

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>Criminal No. 14-10082-GAO</b>
	)	
<b>JOHN SILVIA,</b>	)	
	)	
<b>Defendant.</b>	)	

**OPPOSTIION TO DEFENDANT’S MOTION FOR  
COMPASSIONATE RELEASE (DOC. 362)**

The Court should deny defendant John Silvia, Jr’s motion for compassionate release and/or to modify sentence filed pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). First, defendant has failed to fully exhaust administrative remedies as required by the First Step Act. Second, defendant has failed to demonstrate “extraordinary and compelling circumstances” to justify his immediate release from federal custody.

The First Step Act

A court may reduce a term of imprisonment upon finding “extraordinary and compelling circumstances,” consistent with applicable policy statements of the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A). Under the statute, as amended by Section 603(b) of the First Step Act (“FSA”), the Court may act “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 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.”

Examples of qualifying “extraordinary and compelling reasons” include (1) terminal illness; (2) a serious medical condition that substantially diminishes the ability of the defendant to provide self-care in prison; or (3) the death of the caregiver of the defendant’s minor children. *See* USSG §1B1.13 comment. (n.1). Even when an extraordinary and compelling reason exists,

however, a court should only grant a motion for release if it determines that the defendant is not a danger to the public. USSG §1B1.13(2). And the court must consider, in general, whether the 18 U.S.C. § 3553(a) factors weigh in favor of release. *See* 18 U.S.C. § 3582(c)(1)(A); USSG §1B1.13.

*1. The Administrative Exhaustion Requirement*

Previously, only the BOP could file a motion for compassionate release. The FSA amended the provision to allow defendants to file such a motion as well. *See* 115 P.L. 391, § 603(b)(1). Before a defendant may file a motion, however, the defendant must have either (a) “fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant’s behalf,” or (b) 30 days must have lapsed since the receipt of such a request by the warden of the prison. 18 U.S.C. § 3582(c)(1)(A). The failure to have exhausted administrative remedies within the BOP is fatal to a defendant’s motion for compassionate release. *United States v. Raia*, No. 20-1033, 2020 WL 1647922, at \*2 (3rd Cir. Apr. 2, 2020) (published) (per curiam) (“Given BOP’s shared desire for a safe and healthy prison environment, we conclude that strict compliance with § 3582(c)(1)(A)’s exhaustion requirement takes on added—and critical—importance.”); *see also* *Cook v. Spaulding*, 2020 WL 231464, at \*3 (D.Mass., 2020) (Since “petitioner failed to file any administrative remedies concerning his sentence calculation or compassionate release . . . this court cannot at this time address the merits of the petitioner’s claim”); *United States v. Estrada Elias*, No. 6: 06-096-DCR, 2019 WL 2193856, at \*2 (E.D. Ky. May 21, 2019); *accord* *United States v. Elgin*, Case No. 2:14-cr-129-JVB-JEM, 2019 U.S. Dist. LEXIS 86571, \*2–3 (N.D. Ind. May 23, 2019); *cf.* *United States v. Leverette*, 721 F. App’x 916, 917 (11th Cir. 2018) (exhaustion of BOP remedies is requisite for judicial review under 28 U.S.C. § 2241); *United States v. Roberson*, 746 F. App’x 883, 885 (11th Cir. 2018) (same); *United States v. Alexander*, 609 F.3d 1250, 1260 (11th Cir. 2010) (same).

An inmate may appeal the Warden’s compassionate-release denial through BOP’s administrative remedies program. 28 C.F.R § 571.63(a). Only a denial at the level of either the BOP’s director or general counsel constitutes a “final administrative decision” that may not be further appealed within the administrative remedies program, 28 C.F.R. § 571.63(b), (d). Therefore, absent a final administrative decision, an inmate has failed to exhaust his administrative remedies as required by 18 U.S.C. § 3582(c)(1)(A).

*2. Defendant Silvia Has Not Given BOP a Chance to Act*

Here, defendant Silvia has failed to fully exhaust his administrative remedies as required by statute. While defendant’s motion alleges that Silvia delivered a request to the Warden at FMC Devens for “compassionate release” consideration on April 6, 2020, defendant has not given the BOP any opportunity to make a decision and consider defendant’s request. *See e.g., Raia*, 2020 WL 1647922, at \*2 (“BOP has not had thirty days to consider Raia’s request to move for compassionate release on his behalf, and there has been no adverse decision by BOP for Raia to administratively exhaust within that time period”). Instead, without a citation to any authority, Silvia asks this Court to simply “waive” this 30-day exhaustion requirement due to the exigent circumstances of COVID-19.

Courts that have been asked to bypass or waive the administrative remedies exhaustion requirements have uniformly rejected the idea. *See e.g., United States v. Holden*, 2020 WL 1673440, at \*7 (D.Or., April 6, 2020) (after citing prior cases, “the Court concludes the administrative-exhaustion provision of the FSA is mandatory; it is a statutorily-created exhaustion provision rather than a judicially-created provision”). The court should do the same here and deny defendant’s motion on this basis.

*3. The Court Should Also Deny Defendant’s Motion on the Merits*

In any event, this Court should also deny defendant’s motion on the merits because

potential COVID-19 exposure is not an extraordinary and compelling reason to grant release under any circumstances. *Raia*, 2020 WL 1647922 at \*2 (“[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release[.]”); *United States v. Gileno*, No. 3:19-cr-161-(VAB)-1, 2020 WL 1307108, at \*4 (D. Conn. Mar. 19, 2020) (denying compassionate release because BOP’s proposed plan adequately addresses the COVID-19 pandemic). A defendant seeking compassionate release bears the burden of establishing that release is warranted. *See e.g., United States v. Ebberts*, 2020 WL 91399, at \*4 (S.D.N.Y., 2020) (holding a defendant seeking compassionate release has the burden to show he is entitled to a sentence reduction under the First Step Act). Courts have generally recognized that “it is a rare case in which health conditions present an ‘exceptional reason’” to allow for release where detention otherwise would be warranted. *United States v. Wages*, 271 Fed. App’x 726, 728 (10th Cir. 2008) (considering pretrial detention). In this case, defendant simply has not made a factual record that his needs will not be met while detained.

The United States is cognizant of inmate concerns stemming from COVID-19. The United States, nor the BOP, minimize the concern or risk; this unique situation is being diligently monitored. The BOP has taken aggressive action to mitigate the effects of COVID-19, and has been taking proactive steps to prevent potential coronavirus transmissions for months. *See Updates to BOP Covid-19 Action Plan*, located at [https://www.bop.gov/resources/news/20200319\\_covid19\\_update.jsp](https://www.bop.gov/resources/news/20200319_covid19_update.jsp) (last accessed on April 13, 2020). On March 13, 2020, after consulting with the Centers for Disease Control and reviewing guidance from the World Health Organization, the BOP released its multistep action plan to minimize the risk of COVID-19 in its facilities. The BOP continues to update its plan as it gathers additional information and resources to better manage and protect its inmate population.

The BOP has implemented several preventive measures, including, but not limited to, the following:

1. **Inmate and Staff Screenings:**

Effective April 1, 2020 all inmates in every institution will be secured in their assigned space for 14 days. All incoming inmates are quarantined for 14 days, and screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a documented risk of exposure will be quarantined; symptomatic inmates with documented risk of exposure will be isolated and tested pursuant to local health authority protocols. In areas with sustained community transmission, all facility staff will be screened for self-reported risk factors and elevated temperatures. (Staff registering a temperature of 100.4 degrees Fahrenheit or higher will be barred from the facility on that basis alone.) Contractor access to BOP facilities is restricted to only those performing essential services (e.g. medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. All volunteer visits are suspended absent authorization by the Deputy Director of BOP. Any contractor or volunteer who requires access will be screened using the same procedures as applied to staff prior to entry.

2. **Quarantine Logistics:**

All BOP institutions have assessed their stockpiles of food, medicines, and sanitation supplies, and established quarantine areas within their facilities to house any detainees who are found to be infected with or at heightened risk of being infected with coronavirus pursuant to the above-described screening protocol.

3. **Suspension of Social Visits and Tours:**

The BOP has placed a 30-day hold on all social visits. To ensure that familial relationships are maintained throughout this disruption, all detainees' telephone allowances have been increased to 500 minutes per month. Tours of facilities are also suspended for at least the first 30 days that the BOP's Action Plan is in effect.

4. **Suspension of Legal Visits:**

The BOP has also placed a 30-day hold on legal visits, though such visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols for prison staff. Consistent with this new policy, FMC Devens's website indicates that "All visiting at this facility has been suspended until further notice." <https://www.bop.gov/locations/institutions/dev/> (last visited on April 13, 2020).

5. **Suspension of Inmate Movements:**

BOP has also suspended the movement of inmates and detainees among its facilities for at least the first 30 days that the Action Plan is in effect. Though there will be exceptions for

medical treatment and similar exigencies, this will prevent transmissions between institutional populations. **The BOP has emphasized that all inmates, regardless of where they are being housed, are screened for COVID-19 prior to movement. Both the BOP and USMS are using screening protocols for both inmates and staff.** Likewise, all official staff travel has been cancelled, as has most staff training.

6. **Modified Operations:**

Wardens at BOP facilities have modified operations, such as staggering of meal times and recreation time, to maximize social distancing

See BOP COVID-19 Resource Page at <https://www.bop.gov/coronavirus/index.jsp> (regularly updated).

Taken together, these measures are designed to sharply mitigate the risks of COVID-19 transmission in a BOP institution. Thus far, according to the BOP website of April 13, 2020, while 352 federal inmates and 189 BOP staff have confirmed positive tests for COVID-19 nationwide, BOP has not reported any cases at FMC Devens.

4. *Immediate Release Would Infringe Upon the Right of Victims*

Lastly, defendant's premature release would infringe on his victim's right to reasonable protection provided under the Crime Victims' Rights Act ("CVRA"), which specifies that crime victims have "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). The CVRA requires that the Court "ensure that the crime victim is afforded the rights" contained therein, which rights include "the right to reasonable, accurate, and timely notice of any public court proceeding" involving the defendant's release. 18 U.S.C. §§ 3771(a)(2), (b)(1).

CONCLUSION

In sum, this Court should deny defendant's motion for compassionate release based on his failure to exhaust administrative remedies as well as defendant's failure to demonstrate "extraordinary and compelling circumstances" that are particular to him.

Respectfully submitted,

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Neil J. Gallagher, Jr.  
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