the only available caregiver* for a family member in dire conditions, before concluding that an extraordinary and compelling reason has been established." *United States v. Lindsey*, No. 13 Cr. 271 (LTS), 2021 WL 37688, at *3 (S.D.N.Y. Jan. 4, 2021) (quotation marks omitted and emphasis added). Nicholson has not made that showing here. His motion argues that he is the "best and most viable option" for his mother's care, Def. Mot. at 22, but not "the only available caregiver," *Lindsey*, 2021 WL 37688, at *3. His two siblings—one of whom lives in Rockland County near their mother, *see* Dkt. 114-24 at 1—explain the various impediments to their providing their mother's care, from "affordability," Def. Mot. at 23, to work-related travel, *see id.* at 22. While it is certainly tragic that Nicholson's conduct and its consequences have placed his family in such a predicament, these are "the inevitable circumstances families face when a family member is incarcerated." *Sanchez*, No. 01 Cr. 74 (PAC), 2022 WL 4298694, at *3 (S.D.N.Y. Sept. 19, 2022) (cleaned up). Nicholson's argument that he is the "most viable option"

fails to meet the high bar necessary for early release as a family member's "only available caregiver," and should be rejected.

Fourth, Nicholson invokes the receding COVID-19 pandemic as a purportedly extraordinary and compelling reason for his release. *See* Def. Mot. at 24–25. His argument relies exclusively on four cases from 2020, during the height of the pandemic's pre-vaccine stage. *See id.* But it is 2023, and the same "medical records" that Nicholson says show "he qualifies for chronic care" show that he has *received* that care from his BOP physicians—including at least two doses of the vaccine against COVID-19. *See generally* Ex. C (Nicholson BOP Medical Records); *id.* at 55, 151, 153–54 (vaccination records). Recent authority makes clear that vaccinated defendants are unable to rely on the lingering effects of the COVID-19 pandemic as an extraordinary and compelling reason for early release. *See, e.g.*, *United States v. Lang*, 2022 WL 17819518 (SHS), at *3 (S.D.N.Y. Dec. 20, 2022) (finding that fact that defendant "has received at least two doses of the vaccine against COVID-19 . . . weighs against granting release") (citing *United States v. Jaber*, 2022 WL 35434, at *2 (S.D.N.Y. Jan. 4, 2022); *United States v. Jones*, 2021 WL 4120622, at *2 (S.D.N.Y. Sept. 9, 2021) (same). That is true even for vaccinated defendants whose other conditions may exacerbate their risks from COVID-19. *See, e.g.*, *United States v. Rodriguez*, 2023 WL 3225021, at *3 (S.D.N.Y. May 3, 2023) (denying release to defendant whose "underlying health conditions . . . heighten the risks presented by COVID-19" where motion "strikingly ignores a critical fact: [h]e is vaccinated"). And while Nicholson suggests that his original sentence should be altered because his incarceration through the pandemic "could not have been foreseen," Def. Mot. at 24, this Court has squarely rejected that argument. *See Samuels*, 2023 WL 5003344, at *3 ("At the time of [the defendant's] sentencing in 2009, the Court was fully aware that [the defendant] would age and that he would likely incur the kinds of physical

ailments that often affect inmates, and non-inmates, of advancing years. The conditions described by [the defendant] – even in the context of the COVID-19 pandemic – do not alter that assessment.").

C. The Section 3553(a) Factors Cannot Justify Nicholson's Early Release

Apart from Nicholson's threshold failure to identify extraordinary and compelling reasons for early release, the Section 3553(a) factors counsel against reducing this Court's original sentence. The inquiry in this context is whether the relevant factors "outweigh the 'extraordinary and compelling reasons' warranting compassionate release"—to the extent there are any (and here, there are not)—and "whether compassionate release would undermine the goals of the original sentence." *United States v. Ebbers*, 432 F. Supp. 3d 421, 430–31 (S.D.N.Y. 2020). "Court[s] should be wary of using [a] motion [for compassionate release] to 'correct' the . . . original judgment or introduce unprincipled variance into the execution of duly-imposed sentences." *Id.* at 430. To the extent Nicholson's motion addresses the Section 3553(a) factors, it is little more than such an effort to relitigate and "correct" this Court's original judgment.

First, Nicholson invokes his "background and family support" in a section that focuses nearly entirely on facts that were before this Court at Nicholson's sentencing. *See* Def. Mot. at 18–21. Indeed, this Court expressly considered Nicholson's "background and family support" and found they largely aggravated Nicholson's misconduct: "You are a man who was born to a good family, better than a good family. The way they have stood behind you through all of this is something that I think is very moving; it really is a tribute to them. But you had all the advantages of life. You had family, you had great health, you had a good education, you had intelligence, opportunity, good looks, charm, charisma, you had so much. And yet you used many of these

qualities to victimize people whose only error in judgment was trusting you." Sent'g Tr. 70:23–71:6.

Second, Nicholson argues that his 40-year sentence is unfairly disproportionate to those received by purportedly comparable criminals. The argument is largely recycled from Nicholson's sentencing and habeas papers. Indeed, his primary points of comparison are Bernard Ebbers (sentenced in 2005), *see* No. 02 Cr. 1144, Dkt. 305 (S.D.N.Y. July 18, 2005), John and Timothy Rigas (sentenced in 2005), *see* No. 02 Cr. 1236, Dkts. 253, 254 (S.D.N.Y. June 27, 2005), Jeffrey Skilling (sentenced in 2006), *see* No. 4:04 Cr. 25, Dkt. 1149 (S.D. Tex. Oct. 23, 2006), and Marc Dreier (sentenced in July 2009), *see* No. 09 Cr. 85, Dkt. 84 (S.D.N.Y. Jul. 17, 2009). *See* Def. Mot. at 26–29. This Court was aware of these precedents at its October 2010 sentencing. It distinguished Nicholson's conduct from other financial fraudsters of the era by noting, among other things, that "[t]he victims of these crimes were not banks, they were not large corporations, they were not governments, they weren't institutional investors; these were individuals who basically gave Mr. Nicholson everything they had, they entrusted their whole lives to him. They couldn't diversify; they were not sophisticated investors. And it seems very clear that Mr. Nicholson played on those relationships and cultivated them, encouraged them, to invest their last pennies with him even when it was clear that there was no opportunity for any of that money to be recovered, it was just being taken away." Sent'g Tr. 71:11–20. To the extent Nicholson offers any novel argument, it comes in the form of JSIN data that his motion characterizes as "show[ing] . . . the average length of imprisonment imposed for the six defendants similarly-situated to Mr. Nicholson" between 2017 and 2022. Def. Mot. at 4–5. But JSIN data is far too generalized to fairly characterize as identifying "similarly situated" defendants: it "provides cumulative data based on five years of sentencing data for offenders sentenced under the same primary guideline, and with the same Final

Offense Level and Criminal History Category selected." *See* What Information Does JSIN Provide?, https://www.ussc.gov/guidelines/judiciary-sentencing-information. It is neither surprising, nor grounds for a revision of this Court's Section 3553(a) analysis, that Nicholson's sentence is substantially higher than those in the same broad Guideline class. This Court's sentence was imposed after considering "case-specific information that put Nicholson's crime in context, revealing the identified loss to have been sustained by hundreds of individuals of modest means, many of whom lost their life savings." *Nicholson*, 638 F. App'x at 42.

Third, Nicholson relitigates two issues that were considered exhaustively at sentencing, on habeas, and on appeal. His motion reiterates criticisms of the loss-amount Guidelines, *see* Def. Mot. at 27, and resurrects the argument that "the stacking of two twenty-year counts of fraud" was "a mechanism unique to this case," *id.* at 30. It is beyond dispute that this Court's original sentence was imposed in consideration of factors going far beyond the dollar amount of the loss. *See, e.g.*, *Nicholson*, 2014 WL 4693615, at *10 ("[T]he forty-year sentence was not the result of a mechanical application of the Guidelines. It was, instead, a careful assessment and balancing of the various factors identified by Congress and the Supreme Court as relevant to the calculation of a criminal sentence."). Indeed, to the extent the loss amount is a poor proxy for culpability in this case, it is because the dollar amount *understates* the harm wrought by a criminal who stole, among many other things, a young widow's life insurance payout and the life savings of elderly retirees. *See* Sent'g Tr. 72:20-24 ("The dollar amount doesn't do justice to loss. It's a crude measure, it really is. But in this case, I don't know that it's an overstated measure, I really don't. I've looked at these victim statements.") And both this Court and the Second Circuit swiftly dispatched with Nicholson's argument that his two fraud counts were somehow improperly "stacked." *See, e.g.*,

Nicholson, 638 F. App'x at 41 (describing this argument as "foreclosed by precedent" (citing *United States v. Reed*, 639 F.2d 896, 905 (2d Cir. 1981)).

Fourth, Nicholson boldly proclaims that "[t]here is zero chance of [him] reoffending," Def. Mot. at 33, and that "[n]othing about this case or [his] history suggests that he would be a danger to the community," *id.* at 32. But Nicholson was a recidivist when this case *began*: when he founded Westgate, he had already been banned from the securities industry by its self-regulatory body and prohibited from acting as an investment adviser in New York for similar wrongdoing (that is, theft of customer funds and efforts to obscure that conduct). *See* PSR ¶¶ 94–97, 139 & nn.5–7.

Finally, elements of Nicholson's instant and preceding applications for early release call into question his acceptance of responsibility to a degree that should separately foreclose the relief he seeks. His own letter to the Court, submitted just two months ago, remarkably reframes his decade-long fraud as a failure to "disclose the initial loss," anchoring his culpability "[i]n September of 2008, when Lehman Brothers declared bankruptcy and Westgate Capital suffered devastating losses." Dkt. 114-4 at 1. This narrative is as fantastical in 2023 as it was in 2010, when the Government's sentencing memorandum provided detailed data illustrating "that Nicholson fraudulently inflated the Funds' trading returns from the inception of Westgate Capital to its conclusion," and "that Nicholson lied to investors . . . and misappropriated investor money, prior to May 2000 as well." Dkt. 72 at 7 & n.3. Nicholson's June 2023 letter to the Court also highlights his "apology letters to every shareholder," Dkt. 114-4 at 2—missives that were largely received with outrage by victims who viewed them as shirking responsibility. *See, e.g.*, Andrew Tangel, *'An insulting apology'; Ex-fund manager's letters from jail enrage victims*, Herald News (Mar. 24, 2010), at A10 ("Nicholson seems to confine the fraud to late 2008, when

the investment bank Lehman Brothers Holdings Inc. collapsed, sending financial markets into a tailspin. . . . Another Westgate investor, a woman in her 60s who lives in New York state, said the letter she received from Nicholson 'scared' her. 'It made sick inside,' said the woman. 'Here I was dealing with all of this, and then I get this.' The woman cried during an interview and asked that her name not be used. 'This was for his own personal redemption,' she went on, so he 'can feel like a good person.'").

In his June 2020 application for early release, Nicholson's failure to accept responsibility for the full scope of his crimes was equally plain. He described the entirety of his crime as "a visceral reaction to Lehman's undoing," and reduced his theft of millions of dollars of retail investors' funds as never "find[ing] the courage to disclose the losses." Ex. A, 2020 Application at 3–4. And Nicholson suggested this Court's sentence was distorted by contemporaneous events. *See id.* at 11 ("I was sentenced in the midst of the credit crisis, which many believe caused me to be given an excess sentence."). What Nicholson described in his 2020 Application as not "liv[ing] up to my own ideals," *id.* at 4, and "[his] balance [getting] out of kilter," *id.* at 5, was, in fact, one of the most personal and intimate financial frauds in American history.

Nicholson's doubtful understanding of the full scope of his responsibility is further reason to deny his motion. *See United States v. Nunez*, No. 10 Cr. 392 (CS), 2023 WL 1470502, at *1 n.1 (S.D.N.Y. Feb. 2, 2023) (denying early release because, among other things, the Court "doubt[ed] that he has genuinely come to terms with his conduct and fully accepted responsibility").

CONCLUSION

For the reasons set forth above, Nicholson's motion for early release should be denied.

Dated: New York, New York
September 6, 2023

Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney

By: /s/
Justin Horton
Assistant United States Attorney
(212) 637-2276

EXHIBIT A

June 19, 2020

Warden Petrucci
FCI Otisville

James Nicholson
61985-054

Dear Warden Petrucci,

I am respectfully submitting this letter seeking compassionate release in order to provide for my children and care for my mother.

On June 20, 2020 my father passed away after a long battle with alzheimers. I was very close with my father. To put it bluntly, I'm hurting. My father was a former United States Marine and a retired homicide detective with the New York City Police Department. He fought two wars on behalfof our country. And even more important than all of that, he was a great man and an amazing father.

I've been incarcerated for 11 1/2 years. I transferred to Otisville in September in order to be closer to my family. Prior to that I was in FCI Ray Brook for close to 9 years. My parents live in Rockland County New York. My brother Kevin was an Inspector in the New York City Police Department and just retired after 27 years on the job. He lives in Nanuet. My sister Donna is a special ed teacher and lives in Orange County New York.

I have three beautiful boys. Connor, Ryan and Patrick Nicholson. Ryan and Patrick live in HoHokus New Jersey. My oldest son Connor just graduated two weeks ago from the U.S. Naval Academy in Annapolis Maryland. He'll be in Annapolis until September and then he reports to Pensacola Florida for flight school.

Being seperated from my children, and missing them grow up, is the most painful thing I have ever experienced. I've missed the most cherished moments in a fathers life, and I have to live with the nagging remorse that I'll never have a chance to recreate them. I've been incarcerated for a large percentage of Connor, Ryan and Patrick's lives. Knowing I robbed them of the father they so richly deserve, eats at me daily. When we bring a child into this world we have a deep responsibility and make a profound commitment to love, care and nurture our children. Most of us love our children even more than ourselves, and do what we can to provide for their futures. There is no greater pain than having let a child down. Not being there when they need you.

When I was initially designated to FCI Ray Brook, my parents made the 5 hour trip up for the weekend every four weeks. At the time my father was a healthy vibrant man. He was diagnosed with alzheimers about 7 years ago. I watched him from a prison visiting room slowly succumb to dementia. At first it was simple forgetfullness. Bouts of uncertainty. However, the moments of confusion became longer and longer. It got to the point where I could no longer talk to my father about current events, or politics, or sports. His emails to me became progressively more jumbled. The disease that started with his mind eventually took over his physical abilities. I watched my father go from a walker, to a wheelchair, to completely incapacitated. When he reached the point that he could no longer push himself up, my mother could no longer bring him up for the weekend trips to Ray Brook. My family was forced to put my father in a nursing home for veterans in Westchester County. I never got to see him for the last four years of his life. Prior to my incarceration there wasn't a single week we didn't spend quality time together.

My parents have been my childrens primary means of financial support. They gave my fathers New York City police and military pensions to support their grandchildren. Unfortunately, with my fathers passing, his pensions have now stopped. My mother can no longer afford to support them. My middle son Ryan has just withdrawn from college in what would have been his sophmore year. My youngest son Patrick is going into his senior year of high school. Patrick has top grades and scored in the 90 percentile on his SAT's. With my father's passing Patrick's ability to pay for college is also in doubt, as well as simple basic needs.

My mother is 78 years old, and her health is starting to fail. You'll see from the visiting logs that she came here every single weekend to visit me up until the pandemic halted visits. My biggest fear is now watching her health deteriorate from a prison visiting room, a replay of my father.

Filing a motion on my behalf for a reduction in my sentence would allow me to reuntite with my children, support them financially (positively affecting the trajectory of their lives), spend quality time and care for me mother, and also, very importantly, allow me to begin making meaningful restitution.

My Background

Mr. Petrucci, I haven't been here that long, so you don't know me that well. Let me briefly tell you a little about my background, and what brought me here. My family is very tight knit. I'm the oldest of my siblings. My sister Donna is a year younger, Kevin is three years younger. I was born in the Bronx. When my sister was born the apartment was bursting at the seams. Like many people at that time, my parents decided to migrate to the suburbs. They bought a high ranch house in Rockland County, New York. The same house my mother still lives in.

I knew from a young age I was destined for a career on Wall Street. The capital markets have always fascinated me. Even as a child I grabbed two sections of the newspaper - business and sports, and I read them in that order. I graduated from Stony Brook University with a bachelors degree in economics. During the summers in college I interned on Wall Street, commuting four hours roundtrip by train from Rockland.

The first summer I worked for Kidder Peabody in the investment banking department at 2 Broadway. The following summers I worked on the floor of the stock exchange for Berkman Leff, option specialists. I graduated on a Sunday and started working that Monday for Shearson Lehman Hutton at 14 Wall Street. For the next 21 years, my honeymoon was the only time I took a full week off of work.

Some would say, how could you only have taken one week off in over two decades? It wasn't work to me. I loved it. And it was the way I was raised. I believe in the dignity, the power, and the ethic of work.

After working for eleven years for large investment banks, in 1999 I went out on my own and founded my own company, Westgate Capital Management. I started small, but as we grew over the years I built out the infrastucture, hiring new employees for the back office, accounting, marketing, and experienced traders for our trading desk. I was proud of the team I had assembled.

In the midst of the credit crisis in 2008, Lehman Brothers declared bankruptcy. We had an enormously leveraged position in Lehman as well as exposure to AIG and Goldman Sachs, and sustained large losses. I had a visceral reaction to Lehmans undoing, completely shaken. I saw two decades of hard work flash before my eyes. The thought of telling people I had lost their money brought on gut wrenching nausea. I was

ashamed. While invocating for Lehman to be saved, I teetered back and forth on an hourly basis trying to find the courage to disclose the losses. Looking back, there was never a definitive decision not to, I just kept procrastinating the inevitable, and stupidly put it off day-by-day-by-day. I still cringe thinking about it.

It is a mistake I want to make amends and restitution for in the worst way.

Post Offense Rehabilitation to Consider

Congress has made clear that "rehabilitation of the defendant **alone** shall not be considered an extraordinary and compelling reason." 28 U.S.C. 994(t) (emphasis added). The clear implication is that rehabilitation can be a factor when considered in tandem with other factors. I believe I have demonstrated substantial and extraordinary post-offense rehabilitation.

Mr. Petrucci, Socrates once said, "The unexamined life is not worth living." Well, in the jampacked decades before I went to prison, my life went pretty unexamined. I was always working, driving hard. I didn't reflect; I was busy doing. My energies went toward piling up experiences, not toward finding meaning. But then, practically overnight, almost all of the symbols that validated my identity were gone. I'd lost everything, my freedom, my children, my home, relationships formed over forty years; the career that had structured and defined my entire life.

If there's one great truism, it's that struggle forces you to look inward. I knew I was a good person. I'm not inherently dishonest. I've worked hard my entire life. I deeply care about people. I've always positively contributed to my community. I've never been in trouble with the law. I've literally never even had so much as a speeding ticket in my life. I had the right role models. My father was the most honest man I know. I can't think of a single instance of him ever telling so much as a white lie. Honesty, hard work, kindness, love, and passion were values instilled in me by my parents. Those virtues and others I've espoused to my children more times than I can count.

But when I didn't disclose the losses I was dishonest. After I was incarcerated I took a good look at myself, and began an introspective investigation in an effort to understand why I didn't live up to my own ideals, and what I could learn from my ethical failure. I did a lot of thinking and reflecting. For years I studied and read deeply on the topic of morality and integrity. I took lots of notes, filling up a binder. I was resolved to make sure I never violated my integrity again.

I was ambitious and had a high achievement orientation. Motivation for that comes in two ways: intrinsically and extrinsically. I was certainly intrinsically

motivated - personal growth, satisfaction of doing a good job, helping others develop, finding meaning from efforts, mastering a craft. And the extrinsic rewards also provided me with motivation - monetary compensation, public recognition, and social status.

With the benefit of hindsight, though, I now realize that my balance got out of kilter. It was subtle, I didn't even recognize it, but I started to lean too much on the extrinsic motivators.

I also now realize I had too much of my self-worth invested in the success of Westgate Capital. I intertwined my feelings of self-worth with my professional success. The pressure to perform, the ingrained fear of failure, and the rewards for success caused me to deviate from my values.

When I reflected on my ethical failure, I realized I had never given the moral part of my nature much thought. I took it for granted. Honesty and integrity were drilled into me since I was a child. But I know understand that I had clearer strategies for how to achieve career success than for how to develop profound character. Although I deeply believed in my values, over time I lost congruence between my beliefs and actions.

I believe that the desire to evolve, in other words to get better, is probably humanity's most pervasive driving force. A search for better is one of our greatest traits as humans. And I was resolute that I would never breach my integrity again. I became a student and dedicated myself to studying character development. Social science shows us that character is not static, it's not carved in stone.

Years ago, I developed a strategy to make my moral ecology part of my daily rigor. I call it "going to the moral gym." I spend a few moments in bed at night in self-reflection, making sure I had no moral failures that day. I set a tremendously high standard for myself. It could be something as simple as being short with someone, or making a conscious effort to never join in a conversation where backbiting and gossip are taking place. I now look at every action I take through the lens of, "How would I feel if what I'm doing right now is written up on the front page of the Wall Street Journal or New York Times? Would I still do it?" I won't even approach an unethical line, leaving nothing open for interpretation. This experience has forged an incredible clarification and internalization of my values.

I also leaned heavily on my faith as a Catholic to help me through this crucible. I had a close relationship with Father Kelly while at Ray Brook, and now Deacon Davis here at Otisville. I'll never forget a conversation I had with Father Kelly after confession one day. I expressed to him the guilt I felt for having hurt people financially, and violating the trust they placed in me. Father Kelly said, "Life is complicated, and sometimes we make mistakes. Anyone who claims he never did

anything wrong probably needs to go to confession for lying. Even St. Augustine stole pears as a young man. It's how he discovered the anguish of a guilty conscience and came to understand the supreme value of a clear one." Father Kelly continued, "Mistakes allow us to grow. We have to bless the past with remorse, forgiveness, and atonement. God has forgiven you. Now you have to forgive yourself." He said that a cornerstone of the Catholic faith is that redemption is available to everyone. He told me not to let myself be "robbed of hope."

In terms of my faith (and secularly), I've come to more fully understand that a truer definition of success is really one of significance - the significant difference our lives can make in the lives of others. This significance doesn't show up in profit and loss statements, win-loss records, long resumes, or trophies gathering dust on our mantels or attics. It's found in the hearts and lives of those we've come across who are in some way better because we lived.

I've taken that to heart. At FCI Ray Brook I tutored (on my own time, not as a paid tutor in education) innumerable men over the nine years, helping upwards of 50 men pass their GEDs.

One benefit to tutoring and teaching so many men while incarcerated was that I had my own pedagogical laboratory for research and observation. I witnessed the positive influence education had on mens lives. It brought me to contemplate how more could be done. The answer resided in one of my life long passions - books. I'm a crazed enthusiast for the power of reading. I designed and implemented a biblio-learning program I named the University of Books.

I curated a list of 150 mostly non-fiction books, that were educational and thought provoking. I created an exam for each one, and proctored exams were adminstered upon completion of each book. To complete the program the men had to read fifty books. Ten were required reading to ensure a diversity of subjects, and the other forty they self-selected from the list of 150. The subjects ranged from history, to psychology, to classic American literature, to character development, and much more. I later expanded the program, adding a seperate business and science component. All participants were advised to have a dictionary and look up every word they didn't understand. Without question, the best method to expand one's vocabulary.

Think about how many books you've read in the last couple of years. Fifty books is a substantial sum. But I wanted the program to be meaningful. Not only were the men learning and improving their reading-comprehension, but by committing to reading fifty books it gave them a sense of achievement. I also hoped to inspire a lifelong passion for reading.

The program also accomplished what books do best, it opened the men up to other times and places and lives. Suddenly there was a feeling that the local street corner no longer defined their horizon; that a whole world lay beyond it. However, the most important lesson I wanted the program to convey, is that learning and education don't require showplace campuses. It doesn't even require a teacher. A teacher can give information. They can assist and they can inspire and those are important and beautiful things. However, at the end of the day, the fact is, we educate ourselves. We learn, first of all, by deciding to learn, by committing to learning. This commitment allows, in turn, for concentration. Concentration pertains not only to the task at hand but to all the many associations that surround it. All of these processes are active and deeply personal; all involve the acceptance of responsibility. Education doesn't happen out in the ether, and it doesn't happen in the empty spaces between teachers lips and a student's ears; it happens in the individual brains of each of us.

Given my background, I used to get a lot of questions about finance and the markets. I wrote the curriculum and taught a class I named Understanding the Stock Market. The purpose was to improve men's financial literacy and give them a broad understanding of how the economy works, and how those things affect their everyday lives.

I also taught an entreprenuership program in conjunction with Defy Ventures. Defy is a non-profit that helps formerly incarcerated men start their own business, and in some cases find employment. It's an extensive program in which Entrepreneurs-in-Training (EIT's) start an introductory level and they graduate to white, blue, purple, brown, and then a black belt. It's course work covers all aspects of entrepreneurship, as well as character development, study habits, employment coaching, business and social etiquette, life purpose exercises, public speaking, making presentations, personal finance, taxation, time management, and lots more.

Defy Ventures attempts to solve an obvious problem. Few formerly incarcerated men can grab the first rung of the economic ladder, and even fewer manage to climb it. They have limited education and limited work experience, a rap sheet that makes them even less appealing than others with equally empty resumes. Those factors, combined with societal stigma's and licensing blocks, make the odds of them finding a job remote at best. Defy helps the men turn their often prodigious street smarts and hustle into a legal entrepreneural venture. Even giving them the opportunity to fund their businesses through Shark Tank like competitions.

What I love about teaching entrepreneurship is that it offers economic development rather than humanitarian aid. It's a teacher of how to fish rather than a giver of fish, which is a much better way to deal with poverty and the challenges the formerly

incarcerated face. Job creation is a way to tackle the cause, rather than the symptoms of poverty. I don't think anyone can dispute that the best anti-poverty program ever devised is a job.

I also enjoyed teaching the class because I was helping to connect men to pathways to employment. I tried to instill in them the desire to make the most of their gifts and to avoid squandering them through laziness, self-abuse, poor self-confidence, or an aimless life path. My objective was to bring their potential to fruition, help them with a comprehensive plan and a roadmap into mainstream society. I take great pride in the fact that at least three men I taught are now feeding their families with businesses that I helped them plan.

When I arrived at FCI Ray Brook, I was taken aback by how many men had no contact with their children. I was surprised when I heard most men reference, not their wives, but their "baby mamma's". I soon learned that many men had multiple kids with multiple different women. One guy living next to me had 9 kids with 7 different mothers. I was tutoring another man to read, that had 10 kids with 10 different mothers.

It made me realize that I was incarcerated with the fathers of some of the most at-risk children in the country. From where I was I couldn't do anything directly for their children, but I could try and work with their fathers. I created a parenting program I named **Fatherhood First**. I posted flyers in each unit with big bold font that read "Creating a Brighter Future for Your Children." I thought to myself, what father doesn't want that? I went beyond the men that voluntarilysigned up and recruited guys I knew had poor or nonexistent relationships with their children. Basically I stalked the apathetic. Common sense told me that these were probably the higher risk situations. Some came begrudgingly, others I couldn't get to join.

In the first class I went around the room and had the fathers talk about their children, whatever it was they were willing to share. I tried to create more of a support group environment, hoping men would open up. No easy task for men that had spent their entire lives with a deep aversion to emotional vulnerability.

We talked about how their relationships currently stood with their children and what they aspired for them to be. I starkly laid out the bleak statistics and all the disadvantages their children faced. I also stressed the importance of education and graphically showed the data of the challenges ahead if their kids dropped out of school. I asked if anyone in their families had graduated from college? None of them had. I inquired if anyone had college aspirations for their children? Some chuckled and said "Man, I just hope they don't end up in prison." I wanted to change their mindset. Raise the bar. Even make college a familial expectation. I talked about how the economy has evolved and that today's environment leaves little doubt about the

value of a college education. I gave them the Bureau of Labor statistics showing the median worker with a bachelors degree (and no advanced degree) earned $69,260, compared with $34,540 for the median worker with only a high school diploma. Over a lifetime, that difference accumulated to about $1.5 million. And I said, "You can imagine how dismal the numbers are if you drop out of high school." Most everyone in the class did not have a high school degree, they were aware of challenges. Many had turned to crime because of those challenges.

I gave handouts with heartwarming stories about men and women that had been the first college graduates in their families, imploring them to make that a goal for their children. I created handouts with information about savings vehicles for college, like 529 plans and Coverdell accounts. For many it wasn't feasible to put money away now, but I wanted them to be aware of the options and tax advantages.

Most grew up without fathers. I didn't want to assume anything when it came to parenting skills. So I started with basic skills. I held seperate sessions for 0-4 year olds, 5-12, and teenage parenting. They were also given training on ways to keep their children out of conflict if problems should arise with their wives or baby mama's, opening up the line of communication, and arranging for parenting to continue in a loving and supportive manner.

I talked about how it is 100% natural for a child to think that their environment is the norm. It they're in a neighborhood with drug dealers on the corner, they think that's normal. And if their fathers, and possibly other family members are incarcerated, that's the norm to them. That had to change. That's not normal. We discussed how it is their responsibility to strive to give their children, not just the opportunity to subsist, but to have the chance to flourish.

We brainstormed ideas on how we, individually and collectively, could arrive at a consensus of values and a common vision of what could be done to build strong families and communities. How an environment can be created allowing them to see the promise of their children fulfilled.

I dug in deeper with a few guys individually. I asked a lot of questions. I listened a lot. Especially with some of the men that, for an assortment of reasons, had no contact with their children. I tried to find those with abstract dreams of reuniting, being a father to their children, and stoked those flames. Gave them a bridge to that dream. Got them to sharpen the focus. I sat down and helped them write letters to their children. We found ways to engage them. For example, having their kids report cards sent in, or read books their kids were reading. We arranged to have books sent to their children.

I explained that the most dangerous way of corroding the trust connection, was disengagement. When people we love or with whom we have a deep connection stop caring, stop paying attention, stop investing, and stop fighting for that relationship, trust begins to slip away and hurt starts to seep in. This is true of all relationships, but especially children. The men needed to know they couldn't slip in and out of their children's lives. They had to be a constant presence. Even as difficult as that is from behind prison walls.

I've always had an affinity for children, but this experience opened my eyes to the enormity of the challenges an at-risk child faces. Frederich Douglass' words, "It is easier to build strong children than to repair broken men" came to life right before my eyes and took on so much more meaning.

It's a cause I will pinion myself to post incarceration.

Other Factors

Mr. Petrucci, I am a first time non-violent offender. I come from a good family. I was a productive member of society. I'm a good person. I made a poor choice when I did not disclose the losses, but it should not warrant a 40 year sentence. Consider that the average sentence for murder in the federal system is slightly over 22 years; the median is 20 years. The average sentence for defendants convicted of robbery in the federal courts is 77 months; the median is 63 months. If you examine even the most egregious security fraud crimes, the disparity in sentencing is mindblowing.

I remember watching the media coverage of Mexican crime king Joaquin "El Chapo" Guzman's run from the law and ultimate capture following a shootout with the police. He had been indicted in multiple federal jurisdictions for drug trafficking, numerous murders, arms dealing, money laundering, and had escaped from two different prisons in Mexico. He was extradited to the United States, and ultimately he ended up with a life sentence. But it's essentially the same as mine. And for there not to a differentiation between the life El Chapo, the head of the Sinoloia cartel led, versus my life, it's just not right. That is not justice.

Also please take into consideration, we are in the midst of the corona virus pandemic. It is greatly concerning as inmates here have been testing positive for the corona virus. Covid-19 is a highly contagious disease that has no cure. We've been in some form of modified operations or lockdown for over three months, and it's not going to be abating any time soon. I think we would both agree that my risk level of contracting the disease is substantially higher in prison than at home with my family.

Mr. Petrucci, when the federal government did away with parole, in its place they gave the BOP the power to file a motion with the courts for a reduction in an inmates sentence. It's a remedy that the BOP has nororously refused to use, which is one of the reasons Congress changed the law with the FirstStep Act allowing the inmates to go further and petition the court.

I was sentenced in the midst of the credit crisis, which many believe caused me to be given an excess sentence. I think my judge would rethink it. Obviously the judge has the ultimate say, but it would go a long way if the BOP asked for a reconsideration.

The First Step Act required the BOP to assess every inmate for the liklihood that they recede. I was rated a 1, which is the lowest risk of receding. I'll take that even further, there is zero chance I would recede. I'm not a danger to society and I fit the criteria for extraordinary and compelling reasons to ask the court for a resentencing.

Compassion is not about tossing someone out the door as they're about to die. Compassion is giving someone a second chance at life. Similar to President Trump's commutation of Alice Johnson's life sentence, It's about reuniting a family. It's about changing the trajectory of my childrens lives. It's about letting me spend quality time with my mother, caring for her, and not have to watch her slowly die from behind prison walls. Compassion is about humanity.

Mr. Petrucci, if you have any questions I'd be glad to sit down with you. Thank you for your consideration. I hope you choose to approve my compassionate release request.

Sincerely,

James Nicholson

EXHIBIT B

Response to Inmate Request to Staff

NICHOLSON, James
Reg. No.: 61985-054
Unit: GA

This is in response to your Inmate Request to Staff, dated June 19, 2020, wherein you requested consideration for Compassionate Release/Reduction In Sentence, to be able to provide for your children and care for your mother.

Title 18 of the United States Code, section 3582(c)(1)(A), allows a sentencing court, on motion of the Director of the BOP, to reduce a term of imprisonment for extraordinary or compelling reasons. BOP Program Statement No. 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 582(c)(1)(A) and 4205(g), provides guidance on the types of circumstances that present extraordinary or compelling reasons, such as the inmate's terminal medical condition, debilitated medical condition, status as a new law elderly inmate, an elderly inmate with medical conditions, or an "other elderly inmate", the death or incapacitation of the family member caregiver of the inmate's child, or the incapacitation of the inmate's spouse or registered partner. Your request has been evaluated consistent with this general guidance.

Accordingly, your request for Compassionate Release/Reduction In Sentence is denied at this time.

If you are not satisfied with this response, you may appeal to the Regional Director, Federal Bureau of Prisons, U.S. Custom House, 2nd and Chestnut Street, Philadelphia, Pennsylvania, 19106, within twenty (20) calendar days of the date of this response.

J. Petrucci, Warden

7/22/20
Date

EXHIBIT C
[FILED UNDER SEAL]