IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JEFFREY A. HASSENFLUG, Defendant.	No. 16-00367-01-CR-W-GAF

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S PRO SE MOTION TO REDUCE SENTENCE PURSUANT 18 U.S.C. §3582(c)(1)(A)(i) – COMPASSIONATE RELEASE (D.E. 33) AND TO DEFENDANT'S PRO SE MOTION TO APPOINT COUNSEL (D.E. 36)

The United States of America, through Timothy Garrison, United States Attorney for the Western District of Missouri, and the undersigned attorney, provides the following response in opposition to Jeffrey Hassenflug's motion for compassionate release. The defendant seeks to have his 90-month sentence for Distribution of Child Pornography reduced to time served based upon extraordinary and compelling reasons. The defendant argues extraordinary and compelling reasons exist because the coronavirus (COVID-19) places him at risk if the defendant remains in the custody of the Bureau of Prisons (BOP). (D.E. 33.) The defendant has not exhausted his administrative remedies. Even assuming the defendant had exhausted his administrative remedies, however, the defendant remains a danger to the community. Therefore, the Government opposes the defendant's request and asks the Court to deny the defendant's motion. The Government also opposes the defendant's pro se motion requesting the appointment of counsel. (D.E. 36.)

I. Procedural History

Jeffrey Hassenflug was indicted on December 14, 2016 by a grand jury sitting in the Western District of Missouri with Distribution of Child Pornography over the Internet, Receipt of Child Pornography over the Internet, and Possession of Child Pornography. (D.E. 1.) On April 25, 2018, Hassenflug pled guilty to Distribution of Child Pornography. (D.E. 20.) On October 19, 2018, the Court sentenced Hassenflug to 90 months' imprisonment, to be followed by a 10-year term of supervised release. (D.E. 29.) Based on the information made available on the Bureau of Prisons Inmate Locator, the defendant's release date is September 13, 2024. (*See* https://www.bop.gov/inmateloc/.)

On August 19, 2020, Hassenflug filed a motion under 18 U.S.C. § 3582, seeking immediate release, claiming that the current situation regarding the Coronavirus (COVID-19) places him at risk if he remains in custody in the Bureau of Prisons (BOP) and that extraordinary and compelling reasons warrant his immediate release. (D.E. 33.)

On September 1, 2020, the defendant filed a pro se motion requesting that the Court appoint Counsel to further litigate his request for compassionate release. (D.E. 36.)

According to the BOP, the defendant has previously submitted a request to the Warden at Texarkana FCI that he be placed on home confinement for the remainder of his sentence. The BOP reports, however, that it has no record that the defendant has made a request for compassionate release to the Warden at his BOP facility.

II. First Step Act

The First Step Act, effective December 21, 2018, provides inmates the ability to file a motion for compassionate release, an ability previously only vested in the BOP. Under 18 U.S.C. § 3582(c) a court may not modify a term of imprisonment once it has been imposed except that,

under subsection § 3582(c)(1)(A), a court may reduce a term of imprisonment upon finding "extraordinary and compelling reasons," if such reduction is consistent with applicable policy statements of the Sentencing Commission, after considering the factors set forth in 18 U.S.C. § 3553(a), and after determining the defendant is not a danger to the community as provided in 18 U.S.C. § 3142(g). (U.S.S.G. § 1B1.13(2).) The pertinent policy statement, U.S.S.G. § 1B1.13, defines specific medical, age, and family circumstances as possibly justifying a sentencing reduction under this statute, and further authorizes a sentencing reduction based on an extraordinary and compelling circumstance identified by the BOP. (§1B1.13 Commentary n.1(D).)

The statute, 18 U.S.C. § 3582(c)(1)(A), originally permitted judicial relief only upon a motion by the Director of the BOP. Section 603(b) of the First Step Act now permits courts to 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 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."

As the proponent of a motion, the inmate bears the burden of proving both that they have satisfied the procedural prerequisites for judicial review—*i.e.*, that they have "exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on [his] behalf" or that 30 days have lapsed "from the receipt of such a request by the warden"—and that "extraordinary and compelling reasons" exist to support the motion. 18 U.S.C. § 3582(c)(1)(A); *see United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) ("A party with an affirmative goal and presumptive access to proof on a given issue normally has the burden of proof as to that issue."); *cf. United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013) ("[A] defendant, as the § 3582(c)(2)

movant, bears the burden of establishing that a retroactive amendment has actually lowered his guidelines range in his case.").

III. <u>The Defendant Is Not Entitled to Counsel</u>

The defendant asks the Court to appoint counsel to assist him in further litigating his motion for compassionate release. (D.E. 36.) Simply put, the defendant has no right to counsel in this instance. The 8th Circuit has determined that in proceedings under § 3582(c) there is no constitutional right to the appointment of counsel, nor is there a statutory right to counsel available under 18 U.S.C. 3006A(c). *United States v. Harris*, 568 F.3d 666 (8th Cir. 2009). *See also United States v. Wilson*, 2019 WL 7372975 at 2 (Dec. 31, 2019), (where the South Dakota United States District Court, citing *United States v. Webb*, 565 F 3d 789, 793-95 (11th Cir. 2009), found that the defendant did not have the right to counsel for a motion for compassionate release).

The Government asserts this is particularly true in this case, because even if an attorney were appointed to litigate a motion for compassionate release, the issue would still not be ripe because there is no allegation the defendant has exhausted his administrative remedies with the BOP, as will be explained below.

Further, although the First Step Act does not specify the procedure for judicial consideration of a motion for compassionate release under Section 3582(c)(1)(A), under the law, the inmate does not have a right to a hearing. Rule 43(b)(4) of the Federal Rules of Criminal Procedure states that a defendant need not be present where "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." *See Dillon v. United States*, 560 U.S. 817, 827–28 (2010) (observing that, under Rule 43(b)(4), a defendant need not be present at a proceeding under Section 3582(c)(2) regarding the imposition of a sentencing

modification). In *Wilson*, *supra*, the District Court, citing *Dillon*, also denied a request for an evidentiary hearing on the defendant's motion for compassionate release.

IV. BOP Response to the Coronavirus Pandemic

The BOP has taken significant measures to protect the health of all inmates. The BOP began planning for potential coronavirus transmissions in January 2020. At that time, the agency established a working group to develop policies in consultation with subject matter experts at the Centers for Disease Control (CDC), and in accordance with guidance from the World Health Organization (WHO). The BOP has implemented preventive and mitigation measures including:

- **Screening of Inmates and Staff:** All newly-arriving BOP inmates are processed through quarantine sites and screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with exposure risk factors are quarantined. Symptomatic inmates with exposure risk factors will be isolated and tested for COVID-19. Enhanced health screening of staff is being performed at all BOP locations

- **Quarantine Logistics:** All BOP institutions establish quarantine areas within their facilities to house any inmates found to be infected with or at heightened risk of being infected with coronavirus.

- **Suspension of Social Visits and Tours:** The BOP suspended all social visits and tours.

- **Suspension of Legal Visits:** The BOP placed a hold on legal visits, with exceptions permitted on a case-by-case basis.

- **Suspension of Inmate Movements:** Inmate internal movement is suspended with limited exceptions.

- **Modified Operations:** BOP facilities modified operations in order to maximize social distancing of inmates at facilities.

Further details regarding the BOP's COVID-19 action plan and efforts, and a daily updated resource page are available at: https://www.bop.gov/coronavirus/index.jsp.[1]

[1] According to the resource page, due to the rapidly evolving nature of this public health crisis, the BOP will update the dashboard daily at 3:00 p.m. based on the most recently available data from across the agency as reported by the BOP's Office of Occupational Health and Safety.

Taken together, these measures are designed to mitigate the risks of COVID-19 transmission in BOP institutions. BOP professionals continue to monitor this situation and adjust practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

Unfortunately inmates have become ill, and there have been COVID-19 outbreaks at several institutions.[2] Notwithstanding the current pandemic crisis, the BOP must carry out its charge to incarcerate sentenced criminals to protect the public. It must consider the effect of a mass release on the safety and health of both the inmate population and the citizenry. It must marshal its resources to care for inmates in the most efficient and beneficial manner possible. It must assess release plans, which are essential to ensure that a defendant has a safe place to live and access to health care in these difficult times. And it must consider myriad other factors, including the availability of transportation for inmates, and of supervision of inmates once released.

In addition, the Attorney General has directed that the BOP prioritize transferring inmates to home confinement in appropriate circumstances when those inmates are vulnerable to COVID-19 based on CDC risk factors, and the BOP is devoting all available resources to executing that directive. On March 26, 2020, the Attorney General directed the Director of the BOP, upon considering the totality of the circumstances concerning *every* inmate, to prioritize the use of statutory authority to place prisoners in home confinement. Section 12003(b)(2) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), enacted on March 27, 2020, permits the BOP, if the Attorney General finds that emergency conditions will materially affect the functioning

[2] As of this date the Federal Correctional Institution (Texarkana F.C.I.) in which the defendant is confined reports that only one inmate has tested positive for COVID-19 at that facility. The facility reports that the inmate has recovered. Four staff members also tested positive and two are reported to have recovered. See https://www.bop.gov/coronavirus/

of the Bureau of Prisons,[3] to "lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate." Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (to be codified at 18 U.S.C. § 3621 note.) To date, the BOP has placed more than 7,559 inmates on home confinement. *See* https://www.bop.gov/coronavirus/.

Even though the Government is requesting the Court dismiss the defendant's motion, the Government is sensitive to the issues the defendant raises related to the coronavirus pandemic. The Government does not minimize the concern or the risk to inmates such as the defendant. At the present time, the BOP has taken action to mitigate the danger for all inmates. In this case, although the Government concedes that the defendant has identified CDC medical risk factors affecting the likelihood of severe outcomes from COVID-19, the defendant remains a danger to the community, as will be explained below, and the Government objects to his release from custody.

V. The Defendant has Identified Extraordinary and Compelling Reasons

The Sentencing Commission's pertinent policy statement related to extraordinary or compelling reasons appears at U.S.S.G. § 1B1.13. As amended November 1, 2018, the statement repeats the text of 18 U.S.C. § 3582(c)(1)(A) and adds that the court should reduce the sentence only if 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)."

The BOP promulgated Program Statement 5050.50, amended effective January 17, 2019, to set forth its own internal criteria for evaluating compassionate release requests. Courts have frequently upheld the BOP's discretionary authority in its management duties over federal

[3] On April 3, 2020, the Attorney General gave the Director of the BOP the authority to exercise this discretion.

prisoners. *See Tapia v. United States*, 564 U.S. 319, 331 (2011) ("When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over [the place of imprisonment and treatment programs].").

The CDC has identified two separate categories of medical risk factors affecting the likelihood of severe outcomes from COVID-19. Because this list includes Cancer, the defendant's condition falls into the first of these categories in which the CDC established a list of conditions that, according to current data, definitively entail a greater risk of severe illness. The Government acknowledges that, during the current COVID-19 pandemic, an individual whose medical records confirm a condition on this first list, and who is not expected to recover from that condition, presents an extraordinary and compelling reason for compassionate release.

The Government has obtained copies of the defendant's medical records from the BOP, which the defendant has also attached as an exhibit to his motion for compassionate release. (D.E. 33-2). Those records confirm the defendant's diagnosis of prostate cancer. A June 30, 2020 entry in the defendant's BOP medical records states the following regarding the defendant's cancer diagnosis:

"PSA. elevated in the past one year. PSA: 4.23 (07/19), 4.74 (10/19), 5.5 in 05/2020. Prostate BX: Biopsy was done on 5/27/20, pathology report shows Prostatic adenocarcinoma, Gleason score 6 (3+3)[4] to 5 different areas. E 770 was approved, pending transferred to medical center for the treatment. Currently denies blood in the urine, pain."

[4] The most common scale used to evaluate the grade of prostate cancer cells is called a Gleason score. Most Gleason scores used to assess prostate biopsy samples range from 6 to 10. A score of 6 indicates a low-grade prostate cancer. A score of 7 indicates a medium-grade prostate cancer. Scores from 8 to 10 indicate high-grade cancers. *See* www.mayoclinic.org/diseases-conditions/prostate-cancer/diagnosis-treatment/drc-20353093.

Regarding the defendant's confirmed history of Asthma, the records state the following in the June 30, 2020 entry:

"With a h/o Asthma since he was at high school, denies h/o hospitalized and intubated due to asthma attack. Currently on Albuterol inhaler, used twice/6 months due to night-time awakening because of allergy reaction per the patient Denies HX of smoking."

The Government has communicated with the BOP regarding the defendant's diagnosis and treatment plan. According to the BOP, the defendant is categorized as an "Urgent Medical Priority" for transfer and is currently scheduled for transfer to Butner Federal Medical Center in North Carolina for treatment at the medical center's oncology unit. The general safety precautions undertaken by the BOP described above for all inmates, along with the specific efforts made to diagnose and treat the defendant within the BOP, are sufficient to address the healthcare needs of the defendant at this time. It is the Government's position that, given the pending medical treatment of the defendant's condition by an oncologist at a BOP medical facility, a determination to consider a request for compassionate release is premature. Any changes in the defendant's health related circumstances can be quickly addressed in a motion by the defendant to reconsider a denial of his request for compassionate release as those changes arise.

VI. <u>Defendant Remains a Danger to the Community</u>

This Court may not reduce the defendant's sentence unless it finds that "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)." USSG § 1B1.13. Under present circumstances, an inmate's diagnosis with a medical condition that the CDC has identified as a risk factor for COVID-19, and from which the inmate is not expected to recover, presents an 'extraordinary and compelling reason' that may warrant compassionate release if other criteria are also met. 18 U.S.C. 3582(c)(1)(A). A review of the

defendant's medical records[5] leads the Government to agree that the defendant's chronic medical condition, specifically prostate cancer (combined with a diagnosis of asthma), presents "a serious physical or medical condition . .. that substantially diminishes the defendant's ability to provide self-care within the correctional facility and from which he is not expected to recover," U.S.S.G. § 1B1.13 cmt. n.1(A)(ii)(I). Stated another way, the defendant's ability to provide self-care against serious injury or death as a result of COVID-19 is substantially diminished by this chronic medical condition and sets forth an "extraordinary and compelling" reason for purposes of 18 U.S.C. § 3582(c).

Even though the Government agrees the defendant has identified an extraordinary and compelling reason for release, this defendant is a danger to the community, and should not be considered for compassionate release.

Under 18 U.S.C. § 3142(g), the Court must consider four factors in determining whether the defendant might present a danger: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant, including the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court, and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. 18 U.S.C. § 3142(g)(1)–(4). Consideration of these factors—which are not affected by COVID-19—does not allow this Court to conclude that this defendant is not a danger to the safety of any other person or the community.

[5] The Government has obtained the defendant's medical records from the BOP and can make the records available if required by the Court.

Nature and circumstances of the charged offense, § 3142(g)(1).

On March 7, 2016, an FBI Kansas City Child Exploitation Task Force Officer (TFO) began conducting an online investigation searching for individuals sharing child pornography over the Internet utilizing file sharing software. The TFO directed his investigative focus to a device at IP address 23.255.230.51 (suspect device) because it was associated with a large number of files of interest to child pornography investigations. Over the course of the investigation, which continued through May 12, 2016, the TFO successfully completed the download of over 1,336 files containing child pornography directly from the suspect device. Many of the names of the files were indicative of their child pornographic content and most depicted babies and toddlers being sexually abused. Images the TFO downloaded from the suspect device included a still image of an approximately 2-year-old female child performing oral sex on an apparent adult male. The image was part of a folder in the defendant's collection named "Toddler PTHC extremely 0 – 10yo 2008" and was located within a subfolder maintained by the defendant named "Oral." The TFO also downloaded a video file from the suspect device named "pthc pedo rare deepthroat 5yo wow no gaging. mpg." The video was two minutes in length and depicted a nude prepubescent female performing oral sex on an adult male's penis. Additional investigation by the TFO developed the defendant as the suspect. On June 2, 2016, a state issued search warrant was executed on the defendant's residence in Kansas City, Missouri, located in the Western District of Missouri. Hassenflug was home when officers arrived to execute the search warrant and was the only occupant of the residence. A forensic examiner with the Heart of America Regional Computer forensics Laboratory conducted an analysis of the electronic devices seized from the defendant during the execution of the search warrant. Analysis located approximately 3,047 still images and 131 video files depicting minors engaging in sexually explicit conduct on the defendant's devices,

as well as evidence that a file sharing program was used for the purpose of downloading and sharing child pornography. Most of the child pornography was located on the defendant's Asus laptop computer. Examination revealed that the IP address 23.255.230.51 had been assigned to the defendant's Asus laptop computer. (D.E. 20, paragraph 3 and D.E. 21, paragraphs 4 through 18.)

Weight of the evidence, § 3142(g)(2). In the instant case, the weight of the evidence is not in question as Hassenflug pled guilty to the offense of conviction while also admitting to the possession of a large collection of child pornography. (D.E. 20, ¶ 3.)

Defendant's history and characteristics, § 3142(g)(3).

The defendant was employed as a physician at all times during the offense period. (D.E. 21, paragraphs 63 through 65.) In this position the defendant potentially had access to children and the opportunity for close physical contact with children. That the defendant chose a career in which he would have the opportunity for physical contact with minors is concerning given his deviant sexual attraction to children. Additionally, it is noteworthy that while the defendant was on bond for the offense of conviction the defendant had contact with a female friend of his 10-year-old nephew. Specifically, On April 12, 2018, the defendant and his mother accompanied the defendant's nephew and his friend to a park. The defendant admitted to pretrial officers that the mother of his nephew's friend was not aware of his pending charges. (D.E. 21, paragraph 3.)

Nothing about the COVID-19 pandemic reduces the defendant's danger to others. The defendant has failed to demonstrate that the factors that the Court considered at the time of sentencing have changed, therefore the Court should deny the defendant's motion for immediate release.

VII. The Defendant Has Failed To Exhaust Administrative Remedies

The BOP reports that the defendant has not submitted a request for compassionate release to the Warden of his facility. The Court lacks authority to act on the defendant's motion for compassionate release at this time. The statute requires that a request for compassionate release be presented first to the Bureau of Prisons for its consideration; only after 30 days have passed, or the defendant has exhausted all administrative rights to appeal the Bureau's failure to move on the defendant's behalf, may a defendant move for compassionate release in court.

The compassionate release statute provides, in pertinent part:

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the 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 . . . .

18 U.S.C. § 3582(c)(1)(A).

The statutory restriction is mandatory, and it continues to serve an important function during the present crisis. The Government is very mindful of the concerns created by COVID-19, and the BOP is making its best effort both to protect the inmate population and to address the unique circumstances of individual inmates.

The Third Circuit has considered this issue and determined that a defendant seeking COVID-19 compassionate release must meet the 30-day exhaustion requirement with BOP:

> We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like [defendant]. But the mere existence of COVID-19 in society and the possibility that it might 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. 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. And given the Attorney General's directive that BOP "prioritize the use of [its] various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic," we anticipate that the exhaustion requirement will be speedily dispatched in cases like this one.

United States v. Raia, 954 F.3d 594 (3d Cir. 2020) (citations omitted).

"'[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 825 (2010). As the Supreme Court has recognized, finality is an important attribute of criminal judgments, and one "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion). Accordingly, it is well established that once a district court has pronounced sentence and the sentence becomes final, the court has no inherent authority to reconsider or alter that sentence. Rather, it may do so only pursuant to statutory authorization. *See, e.g.*, *United States v. Addonizio*, 442 U.S. 178, 189 & n.16 (1979); *United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008); *United States v. Smartt*, 129 F.3d 539, 540 (10th Cir. 1997) ("A district court does not have inherent authority to modify a previously imposed sentence; it may do so only pursuant to statutory authorization.") (internal quotation marks omitted).

Consistent with that principle of finality, Section 3582(c) provides that a court generally "may not modify a term of imprisonment once it has been imposed," 18 U.S.C. § 3582(c), except in three circumstances: (1) upon a motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A), such as that presented by the defendant; (2) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," 18 U.S.C.

§ 3582(c)(1)(B); and (3) where the defendant was sentenced "based on" a retroactively lowered sentencing range, 18 U.S.C. § 3582(c)(2).

Given the plain language and purpose of the statute, the requirements for filing a sentence reduction motion—including the requirement that a defendant exhaust administrative remedies or wait 30 days before moving in court for compassionate release—are properly viewed as jurisdictional. Section 3582(c) states that a "court may not modify" a term of imprisonment except in enumerated circumstances. 18 U.S.C. § 3582(c). It thus "speak[s] to the power of the court rather than to the rights or obligations of the parties," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (citation omitted), delineating "when, and under what conditions," a court may exercise its "'adjudicatory authority,'" *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) (quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam)). That conclusion is reinforced by the historical powerlessness of the courts to modify a sentence after the expiration of the term at which it was entered. *See United States v. Mayer*, 235 U.S. 55, 67-69 (1914); *United States v. Welty*, 426 F.2d 615, 617-618 & n.8 (3d Cir. 1970). Section 3582(c) accordingly has been understood as conferring the jurisdictional authority that previously was lacking by providing express statutory authorization to modify otherwise final sentences.[6]

[6] A number of courts have recognized that the prerequisites for relief under Section 3582(c)(2), which allows a sentence reduction based on a retroactive guideline amendment, are jurisdictional. *See, e.g.*, *United States v. Auman*, 8 F.3d 1268, 1271 (8th Cir. 1993); *United States v. Garcia*, 606 F.3d 209, 212 n.5 (5th Cir. 2010); *United States v. Williams*, 607 F.3d 1123, 1125-26 (6th Cir. 2010); *United States v. Austin*, 676 F.3d 924, 930 (9th Cir. 2012); *United States v. Graham*, 704 F.3d 1275, 1279 (10th Cir. 2013); *United States v. Mills*, 613 F.3d 1070, 1078 (11th Cir. 2010); *see also United States v. Higgs*, 504 F.3d 456 (3d Cir. 2007) (canvassing history of judicial treatment of Rule 35 as jurisdictional and holding that Rule 35(a) and Section 3582(c)(1)(B) remain jurisdictional after *Bowles*). Other courts disagree. *See, e.g.*, *United States v. Johnson*, 732 F.3d 109, 116 n.11 (2d Cir. 2013); *United States v. Taylor*, 778 F.3d 667, 670 (7th Cir. 2015).

We recognize that, in recent years, the Supreme Court has cautioned against imprecise use of the "jurisdictional" label, and explained that a statutory claim-processing rule, even if mandatory, is presumed to be nonjurisdictional absent a clear statement to the contrary. *See Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848-50 (2019). A prescription is not jurisdictional merely because "it 'promotes important congressional objectives,'" *id*. at 1851 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 n.9 (2010)), and courts should not deem jurisdictional rules that "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). But whether a prescription is jurisdictional turns on Congress's intent, which is properly determined by the text, context, relevant historical treatment, and purpose of the provision. *Henderson*, 562 U.S. at 436. Here, the relevant factors indicate that Section 3582(c) sets forth a jurisdictional limitation on a district court's authority to modify a sentence, such that a district court lacks jurisdiction to consider a motion for compassionate release where the defendant has failed to satisfy the exhaustion requirement of Section 3582(c)(1)(A).[7]

While the Government maintains that the time limitation in Section 3582(c)(1)(A) is jurisdictional, given that it stands as an exception to the historic and fundamental rule that courts may not revisit a final criminal judgment, the point is ultimately academic. Even if the exhaustion requirement of Section 3582(c)(1)(A) is not jurisdictional, it is at least a mandatory claim-processing rule and must be enforced if a party "properly raise[s]" it. *Eberhart*, 546 U.S. at 19 (holding that Fed. R. Crim. P. 33, which permits a defendant to move for a new trial within 14

[7] Although we use the term "exhaustion requirement," to be clear, an inmate need not "exhaust" administrative remedies if the motion is filed in court 30 days after receipt of a request by the warden.

days of the verdict, is a nonjurisdictional but mandatory claim-processing rule). The government raises the rule here, and it must be enforced.[8]

The requirement of a 30-day period to afford BOP the initial review of the defendant's request therefore cannot be excused. While Congress indisputably acted in the First Step Act to expand the availability of compassionate release, it expressly imposed on inmates the requirement of initial resort to administrative remedies. And this is for good reason: The Bureau of Prisons conducts an extensive assessment for such requests. *See* 28 C.F.R. § 571.62(a); BOP Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf. As the Procedures reflect, the Bureau of Prisons completes a diligent and thorough review, with considerable expertise concerning both the inmate and the conditions of confinement. Its assessment will always be of value to the parties and the Court.

For all of these reasons, BOP is best positioned to determine the proper treatment of the inmate population as a whole, taking into account both individual considerations based on an inmate's background and medical history, and more general considerations regarding the conditions and needs at particular facilities. The provision of Section 3582(c)(1)(A) prioritizing administrative review therefore makes sense not only in the ordinary case, but also at the present

[8] Indeed, even those courts that have concluded that the requirements of Section 3582(c)(2) are not jurisdictional still largely enforce the statutory prerequisites to relief. *See, e.g.*, *Taylor*, 778 F.3d at 670 (recognizing that even if a court has the "power to adjudicate" a motion under Section 3582(c)(2), it may lack "authority to *grant* a motion . . . because the statutory criteria are not met") (emphasis in original).

time. Even if this Court could ignore the mandatory exhaustion requirement, which it cannot, it would be imprudent to prevent BOP from engaging in that review.

This remains true in the present crisis. The Government does not downplay the defendant's concerns in any way, however, the defendant has not 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.

Even assuming, however, that the Court finds that the defendant has exhausted his administrative remedies prior to ruling on his motion, the defendant's request should be denied because he is a danger to the safety of the community.

VIII. <u>The Court Has No Authority to Place the Defendant on Home Confinement</u>

To the extent that the Court considers the defendant's motion as a request to resentence him to home confinement for the remaining 48 months of his custodial sentence, the Court should decline the request. Read in conjunction, 18 U.S.C. §§3621(b) and 3624(c) impose upon the BOP a qualified obligation to facilitate a prisoners' transition from incarceration in a prison facility to a halfway house. (*See Elwood v. Jeter*, 386 F.3d 842, 844, 847 (8th Cir. 2004).) "There is no question that § 3621(b) provides the BOP with broad discretion to choose the location of an inmate's imprisonment." *Fults v. Sanders*, 442 F.3d 1088, 1090 (8th Cir. 2006). In a case originating from the Western District of Missouri, in a concurring opinion, Judge Bright opined that the Second Chance Act of 2007 marked "an increasing special obligation to help federal offenders successfully reenter into society." *United States v. Wessels*, 539 F.3d 913, 915 (8th Cir. 2008) (Bright, J., concurring) (citing Pub. L. No. 110-199, 122 Stat. 657 (Apr. 9, 2008).) The First Step Act, under which the defendant is seeking release, further expanded the BOP's authority to place prisoners, providing more ways to reach rehabilitation goals, but it did not change a district court's authority

to place an inmate, and does not provide authority for the Court to order placement in a halfway house or order home confinement.

On March 26, 2020, the Attorney General directed the Director of the Bureau of Prisons to prioritize the use of statutory authority to place prisoners in home confinement. The CARES Act, passed on March 27, 2020, temporarily expanded this provision, while leaving its application to the BOP. As part of the CARES Act, Congress sought to address the spread of the coronavirus in prison by permitting the BOP to expand the use home confinement under § 3624(c)(2). Section 12003(b)(2) of the CARES Act suspends, during the emergency of the coronavirus pandemic, the limitation in § 3624(c)(2) that restricts home confinement to the shorter of 10 percent of the inmate's sentence or 6 months, once the Attorney General makes requisite finding that emergency conditions will materially affect the function of BOP.[9] The Attorney General made those findings on April 3, 2020, conferring on BOP the authority to expand its use of home confinement, and the BOP is devoting all available resources to executing that directive.

As set out above, and pursuant to 18 U.S.C. § 3642(c)(2), the BOP has exclusive authority to determine the placement of prisoners. Although, the First Step Act, CARES Act, and Second Chance Act give eligible inmates the possibility to be considered for home confinement or halfway house placement, that decision reset with the BOP. *See United States v. Kluge*, 2020 WL 209287 at *3 (D. Minn. Jan 14, 2020) ("Nothing in the statutes amended by the FSA permits the Court to place Defendant in home confinement. Under the FSA, the authority to place a prisoner remains

[9] Section 12003(b)(2) provides that "if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate."

with the BOP."); *United States v. James*, 2020 WL 1922568 *3 (D. Minn. April 21, 2020) (holding the district court "lacks jurisdiction to grant [defendant's] motion under the First Step Act, Second Chance Act, or CARES Act.")

Since March 26, 2020, the BOP has assessed and placed a significant number of inmates on home confinement (*see* https://www.bop.gov/coronavirus/index.jsp), focusing on, among other factors, the vulnerability of the inmates, the prisons most at risk, and the dangers posed by the inmates if release. The BOP is in the best position to determine who should be placed on home confinement, and has greatly expanded this option for suitable inmates during this time of crisis. Regardless of the Court's determination on compassionate release, the authority to determine the defendant's placement for the remainder of his sentence rests squarely with the BOP.

Based on the foregoing, the Government respectfully requests that the defendant's motion for compassionate release be denied.

Respectfully submitted this ___ day of September, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 08 2020, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record and a certified mailed copy with return receipt mailed on September 09, 2020 to the defendant at:

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