Federal Defenders
OF NEW YORK, INC.

Southern District
52 Duane Street-10th Floor, New York, NY 10007
Tel: (212) 417-8700 Fax: (212) 571-0392

David E. Patton
Executive Director
and Attorney-in-Chief

Southern District of New York
Jennifer L. Brown
Attorney-in-Charge

April 9, 2020

BY ECF AND EMAIL

Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: United States v. Rabadi
13 Cr. 353 (KMK)

Dear Judge Karas:

We write in reply to the government's opposition dated April 8, 2020. In its opposition, the government first asserts that the Warden's denial of Mr. Rabadi's request for compassionate release is not a sufficient exhaustion of administrative remedies to permit this Court to adjudicate Mr. Rabadi's motion for compassionate release. That decision, however, is one within this Court's authority, because the compassionate release statute sets forth a claim processing rule that is subject to equitable exceptions; here, both irreparable harm and futility warrant the Court excusing any further exhaustion. As to the substance of Mr. Rabadi's need for compassionate release, the government asks the Court to deny such release because of Mr. Rabadi's criminal history, stable, albeit concededly serious, medical conditions, and the protective measures taken by the BOP during this pandemic. But Mr. Rabadi has only three and one-half months left on his 24-month VOSR sentence. Serious as his violation conduct was, it did not warrant the high risk of severe consequences to his health that he is currently experiencing at MDC; placing him on strict home detention with GPS and no ability to leave the house other than for medical appointments will, in the extraordinary, compelling, and unforeseeable circumstances raised by this pandemic, best serve the purposes of sentencing.

I. This Court Has The Authority To Adjudicate Mr. Rabadi's Compassionate Release Motion Now.

Mr. Rabadi has presented his request for compassionate release to the Warden of the MDC, and the Warden has denied that request. The government asserts that is not sufficient, and argues that in order for this Court to have the authority to review his motion for compassionate release, Mr. Rabadi and this Court must wait until May 3, 2020, when 30 days from the time of Mr. Rabadi's request to the Warden will have passed. The government provides no information concerning what will occur during the next three and a-half weeks or how that passage of time will either enable the BOP to further review Mr. Rabadi's case or place this Court in a better position to do so.[1]

As an initial matter, a defendant clearly need not have "fully exhausted all administrative rights" in order to bring a motion for compassionate release. *See* Gov't Opp. at 9. Section § 3582(c)(1)(A), as modified by the First Step Act, provides that the Court may reduce a defendant's sentence,

> 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[.]

Although "exhaust[ion]" is mentioned in this claim processing rule, the rule is patently not about the type of administrative exhaustion found in other contexts, where an agency or state court will adjudicate the application. Rather, § 3582(c)(1)(A)'s claim processing rule just gives the Bureau of Prisons a right of first refusal to bring a compassionate release application on a defendant's behalf. If it fails to act within 30 days, the defendant may go to court. Like similar claims processing rules, it is not absolute and is subject to

---

[1] Counsel learned yesterday evening, from A.U.S.A. James Cho in the Civil Division, E.D.N.Y., that at the Civil Division's behest (Mr. Rabadi is a named plaintiff in a pending habeas class action law suit in E.D.N.Y., *Chunn, et al. v. Warden Derek Edge*, 20 Civ. 1590 (RPK)), government officials approached Mr. Rabadi yesterday at the MDC and questioned him about whether he intended to file an administrative appeal of the Warden's decision. That questioning was done without notice to counsel, and without counsel having had a full opportunity to explain to Mr. Rabadi what options may be available to him.

equitable exceptions, including those based on futility and the emergent threat of irreparable harm.

A. In the analogous Title VII context, courts may waive the waiting period.

Section § 3582(c)(1)(A) describes a claims processing scheme most similar to that of Title VII of the Civil Rights Act of 1964. Title VII proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin. As a precondition to commencing a Title VII action in court, a complainant must first file a charge with the Equal Employment Opportunity Commission ("EEOC").

> When the EEOC receives a charge, in contrast to agencies like the National Labor Relations Board, 29 U.S.C. § 160, and the Merit Systems Protection Board, 5 U.S.C. § 1204, it does not "adjudicate [the] clai[m]," Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, (1974). Instead, Title VII calls for the following course. Upon receiving a charge, the EEOC notifies the employer and investigates the allegations. 42 U.S.C. § 2000e–5(b). If the Commission finds "reasonable cause" to believe the charge is true, the Act instructs the Commission to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* When informal methods do not resolve the charge, the EEOC has first option to "bring a civil action" against the employer in court. § 2000e–5(f)(1). Where the discrimination charge is lodged against state or local government employers, the Attorney General is the federal authority empowered to commence suit. *Ibid.*
>
> In the event that the EEOC determines there is "n[o] reasonable cause to believe that the charge is true," the Commission is to dismiss the charge and notify the complainant of his or her right to sue in court. 42 U.S.C. § 2000e–5(b), f(1); 29 CFR § 1601.28. Whether or not the EEOC acts on the charge, a complainant is entitled to a "right-to-sue" notice 180 days after the charge is filed. § 2000e–5(f)(1); 29 CFR § 1601.28. And within 90 days following such notice, the complainant may commence a civil action against the allegedly offending employer. § 2000e–5(f)(1).

Fort Bend City, Texas v. Davis, 139 S. Ct. 1843, 1846–47 (2019) (footnote omitted).

In *Davis*, the Supreme Court held that the Title VII charge filing requirement was a non-jurisdictional "claim-processing rule" because the statute spoke to a party's "procedural obligations," requiring the party "to submit information to the EEOC and to wait a specified period before commencing a civil action." *Id.* at 1851. Because it was "a processing rule, albeit a mandatory one," prescribed by statute, it was subject to forfeiture. *Id.*

The Supreme Court has not had occasion to decide whether the mandatory claims processing rule in Title VII is subject to equitable exceptions. *Id.* at 1849 n.5 (noting that the Court had reserved on this issue). It has, however, recently endorsed courts' power to waive other non-jurisdictional statutory exhaustion requirements. *Smith v. Berryhill*, 139 S. Ct. 1765, 1773–74 (2019) ("While [42 U.S.C.] § 405(g) delegates to the [Social Security Administration] the authority to dictate which steps are generally required [before judicial review], exhaustion of those steps may not only be waived by the agency, but also by the courts.") (citations omitted).

But the Second Circuit has ruled several times, and as recently as last month, that Title VII's charge filing and waiting requirements are subject to equitable exceptions like futility. *See, e.g.*, *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385-86 (2d Cir. 2015) (holding that Title VII's statutory requirement is a "precondition to suit," but not jurisdictional, and therefore "is subject to equitable defenses" and may be waived by a court) (remanding for district court to consider futility); *Fernandez v. Chertoff*, 471 F.3d 45, 58 (2d Cir. 2006) ("[C]ourts may, in their discretion, waive administrative exhaustion requirements under circumstances where the administrative remedy is inadequate because the agency cannot provide effective relief."); *Rein v. McCarthy*, No. 19-842-cv, __ F. App'x __, 2020 WL 1042220, at *1 (2d Cir. Mar. 4, 2020) (deadline for filing administrative complaint "is subject to waiver, estoppel, and equitable tolling").

In *Boos v. Runyon*, 201 F.3d 178 (2d Cir. 2000), the Second Circuit dealt squarely with a postal employee's failure to wait for a final ruling from the EEOC before bringing a disability decimation action. Having determined that the waiting period was not jurisdictional, the Court ruled that "we may waive it, in appropriate circumstances." *Id.* at 183. It proceeded to do so, *sua sponte* in the interest of judicial economy. *Id.*

B. Courts commonly waive statutory claims processing rules.

Outside the Title VII context, too, the Second Circuit and other Courts of Appeals have routinely held that claims processing rules are subject to equitable defenses. As the Second Circuit noted last year, "[e]ven where

exhaustion is seemingly mandated *by statute* or decisional law, the requirement is not absolute." *Washington v. Barr*, 925 F.3d 109, 119 (2d. Cir. 2019) (emphasis added) (considering futility, the ability of the agency to grant relief, and undue prejudice as equitable defenses to a judicial exhaustion requirement).

For instance, in the context of claims under the Social Security Act, the Second Circuit has recognized that courts may waive statutory exhaustion requirements, including where attempts at exhaustion would be futile and result in irreparable injury. *See, e.g.*, *New York v. Sullivan*, 906 F.2d 910, 917-18 (2d Cir. 1990).

Regarding habeas motions, 28 U.S.C. § 2254(b)(1) contains a statutory exhaustion requirement before a prisoner can bring a habeas motion, and lists a limited number of exceptions. Despite this statutory language, federal courts have found additional equitable bases to waive exhaustion beyond those listed in the statute. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 135-36 (1987) (explaining that even statutory exhaustion requirements are not "rigid and inflexible," in part because they are assumed to be subject to the same exceptions that existed before Congress began codifying exhaustion) (citing *Frisbie v. Collins*, 342 U.S. 519 (1952)); *see also, e.g.*, *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993) (waiving exhaustion where "exceptional circumstances of peculiar urgency are shown to exist").[2]

To give one final example, immigration statutes include mandatory, statutory exhaustion requirements prior to judicial review. Nonetheless, courts have recognized their ability to waive those exhaustion requirements under certain circumstances. *See, e.g.*, *Grullon v. Mukasey*, 509 F.3d 107, 111 (2d Cir. 2007) (recognizing that "mandatory" "statutory" exhaustion requirements—indeed, even using the word "jurisdictional"—under immigration law were still subject to waiver in certain situations, including where an agency could not provide the relief an immigrant sought); *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 173 (2d Cir. 2004) (same); *Iddir v. I.N.S.*, 301 F.3d 492, 498 (7th Cir. 2002) (collecting authorities as to when immigration exhaustion requirements can be waived, including for prejudice and futility).

C. This Court should waive the 30-day waiting period in this case.

---

[2] In a recent filing in the District of the District of Columbia, the government joined a defense motion for compassionate release due to COVID-19, citing *Hendricks* for the proposition that "a Court can dispense with the administrative exhaustion requirement where, as here, there are 'exceptional circumstances of peculiar urgency . . . .'" *United States v. Majid Ghorbani*, 18 Cr. 255 (PLF), Dkt. No. 129 (D.D.C. Apr. 3, 2020).

As the government concedes, due to the unusual circumstances presented by the COVID-19 epidemic, compassionate release decisions should be made "expeditiously" by the BOP, lest they come too late. *Gov't Opp.* at 11. It provides no time frame, however, within which an administrative appeal of Mr. Rabadi's compassionate release request would be decided by the BOP. In other compassionate release cases in this district, it has submitted sworn declarations from BOP staff stating that no time frame can be provided. *See* Exhibit A, Declaration of Caryn Flowers, submitted in *United States v. Nkanga Nkanga,* 18 Cr. 713 (JMF) (ECF # 112-1). Thus, it appears that at a minimum, Mr. Rabadi would have to wait 30 days from his initial request to the warden for compassionate release, *i.e.,* May 3, 2020, three weeks from now.

Several other courts in this circuit have excused the thirty-day lapse period in response to the COVID-19 crisis. *See, e.g., United States v. Zukerman*, No. 16-CR-194 (AT) (S.D.N.Y. Apr. 3, 2020), ECF No. 116; *United States v. Colvin*, No. 3:19cr179 (JBA) (D. Conn. Apr. 2, 2020), ECF No. 38; *United States v. Perez*, No. 17 Cr. 513-3 (AT) (S.D.N.Y. Apr. 1, 2020), ECF No. 98. In *Perez*, the defendant, who was housed at the Metropolitan Correctional Center, had the additional factor of having only several weeks left on his sentence, but, like Mr. Rabadi, he had a variety of medical complications (his age is not apparent from the court's order). *See* Exhibit B (*Perez* Order at 1-2). Judge Torres held that the exhaustion requirement should be waived because (1) the requirement was futile; (2) the administrative process would be incapable of granting adequate relief; and (3) exhaustion would subject the defendant to undue prejudice. *Id.* at 4. The court held that forcing the defendant to wait thirty days could render the exhaustion requirement futile, undermine the agency's ability to grant adequate relief, and "obviously" cause prejudice to the defendant because "even a few weeks' delay carries the risk of catastrophic consequences for [the defendant]." *Id*. Because of the defendant's "heightened risk of serious illness or death from COVID-19 due to his pre-existing medical issues," the court held, strict adherence to the exhaustion requirement "would be directly contrary to the purpose of identifying and releasing individuals whose circumstances are extraordinary and compelling." *Id.* at 6 (internal quotation marks omitted). Similarly, another recent decision by Judge Torres is highly similar to the facts in this case. In *United States v. Zukerman*, Judge Torres granted compassionate release to a seventy five-year-old defendant who was serving a seventy-month sentence for tax evasion. No. 16-CR194 (AT) (S.D.N.Y. Apr. 3, 2020), ECF No. 116. The defendant has approximately two-and-a half years left on his sentence, but under the FSA's Pilot Program, his term of imprisonment could be reduced to home confinement starting in May 2021. *Id.* at 1-2. The defendant suffered from diabetes, hypertension, and

obesity, and his physician had opined that he was at high risk for contracting COVID-19. *Id.* at 2. Judge Torres found that these factors weighed in favor of waiving the thirty-day exhaustion requirement. *Id.* at 7. The court rejected the government's argument that it should require the defendant to exhaust administrative remedies because he was not "within days" of release because such argument "misses the point and understates the gravity of the COVID-19 pandemic." *Id.* "Although Zukerman's original release date may be far off, the threat of COVID-19 is at his doorstop." *Id.* The same applies to Mr. Rabadi, given his age, cardiac condition and diabetes.

When the First Step Act's exhaustion requirement is viewed, as it should be, through an "intensely practical" lens, Mr. Rabadi's presentation of his claim to the BOP and the Warden's denial of it is sufficient to satisfy the policies underlying the requirement. Giving the BOP several additional weeks to review an administrative denial would not "afford the parties and the courts the benefit of [the BOP's] experience and expertise." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). While the government argues that this Court should wait to review Mr. Rabadi's request for compassionate release because the BOP is in the best position to make an initial assessment of it based on his medical records and disciplinary records, *Gov't Opp.* at 11-12, here, that initial assessment has been made: the only ground provided by the Warden for denying Mr. Rabadi's request for compassionate release is that "a review of his medical record does not identify any significant changes to his medical conditions to reflect a terminal or debilitated medical condition." On that ground, only someone already severely ill with COVID-19 could be released; that would, of course, be too late. Because this ground asserted by the Warden takes no particular account of Mr. Rabadi's *risk* of contracting and/or suffering acutely from COVID-19, it cannot permit meaningful administrative review. In addition, the failure to provide a full statement of reasons for the denial is contrary to the BOP's own regulations. *See* 28 C.F.R. § 571.63. Thus, in this particular case, there is no reason to believe that any additional substantive review could or will occur. Nor is there any basis for deference to the BOP's "informed decision" about the "relative merits" of Mr. Rabadi's request for compassionate release. *Gov't Opp.* at 12.

That such further administrative review is neither likely to occur in a timely manner nor necessary to this Court's decision on the merits is further indicated by the inconsistent position the Department of Justice has taken in this exact same posture within the last two days as to two of the other named plaintiffs in the pending class action habeas in E.D.N.Y. (*Chunn, et al. v. Warden Edge*, No. 20 Civ. 1590 (RPK)) Hassan Chunn and Nehemiah McBride received denials of their requests for compassionate release from the Warden of the MDC simultaneously with Mr. Rabadi. *See* Exhibit C, Letter

of A.U.S.A. James Cho. In Mr. McBride's case, the government quickly informed the sentencing court that it would not assert a need for exhaustion beyond the Warden's denial of Mr. McBride's request and consented to the grant of compassionate release. *United States v. Nehemiah McBride*, 15 Cr. 876 (DLC), ECF No. 72. In Mr. Chunn's case, the government also informed the sentencing court that it would not assert a need for exhaustion beyond the Warden's denial of Mr. Chunn's request, and took no position on the motion for compassionate release. *United States v. Hassan Chunn,* 16 Cr. 388 (BMC) (E.D.N.Y.), ECF No. 29. If the Warden's denial was adequate exhaustion for Court review in those two cases, why is it not adequate here? Why can the government control when a sentencing court can reach the merits of a compassionate release motion by selectively invoking an exhaustion requirement in inconsistent ways for identically situated defendants?

There is, in addition, a high risk of irreparable injury if the Court were to wait to adjudicate Mr. Rabadi's petition until May 3, 2020. With the speed and unpredictability of this pandemic in New York—now the epicenter of the pandemic—waiting even three weeks will be too late. Less than a week ago there were 46,000 COVID-19 cases in New York and more than 600 deaths. Today that number is over 130,000 infected and 4,758 dead. Within the BOP, the rate of infection, despite the failure to test properly, has risen exponentially: on March 20, there were two confirmed cases among inmates and staff; now there are 377 – an 18,750% increase. Eight inmates have died.

The charts below were updated today, though they no doubt undercount the number of cases inside the BOP given the paucity of testing.[3] (On April 7, 2020, the BOP reported that only seven tests had been performed on inmates at MDC, 3 were positive, and 7 staff are also positive.)

BOP-Reported Positive Tests for COVID-19 Nationwide[4]

[3] Data are from the Centers for Disease Control and Prevention, www.cdc.gov; Johns Hopkins University COVID-19 global case tracking, https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6, and the Bureau of Prisons, www.bop.gov/coronavirus. BOP numbers include both inmates and staff with confirmed positive tests.

[4] Numbers obtained from www.bop.gov/coronavirus on a daily basis. There is good reason to believe that the numbers reported by the BOP understate the actual number of

Date	Number of Positive Inmates	Number of Positive Staff	Number of Inmate Deaths
3/19/2020	0	0	0
3/20/2020	0	2	0
3/21/2020	1	2	0
3/22/2020	1	2	0
3/23/2020	3	3	0
3/24/2020	6	3	0
3/25/2020	6	3	0
3/26/2020	10	8	0
3/27/2020	14	13	0
3/28/2020	19	19	1
3/29/2020	19	19	1
3/30/2020	28	24	1
3/31/2020	29	30	1
4/1/2020	57	37	3
4/2/2020	75	39	6
4/3/2020	91	50	7
4/4/2020	120	54	8
4/5/2020	138	59	8
4/6/2020	195	63	8
4/7/2020	241	72	8
4/8/2020	272	105	8

Percentage of Increase of Infected BOP People (Inmates and Staff)

---

tested-positive cases. *Compare* M. Licon-Vitale, MCC Ward, and D. Edge, MDC Warden, *Response to EDNY Administrative Order 2020-14* (Apr. 7, 2020) *at* https://www.nyed.uscourts.gov/pub/bop/MDC_20200407_042057.pdf (3 positive inmates at MDC Brooklyn) *with COVID-19 Cases* Federal Bureau of Prisons (Apr. 7, 2020) *at* www.bop.gov/coronavirus (2 positive inmates at MDC Brooklyn).

Since 3/20/2020[5]

Date	Number of BOP Cases[6]	BOP Percentage Increase Since 3/20/2020	National Percentage Increase Since 3/20/2020	Number of National Cases
3/20/2020	2	0%	0%	18,747
3/21/2020	3	50%	31%	24,583
3/23/2020	6	200%	135%	44,183
3/24/2020	9	350%	190%	54,453
3/26/2020	18	800%	355%	85,356
3/27/2020	27	1250%	451%	103,321
3/29/2020	38	1800%	651%	140,904
3/30/2020	52	2500%	772%	163,539
3/31/2020	59	2850%	892%	186,101
4/1/2020	94	4600%	1036%	213,144
4/2/2020	114	5600%	1176%	239,279
4/3/2020	141	6950%	1379%	277,205
4/4/2020	174	8600%	1526%	304,826
4/5/2020	197	9750%	1665%	330,891
4/6/2020	259	12850%	1897%	374,329
4/7/2020	313	15550%	1963%	386,800
4/8/2020	377	18750%	2140%	419,975

Mr. Rabadi should not be forced to bear the potentially fatal consequences of the BOP's failure—however understandable—to adequately prepare for COVID-19. In these extraordinary circumstances, this Court should review the merits of Mr. Rabadi's emergency motion for compassionate release and waive the exhaustion requirement under 18 U.S.C. § 3582(c)(1)(A)(i). Mr. Rabadi's medical conditions and the conditions in the MDC weigh strongly in favor of this Court adjudicating his compassionate release motion now.

II. The Section 3553 Factors Weigh In Favor Of Releasing Mr. Rabadi To Strict Home Detention Now.

---

[5] National numbers obtained from www.cdc.gov and https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6

[6] Includes the number of both BOP inmates and staff who have tested positive for COVID-19

At base, the question on this motion is whether Mr. Rabadi should be released now or whether he must wait another three and a-half months until his scheduled release date. He should be released now, in light of his vulnerability to COVID-19, and the fact that he can be detained at home with electronic monitoring where both he and the public will be safe. These changed circumstances are "extraordinary and compelling" so as to warrant compassionate release and modification of his original sentence, because they materially alter the balance of 3553(a) factors, which this Court is to consider anew in the context of an application for compassionate release.

While in August 2019, this Court was principally concerned with the risk that Mr. Rabadi would re-offend, the changed post-pandemic world has, for all intents and purposes, stripped him of any ability to re-offend, by bringing the economy to a stand-still, as well as greatly increasing his incentive to comply with the law, or risk return to the MDC. While Mr. Rabadi's crime remains as serious as the Court deemed it in August, 2019, keeping him in prison in conditions that jeopardize his life is disproportionate, and far "greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. § 3553(a).

We recognize that Mr. Rabadi committed this violation of supervision release while on supervision for a prior fraud. It is nevertheless a white-collar offense, and thus is on the low end of the spectrum in terms of danger to the community should he be released on home detention. Again, the similarities to *Zukerman* are striking. As Judge Torres observed, "Zukerman evaded taxes totaling millions of dollars." *Zukerman*, *supra*, at 10. Judge Torres cited his greed and deception, yet still granted compassionate release, because the Court did not intend for its original sentence to include a great and "unforeseen risk of severe illness or death." *Id.* at 11.

Mr. Rabadi's age and chronic medical conditions, combined with the COVID-19 crisis are factors for this Court to consider in his current personal history and characteristics that favor resentencing under the section 3553(a) factors. The government lays out the BOP's multi-phase protocol for dealing with the COVID-19 crisis. It ignores the numbers of positive BOP inmates and staff and the exponential growth of those numbers over the last two weeks, as set forth above in the charts. It takes no account of what the BOP reported to Congress on April 7th: in addition to the positive inmates reported on the BOP website, 456 inmates are in isolation but have not been tested and 3850 inmates are in medical quarantine. The government also fails to tell the Court what is actually happening inside MDC today: numerous inmates are symptomatic and untested, despite their lawyers' requests to have them tested; staff are being required to return to work only 48 hours

after exposure to positive inmates, and without adequate protective gear;[7] there is insufficient medical staff (3 doctors for over 1700 inmates, 537 of whom fall within a heightened risk category); the MDC continues to accept a significant number of new inmates who are in transit from the community and to place some of these inmates onto units other than the isolated intake unit;[8] and, over the last two weeks, counsel have been forced to seek specific emergency court orders to obtain basic medical care for their clients at MDC. While Mr. Rabadi is thus far not symptomatic, there is no guarantee that will continue with every day he remains inside the MDC. The government asserts that Mr. Rabadi's health is stable and well-managed by the BOP; in fact, Mr. Rabadi reports that he suffered a stroke in prison a year ago. *See* Declaration of Katherine Rosenfeld, Exhibit E, at ¶ 26. Far from having just average chronic health conditions, as the government implies when it argues that nothing distinguishes Mr. Rabadi from the other 536 at-risk inmates at the MDC, Mr. Rabadi has stents in his heart, a tumor on one of his kidneys, diabetes, and high blood pressure, as well as an anal fistula. *Id.* at ¶ 22; *see also* Declaration of Migdaliz Quinones, attached as Exhibit F.

We acknowledge that other 3553(a) factors—specifically the need to promote respect for the law and deterrence—weighed in favor of the maximum term of incarceration at the time of sentencing and were instrumental in the Court's sentencing decision. But the calculus on those factors has changed dramatically with the COVID-19 pandemic. The deterrent effect of the virus itself is a powerful motivator for Mr. Rabadi. And the Court never intended for that sentence to carry an unreasonable threat of severe illness. *See United States v. Daniel Hernandez*, No. 18 Cr. 834 (PAE) (S.D.N.Y. Mar. 25, 2020), ECF No. 440 ("Had the Court known that sentencing Mr. Hernandez to serve the final four months of his term in a federal prison would have exposed him to a heightened health risk, the Court would directed that these four months be served instead in home confinement.")

Again, Mr. Rabadi has only three and one-half months left to serve on his sentence. He seeks release on strict home detention, with no ability to leave the house for any reason but medical care, and with electronic monitoring. Mr. Rabadi will return to live in the home where he resided

---

[7] "Citing lack of masks and soap, Congresswoman Nydia Velazquez fears Brooklyn federal jail is 'powder keg of coronavirus infection," N.Y. Daily News, Apr. 7, 2020, https://www.nydailynews.com/new-york/ny-mdc-brooklyn-jail-coronavirus-20200407-o5wrhffchjfvpk5b7thglvzury-story.html

[8] Letter to Director of BOP, from Nydia Velazquez, Apr. 6, 2020, attached as Ex. D.

prior to his incarceration (and for approximately thirty years), and he can self-quarantine in a separate bedroom away from his family members who also live there. Mr. Rabadi's adult daughter Sandra will pick Mr. Rabadi up from the facility, wearing appropriate protective mask and gloves, and providing mask and gloves to Mr. Rabadi; she will bring him home should he be released. He will agree not to engage in any work during this period of home detention. Probation will know if he tries to leave the house without permission and can immediately inform this court.

It is hard to imagine that the public will be safer three months from now when he is scheduled to be released; but it is clear that Mr. Rabadi will be far safer at home than at the MDC.

Respectfully submitted,
/s/
Sylvie J. Levine
Assistant Federal Defender
Federal Defenders of New York

CC: AUSA Daniel Richenthal
AUSA Margery Feinzig
Chief U.S. Probation Officer Michael Fitzpatrick
Albert Dayan, Esq.