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F. #2008R00530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA

- against - Docket No. 10-CR-1020 (ENV)

ABDEL HAMEED SHEHADEH,

Defendant.

- X

THE GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DEFENDANT'S MOTION FOR RELEASE FROM CUSTODY

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The government respectfully submits this memorandum of law in opposition to the defendant Abdel Hameed Shehadeh's motion for release from custody. (See ECF No. 175) ("Motion" or "Mot.").

PRELIMINARY STATEMENT

The motion for release of Shehadeh, a defendant who traveled to Pakistan to attempt to join the Taliban, attempted to travel to Somalia to wage violent jihad, and lied to law enforcement about his efforts to become an international terrorist, should be denied for multiple reasons.

As an initial matter, the Court lacks authority to order the defendant's release at this time, because, as the defendant concedes, he has not exhausted his administrative remedies. The Court may not simply excuse or ignore the exhaustion requirement. See United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020).

Moreover, the defendant has not met 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). There is no medical consensus that his documented medical condition places him at a significantly greater risk of becoming seriously ill if he were to contract COVID-19. Moreover, the defendant is housed at a facility with no currently active cases of COVID-19 among the inmate population.

In any event, even if Shehadeh could meet his burden to show that release is permitted—which he cannot—it would nevertheless remain unwarranted. The same Section 3553(a) factors which militated against leniency at the time of sentencing—such as the defendant's repeated efforts to wage violent jihad against the United States and other perceived enemies over a sustained period of time—should be considered in weighing a motion for release. Releasing the

defendant prematurely would not be commensurate with a balancing of these Section 3553(a) factors.

FACTUAL AND PROCEDURAL BACKGROUND

I. Shehadeh's Offense Conduct, Trial Conviction, Sentencing, and Appeal

The Court is familiar with the offense conduct in this case, having presided over Shehadeh's trial in March 2013 and sentencing him in September 2013.

After extensive pretrial litigation, Shehadeh proceeded to trial on an indictment charging him with three counts of making materially false statements to law enforcement, in violation of 18 U.S.C. § 1001. At trial, the jury convicted Shehadeh on all three counts, finding that two of the counts involved international terrorism.

At sentencing, the Court calculated a sentencing range under the United States Sentencing Guidelines (the "Guidelines") of 63 to 78 months' imprisonment, before determining that an upward variance from the applicable Guidelines range was appropriate, in light of the serious nature of Shehadeh's conduct. The Court imposed a sentence of 13 years' imprisonment.

On appeal, the Second Circuit affirmed Shehadeh's conviction, rejecting the defendant's arguments that his waiver of his Miranda rights was infirm and that the district court had improperly instructed the jury on whether the government was required to prove that the defendant knew his statements were directed at an FBI agent. United States v. Shehadeh, 586 Fed. Appx. 47 (2d Cir. 2014).

II. The Instant Motion

The defendant has not filed a petition with the warden of FCI McKean, where he is currently housed, for the Bureau of Prisons to move this Court for his compassionate release pursuant to 28 C.F.R. § 571.61(a). (See Mot. at 5) (conceding lack of administrative exhaustion).

On April 27, 2020, the defendant filed the Motion, arguing that he is a uniquely vulnerable inmate, in light of the filter implanted in his inferior-vena-capa ("IVC") vein due to pulmonary embolism. Notably, as of May 5, 2020, FCI McKean has six inmates who have tested positive for COVID-19, with no currently active cases.

ARGUMENT

I. Shehadeh's Motion Must Be Denied for Failure to Exhaust His Administrative Remedies

Shehadeh does not dispute that he has failed to exhaust his administrative remedies. In fact, he has not filed a petition with the Bureau of Prisons. Citing Washington v. Barr, 925 F.3d 109, 118 (2d Cir. 2019), and United States v. Sawicz, 08-CR-287 (ARR), 2020 WL 1815851 (E.D.N.Y. Apr. 10, 2020), Shehadeh argues that administrative exhaustion is not necessary. As set forth below, the law is squarely to the contrary. Consequently, Shehadeh's motion must be denied at this time.

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

Shehadeh's statement of the law conflicts with the express, unambiguous statutory requirement that he "fully exhaust" his administrative remedies. 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 Shehadeh 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, as here, a defendant's compassionate release motion has not been presented to the warden, the defendant cannot file his motion in district court, and the district court "may not" modify his term of imprisonment, until he has "fully exhausted all administrative rights." In short, when an inmate has not made an application for release, § 3582(c)(1)(A) requires "ful[] exhaust[ion]."[1]

The BOP Program Statement outlines the process by which a defendant can "fully exhaust" his/her administrative rights in detail. See Program Statement No. 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g), https://www.bop.gov/policy/progstat/5050_050_EN.pdf. That statement explains that a prisoner seeking compassionate release must first file a request with the prison warden asking the BOP to move for compassionate release on the prisoner's behalf. See id. at 3 (citing 28 C.F.R. § 571.61). Upon receipt of an application for compassionate release, BOP officials at the relevant facility are to conduct an extensive and thorough assessment of, among other things, the inmate's particular conditions of confinement and the stated grounds for release, including, as warranted, the inmate's health. See id. This assessment, and the knowledge and expertise of BOP staff, can be of great value to the parties and the Court. If the prison warden

[1] See, e.g., United States v. Leeland Eisenberg, No. 16-CR-157-LM, 2020 WL 1808844 (D.N.H. Apr. 9, 2020) ("[B]efore a district court may consider a compassionate release motion filed directly by a defendant, the defendant must demonstrate that he has either exhausted his administrative rights to appeal BOP's refusal to bring a motion for compassionate release on his behalf or that BOP has ignored his request for compassionate release for 30 days."); United States v. Korn, No. 11-CR-384S, 2020 WL 1808213, at *2 (W.D.N.Y. Apr. 9, 2020) (same); United States v. Brummett, No. 6: 07-103-DCR, 2020 WL 1492763, at *1 (E.D. Ky. Mar. 27, 2020) (same); United States v. Mattingley, No. 15-CR-00005, 2020 WL 974874, at *5 (W.D. Va. Feb. 28, 2020) (same); United States v. Hilton, No. 1:18CR324-1, 2020 WL 836729, at *2 (M.D.N.C. Feb. 20, 2020) (same). But see United States v. Woodson, No. 18-CR-845 (PKC), 2020 WL 1673253, at *1 (S.D.N.Y. Apr. 6, 2020); United States v. York, No. 3:11-CR-76, 2019 WL 3241166, at *6 (E.D. Tenn. July 18, 2019) ("Because 30 days have passed since [the defendant's requests to BOP], the Court has authority to hear this matter under § 3582(c)(1)(A)").

denies an initial request, the prisoner must appeal the denial through the BOP's Administrative Remedy Procedure. See id. at 15 (citing 28 C.F.R. § 571.63). An appeal is considered logged on the date it is entered as received, and a response must be made timely; if a prisoner does not receive a response within the allotted time, the prisoner may consider the absence of a response to be a denial. See 28 C.F.R. § 542.18 (detailing response times). Only after that process is complete will a defendant be considered to have "fully exhausted" his or her administrative remedies. Thus, requests for compassionate release follow the same exhaustion procedure as for routine administrative grievances (i.e., the use of forms BP-9 through BP-11). See United States v. Bolino, 06-CR-806 (BMC), 2020 WL 32461, at *1 (E.D.N.Y. Jan. 2, 2020).

Here, as the warden at Shehadeh's institution has not yet had opportunity to adjudicate any application by Shehadeh, Shehadeh has not yet exhausted his administrative remedies. 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 that excuses exhaustion only where the warden of the inmate's institution fails to respond to an inmate's initial request within 30 days. In cases where that exception does not apply, the language

of the statute states that a court "may not" modify a sentence unless the defendant has first "fully exhausted all administrative rights." 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, this Court lacks the authority to grant the defendant's motion at this time.

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. Shehadeh appears to argue that the Court can disregard the statutory exhaustion requirement that is a precondition to granting a reduction in sentence under § 3582(c)(1)(A), and make its own equitable exception to the rule. The only Court of Appeals to have addressed the question has rejected the argument and required exhaustion. See Raia, 954 F.3d 594. In Raia, 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 with Section 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." Id. at 597. The vast majority of district courts that have reached the issue have also required exhaustion. See, e.g., United States v. Canale, 17-CR-287 (JPO), 2020 WL 1809287, at *1 (S.D.N.Y. Apr. 9, 2020); United States v. Roberts, 18-CR-528 (JMF), 2020 WL 1700032, at *2 (S.D.N.Y. Apr. 8. 2020); United States v. Woodson, 18-CR- 845 (PKC), 2020 WL 1673253, at *4 (S.D.N.Y. Apr. 6, 2020); United States v. Weiland, 18-CR-273 (LGS), 2020 WL 1674137, at *1 (S.D.N.Y. Apr. 6, 2020); United States v. Johnson, 14-CR-4-0441, 2020 WL 1663360, at *1 (D. Md. Apr. 3, 2020); United States v. Carver, 19-CR-6044, 2020 WL 1604968, at *1 (E.D. Wa. Apr. 1, 2020); United States v. Clark, 17-CR-85 (SDD), 2020 WL 1557397, at *3 (M.D. La. Apr. 1,

2020); United States v. Williams, 15-CR-646, 2020 WL 1506222, at *1 (D. Md. Mar. 30, 2020); United States v. Garza, 18-CR-1745, 2020 WL 1485782, at *1 (S.D. Cal. Mar. 27, 2020); United States v. Zywotko, 19-CR-113, 2020 WL 1492900, at *1 (M.D. Fla. Mar. 27, 2020); United States v. Eberhart, 13-CR-313, 2020 WL 1450745, at *2 (N.D. Cal. Mar. 25, 2020); United States v. Gileno, 19-CR-161, 2020 WL 1307108, at *3 (D. Conn. Mar. 19, 2020); see also Bolino, 2020 WL 32461, at *1.

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 failure of the warden to act on the inmate's request within 30 days. 18 U.S.C. § 3582(c)(1)(A). This alternative acts as a statutory futility provision for cases—unlike Shehadeh's—where the warden of an inmate's institution fails to respond within the 30 day period provided by Congress.

Second, in cases presenting the most urgent circumstance—inmates diagnosed with a terminal illness—Section 3582(d) requires the warden of an inmate's institution 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.

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)).

B. Shehadeh's "Exceptions" Argument Fails

In the face of unambiguous statutory language and numerous cases applying it in this district and elsewhere, Shehadeh relies on Washington v. Barr, 925 F.3d 109, 118 (2d Cir. 2019) and a district court decision relying on Washington, that this Court both may and should find that the exhaustion requirement is excused because he fits within certain unwritten, but allegedly applicable, exceptions. That claim is wrong. The statute's plain language does not permit exceptions, and Washington is inapposite for precisely that reason.

In Washington, the Second Circuit stated that "[e]ven 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)). Thus, Shehadeh, and the district court decision on which he principally relies, contend that Washington permits courts to create equitable exceptions to statutory exhaustion requirements. The problem with this interpretation of Washington is that Washington involved a judge-made, not statutory, exhaustion requirement. 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.

> Judge Sullivan has recently explained that
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> > the Second Circuit's reference to exhaustion requirements "seemingly mandated by statute," is best understood to regard judge-made requirements that "seem" consistent with statutory purpose and congressional intent, though not located in the statutory text. In other words, the statement speaks only to exhaustion requirements implied by a statute's structure and purpose, not to requirements that are expressly provided for in the statute itself.

United States v. Ogarro, No. 18-CR-373-9 (RJS), 2020 WL 1876300, at *4 (S.D.N.Y. Apr. 14, 2020) (quoting Washington, 925 F.3d at 118) (emphasis in Ogarro). Notably, McCarthy, the Supreme Court decision that Washington cited in support of its statement, 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 clear in Ross, there is a critical distinction between statutory and judge-made exhaustion requirements.[2]

This case, by contrast, 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).

Notably, the district court decision on which Shehadeh principally relies found equitable exceptions to the statutory text in reliance on the flawed application of Washington that Shehadeh invites here. See Sawicz, 2020 WL 1815851, at *3. That case also has other distinguishing characteristics that Shehadeh omits from his motion. In Sawicz, the defendant was sentenced to five years' imprisonment for a violation of supervised release by possessing child pornography—a violation that the court found did not involve violent conduct—and the defendant

[2] To the extent that Washington's statement that exhaustion mandated "by statute" is "not absolute" could be read as applying to express statutory exhaustion requirements, it would be dicta because Washington involved only a judge-made exhaustion requirement, 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)).

was less than five months away from the date on which he would be eligible for release to home confinement. These distinguishing facts are omitted from Shehadeh's motion, and the circumstances of this case, most notably the defendant's repeated efforts to wage violent jihad, are far different.

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. Shehadeh Has Not Carried His Burden to Demonstrate Extraordinary and Compelling Reasons For His Immediate Release

Even if Shehadeh had exhausted his administrative remedies, the Court should reject his motion on the merits, as he has not carried his burden to demonstrate "extraordinary and compelling" reasons for his immediate release. While Shehadeh's BOP medical records document his use of an IVC filter, which corroborates his claim of pulmonary embolism, public health officials have not necessarily identified pulmonary embolism as an underlying medical condition that creates an increased risk of infection or of severe symptoms from COVID-19, and numerous district courts have found that a defendant's pulmonary embolism does not create a risk of infection or severe symptoms from COVID-19 so great that a reduction in sentence is warranted. Finally, despite his motion's dark premonitions about the spread of COVID-19 throughout the BOP, the defendant is currently housed in a facility with no currently active COVID-19 cases, although six inmates have previously tested positive at that facility. While the risk posed by COVID-19 is real, 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 facility where Shehadeh is housed. Taken together, Shehadeh's relative health, the condition of the facility in which he is incarcerated, and the remaining Section 3553(a) factors strongly counsel against his release.

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. —
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> > (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—
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> > > (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.
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> (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.
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> (C) Family circumstances. —
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> (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.
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> (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.

Even if a court finds "extraordinary and compelling reasons" making a defendant eligible for release, the 18 U.S.C. § 3553(a) factors still govern whether release is warranted. See 18 U.S.C. § 3582; U.S.S.G. § 1B1.13.

The Guidelines and BOP policy have established clear criteria to aid in a court's determination of when compassionate release is appropriate pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). See U.S.S.G. § 1B1.13; see also BOP Program Statement 5050.50. Both the Guidelines and the BOP Program Statement primarily limit compassionate relief to cases of serious illness or impairment, advanced age or a need to care for a child, spouse or registered partner. See id.; see also United States v. Traynor, 04-CR-0582 (NGG), 2009 WL 368927, at *1 n.2 (E.D.N.Y. Feb. 13, 2009). As the court recognized in Traynor, Congress noted that Section 3582(c)(1) "applies . . . to the unusual case in which the defendant's circumstances are so changed, such as

by terminal illness, that it would be inequitable to continue the confinement of the prisoner." Id. at *1 (citing Senate Report No. 98–225, 98th Cong., 2d Sess., reprinted in 1984 U.S.C.C.A.N. 3182, 3304).

As the proponent of release, Shehadeh 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, 02-CR-743 (CM), 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's Response to the COVID-19 Pandemic

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. All new inmates are screened, and those with any risk factors, even if asymptomatic, are quarantined. 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. On April 13, 2020, the BOP ordered an extension of the April 1, 2020 action plan through May 18, 2020.

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.

As of today, FCI McKean, where Shehadeh is housed, has six inmates who have tested positive for COVID-19, but no active cases of COVID-19.

C. Discussion

Shehadeh argues that he has met the burden of establishing "extraordinary and compelling circumstances" that warrant his release both because of, as a general matter, the claimed difficulty in the BOP's quest to contain the infection, and because of the pulmonary embolism that place him at very high risk for severe COVID-19 complications. If he is granted a reduction in sentence and is released from his correctional facility, which has no active cases of COVID-19, Shehadeh plans to relocate to Michigan (a current hot zone of the pandemic) where he plans to obtain shelter with a Muslim community.

These arguments should be rejected.

1. Shehadeh Has Not Demonstrated He Is at a Greater Risk of Contracting COVID-19 at FCI McKean Than in Michigan

Shehadeh's generalized complaints about the BOP's response to the COVID-19 pandemic and his concern that he could contract COVID-19 at some point while incarcerated are insufficient to carry his burden to demonstrate "extraordinary and compelling" reasons for a reduction of his sentence and his immediate release.

Shehadeh's motion is filled with non-specific claims about the spread of COVID-19 within prisons and the BOP system generally. Relying on assumptions about what prisons are generally like, Shehadeh presupposes the ineffectiveness of the BOP's efforts to contain the spread of COVID-19 and mitigate its effects.

The measures taken by the BOP, as detailed above, 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 of public health experts. This is particularly true at FCI McKean, where Shehadeh is incarcerated, and where there are currently no active cases of COVID-19 at the facility among either staff or inmates. But in spite of the relative safety of the controlled conditions at the specific institution where he is housed, Shehadeh seeks immediate release from the BOP system so that he can relocate to Ypsilanti, Michigan—a state with widespread COVID-19 infection—where he intends to shelter with a Muslim community.

Shehadeh cannot carry his burden to demonstrate "extraordinary and compelling" reasons for his immediate release with generalities and assumptions about the spread of COVID-19 in prisons generally, particularly when the one in which he is housed has so far largely escaped the reach of COVID-19, and he seeks release to a hot zone of the pandemic in the United States.

See 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"). The risk of potential exposure to COVID-19 in a BOP facility cannot alone form the basis to release a sentenced prisoner. See Raia, 954 F.3d at 597 ("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.").

2. Shehadeh's Documented Medical Conditions Do Not Establish His Eligibility for Release

In his motion, Shehadeh argues that his pulmonary embolism places him at high risk for severe COVID-19 complications, and that this increased risk of suffering severe symptoms or complications from a COVID-19 infection is an "extraordinary and compelling" reason establishing his eligibility for compassionate release. Though Shehadeh appears to suffer from pulmonary embolism, public health officials have not identified pulmonary embolism as an underlying medical condition that places a person at a higher risk either of becoming infected or of suffering severe symptoms or complications from a COVID-19 infection. Notably, the Centers for Disease Control and Prevention ("CDC") website does not list pulmonary embolism as a heightened risk factor, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited May 7, 2020).

Notably, however, at least two federal courts have granted relief to defendants suffering from pulmonary embolism who raised similar concerns that they faced increased risk as

a result of COVID-19. United States v. Garcha, 19-cr-00663-EJD-1 (VKD), 2020 WL 1593942, at *2 (N.D. Cal. Apr. 1, 2020) (finding that defendant's pulmonary embolism "render him particularly susceptible to infection from the COVID-19 virus while in custody and particularly at risk of severe illness or death as a result of such infection."); United States v. Bertrand, 3:00cr12/LAC, 2020 WL 2179387, at *1 (N.D. Fla. Apr. 29, 2020) (same).

In short, Shehadeh's health conditions fail 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).

3. The Section 3553(a) Factors Weigh Against Shehadeh's Release

Because Shehadeh has not met his burden to show that there are "extraordinary and compelling reasons" that might permit his release at this time, the Court need not proceed to the analysis under Section 3553(a) as to whether release is indeed warranted. See 18 U.S.C. § 3582; U.S.S.G. § 1B1.13. However, if a Section 3553(a) analysis was conducted, it would weigh strongly against Shehadeh's release.

Shehadeh appears to argue that his release is warranted because he has already served a sentence that is sufficient to meet the purposes of sentencing under 3553(a)(2), as Shehadeh only needs to wait an additional 45 weeks before being eligible for a half-way house, while his home confinement eligibility date is September 6, 2021, and also because of his claimed rehabilitation while incarcerated.

As an initial matter, "no substantially mitigating weight can be borne here by the fact that [Shehadeh] did what was plainly required of him—that is, behaving himself in prison.

[Shehadeh] may, in due course, receive a reward for his compliance with institutional disciplinary regulations through good time credit." United States v. Mumuni, 946 F.3d 97, 112 (2d Cir. 2019) (noting that while defendant's "compliance with institutional regulations has no bearing on the sentencing factors a district court must consider under 18 U.S.C. § 3553(a)," if "[b]y contrast, [the defendant had] failed to abide by institutional regulations, his continued disrespect of the rules would suggest a greater need to protect the public from further crimes and to deter future criminal conduct").

Application of the Section 3553 factors does not accrue to Shehadeh's benefit. At sentencing, this Court characterized Shehadeh's criminal activity—that he "did want to join violent international jihad, and attempted to join the Army in contemplation of turning his weapons on his potential future military comrades"—as "the kind of serious criminal conduct warranting imposition of a significant sentence," and, indeed, an "above-guidelines sentence." (ECF No. 169 at 9-10). In light of these considerations, reducing Shehadeh's sentence would not be warranted. 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"); 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).

CONCLUSION

For the foregoing reasons, Shehadeh's motion for a reduction in sentence should be denied.

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May 8, 2020

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