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* ADMITTED IN NY FLA AND D C

April 27, 2022

[redacted].
Acting General Counsel Central Office
320 First Street, NW
Washington D.C. 20534

Re: [redacted]

Dear Mr. [redacted]:

[redacted] fits squarely within the class of offenders the Attorney General and BOP Director directed be transferred pursuant to the CARES ACT to serve the remainder of their sentence on home confinement to mitigate the spread of COVID-19. Although both the facility warden (Warden [redacted]) and relevant RRM agreed with this assessment, the Correctional Programs Division ("CPD") at Central Office refused to change the SENTRY code (entered after the previous denial), which is determinative of whether the offender in question satisfies the Attorney General and BOP Director's stated criteria. According to CPD, [redacted] was denied because the court, at sentencing, found that he had a supervisory role in the offense and obstructed justice. This refusal is wrong, for several reasons.

First and foremost, the stated reasons are inconsistent with the most recent (April 13, 2021) BOP memorandum (discussed below), which reserves the "denial" SENTRY code for those who fall outside the BOP's stated criteria. Neither a defendant's role in the offense, nor a Guidelines adjustment for obstruction of justice is listed in this BOP memo as being among those factors that are disqualifying. Second, once an inmate has served 25% of his sentence and is otherwise qualified for release, the decision is the Warden's to make, and the Warden's discretion should not be pre-empted by a decision of CPD made prior to the time the inmate was fully qualified. Third, similarly situated offenders are eligible for other forms of early release pursuant to BOP regulations, namely RDAP and FSA Earned Time. For the reasons that follow, the SENTRY Code for denying [redacted] release should be deleted to

permit Warden [redacted] in conjunction with the facility staff and RRM, to exercise their discretion and transfer Mr. [redacted] to home confinement, both to protect Mr. [redacted] and to mitigate the spread of COVID-19 at FCI Ashland.

Mr. [redacted] Meets the Criteria for CARES ACT Relief

Both Warden [redacted] and RRM concluded Mr. [redacted] met the BOP criteria for home confinement. They were correct. The most recent BOP guidance of relevance was issued April 13, 2021 by [redacted], Assistant Director, Correctional Programs Division (the "[redacted] Memorandum"). The [redacted] Memorandum "provides updated guidance and direction and supersedes the memorandum dated November 16, 2020." Rather than providing a non-exhaustive list of criteria, the memo explicitly states that "[t]he following factors are to be assessed to ensure inmates are suitable for home confinement under the CARES Act":

- Reviewing the inmate's institutional discipline history for the last twelve months (Inmates who have received a 300 or 400 series incident report in the past 12 months may be referred for placement on home confinement, if in the Warden's judgement such placement does not create an undue risk to the community);
- Ensuring the inmate has a verifiable release plan;
- Verifying the inmate's current or a prior offense is not violent, a sex offense, or terrorism-related;
- Confirming the inmate does not have a current detainer;
- Ensuring the inmate is Low or Minimum security;
- Ensuring the inmate has a Low or Minimum PATTERN recidivism risk score;
- Ensuring the inmate has not engaged in violent or gang-related activity while incarcerated (must be reviewed by SIS);
- Reviewing the COVID-19 vulnerability of the inmate, in accordance with CDC guidelines; and
- Confirming the inmate has served 50% or more of their sentence; or has 18 months or less remaining on their sentence and have served 25% or more of their sentence.

See Exhibit A, Matevousian Memo, at 1-2.

It is undisputed that Mr. [redacted] fits this criterion:

- He has no disciplinary infractions of any sort;

- He has a verifiable release plan;
- He has no prior offenses, and his current offense does not involve violence, sex, or terrorism;
- He is a minimum security inmate;
- His PATTERN score is Minimum;
- He has no ties to gangs, nor has he engaged in gang-related activity while incarcerated;
- He has seven comorbidities — age, 75 years old; obesity; prior cancer (colon cancer); PSA level is very high at 18+ indicating a heightened risk of developing prostate cancer; chronic lung diseases (chronic obstructive pulmonary disease and episodic acute bronchitis); stroke (having suffered 2 strokes; depression; substance use disorder (alcohol) — which are all recognized by the CDC to increase the risk of severe COVID-19 complications; and
- He has less than 18-months remaining on his sentence, for which he has thus far served 25%.

Additionally, Mr. [redacted] was at liberty on bail in this case, without issue, for three years and two months; this period included bail pending appeal. Mr. [redacted] was also permitted to self-surrender, which he did without issue. There is no reason to believe, therefore, that Mr. [redacted] poses any risk to the community if transferred to home confinement, the same place he resided during the pendency of his trial and appeal. Warden [redacted] and the RRM's decision to transfer Mr. [redacted] was consistent with the BOP guidance.

<u>CPD Erred in Pre-Empting the Warden's Discretion to Grant Relief</u>

Per the [redacted] Memorandum, the Warden "may forward the home confinement referral to the Correctional Programs Division ["CPD"] for further review" "[i]f the Warden determines there is a need to refer an inmate for placement in the community due to COVID-19 risk factors who is outside of the criteria listed above." Exhibit A, at 3. Clear from this language is that the decision whether to grant release to those defendants who satisfy the factors listed in the [redacted] Memorandum belongs to the Warden, who engages the CPD <u>only</u> to seek review of an application on behalf of an inmate whose circumstances to do not satisfy the memorandum's criteria. Although the initial SENTRY entry was made by the CPD at a time when Mr. [redacted] had not yet met the criterion of having served 25% of his sentence, he logically should be in no worse position after he meets that criterion, and the Warden's authority to evaluate his suitability for release pursuant to the [redacted] Memorandum should be unencumbered by the CPD, which, consistent with the Warden's authority, should delete the prior entry.

Support for this conclusion is provided by that part of the [redacted] Memorandum that states, "If an inmate does not qualify for CARES Act home confinement under the above criteria, **they should be reviewed at the appropriate time** for placement in a Residential Reentry Center and/or home confinement consistent with applicable laws and BOP policies." Exhibit A, [redacted] Memo, at 3 (emphasis added). Clear, therefore, is that the "denial" SENTRY Code is applicable only where the Warden believes the offender is ineligible under the applicable criteria. Indeed, when the "appropriate time" arrives — *i.e.* whenever the offender fits the criteria — the [redacted] Memorandum instructs that the offender should be reviewed in conjunction with the applicable factors, and the Warden permitted to forward the request to the RRM for a final determination as would normally occur for any other offender the Warden deems eligible.

Here, when Mr. [redacted] first applied to the Warden in XXX, his application, consistent with the [redacted] Memorandum, was forwarded to the Correctional Programs Division in Central Office because Mr. [redacted] had not yet served 25% of his sentence. *Cf.* Exhibit A, [redacted] Memo, at 1-2.[1] CPD denied the request on March 4, 2022, without providing a reason. When the only impediment to Mr. [redacted] fitting within the [redacted] Memorandum criteria was removed — i.e., service of 25% — the time was "appropriate" for the Warden to send the recommendation directly to the RRM, which he did on or about April 15, 2022. Agreeing with the Warden, the RRM, on April 20, 2022, approved the transfer to home confinement, and advised Mr. [redacted] he would be transferred to home confinement on May 11, 2022.

Two days later, Mr. [redacted] was informed his release had been "revoked" by CPD. [redacted] told Mr. [redacted] the basis for the revocation was the initial March 4, 2022, CPD denial before Mr. [redacted] had reached his 25% time served. A review of the March 4, 2022, denial, signed by [redacted], states that CPD believes Mr. [redacted] ineligible under the CARES Act due to his role as "an organized-leader of obstruction of justice - percentage of time served is never a factor."

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[1] Our understanding is that because Mr. [redacted], at the time of his initial application had not yet served 25% of his 21-month sentence, Warden [redacted] submitted Mr. [redacted] for consideration to the CPD due to his numerous health conditions (7 of 10 CDC COVID-19 risk factors including 2 strokes, CPD, age, obesity and cancer)."

CPD's claim that "percentage of time served is never a factor" is inconsistent with the [redacted] Memorandum's criterion that "the inmate has served 50% or more of their sentence; or has 18 months or less remaining on their sentence and have served 25% or more of their sentence."

More fundamentally, the [redacted] Memorandum requires verification that "the inmate's current or a prior offense is not violent, a sex offense, or terrorism-related," and, therefore would require a Warden to refer an otherwise eligible inmate to CPD, but does not require such a referral for inmates convicted of any other offense, nor does it exclude inmates whose sentencing Guidelines reflect any particular adjustment, such as for role in the offense or obstruction of justice.[2]

Further, other high-profile individuals have been transferred to home confinement after having committed far more egregious offenses, with similar enhancements. For example, [redacted], the 69-year old former comptroller for [redacted] who, over a 22-year period, embezzled $53.7 million in [redacted] money to fund her lavish lifestyle, and sentenced to 19.5 years, was transferred to home confinement.[3] Likewise, 73-year old former [redacted],[4] who was granted transfer to home confinement notwithstanding that she had been sentenced to five years' imprisonment for pocketing $800,000, provided by donors whom she promised the money would provide scholarships for poor students and despite the court's finding that she obstructed justice under USSG § 3C1.1.[5] If the above-mentioned persons were deemed worthy candidates, the far more egregious nature of their crimes notwithstanding, Mr. [redacted] having organized and led one unknowing person to conceal a failure

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[2] We also observe that, at sentencing, Judge [redacted] applied a two-point adjustment for role in the offense under USSG § 3B1.1(c) after rejecting the government's request for a four-point adjustment under USSG § 3B1.1(a).

[3] *See* [redacted], published online Aug. 9, 2021, available at, [redacted]

[4] *See* [redacted] *freed from prison due to coronavirus fears, pastor reports*, Tallahassee Democrat, published online Apr. 23, 2020, available [redacted]-freed-prison-due-coronavirus-fears/3012043001/

[5] Mr. [redacted] was also ascribed a four-point enhancement under USSG § 3C1.1. *See* Exhibit B, Sent. Trans., at 75.

to bill a campaign for expenses not exceeding $150,000 should not be a disqualifier.

Nor is it a disqualifier in other contexts. Other BOP programs that allow for early release and exempt offenders with certain convictions do not exclude persons who receive a role adjustment for being organizers or leaders, or whose sentencing guidelines are increased for obstructing justice. For example, the Residential Drug Abuse Program, which allows inmates to receive one year off their sentence, excludes a large class of inmates, but not those deemed to have an aggravated role in the offense of conviction. *See* 28 CFR § 550.55(b). Indeed, if Mr. [redacted] enrolled in and completed RDAP, there is no question that he would be eligible for the year off. Likewise, Mr. [redacted], as a minimum-security inmate, has been determined by the BOP to be eligible for the maximum allotted time-off permitted by the FSA Earned Time program, and that program exempts an even larger class of offenders than RDAP.[6]

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The bottom line is that not only is CPD's refusal to change the SENTRY code inconsistent with BOP's own [redacted] Memorandum, the reasons for denying him release just doesn't hold weight. Deferring to the Warden and the RRM, additionally, is a sounder approach in making home confinement determinations considering they are the ones on the ground who interact with the offender and can best judge the specific needs of the offender and the facility. And, yet here, once Mr. [redacted] met the 25% criterion provided in the [redacted] Memorandum, and both the Warden and RRM agreed transferring him to home confinement would help protect Mr. [redacted] while simultaneously mitigating the spread of COVID-19 at FCI Ashland, CPD refused to change the code to permit Mr. [redacted]s transfer.

Simply put, neither Warden [redacted] nor Mr. [redacted] should be penalized for the Warden's earlier decision to forward what can only be characterized as an emergency request to CPD to transfer Mr. [redacted] to home confinement. Yet, that is exactly what is happening here, since but for Warden [redacted] earlier emergency application to CPD, the Warden's subsequent recommendation, once Mr. [redacted] had served 25% of his sentence, would have gone to the RRM and would have been approved.

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[6] *See Disqualifying Offenses A list of offenses that would disqualify offenders from earning time credits*, Federal Bureau of Prisons, last viewed Apr. 27, 2022, available at https://www.bop.gov/resources/fsa/time_credits_disqualifying_offenses.jsp

For these reasons, the decision to transfer Mr. L[redacted]'s to home confinement should be reinstated.

Sincerely,

[redacted]