UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-*v.*-	:	S5 15 Cr. 706 (VSB)
NG LAP SENG, a/k/a "David Ng," a/k/a "Wu Liseng," a/k/a "Boss Wu,"	:	
Defendant.	:	

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA
IN OPPOSITION TO DEFENDANT NG LAP SENG'S MOTION FOR RELEASE

GEOFFREY S. BERMAN
United States Attorney
Southern District of New York

ROBERT ZINK
Chief, Fraud Section
Criminal Division

Daniel C. Richenthal
Janis M. Echenberg
Douglas S. Zolkind
Assistant United States Attorneys

David A. Last
Assistant Chief

- Of Counsel -

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The Government respectfully submits this memorandum of law in opposition to the motion for release filed by defendant Ng Lap Seng, a/k/a "David Ng," a/k/a "Wu Liseng," a/k/a "Boss Wu" (the "defendant").

PRELIMINARY STATEMENT

The defendant, who engaged in a sophisticated, wide-sweeping, and serious bribery and money laundering scheme, whose conviction was affirmed on appeal, who has served less than half of his sentence, and who is incarcerated at a facility with no known cases of inmates or staff with COVID-19, now moves this Court to release him immediately and permanently from prison, on the ground that he is a greater risk for complications in the event that he were to get COVID-19. That motion should be denied for multiple reasons.

First, this Court lacks authority to order the defendant's release at this time, because he has not exhausted his administrative remedies. The defendant's claim that the Court may simply excuse or ignore that undisputed failure, over the Government's objection, is wrong. It has been rejected by the Third Circuit, *see United States v. Raia*, No. 20-1033, --- F.3d ---, 2020 WL

1647922, at *2 (3d Cir. Apr. 2, 2020), and also by virtually every court in this district to have been presented with it, *see, e.g.*, *United States v. Woodson*, No. 18 Cr. 845 (PKC), 2020 WL 1673253, at *4 (S.D.N.Y. Apr. 6, 2020). For good reason: "Lawmakers who created the statutory right of a convicted defendant to bring an application to reduce his sentence placed a limitation on his right to do so." *Id.* at *3. "[T]he Court is not free" to disregard that limitation by "infer[ring] a general 'unwritten 'special circumstances' exception'" that is irreconcilable with the statute's plain language. *United States v. Roberts*, No. 18 Cr. 528 (JMF), 2020 WL 1700032, at *2 (S.D.N.Y Apr. 8, 2020) (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016)) (denying motion of HIV-positive inmate).

Second, the defendant fails to discharge his burden to demonstrate that he, personally and individually, falls into the narrow band of inmates for whom "extraordinary and compelling reasons" warrant immediate and permanent release. 18 U.S.C. § 3582(c)(1)(A). The defendant's medical conditions, while undoubtedly real, predate his incarceration by years (and were taken into account in imposing a below-Guidelines sentence), are both reasonably common and stable, and do not distinguish him from numerous others. Moreover, the defendant, unlike many others who have moved for release in recent days and weeks, is in a long-term, low-security facility—and one without any known cases of inmates or staff with COVID-19.

Third, and in any event, even assuming *arguendo* that the defendant had otherwise met or could meet his burden, release would remain unwarranted. The law requires that the same Section 3553(a) factors considered at sentencing be considered in weighing a motion for release. As noted above, the defendant has served less than half of his sentence. Release at this time, as he proposes, to a massive, multimillion dollar luxury apartment, with a live-in housekeeper, would not be in accord with those factors. Nor does the defendant, who bears the burden, offer a

basis for the Court to find that, in fact, that is where he will remain if his motion were granted. On the contrary, the Government understands that because the defendant is no longer lawfully in the United States, and there accordingly is both an Immigration and Customs Enforcement ("ICE") detainer and a judicial order of removal in place, if the defendant's motion were granted, he would be released into the custody of ICE and then flown to China. That is, of course, what he has sought ever since his arrest. And even if that did not occur, the defendant continues to present a serious flight risk—particularly now that his conviction has been affirmed. There is at least a substantial likelihood that he will use his massive wealth and connections to seek to return to China (a country with which the United States does not have an extradition treaty) if given the chance. The Court should not release the defendant, more than halving his sentence, given this undeniable fact.

ARGUMENT

I. THE DEFENDANT'S MOTION MUST BE DENIED FOR FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES

The defendant does not dispute that he has failed to exhaust his administrative remedies. Nor could he, because his request to the Federal Bureau of Prisons ("BOP"), which was only made recently, has not yet been ruled upon, much less he has not availed himself of his right to appeal within the BOP a denial, were one to occur, *see* 28 C.F.R. §§ 542.15, 571.63, nor has it been 30 days from the receipt by the BOP of his request. The defendant asserts that, nonetheless, the Court "should excuse [his] failure to exhaust his administrative remedies." (Def. Mem. 4.) The law is squarely to the contrary.

A. The Statute's Exhaustion Requirement Is Mandatory and Contains No Exceptions

Under 18 U.S.C. § 3582(c), a district court "may not" modify a term of imprisonment once imposed, except under limited circumstances. One such circumstance is the so-called compassionate release provision, under which the defendant here seeks relief, which provides that a district court "may reduce the term of imprisonment" where it finds "extraordinary and compelling circumstances." *Id.* § 3582(c)(1)(A)(i). A motion under this provision may be made by either the BOP or a defendant, but in the latter case only "after 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 the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.* (emphasis added). Accordingly, where a compassionate release motion is brought by a defendant who has not "fully exhausted all administrative rights," the district court "may not" modify his term of imprisonment. In short, Section 3582(c)(1)(A)'s exhaustion requirement requires "ful[] exhaust[ion]." The defendant's assertion that he should be "excused" (Def. Mem. 4) from that express, unambiguous requirement has no basis in the statute.

That ends this matter at this time. This is so because Section 3582(c)'s exhaustion requirement is statutory, not the sort of judicially-crafted exhaustion requirement that "remain[s] amenable to judge-made exceptions." *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Statutory exhaustion requirements "stand[] on a different footing." *Id.* "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Id.* Thus, where a statute contains mandatory exhaustion language, as it does here, the only permissible exceptions are those contained in the statute. *Id.*; *see also Bastek v. Fed. Crop. Ins.*, 145 F.3d 90, 94 (2d Cir.

1998) ("Faced with unambiguous statutory language requiring exhaustion of administrative remedies, we are not free to rewrite the statutory text.").

As described above, Section 3582(c)(1)(A) has mandatory exhaustion language with no exceptions. The plain language of the statute states that a court "may not" modify a sentence unless the defendant has first "fully exhausted all administrative rights" or waited 30 days after transmitting his request to the warden. Unlike the Prison Litigation Reform Act ("PLRA"), for example (cited at Def. Mem. 4), there is no statutory qualifier that a defendant need only to exhaust all "available" remedies.[1] *Cf. Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 750 (2017) (statute requiring that certain types of claims "shall be exhausted" is a mandatory exhaustion provision for those types of claims). For this reason, as Judge Cote and others have explained, this Court lacks the authority to grant the defendant's motion at this time. *United States v. Monzon*, No. 99 Cr. 157 (DLC), 2020 WL 550220, at *2 (S.D.N.Y. Feb. 4, 2020).

In recent days and weeks, as the Court is aware, numerous defendants have cited the unusual circumstances presented by COVID-19 as a basis for compassionate release, and have argued that the exhaustion requirement should be waived or excused. The only court of appeals to have addressed the question has rejected the argument and required exhaustion. *See United States v. Raia*, No. 20-1033, --- F.3d ---, 2020 WL 1647922 (3d Cir. Apr. 2, 2020). In *Raia* (a case that the defendant omits from his brief) the Third Circuit recognized the serious concerns presented by COVID-19, but held that, in light of these concerns, as well as the BOP's statutory role and its "extensive and professional efforts to curtail the virus's spread, . . . strict compliance

[1] In particular, the PLRA demands that an inmate exhaust "such administrative remedies *as are available*," meaning that the only permissible exception to exhaustion is where the remedies are "unavailable." *Ross*, 136 S. Ct. at 1856-58 (emphasis added); *see also id.* at 1855 (criticizing the "freewheeling approach" adopted by some courts of appeals to exhaustion requirements, and overruling precedent from the Second Circuit and other circuits that had read additional exceptions into the rule). Here, no such exception exists in the statute.

with Section 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." *Id.* at *2. The vast majority of district courts that have reached the issue—including, to the Government's knowledge, all in this district, except one—have also required exhaustion. *See, e.g.*, *Roberts*, 2020 WL 1700032, at *2; *United States v. Canale*, No. 17 Cr. 287 (JPO), 2020 WL 1809287, at *1 (S.D.N.Y. Apr. 9, 2020); *United States v. Woodson*, No. 18 Cr. 845 (PKC), 2020 WL 1673253, at *4 (S.D.N.Y. Apr. 6, 2020); *United States v. Weiland*, No. 18 Cr. 273 (LGS), 2020 WL 1674137, at *1 (S.D.N.Y. Apr. 6, 2020); *United States v. Arena*, No. 18 Cr. 14 (VM) (S.D.N.Y. Apr. 6, 2020) (Dkt. 354, at 2-3); *United States v. Hernandez*, No. 18 Cr. 834 (PAE), 2020 WL 1445851, at *1 (S.D.N.Y. Mar. 25, 2020); *United States v. Cohen*, No. 18 Cr. 602 (WHP), 2020 WL 1428778, at *1 (S.D.N.Y. Mar. 24, 2020); *United States v. Johnson*, No. 14-CR-4-0441, 2020 WL 1663360, at *1 (D. Md. Apr. 3, 2020); *United States v. Carver*, No. 19 Cr. 6044, 2020 WL 1604968, at *1 (E.D. Wa. Apr. 1, 2020); *United States v. Clark*, No. 17 Cr. 85 (SDD), 2020 WL 1557397, at *3 (M.D. La. Apr. 1, 2020); *United States v. Williams*, No. 15 Cr. 646, 2020 WL 1506222, at *1 (D. Md. Mar. 30, 2020); *United States v. Garza*, No. 18 Cr. 1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020); *United States v. Zywotko*, No. 19 Cr. 113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020); *United States v. Eberhart,* No. 13 Cr. 313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020); *United States v. Gileno*, No. 19 Cr. 161, 2020 WL 1307108, at *3 (D. Conn. Mar. 19, 2020); *see also Monzon*,

2020 WL 550220, at *2; *United States v. Bolino*. No. 6 Cr. 806, 2020 WL 32461, at *1 (E.D.N.Y. Jan. 2, 2020) (citing cases).[2]

To be sure, COVID-19 presents unusual circumstances, in which compassionate release decisions should be made expeditiously. But the text of Section 3582 contains no exigency or similar exception, and indeed, the text refutes the availability of such an exception in two respects.

First, while many statutory exhaustion provisions require exhaustion of all administrative remedies before a claim may be brought in court, Section 3582 provides an alternative: exhaustion of all administrative rights *or* the lapse of 30 days from the warden's receipt of the inmate's request for compassionate release, whichever is earlier. 18 U.S.C. § 3582(c)(1)(A). This statutory alternative suggests that the Congress recognized that even if compassionate release requests cannot always await the full administrative process to be completed, the BOP should have at least 30 days to act on such a request. Legislative history is in accord. *See Roberts*, 2020 WL 1700032, at *2 (legislative history "indicates that Congress recognized the importance of expediting applications for compassionate release and still chose to require a thirty-day waiting period"). As Judge Marrero recently recognized, there is "simply no authority that permits [the defendant] to circumvent the administrative exhaustion requirement" based on a claim of futility, because the ability to seek relief after 30 days constitutes "an express futility

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[2] *But see United States v. Perez*, No. 17 Cr. 513 (AT), 2020 WL 1546422, at *3 (S.D.N.Y. Apr. 1, 2020); *United States v. Colvin*, No. 19 Cr. 179, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020). However, both *Perez* and *Colvin* (cited at Def. Mem. 7) relied on *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019), which, as discussed below, is inapposite because it involves judge-made exhaustion doctrine. *Perez* and *Colvin* are also are inapposite because each was a case where delay amounted to denial because the defendant had a very short period (less than three weeks in *Perez*, and eleven days in *Colvin*) remaining on his or her sentence. *See Perez*, 2020 WL 1546422, at *3; *Colvin*, 2020 WL 1613943, at *2. The defendant omits this fact. And his case is far different.

provision." *Arena*, No. 18 Cr. 14 (VM) (Dkt. 354, at 2); *see also United States v. Gross*, No. 15 Cr. 769 (AJN), 2020 WL 1673244, at *2 (S.D.N.Y. Apr. 6, 2020) ("the case for carving out an equitable exception here is weak" because Section 3582(c) "provides a built-in futility exception in the form of the 30-day rule").

Second, in cases presenting the most urgent circumstance—inmates diagnosed with a terminal illness—Section 3582(d) requires the BOP to process any application for compassionate release in 14 days. That Congress allowed 14 days to process the claims of even a terminally ill inmate suggests that it could not have intended to allow a shorter period (which excusing exhaustion would effectively provide) in a case, such as this, where the potential risk to the inmate, while serious, remains potential.

As the Third Circuit recognized, the mandatory exhaustion requirement accommodates the valuable role that the BOP plays in the compassionate release process. Informed decisions about compassionate release require the collection of information, like disciplinary records, medical history, and facility details, which the BOP is uniquely suited to obtain and that will benefit both the BOP and later a court evaluating such claims. The BOP is also well situated to make relative judgments about the merits of compassionate release requests—particularly at a time like this when many inmates, in different circumstances, are making requests advancing similar claims—and adjudicate those positions in a consistent manner. The Court may of course review those judgments, but Congress expressed its clear intent that such review would come second, with the benefit of the BOP's initial assessment. *See United States v. Russo*, No. 16 Cr. 441 (LJL) (S.D.N.Y. Apr. 3, 2020) (Dkt. 54, at 4) (The statutory text "recognizes that the BOP is frequently in the best position to assess, at least in the first instance, a defendant's conditions, the risk presented to the public by his release, and the adequacy of a release plan. That recognition

is consistent with one of the bedrock principles underlying administrative exhaustion—to permit the agency, with its expertise and with its responsibility over the movant, to make a decision in the first instance."); *see also Woodson*, 2020 WL 1673253, at *3 ("If the BOP denies a defendant's application, the BOP's decision may inform the Court of why the agency does not consider the relief warranted. The present national health emergency makes thoughtful and considered input from the BOP all the more valuable in avoiding unwarranted disparities among convicted defendants.").

In any event, to ignore the mandatory, express, statutory exhaustion requirement, whatever its merits, would be legal error. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018) ("[T]his case presents a question of statutory interpretation, not a question of policy."); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (Where a "statute's language is plain, the sole function of the courts is to enforce it according to its terms." (internal quotation marks omitted)); *cf., e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("This is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation." (internal quotation marks omitted)).

B. The Defendant's "Exceptions" Argument Fails

In the face of unambiguous statutory language, and numerous cases applying it in this district and elsewhere (*see supra* pp. 5-6), the defendant claims, relying principally on *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019), that this Court both may and should find that the exhaustion requirement is "excused" because he fits within certain unwritten, but allegedly applicable, "exceptions." (Def. Mem. 4.) That claim is wrong. The statute's plain language does not permit exceptions. And *Washington* is inapposite for precisely that reason.

Washington involved a *judge-made*, not statutory, exhaustion. *See Washington*, 925 F.3d at 116 (stating that the statute in question "does not mandate exhaustion of administrative remedies" but finding that exhaustion requirement was nevertheless appropriate); *id.* at 118 ("Although not mandated by Congress, [exhaustion] is consistent with congressional intent."). Thus, it was appropriate for the court to consider judge-made exceptions to the judge-made exhaustion requirement, or to put it differently, the scope of the judge-made requirement. *See Ross*, 136 S. Ct. at 1857. But this case involves a mandatory, express, statutory exhaustion requirement. That is entirely different. *See Bastek*, 145 F.3d at 95 (rejecting application of various exceptions to exhaustion requirement where clear statutory requirement exists); *Theodoropoulos v. INS*, 358 F.3d 162, 172 (2d Cir. 2004) (rejecting futility exception to exhaustion requirement in Immigration and Nationality Act because such an exception is "simply not available when the exhaustion requirement is statutory," as opposed to judicial); *United States v. Gonzalez-Roque*, 301 F.3d 39, 46-48 (2d Cir. 2002) (rejecting argument that statutory exhaustion requirement for collaterally attacking a removal order should be excused in light of defendant's *pro se* status in removal proceedings).

To be sure, *Washington* states: "Even where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute. The Supreme Court itself has recognized exceptions to the exhaustion requirement under 'three broad sets of categories.'" *Washington*, 925 F.3d at 118 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)). But the inclusion of the foregoing phrase "by statute" is not supported by the citation that follows. *McCarthy* is another case involving a judge-made exhaustion requirement. *See McCarthy*, 503 U.S. at 152 ("Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim." (emphasis in original)). It thus provides no support for the notion that exhaustion mandated "by statute" is not

absolute. *See Bastek*, 145 F.3d at 95 (rejecting application of *McCarthy* exceptions in a statutory case). Moreover, while *Washington* goes on to discuss three recognized exceptions to exhaustion, it is again describing three exceptions recognized in *McCarthy* in the judge-made context, and as the Supreme Court made crystal clear in *Ross*, there is a critical distinction between statutory and judge-made exhaustion requirements. Given that *Washington* was a judge-made exhaustion case, its unexplained statement that exhaustion mandated "by statute" is "not absolute" is dicta, and cannot supplant the clear statements to the contrary in cases like *Ross* and *Bastek*, and the plain language of the statute here. *See Woodson*, 2020 WL 1673253, at *3 ("The passing reference to 'exhaustion [that] is seemingly mandated by statute . . . is not absolute' in [*Washington*] was not necessary to the Court of Appeals' holding." (ellipsis in original)); *Roberts*, 2020 WL 1700032, at *2 (rejecting argument that *Washington* permits excusing exhaustion under Section 3582(c); unlike those that are judge-made, "statutory exhaustion requirements, such as those set forth in Section 3582(c), must be strictly enforced" (internal quotation marks omitted)).

Mathews v. Eldridge, 424 U.S. 319 (1976) and *Bowen v. City of New York*, 476 U.S. 467 (1986) (cited at Def Mem. 5, 7) are similarly inapposite. In each case, the Supreme Court considered a provision of the Social Security Act providing that a claimant could bring a civil action challenging a decision by the Secretary of Health, Education and Welfare only after "a final decision of the Secretary made after a hearing." 42 U.S.C. § 405(g). The Supreme Court construed this to contain two requirements: (1) a non-waivable, "jurisdictional" element that a claim shall have been brought before the Secretary, and (2) a waivable element that the remedies prescribed by the Secretary be exhausted. *Eldridge*, 424 U.S. at 328. In *Eldridge*, the claimant argued that the Due Process Clause of the Fifth Amendment requires that prior to termination of

Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing. In evaluating whether the denial of his claim was sufficiently "final" so as to "satisfy the exhaustion requirement," the Supreme Court noted that (1) his Due Process claim was entirely "collateral" to his substantive claim of entitlement, and (2) his claim to a predeprivation hearing as a matter of constitutional right "rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.* at 330-31. The Supreme Court accordingly concluded that the denial of the claimant's request for benefits "constitutes a final decision" for purposes of the exhaustion requirement. *Id.* at 332. Thus, *Eldridge* did not excuse an exhaustion requirement; it found it to have been satisfied. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) ("*Eldridge*, however, is a case in which the Court found that the respondent *had followed* the special review procedures set forth in § 405(g), thereby *complying with*, rather than *disregarding*, the strictures of § 405(h).").

In *Bowen*, the Supreme Court stated that *Eldridge* established a two-part test that is satisfied when "the claims were collateral to any claim for benefits, and the harm imposed by exhaustion would be irreparable." *Bowen*, 476 U.S. at 476. The Supreme Court held that the particular claims in that case also satisfied the *Eldridge* test, and thus exhaustion was not required. *Id.* at 483-84. However, the Supreme Court went on to use language suggesting not that the requirement of a "final decision" (and thus the exhaustion requirement) had been *satisfied*, but rather that it could be "excused" under the circumstances set forth in *Eldridge*, as well as when a court deems appropriate "as guided by the policies underlying the exhaustion requirement." *Id.* at 485. These statements in *Bowen*, which go beyond *Eldridge* and are arguably dicta, are in stark tension with *Ross* and other more recent Supreme Court precedents.

Indeed, they set forth precisely the sort of "freewheeling approach to exhaustion" that the Supreme Court has since repudiated. *Ross*, 136 S. Ct. at 1350.

As the Supreme Court has made clear numerous times since *Eldridge* and *Bowen*—and the defendant ignores—courts are "not free to rewrite the statutory text" when Congress has "barred claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 111 (1993). And where Congress has mandated exhaustion, the Supreme Court has rejected attempts to rely on the policies of administrative exhaustion, like those cited in *Bowen*, or the notion of a futility requirement. *See, e.g.*, *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also Woodson*, 2020 WL 1673253, at *3.

Thus, particularly in light of subsequent precedent, *Eldridge* and *Bowen* stand at most for the proposition that the specific statutory exhaustion requirement at issue in those cases can be excused by a court where the two-part *Eldridge* test is satisfied. But by no means do they stand for the proposition that *all* statutory exhaustion requirements may be excused, let alone one as unambiguous as Section 3582(c). Indeed, when the Supreme Court recently reiterated the two-part *Eldridge* test, it emphasized that exhaustion schemes should be interpreted "with a regard for the particular administrative scheme at issue" and that the Social Security Administration is "unusually protective of claimants." *Smith v. Berryhill*, 139 S. Ct. 1765, 1774, 1776 (2019). *Smith* and *Ross* both make clear that the analysis of whether any given statutory exhaustion provision allows for exceptions is unique to that statute. While one statute's text and history may give judges leeway to make exceptions, another may not. *See Ross*, 136 S. Ct. at 1858 n.2; *see also Smith*, 139 S. Ct. at 1776; *Illinois Council on Long Term Care, Inc.*, 529 U.S. at 14 (while interpreting one statutory exhaustion provision, rejecting reliance on a case interpreting a

different statutory exhaustion provision because the outcome "turned on the different language of that different statute").[3]

In sum, the analysis of a statutory exhaustion requirement, like any other statutory requirement, must "begin[] with the text" and utilize "ordinary interpretive techniques." *Ross*, 136 S. Ct. at 1856 and 1858 n.2; *see also, e.g.*, *Ron Pair Enters.*, 489 U.S. at 241. The text of Section 3582(c) is unambiguous and provides for no exceptions. "[T]he Court is not free to infer" one that is irreconcilable with that text. *Roberts*, 2020 WL 1700032, at *2; *see also, e.g.*, *Woodson*, 2020 WL 1673253, at *3.

II. THE DEFENDANT HAS NOT DEMONSTRATED EXTRAORDINARY AND COMPELLING REASONS FOR HIS IMMEDIATE RELEASE

Because the defendant's motion must be denied at this time for failure to exhaust his administrative remedies, the Court need not reach the merits of his motion. But if the Court were to choose to reach the merits, it should reject the motion (and for the same reasons, should reject the defendant's alternative request for a release recommendation to the BOP). While COVID-19 is undoubtedly serious, and the situation is dynamic, the defendant has not met his burden to demonstrate compelling and extraordinary circumstances warranting immediate release. On the contrary, if the Court were to accept his apparent logic, every federal prisoner with heart disease and/or diabetes or similar conditions, regardless of the severity of those conditions, where the inmate is located, what the inmate did, the length of time left on his sentence, or what will follow release, would be entitled to immediate and permanent release. That is unfeasible, unwarranted, and not consistent with the public interest, the applicable statutory framework, or the purpose underlying the framework.

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[3] It bears noting that even if *Eldridge* and *Bowen* were applicable here, the two-part test set forth therein would not be satisfied. The defendant's claim before this Court is not collateral to the claim he is raising with the BOP—it is one and the same.

A. Applicable Law

Under Section 3582, the Court "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 . . . 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).

The relevant Sentencing Commission policy statement is U.S.S.G. § 1B1.13. That statement provides that the Court may reduce the term of imprisonment if "extraordinary and compelling reasons warrant the reduction," *id.* § 1B1.13(1)(A); "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)," *id.* § 1B1.13(2); and "the reduction is consistent with this policy statement," *id.* § 1B1.13(3).

The Application Note describes the circumstances under which "extraordinary and compelling reasons exist":

> (A) Medical Condition of the Defendant. —
>
> > (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
> >
> > (ii) The defendant is—
> >
> > > (I) suffering from a serious physical or medical condition,
> > > (II) suffering from a serious functional or cognitive impairment, or
> > > (III) experiencing deteriorating physical or mental health because of the aging process,
> >
> > that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

> (B) Age of the Defendant. — The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) Family circumstances. —
>
> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
>
> (D) Other Reasons. — As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

Id. § 1B1.13 Application Note 1.

Regardless of the theory of "extraordinary and compelling reasons" under which a defendant proceeds, as noted above, the 18 U.S.C. § 3553(a) factors are relevant to whether release is warranted. *See* 18 U.S.C. § 3582; U.S.S.G. § 1B1.13.

As the proponent of release, the defendant bears the burden of proving that "extraordinary and compelling reasons" exist. *See United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) ("If the defendant seeks decreased punishment, he or she has the burden of showing that the circumstances warrant that decrease."); *United States v. Gotti*, No. 02 Cr. 743 (CM), --- F. Supp. 3d ---, 2020 WL 497987, at *5 (S.D.N.Y. Jan. 15, 2020) (defendant "has the burden of showing that 'extraordinary and compelling reasons' to reduce his sentence exist").

B. The BOP and COVID-19

The BOP has made and continues to make significant efforts to respond to the threat posed by COVID-19.

Since at least October 2012, the BOP has had a Pandemic Influenza Plan. *See* BOP Health Management Resources, https://www.bop.gov/resources/health_care_mngmt.jsp. In January 2020, the BOP began to plan specifically for COVID-19 to ensure the health and safety of inmates and BOP personnel. *See* BOP COVID-19 Action Plan, https://www.bop.gov/resources/news/20200313_covid-19.jsp. As part of its Phase One response, the BOP began to study "where the infection was occurring and best practices to mitigate transmission." *Id.* In addition, the BOP stood up "an agency task force" to study and coordinate its response, including using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the [Centers for Disease Control and Prevention (CDC)], the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the Vice President. BOP's planning is structured using the Incident Command System (ICS) framework." *Id.*

On or about March 13, 2020, the BOP implemented its Phase Two response "to mitigate the spread of COVID-19, acknowledging the United States will have more confirmed cases in the coming weeks and also noting that the population density of prisons creates a risk of infection and transmission for inmates and staff." *Id.* These national measures are intended to "ensure the continued effective operations of the federal prison system and to ensure that staff remain healthy and available for duty." *Id.* For example, the BOP (a) suspended social visits for 30 days (but increased inmates access to telephone calls); (b) suspended legal visits for 30 days (with case-by-case accommodations); (c) suspended inmate movement for 30 days (with case-

by-case exceptions, including for medical treatment); (d) suspended official staff travel for 30 days; (e) suspended staff training for 30 days; (f) restricted contractor access to BOP facilities to only those performing essential services, such as medical treatment; (g) suspended volunteer visits for 30 days; (h) suspended tours for 30 days; and (i) generally "implement[ed] nationwide modified operations to maximize social distancing and limit group gatherings in [its] facilities." *Id.* In addition, the BOP implemented screening protocols for both BOP staff and inmates, with staff being subject to "enhanced screening" and inmates being subject to screening managed by its infectious disease management programs. *Id.* As part of the BOP's inmate screening process, (i) "[a]ll newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms"; (ii) "[a]symptomatic inmates with exposure risk factors are quarantined; and (iii) "[s]ymptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols." *Id.*

On or about March 18, 2020, the BOP implemented Phase Three, which entailed: (a) implementing an action plan to maximize telework for employees and staff; (b) inventorying all cleaning, sanitation, and medical supplies; (c) making sure that ample supplies were on hand and ready to be distributed or moved to any facility as deemed necessary; and (d) placing additional orders for those supplies, in case of a protracted event. *See* BOP Update on COVID-19, *at* https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

On or about March 26, 2020, the BOP implemented Phase Four, which entailed: (a) updating its quarantine and isolation procedures to require all newly admitted inmates to BOP, whether in a sustained community transition area or not, be assessed using a screening tool and temperature check (including all new intakes, detainees, commitments, writ returns from judicial proceedings, and parole violators, regardless of their method of arrival); (b) placing asymptomatic

inmates in quarantine for a minimum of 14 days or until cleared by medical staff; and (c) placing symptomatic inmates in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. *See* BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

On or about April 1, 2020, the BOP implemented Phase Five, which entails: (a) securing inmates in every institution to their assigned cells/quarters for a 14-day period to decrease the spread of the virus; (b) to the extent practicable, offering inmates access to programs and services that are offered under normal operating procedures, such as mental health treatment and education; (c) coordinating with the United States Marshals Service to significantly decrease incoming movement; (d) preparing to reevaluate after 14 days and make a decision as to whether or not to return to modified operations; and (e) affording limited group gathering to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access. *Id.*

The BOP has also "increased Home Confinement by over 40% since March and is continuing to aggressively screen all potential inmates for Home Confinement." Update on COVID-19 and Home Confinement, https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp. In addition, the BOP "has begun immediately reviewing all inmates who have COVID-19 risk factors, as described by the CDC, starting with the inmates incarcerated at FCI Oakdale, FCI Danbury, FCI Elkton and similarly-situated facilities [with COVID-19 outbreaks] to determine which inmates are suitable for home confinement." *Id.*[4]

[4] The Government understands that the defendant does not qualify for home confinement because he is not lawfully in the United States and is subject to an ICE detainer.

As of today, FCI Allenwood Low, where the defendant is housed, has zero inmates or staff members who have tested positive for COVID-19. *See* https://www.bop.gov/coronavirus/index.jsp (last viewed April 10, 2020, at 3:11 p.m.).[5]

These and other steps belie any suggestion that the BOP is failing to address meaningfully the risk posed by COVID-19 to inmates. To the contrary, they show that the BOP has taken the threat seriously, has mitigated it, and continues to update policies and procedures in accord with the facts and recommendations.

The defendant appears to suggest that, notwithstanding the foregoing, because certain facilities are still accepting new inmates, the BOP has not done enough to mitigate the risk to current inmates. (*See* Def. Mem. 15.) The defendant omits that, under current procedures, all new inmates are screened, and those with any risk factors, even if asymptomatic, are quarantined (as the defendant appears to acknowledge earlier in his brief (*see id.* at 12)). *See* BOP Implementing Modified Operations, https://www.bop.gov/coronavirus/covid19_status.jsp; BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp. Nor is FCI Allenwood Low permitting visitation. *See* https://www.bop.gov/locations/institutions/alf/; *see also* BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp. By contrast, the defendant does not propose any screening of or limitation on who may live or interact with him, including his family members and "live-in housekeeper" (Def. Mem. 18), much less reliable and enforceable limitations—assuming *arguendo* that he in fact would live where he proposes to live, rather than be transferred to ICE custody, as the Government understands would occur.

[5] The Government has confirmed this fact with the BOP. In a footnote (Def. Mem. 15 n.20), the defendant incorrectly suggests that an inmate at his facility tested positive.

C. Discussion

There is no dispute that the defendant has heart disease, diabetes, and certain other conditions. There is also no dispute that at least heart disease and diabetes, along with the defendant's age, are COVID-19 risk factors. *See* CDC, Groups at Higher Risk for Severe Illness https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. But serious though the defendant's conditions may be, either individually or as a group, they pre-date his incarceration by years, and they are both stable and manageable. Nor does the defendant allege that he is not being treated properly for any of his conditions. In support of his motion, he notably encloses only records and reports that pre-date his incarceration. (*See* Def. Mem., Ex. C; Dkt. 846.) Records from his incarceration demonstrate that he is being treated appropriately and doing well. For example, earlier this year, during a routine examination, he reported that he had no complaints, was "feeling 'good,'" "runs up to 6 miles 4 times/week without discomfort," and did not have "shortness of breath, chest pain, syncope, excessive diaphoresis, [or] fatigue." (Ex. 1, at 1.) He also felt that "he does not need specialty care." (*Id.* at 5.) To be sure, the same records indicate that he needed to make more progress at controlling his diabetes, but that progress was—and remains—in his control, namely, he needed to snack less on sugary and salty foods. (*See id.* at 1, 5.)

At bottom, hyperbole aside (*e.g.*, Def. Mem. 1 (warning of "a death sentence")), the defendant's argument is that he is older; he has certain reasonably common, though potentially serious health conditions; he is in prison; and there is a COVID-19 pandemic—so he should be immediately released. That is not sufficient for the defendant to discharge his burden to demonstrate that he—personally and individually—falls into the narrow band of inmates who are "suffering from a serious physical or medical condition," "that substantially diminishes the

ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13, Application Note 1(A). *See Raia*, 2020 WL 1647922, at *2 ("We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread."); *cf. Gileno*, 2020 WL 1307108, at *4 (the defendant, who allegedly suffered from high blood pressure, high cholesterol, asthma, and allergies, "has not shown that his medical issues, which remain largely the same as when he was sentenced, 'substantially diminish [his] ability . . . to provide self-care' within the correctional facility" (brackets in original)).

Indeed, the defendant does not really attempt to demonstrate what is required, instead suggesting that anyone at high risk for COVID-19 complications should be immediately released, regardless of what they did, how much time they have served, where they are housed, or any other individual factors, because the BOP purportedly has had a generally "ineffective" response to COVID-19. (Def. Mem. 15; *see also id.*, Ex. G (Affidavit of Brie Williams) ¶ 4 ("I submit this affidavit in support of any defendant seeking release from custody during the COVID-19 pandemic, so long as such release does not jeopardize public safety and the inmate

can be released to a residence in which the inmate can comply with CDC social distancing guidelines.").) That suggestion is not in accord with the facts or the law.[6]

As noted above, the defendant has also not cogently explained why both he and those with whom he lives and interacts allegedly would be safer if he were out of prison, which is in rural Pennsylvania and where authorities are enforcing screening and quarantine as warranted, and instead living in Manhattan, which has a high rate of COVID-19 infection and medical facilities that are struggling to keep up. *Cf. United States v. Davenport*, No. 17 Cr. 61 (LAP) (S.D.N.Y. Apr. 9, 2020) (Dkt. 255, at 2) (denying motion of defendant with diabetes and heart disease; explaining "that there are no current cases of COVID-19 at Schuylkill but that Haverford, the town in which [the defendant] proposes to be released, has one of the highest rates of COVID-19 infection in the Commonwealth of Pennsylvania"). This is a particular concern when the defendant is someone who repeatedly failed to abide by the terms of bail by going to a restaurant, in violation of this Court's orders, and presents a serious risk of flight.

Finally, and in any event, the same Section 3553(a) factors that warranted the defendant's sentence counsel against release, particularly given that he has served less than half of his sentence. The Court stated at sentencing:

> There is no question that you have been convicted of serious offenses. Your activities were not isolated incident, but instead occurred over a number of years. In other words, you had more

[6] Courts considering bail applications, where, unlike here, the defendant is presumed innocent, have rejected this kind of sweeping, non-case specific argument. *See*, *e.g.*, *United States v. Chambers*, No. 20 Cr. 135 (JMF), 2020 WL 1530746 (S.D.N.Y. Mar. 31, 2020) (asthma); *United States v. Michael Valdez*, No. 19 Cr. 883 (JPO) (S.D.N.Y. Mar. 27, 2020) (asthma); *United States v. Rivera*, No. 20 Cr. 6 (JSR) (S.D.N.Y. Mar. 25, 2020) (asthma); *United States v. Gonzalez*¸No. 19 Cr. 123 (NRB) (S.D.N.Y. Mar. 25, 2020) (asthma); *United States v. Fofana*, No. 19 Cr. 447 (DLC) (S.D.N.Y. Mar. 30, 2020) (asthma); *United States v. Steward*, No. 20 Cr. 52 (DLC) (S.D.N.Y. Mar. 26, 2020) ("high-risk" list); *United States v. White*, No. 19 Cr. 536 (PKC) (S.D.N.Y. Mar. 25, 2020) (whooping cough); *United States v. Knight*, No. 20 Cr. 216 (CS) (S.D.N.Y. Mar. 27, 2020) (age and underlying health condition); *United States v. Bradley*, No. 19 Cr. 632 (GBD) (S.D.N.Y. Mar. 24, 2020) (recent stroke and high blood pressure).

> than ample opportunity to rethink your approach as to how you would accomplish your end goal of having a conference center built in Macau. However, at least based upon the evidence presented at trial, not only did you not change your mind with regard to how you'd proceed, the evidence would suggest that you became, as that possibility became closer, you became more aggressive as time went on, pushing either directly or indirectly through Jeff Yin or Lorenzo and Ashe to complete certain tasks and take certain actions in their capacity as ambassadors in Mr. Yin's case as one of your employees, with regard to Mr. Ashe as President of the PGA, as well as the actions and influence the actions of others within the United Nations.

(Sentencing Tr. (Dkt. 843) 86-87.) The Court also explained that the defendant took actions that "made the detection of that activity and the bribery scheme more difficult" (*id.* at 87), caused "damage to the United Nations as an institution" (*id.*), "rigged the system" (*id.* at 88), and required robust general deterrence and the sending of "a message to those at the United Nations itself and other institutions in this country that perverting the decision-making or attempting to pervert decision-making through bribes will not be tolerated and that there are consequences to those actions" (*id.* at 89).

Everything that the Court said remains true. Reducing the sentence of the defendant to less than half of what he was sentenced to serve, particularly given where he is housed and the speculative basis of his motion, is unwarranted. *Cf.*, *e.g.*, *United States v. Credidio*, No. 19 Cr. 111 (PAE), 2020 WL 1644010, at *1 (S.D.N.Y. Apr. 2, 2020) (explaining the court denied a request to change a sentence of 33 months' imprisonment to home confinement for 72-year old defendant at MCC deemed by BOP to be at high risk of COVID-19 complications, because "a lengthy term of imprisonment is required for [the defendant] for all the reasons reviewed at sentencing," and recommending BOP expedite designation to a long-term facility); *United States v. Lisi*, No. 15 Cr. 457 (KPF), 2020 WL 881994, at *5 (S.D.N.Y. Feb. 24, 2020) (denying motion of defendant suffering from, among other things, asthma and high blood pressure; "The

sentencing factors weigh heavily against the reduction of [the defendant's] sentence to time served."), *reconsideration denied*, 2020 WL 1331955 (S.D.N.Y. Mar. 23, 2020).

Moreover, despite the defendant's repeated reference to agreeing to "serve the remainder of his prison sentence in home confinement" (Def. Mem. 1, 16, 17), "the only way to grant [him] the relief [he] seeks (*i.e.*, release from prison) under Section 3582(c) is to reduce [his] sentence to time served—in other words, to *permanently* release [him]." *Roberts*, 2020 WL 1700032, at *3 (emphasis in original); *see also United States v. Urso*, No. 03 Cr. 1382 (NGG), 2019 WL 5423431, at *1 (E.D.N.Y. Oct. 23, 2019); 18 U.S.C. § 3621(b). Of course, in theory, the Court could so reduce the defendant's sentence, and also order that he be confined to his apartment for a particular period of time, as a special condition of supervised release. But even assuming *arguendo* that release to a multimillion dollar luxury apartment, with a live-in housekeeper, after serving less than half of a prison sentence, were otherwise consistent with Section 3553(a) in this case, such a condition here would be both effectively unenforceable and effectively meaningless.

It would be effectively unenforceable because it is difficult to detect such a violation generally (as it was when the defendant went repeatedly to a restaurant while on bail), and for a violation to have consequences, the defendant would have to be returned to prison, after he has been exposed to multiple others in New York City at the height of the pandemic. At the same time, it would also be effectively meaningless because, as noted above, upon completion of the defendant's prison sentence, he will be transferred to ICE custody and then removed to China. And, in any event, the defendant has no material reason to abide by an order to remain in the United States. The loss of a few million dollars in real estate—which is all that the defendant, who bears the burden, proposes (Def. Mem. 18)—is not remotely sufficient to assure that he will

stay in home confinement. Given the defendant's virtually unlimited resources, and that his conviction has been affirmed on appeal, nothing would be sufficient.

* * *

The defendant committed serious corruption offenses, and rightly received a multiple-year term of imprisonment. He appealed his conviction, and it was affirmed. Real though his medical conditions are, they pre-date his sentencing, were taken into account by the Court in imposing sentence, and are stable, manageable, and being properly treated. And real though the risk of COVID-19 is, the BOP has taken and continues to take meaningful steps to mitigate that risk—and appears to have done so particularly effectively with respect to the long-term, low-security facility where the defendant is housed. The defendant is not entitled to immediate and permanent release, more than halving his sentence.

CONCLUSION

For the foregoing reasons, the defendant's motion should be denied.

Dated: New York, New York
April 10, 2020

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: s/ Daniel C. Richenthal
Daniel C. Richenthal
Janis M. Echenberg
Douglas S. Zolkind
Assistant United States Attorneys
(212) 637-2109/2597/2418

ROBERT ZINK
Chief, Fraud Section
Criminal Division

By: s/ David A. Last
David A. Last
Assistant Chief
(202) 616-5651