UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES	:	16 Cr. 473 (RA)
- v. -	:	
HAENA PARK,	:	
Defendant.	:	
	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF HAENA PARK'S EMERGENCY MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)

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Ms. Park's current conditions of detention at Danbury-FCI pose a very real risk that she will contract COVID-19 and, because of her serious, underlying medical conditions, she may succumb to the virus. Ms. Park's crime (for which she received a 36-month sentence) was indisputably serious but she does not deserve to die in prison.

The virus is rapidly spreading throughout the BOP and particularly at Danbury. When Ms. Park filed her Motion for Compassionate Release on April 2, there were nine confirmed cases at the facility. On April 7, when the Court issued its Order relating to Ms. Park's Motion, there were 22 positive cases in Danbury's inmate population and 7 positive cases among its staff. Today, there are 39 inmates who have tested positive at Danbury and 12 staff members with the virus. *See* BOP, *Open COVID-19 Tested Positive Cases* (Apr. 9, 2020), https://www.bop.gov/coronavirus/. Danbury now ranks as having the second most reported positive cases of any BOP facility. The only facility with more reported cases is Oakdale FCI (39 inmates, 13 staff members), where five inmates already have died from the virus. *Id.* The risk to Ms. Park of being included in these grim statistics is increasing daily.

In its opposition to Ms. Park's motion, the government does not dispute any of the foregoing, but instead opposes Ms. Park's release because Ms. Park "has failed to exhaust her administrative remedies [and] [b]ecause such exhaustion is mandatory, the Court lacks the authority to grant compassionate release at this time."

To the extent the Court needs to resolve the exhaustion argument,[1] Ms. Park submits this Reply Memorandum of Law. For the reasons discussed below, the Court can dispense with the exhaustion requirement of 18 U.S.C. § 3582(c).

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[1] In its April 7 Order, the Court ordered the government to submit a letter by April 10 advising the Court of the BOP's determination as to Ms. Park's eligibility for release pursuant to either 18 U.S.C. 3624(c) or 18 U.S.C. 3622(a). The Court further ordered that "[i]f the government

A. The Court can waive the exhaustion requirement of 18 U.S.C. § 3582(c)

1. Claim-processing rules, such as that contained in Section 3582(c)(1)(A), may be waived by a court.

Under the recently-enacted First Step Act, 18 U.S.C. § 3582(c)(1)(A), a sentencing 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, whichever is earlier***, may reduce the term of imprisonment …, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
> (i) 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) (emphasis added).

For the reasons described below, the Court should find that the 30-day waiting period contained in this statute is a non-jurisdictional claim-processing rule, which can be waived by the Court under the unique emergency circumstances here.

a. Section 3582(c)(1)(A) contains a non-jurisdictional claim-processing rule.

To start, the requirement that a defendant exhaust administrative remedies *or* await the passage of 30 days before applying directly to a district court for release is a "claim-processing" rule and is not jurisdictional.

The Supreme Court recently explained the distinction between these two types of rules in *Fort Bend City, Texas v. Davis*, 139 S. Ct. 1843 (2019). As the Court noted, the term

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notifies the Court that the BOP has not made a final determination by April 10, the Court will promptly consider Ms. Park's motion, including her exhaustion arguments, at that time."

"jurisdictional" is generally "reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction)." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846 (2019). "Jurisdictional" prerequisites to a suit may be raised by the court or a party at any time and are not subject to forfeiture or waiver. *See id.* at 1849; *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017). In contrast, non-jurisdictional claim-processing rules, including statutory exhaustion requirements, can be waived by a party if they are not timely asserted and may be subject to equitable waiver by a court. *See Davis*, 139 S. Ct. at 1849 & n.5 (noting Supreme Court has reserved question of whether mandatory claim processing rules are subject to equitable exceptions); *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019) (stating that non-jurisdictional statutory exhaustion requirements can be waived by courts); *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (explaining difference between jurisdictional requirements versus "claim-processing rule[s]," "like a filing deadline or an exhaustion requirement," which require the parties to take certain procedural steps at certain specified times); *United States v. Kwai Fun Wong*, 575 U.S. 402, 405 (2015) (ruling that certain statutory claim processing rules are subject to equitable tolling); *Bowen v. City of New York*, 476 U.S. 467, 482-83 (1986) (waiving statutory exhaustion requirements, in part, because claimants would suffer irreparable injury if exhaustion requirements were enforced against them).

In *Davis*, the Supreme Court held that the rule at issue was a non-jurisdictional "claim-processing rule" because the statute spoke to a party's "procedural obligations," requiring the party "to submit information to [a particular administrative agency] and to wait a specified period before commencing a civil action." *Id.* at 1851. The statute's requirement was thus "a processing rule,

albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." *Id.*

Like the statute at issue in *Davis*, Section 3582(c)(1)(A) contains a non-jurisdictional claim-processing rule. The Second Circuit has not ruled on whether this specific subsection of the statute is jurisdictional. However, in the context of other Section 3582(c) motions, the Second Circuit has joined the majority of circuits to consider the issue in stating that this is not a jurisdictional statute. In *United States v. Johnson*, the Second Circuit explicitly cautioned against characterizing Section 3582(c) as "jurisdictional." *See* 732 F.3d 109, 116 n.11 (2d Cir. 2013). The Circuit explained that the provision was not jurisdictional because the source of a court's jurisdiction over a federal sentence, and the question of whether a federal sentence could be reduced, derived from other sources. *See id.* (citing 28 U.S.C. § 1331); *see also* 18 U.S.C. § 3231.

This accords with the opinions of most Circuits to consider the issue— including the Fourth, Fifth, Seventh, and Eleventh—which have found that it is improper and incorrect to characterize Section 3582(c) as jurisdictional. *See United States v. Taylor*, 778 F.3d 667, 670-71 (7th Cir. 2015) (explaining in context of § 3582(c)(2) motions that "§ 3582 is not part of a jurisdictional portion of the criminal code" and stating "[t]he general rule that has emerged is that 'when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character'") (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)); *United States v. Carlton*, 900 F.3d 706, 710-11 (5th Cir. 2018) (finding this statute is not "jurisdictional" and stating that when Congress does not clearly characterize a statutory limitation as jurisdictional, courts should not treat it as jurisdictional); *United States v. May*, 855 F.3d 271, 274-75 (4th Cir. 2017) (same); *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1245 (11th Cir. 2017) (same).

This also makes sense in light of the remaining statutory provisions. Section 3582(c) sets forth different circumstances under which a district court may lower a previously-imposed sentence. The statute assumes a court's jurisdiction over these sentences; it is not the statutory provision that provides that jurisdiction.

Finally, the fact that the government has waived exhaustion and/or the 30-day waiting period in certain cases, and that courts have accepted this waiver, shows that the statute is not jurisdictional. *See, e.g.*, *United States v. Eli Dana*, No. 14 Cr. 405 (JMF), ECF Docket No. 108 (S.D.N.Y. Mar. 31, 2020) (granting compassionate release motion without exhaustion of administrative remedies, where government consented); *United States v. Jose Maria Marin*, No. 15 Cr. 252 (PKC), ECF Docket No. 1325-1326 (E.D.N.Y. Mar. 30, 2020) (waiving exhaustion requirement and granting compassionate release to defendant based on special risks he faced from COVID-19). If the 30-day waiting period were jurisdictional, a court would not have the power to waive it, even if the government consented.

b. Claim processing rules like Section 3582(c)(1)(A)'s 30-day waiting period can be waived by a court.

Because Section 3582(c) contains a non-jurisdictional claim-processing rule, this Court can waive its application—even without government consent.

The Second Circuit and other Courts of Appeals have routinely held that claim-processing rules are subject to equitable defenses and can be waived by courts.[2] *See, e.g.*, *Boos v. Runyon*, 201 F.3d 178, 183 (2d Cir. 2000) (holding that administrative exhaustion requirement is a claim processing rule and is not jurisdictional, meaning that the court "may waive it, in appropriate

[2] As noted, the Supreme Court has not yet definitely decided this issue, *see Davis*, 139 S. Ct. at 1849, n.5, though it has seemingly endorsed a court's power to waive these requirements, *see, e.g.*, *Berryhill*, 139 S. Ct. at 1774.

circumstances" and waiving requirement in interests of judicial economy); *Washington v. Barr*, 925 F.3d 109, 119 (2d Cir. 2019) (stating that "[e]ven where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute" and finding that exhaustion can be waived where it would be futile, where the agency is unable to provide an adequate remedy, or where it would result in undue harm).

For example, in the context of employment discrimination claims, the Second Circuit has recognized that statutory exhaustion requirements can be waived if adequate remedies are not available through the agency or if exhaustion would be "futile." *See, e.g.*, *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385-86 (2d Cir. 2015) (holding that Title VII's statutory exhaustion requirement is a "precondition to suit," but not jurisdictional, and therefore "is subject to equitable defenses" and may be waived by a court); *Fernandez v. Chertoff*, 471 F.3d 45, 58 (2d Cir. 2006) (same).

Similarly, in the context of claims under the Social Security Act, the Second Circuit has recognized that courts may waive statutory exhaustion requirements, including where attempts at exhaustion would be futile and result in irreparable injury. *See, e.g.*, *New York v. Sullivan*, 906 F.2d 910, 917-18. (2d Cir. 1990).

Regarding habeas motions, 28 U.S.C. § 2254(b)(1) contains a statutory exhaustion requirement before a prisoner can bring a habeas motion, and lists a limited number of exceptions. Despite this statutory language, federal courts have found additional equitable bases to waive exhaustion beyond those listed in the statute. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 135-36 (1987) (explaining that even statutory exhaustion requirements are not "rigid and inflexible," in part because they are assumed to be subject to the same exceptions that existed before Congress began codifying exhaustion) (citing *Frisbie v. Collins*, 342 U.S. 519 (1952)); *see also, e.g.*,

Hendricks v. Zenon, 993 F.2d 664, 672 (9th Cir. 1993) (waiving exhaustion where "exceptional circumstances of peculiar urgency are shown to exist").

To give one final example, immigration statutes include mandatory, statutory exhaustion requirements. Nonetheless, courts have recognized their ability to waive those exhaustion requirements under certain circumstances. *See, e.g.*, *Grullon v. Mukasey*, 509 F.3d 107, 111 (2d Cir. 2007) (recognizing that "mandatory" "statutory" exhaustion requirements under immigration law were still subject to waiver in certain situations, including where an agency could not provide the relief an immigrant sought); *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 173 (2d Cir. 2004) (same); *Iddir v. I.N.S.*, 301 F.3d 492, 498 (7th Cir. 2002) (collecting authorities as to when immigration exhaustion requirements can be waived).

In light of the fact that claim-processing requirements such as Section 3582(c)(1)(A)'s 30-day waiting period are subject to equitable exceptions, several courts have already waived this requirement in light of exigencies cause by the COVID-19 pandemic. *See, e.g.*, *United States v. Wilson Perez*, No. 17 Cr. 513 (AT), ECF Docket No. 98, (S.D.N.Y. Apr. 1, 2020) (granting release based on health issues and finding court could waive exhaustion requirement); *United States v. Zuckerman*, No. 16 Cr. 194 (AT), 2020 WL 1659880, at *3 (S.D.N.Y. Apr. 3, 2020) (same); *United States v. Jose Maria Marin*, No. 15 Cr. 252 (PKC), ECF Docket No. 1325-1326 (E.D.N.Y. Mar. 30, 2020) (waiving exhaustion requirement and granting compassionate release to defendant based on special risks he faced from COVID-19); *United States v. Samuel H. Powell*, No. 94 Cr. 316 (ESH), ECF Docket No. 97 (D.D.C. Mar. 27, 2020) (granting compassionate release for 55-year old defendant with respiratory problems in light of outbreak, without waiting for 30 days or other exhaustion of administrative remedies through the BOP); *United States v. Agustin Francisco*

Huneeus, No. 19 Cr. 10117 (IT), ECF Docket No. 642 (D. Mass. Mar. 17, 2020) (granting defendant's emergency motion based on COVID-19).

2. The Court should waive the 30-day waiting period here because it is futile and Ms. Park will be irreparably harmed by this delay.

As of the filing of this motion, the BOP has failed to make a determination on Ms. Park's pending request for compassionate release.[3] In its April 7 Order, the Court ordered the government to submit a letter advising the Court of the BOP's determination by April 10. If the BOP has not made its decision by that date, the Court should waive the 30-day waiting period (which would expire on March 25, 2020—30 days after Dr. Maitland's email) because it is futile and Ms. Park will be irreparably harmed by the delay. At base, the question is whether the Court can decide Ms. Park's motion now or whether she must wait another two weeks until 30 days have elapsed since she asked the BOP to release her. Her motion should be decided now and she should be released now. Every days counts in the face of this rapidly spreading disease.

Despite the urgency and demands by Attorney General Barr for the BOP to expedite its decision-making process, the BOP has been slow to respond to inmates' COVID-19-based-requests for compassionate release. When courts have requested firm dates for high-risk individuals seeking compassionate release, the BOP has stated that it cannot provide any time frame for processing these applications. In two recent cases, for example, Judge Furman ordered the BOP to "set forth a firm date by which it will reach a decision . . . mindful that each day that passes exposes [the inmate] to more peril and that, under the circumstances, [awaiting 30 days]

[3] On March 27, 2020, through defense counsel, Ms. Park submitted a request for Compassionate Release to the warden of Danbury-FCI. Two days earlier, on March 25, 2020, Ms. Park's former treating physician, Dr. Maitland, sent an email to the BOP urging "furlough release of Haena Park, from federal prison, given the risk of COVID-19 exposure causing severe illness in Ms. Park." *See* Exh. A to Park Compassionate Release Motion, ECF Doc. 57.

may result in irreparable harm." *See United States v. Nkanga*, No. 18 Cr. 713 (JMF), ECF Dkt. 104 (S.D.N.Y. Apr. 3, 2020). In its response, the MDC ignored Judge Furman's order and refused to provide a date. In her affidavit, Caryn Flowers, an Associate Warden, outlined the administrative process for reviewing compassionate release applications, stated that due to the "volume of incoming requests, the BOP cannot set forth a firm date by which the BOP will reach a decision on Petitioner's pending application," and noted that the inmate may "present his claims to his sentencing court" in 30 days) *Id.*, ECF Dkt. 112-1; *see also United States v. Robert Russo*, 16 Cr. 441 (LJL), ECF Dkt. No. 53 (S.D.N.Y. Apr. 2, 2020) (stating "the Bureau of Prisons is unable to give a specific time frame" as to when it will resolve a compassionate release request). On average, under ordinary circumstances, the BOP takes around 141 days to process an approval of compassionate release and 196 days to process a denial. *See* January 16, 2018 Letter from Assistant Attorney General Stephen E. Boyd, *available at* https://www.themarshallproject.org/documents/4369114-1-2018-BOP-response. As a result, there is no basis to believe that if the BOP has not reached a decision by tomorrow that the BOP will take meaningful action in the following two weeks.

Waiving the 30-day waiting period is also completely consistent with Congressional intent. The First Step Act's amendment to 18 U.S.C. § 3582(c)(1)(A) was titled "Increasing the Use and Transparency of Compassionate Release." It was enacted against the backdrop of the BOP's infrequent use of compassionate release and was intended to increase and expedite compassionate release applications. *See, e.g.*, *United States v. Redd*, No. 97 Cr. 06 (AJT), 2020 WL 1248493, at *7 (E.D. Va. Mar. 16, 2020) (discussing legislative history and Congressional intent); *United States v. Young*, No. 00 Cr. 02 (AAT), 2020 WL 1047815, at *5 (M.D. Tenn. Mar. 4, 2020) (same); 164 Cong. Rec. S7753-01, 164 Cong. Rec. S7753-01, S7774. (noting First Step Act "expands

compassionate release under the Second Chance Act and expedites compassionate release applications"). The statutory scheme also shows that when Congress anticipated a potential emergency, it sought to compel the BOP to consider those emergency applications in an expedited fashion. Where an inmate has a "terminal illness," the statute requires BOP to inform the inmate's attorney and family within 72 hours, so that they can prepare a compassionate release application to a court, and requires the BOP to act on the inmate's release request within 14 days. *See* 18 U.S.C.A. § 3582(d)(2). In other words, where Congress anticipated an emergency, the statute reflects its intent that the inmate receive a response from both the BOP and a court on an expedited basis. However, it seems fair to say that Congress would not have anticipated the type of emergency situation presented here.

Finally, to the extent the statute is ambiguous as to whether the Court can waive the 30-day requirement, the rule of lenity requires the Court to resolve the issue in Ms. Park's favor. *See*, *e.g. United States v. Simpson*, 319 F.3d 81, 86 (2d Cir. 2002) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.") (internal quotation omitted).

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For the reasons outlined in our motion, Mr. Park should be released so that she doesn't die in a federal prison that cannot adequately protect her during this pandemic.

The Court can order Ms. Park's release in several ways including, but not limited to: (1) reducing Ms. Park's prison sentence to time served and requiring the remainder of her original sentence be served under home confinement as a condition of her term of supervised release; (2) releasing Ms. Park temporarily (subject to appropriate conditions) until the threat posed by COVID-19 has passed and then remanding her to serve whatever additional term of imprisonment is left on her original sentence; or (3) by sidestepping the § 3582(c) process

altogether and allowing Ms. Park to file a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on the grounds that the current conditions at Danbury-FCI pose a threat to Ms. Park's well-being. *See Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (The Second Circuit has "long interpreted § 2241 as applying to challenges to the execution of a federal sentence, including such matters as . . . prison conditions."); *see generally Hassan Chun v. Warden Derek Edge*, 20 cv 1590 (E.D.N.Y), Dkt. No 1, Class Action Petition Seeking Writ of Habeas Corpus (March 27, 2020) (lodged on behalf of high-risk inmates at the MDC in light of the COVID-19 pandemic). The Court could then release Ms. Park on bail while the petition is pending, or until the unconstitutional conditions have been resolved. *See Muja v. United States*, 2011 WL 1870290, at *1 (E.D.N.Y. May 16, 2011) (to obtain bail petitioner "'must demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective.'" (quoting *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir.1990)).

In short, no matter how it is accomplished, extraordinary and compelling reasons warrant Ms. Park's release from Danbury-FCI. In light of her vulnerabilities, there should be no more delay in releasing her.

Dated: New York, New York
April 9, 2020

/s/ Julia Gatto
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