

**IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA)	
)	No. 15-cr-282, Judge Gettleman
)	
v.)	
)	Emergency Judge:
WALTER BEICH)	Chief Judge Rebecca Pallmeyer

**DEFENDANT BEICH'S EMERGENCY MOTION FOR COMPASSIONATE
RELEASE OR RECOMMENDATION FOR IMMEDIATE RELEASE ON
HOME CONFINEMENT**

WALTER BEICH, by the Federal Defender Program and its attorney AMANDA G. PENABAD, respectfully moves this Court to grant his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), or in the alternative, a renewed recommendation to the BOP that he be transferred to home confinement immediately pursuant to § 12003(b)(2) of the CARES Act and 18 U.S.C. § 3621(b)(4). In this case, Mr. Beich meets the criteria for compassionate release under 18 U.S.C § 3582(C)(1)(A) and Guideline §1B1.13 – he is over 65 years of age, is experiencing deterioration as a result of the aging process, and has completed over 75% of his sentence, once good time and RDAP credit are factored in. Further, there are extraordinary and compelling reasons to grant relief because Mr. Beich’s advanced age—66 years old—and health conditions (including serious cardiac conditions and diabetes) mean that he faces a significant risk of death or serious injury from COVID-19. Mr. Beich is due to be released in October of this year. However, any continued custody places him at risk for his life.

RELIEF REQUESTED

Mr. Beich respectfully requests that that this Court immediately enter an order reducing his sentence to time served. In the alternative, he asks that this Court recommend to the BOP that he be transferred to home confinement immediately pursuant to § 12003(b)(2) of the CARES Act and 18 U.S.C. § 3621(b)(4).

On April 28, 2020, counsel emailed the Warden and BOP Regional Counsel a request for compassionate release or, in the alternative, immediate release to home confinement pursuant to the CARES Act. *See Exhibit A.* Counsel has not yet received a response. Counsel suspects that Mr. Beich also made a request for compassionate release to the Warden prior to counsel's request, but Mr. Beich's counselor at FCI Terre Haute has refused multiple requests to schedule a legal call between counsel and Mr. Beich until a court date is pending.¹ Mr. Beich's counselor at the facility has also ignored defense counsel's emailed requests for information regarding whether Mr. Beich made such a request for compassionate release. Once the Court sets a hearing date, defense counsel will set up a legal call immediately and update the Court and government regarding the status of exhaustion efforts.

BACKGROUND

I. Factual and Procedural History

On November 16, 2016, Mr. Beich pled guilty to one counts of health care fraud and one count of aggravated identity theft. Dkt. #52. This Court subsequently

¹ Defense counsel notes that she has contacted other counselors at FCI Terre Haute and those counselors have allowed defense counsel access to her other clients housed in the facility. It appears that Mr. Beich's counselor has arbitrarily imposed his own requirements on legal calls.

sentenced Mr. Beich to 48 months in prison, 24 months consecutive on each count. Dkt. #76. Mr. Beich surrendered to the BOP in May of 2018. *Id.*

While in custody, Mr. Beich completed the RDAP program, earning credit on his sentence. *See* Exhibit B, Computation Sheet (noting projected satisfaction of sentence method 3621E). Between that RDAP credit, good time credit, and the almost two years of time served, Mr. Beich has completed roughly 75% of his sentence.² He is scheduled to be released on October 21, 2020. *See* Exhibit B at 1 (listing projected release date at 10-21-2020). Mr. Beich is therefore currently in the window where he is eligible for placement in community corrections. *See* 18 U.S.C. § 3624(c). On October 16, 2019, this Court issued an order recommending that the BOP allow Mr. Beich the maximum amount of time in community corrections under then-existing regulations. Dkt. #88. Given his release date, it appears that the BOP did not honor that recommendation as Mr. Beich is still at FCI Terre Haute. Now, given the COVID-19 crisis in the BOP, Attorney General William J. Barr relaxed home confinement eligibility and, as a result, Mr. Beich is eligible for immediate release to home confinement.

II. Mr. Beich's Age, Health Problems, and Incarceration in the Highest-Risk Facility in the BOP System Place Him at High Risk for Death from COVID-19.

Mr. Beich is 66 years old, has served over 75% of his sentence, and has less than a year to serve. He also suffers from a long history of cardiac troubles and

² Counsel infers the 75% number based on the fact that Mr. Beich has less than one year left to serve and was sentenced to 48 months.

diabetes, as documented in the PSR and the Motion to Vacate Sentencing Date, Dkt. #60. The Court also explicitly recognized these serious conditions at his sentencing. *See* Dkt. #78, Statement of Reasons. His age and documented underlying health conditions place him at greater risk for complications during this pandemic.

In the United States, 80% of reported deaths from COVID-19 have been in adults who, like Mr. Beich, are age 65 or older. *Older Adults*, Ctr. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Apr. 28, 2020). Older adults are also far more likely to be hospitalized as a result of COVID-19. *Id.* The Centers for Disease Control and Prevention (CDC) estimates that 31–59% of adults ages 65–84 with COVID-19 will require hospitalization. *Id.* The Intensive Care National Audit and Research Centre in London reports that 56.4% of those between the ages of 60-69 admitted to the ICU as a result of COVID-19 died there. *ICNARC report on COVID-19 in critical care*, ICNARC (Apr. 10, 2020), <https://tinyurl.com/smfm6zf>. Mr. Beich's advanced age therefore places him at substantial risk, should he contract the virus.

Mr. Beich's release request is especially urgent because he suffers from serious cardiac conditions and diabetes. Emerging information suggests that, although the virus primarily presents as a respiratory illness, there is now greater evidence to suggest that COVID-19 may also attack the kidneys, heart, intestines, liver and brain.³ New York State recently released data about the top chronic health problems

³ Ariana Eunjung Cha, *A mysterious blood-clotting complication is killing coronavirus patients*, Washington Post (April 22, 2020), <https://www.washingtonpost.com/health/2020/04/22/coronavirus-blood-clots/>

of those who died of COVID-19, and almost all cardiovascular conditions.⁴ According to the CDC, hypertension is associated with increased illness severity and adverse outcomes.⁵ The reason for this is that “[s]omeone with pre-existing heart disease who becomes ill with COVID-19 may suffer a heart attack or develop congestive heart failure. This rapid worsening of cardiovascular health is likely due to a combination of the severe viral illness and its increased demands on the heart (fever causes rapid heart rate, for example), compounded by low oxygen levels due to pneumonia and increased propensity for blood clot formation.”⁶

Mr. Beich is further at risk because of his status as a diabetic. The CDC has recognized that diabetics are at high risk of complications from coronavirus. Centers for Disease Control, *Groups at Higher Risk for Severe Illness*, <https://tinyurl.com/w4yd732>. Similarly, the American Diabetes Association has stated that “people with diabetes are more likely to experience severe symptoms and complications when infected with a virus” and, in particular, has emphasized that “[h]aving heart disease or other complications in addition to diabetes could worsen

⁴ See *id.*; see also Betsy McKay, *Heart Conditions Prove Especially Dangerous For COVID-19 Patients*, The Wall Street Journal, April 12, 2020, www.wsj.com/amp/articles/heart-conditions-prove-especially-dangerous-for-covid-19-patients-11586683801 (noting that even mild cases of hypertension can increase risk).

⁵ Centers for Disease Control and Prevention, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, (visited April 29, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>

⁶ Dara K. Lee Lewis, *How does cardiovascular disease increase the risk of severe illness and death from COVID-19?*, Harvard Health Blog, April 02, 2020, <https://www.health.harvard.edu/blog/how-does-cardiovascular-disease-increase-the-risk-of-severe-illness-and-death-from-covid-19-2020040219401>.

the chance of getting seriously ill from COVID-19, like other viral infections, because your body's ability to fight off an infection is compromised." American Diabetes Association, *How COVID-19 Impacts People with Diabetes*, <https://www.diabetes.org/coronavirus-covid-19/how-coronavirus-impacts-people-with-diabetes> (emphasis added).

Although FCI Terre Haute has not yet reported any positive cases of the virus, that does not mean positive cases do not exist. As another court in this district recently explained,

As the government notes in its response, at the time when the Court is preparing this order, there have been no confirmed cases of coronavirus disease at FCI Terre Haute....But that is not the same as saying that the institution is coronavirus-free or that there is no risk to [the defendant]. As the Court has learned all too well from dealing (as emergency judge) with release requests from the Chicago Metropolitan Correctional Center and assiduously following the statistics there over the past five weeks, all that one can say with any reasonable certainty is that a correctional institution is free of confirmed-positive inmates and staff until it isn't. There is no institution-wide or even widespread testing taking place within BOP institutions. This, together with the now-well-known fact that a person may carry and transmit coronavirus without being symptomatic (and thus without any reason to even be considered for testing), and the fact that correctional institutions have a constant influx of personnel who come from and return to the community large and thus may contract coronavirus without being detected by BOP, basically eliminate any guarantee, or anything close to a guarantee, that [the defendant] has not been and will not be exposed while at FCI Terre Haute. The risk to him, quite simply, cannot be discounted based on the current statistics or the thorough measures that the BOP has appropriately imposed to stem the spread of the virus. On the latter point, it is worth noting that these are the same system-wide measures BOP adopted at the Chicago MCC, which per the BOP website now has 26 confirmed cases among detainees and staff as of the afternoon of April 19.

U.S. v. Manning, 15-Cr-5007, Dkt. #90 (April 20, 2020). The risk to Mr. Beich in the

BOP is serious. And as discussed further below, because Mr. Beich is incarcerated, he is unable to follow expert guidance to reduce his risk of exposure to COVID-19. Accordingly, immediate release may be his only chance of avoiding serious illness or death.

ARGUMENT

I. Introduction

As an older inmate nearing the end of his sentence, Mr. Beich is exactly the sort of person who meets the criteria for compassionate release. Releasing Mr. Beich will not only potentially save his life, but will also protect the inmates and staff at FCI Terre Haute, and will have a salutary effect on the broader community. “When officers and staff members who work in prisons get infected, they will bring the virus home to their families.”⁷ A chorus of public health experts has confirmed that releasing more people will protect the community from COVID-19: “We must protect public safety. But, today, there is no greater threat to public safety than the coronavirus.”⁸

⁷ Mary Bassett et al., *Andrew Cuomo, Stop a Coronavirus Disaster: Release People from Prison*, NY Times (Mar. 30, 2020) <https://www.nytimes.com/2020/03/30/opinion/nyc-prison-release-covid.html>.

⁸ *Id.*; see also Letter from the Justice Collaborative to Donald J. Trump, President of the United States (Mar. 27, 2020) <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf> (“[W]e ask that you commute sentences for all elderly people. . . . [O]lder people are at a higher risk of getting severe COVID-19 disease and dying. . . . Also, older people who are released from prison pose little risk to public safety.”).

II. This Court Should Grant Mr. Beich Compassionate Release and Reduce His Sentence to Time Served.

In 2018, the First Step Act modified the compassionate release statute to end the BOP's gatekeeping function and to allow inmates to directly file compassionate release motions in certain circumstances. *See* 18 U.S.C. § 3582(c)(1)(A)(i). Under the First Step Act, the Court may grant an inmate's motion for a sentencing reduction if three requirements have been satisfied.

First, the Court must determine either that (a) 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 that (b) 30 days have elapsed since the receipt of such a request by the warden of the defendant's facility. *Id.* But, as discussed further below, courts have recognized that these requirements may be waived in light of the COVID-19 emergency. *See, e.g., United States v. Zuckerman*, 16 CR 194 (S.D.N.Y. April 3, 2020) ("the Court holds that [defendant]'s advanced age and compromised health, combined with the high risk of contracting COVID-19 at Otisville, justify waiver of the exhaustion requirement."). **Second**, the Court must determine 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." *Id.* **Third**, the Court may reduce a defendant's sentence after determining that the reduction is consistent with the sentencing factors outlined in 18 U.S.C. § 3553(a). *Id.*

Here, Mr. Beich satisfies all three of those requirements. He is over the age of 65 and has served over 75% of his sentence. The aging process has resulted in a

general deterioration of his physical condition, as is evidenced by his cardiac conditions and other ailments. And as an older and sick person, continued incarceration in a Bureau of Prisons facility would place Mr. Beich at an unacceptable risk of death or serious injury. Given the speed with which COVID-19 has spread through the prison system, Mr. Beich cannot mitigate his risk of exposure by relying on the ordinary and time-consuming administrative review process. Particularly in light of the danger posed by this pandemic, an order reducing Mr. Beich's sentence to time served would best achieve § 3553(a)'s directive to impose a sentence that is "sufficient but not greater than necessary." Given his age, health conditions, and low risk of recidivism, Mr. Beich's release would pose no danger to the community. To the contrary, the safety of the community and of Mr. Beich would be best achieved by granting this motion. Each of the three requirements is addressed in more detail below.

A. This Court should waive the exhaustion requirement in light of the equitable and textual exceptions contained in the compassionate release statute.

As a preliminary matter, counsel sent a request on Mr. Beich's behalf to the Warden and Regional Counsel on April 28, 2020. Defense counsel suspects that Mr. Beich also made a request to the Warden, but as explained above, has been unable to confirm due to lack of access to her client. As a result, counsel believes that 30 days have not yet passed since Mr. Beich made his request to the Bureau of Prisons. While some judges in this district have found that there are no exceptions to the 30-day requirement, many courts have concluded the opposite and this is an area where

judicial attitudes are evolving quickly. *See United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at *1 (S.D.N.Y. Apr. 20, 2020) (Nathan, J.) (reconsidering earlier view that courts lack power to waive the 30-day requirement in light of subsequent case law and ordering compassionate release).

Here, Mr. Beich argues that there are three independent reasons to waive the 30-day period. First, because the procedural requirements of § 3582(c)(1)(A) are not jurisdictional, these requirements are unquestionably subject to waiver, forfeiture, and estoppel. In light of the government’s inconsistent positions of waiver—invoking it against disfavored defendants, but declining to in other cases—the Court should estop the government from relying on waiver here. Second, in determining the scope of the equitable exceptions applicable to § 3582(c)(1)(A), the Supreme Court has instructed courts to look to the scope and structure of the statutory provision. Such an inquiry leads to the conclusion that a number of other equitable exceptions—including futility and undue burden are available here. Third, even if the Court were to conclude that none of these equitable exceptions are available, the Court should find that there is a textual exception to the exhaustion requirement for cases where there are no “administrative rights” capable of providing relief.

1. *The Court should waive the exhaustion requirement because it would be futile to require Mr. Beich to exhaust administrative remedies.*

The procedural requirements of § 3582(c)(1)(A) are not jurisdictional. In a series of recent cases, the Supreme Court has emphasized that “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500,

516 (2006). In *United States v. Taylor*, the Seventh Circuit applied this line of cases to conclude that the procedural requirements contained in § 3582(c)(2) are not jurisdictional. *United States v. Taylor*, 778 F.3d 667, 670–71 (7th Cir. 2015). While the *Taylor* court did not address the provisions of § 3582(c)(1)(A), the logic of the decision applies equally to both provisions. Just like Section (c)(2), Section (c)(1)(A) is not located in the jurisdictional section of the U.S. Code, nor is it phrased in jurisdictional terms. *Id.* Because of that, there is no basis for treating either provision as a jurisdictional requirement.

As a non-jurisdictional claims-processing rule, § 3582(c)(1)(A) is undoubtedly subject to certain equitable exceptions, including waiver, forfeiture, and estoppel.⁹ And, indeed, in a significant number of cases around the country, the government has agreed to waive the exhaustion requirement so as to allow defendant’s compassionate release motions to be heard on the merits.¹⁰ Mr. Beich is not aware of whether the government plans to waive exhaustion in his case.

⁹ See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (Non-jurisdictional rules are “subject to waiver, estoppel, and equitable tolling.”); *Delgado v. Merit Sys. Prot. Bd.*, 880 F.3d 913, 925 (7th Cir. 2018), *as amended on denial of reh’g and reh’g en banc* (June 19, 2018) (In Title VII context “exhaustion is not a jurisdictional requirement and may thus be waived or subject to estoppel and equitable tolling.”); *Miller v. F.D.I.C.*, 738 F.3d 836, 843–44 (7th Cir. 2013) (“Whether a limitations period has the status of a jurisdictional prerequisite or a claim-processing rule determines whether it is subject to waiver, estoppel, or equitable-tolling doctrines.”).

¹⁰ See, e.g., *United States v. Manning*, 15-cr-50007 (Apr. 20, 2020) (Kennelly, J.) (ECF No. 90 at 3). (“Here the government has waived the statutory exhaustion requirement (and, indeed, has forfeited any argument to the contrary”); *United States v. Roberts*, 2020 WL 170032, at *1 (S.D.N.Y. Apr. 8, 2020); *United States v. Russo*, 2020 WL 1862294, at *4-7 (S.D.N.Y. Apr. 14, 2020) *United States v. Haynes*, Case No. 6:18-cr-6015, Dkt. No. 270 (W.D.N.Y. Apr. 14, 2020); *U.S. v. Gentile*, 2020 WL 1814158, at *2 (S.D.N.Y. Apr. 9, 2020) (noting government “stated it would waive any argument that

But if the government declines to waive the exhaustion requirement, this Court must determine whether Congress intended for § 3582(c)(1)(A) to prevent defendants from asserting other equitable exceptions, such as futility. The Supreme Court has expressly declined to rule, in any generalized way, on the question of when equitable exceptions are applicable to statutory claims-processing rules. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 18 n.3 (2017) (“We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions.”).

Instead of a one-size-fits-all approach, the Supreme Court has consistently addressed the issue on the basis of the specific statutory scheme at issue—declaring that the question of congressional intent is of “paramount importance.” *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). In cases where the statutory scheme reveals that “Congress wanted more oversight by the courts,” the Supreme Court has held that “exhaustion of those [administrative] steps may not only be waived by the agency, but also excused by the courts.” *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019). Admittedly, in *Ross v. Blake*, the Supreme Court held that equitable exceptions were not applicable to the exhaustion requirement in the Prison Reform Litigation Act.

Gentile had failed to satisfy the exhaustion requirement”); *United States v. Powell*, No. 1:94-cr-316-ESH, Dkt. No. 98 (D.D.C. Mar. 28, 2020) (granting unopposed motion for compassionate release in light of COVID-19); *United States v. Jasper*, No. 18-cr-390, Dkt. No. 440 (S.D.N.Y. Apr. 6, 2020) (government concession on exhaustion); *United States v. Knox*, No. 15-cr-445, Dkt. No. 1086 (S.D.N.Y. Apr. 10, 2020) (same); *United States v. Ghorbani*, Case No. 18-cr-255-PLF, Dkt. No. 129 (D.D.C. Apr. 3, 2020) (joint government & defense submission acknowledging exhaustion can be waived); *United States v. Gentry*, Case No. 2:19-cr-78-CCC, Dkt. No. 98 (DNJ Apr. 5, 2020) (where defendant not in BOP custody futility exception permits court to review exhaustion requirement).

Ross v. Blake, 136 S. Ct. 1850 (2016). But that ruling was based on the specific text and history of the PLRA. *Id.* at 1856 (discussing text); 1857 (discussing history).

Section 3582(c)(1)(A) is not the PLRA and it is not a generic statutory exhaustion provision. Both the text and the structure of § 3582(c)(1)(A) demonstrate that Congress did not intend to preclude defendants from availing themselves of traditional equitable exceptions, such as futility. It is telling that the current language of Section 3582(c)(1)(A) was passed as part of the First Step Act, under the heading “Increasing the Use and Transparency of Compassionate Release.” Pub. L. No. 115-391, 132 Stat. 5339 (2018).

The structure of the provision further supports the conclusion that Congress did not intend to unduly restrict defendants’ ability to access the courts. As Judge Rakoff recently noted, § 3582(c)(1)(A) imposes not an exhaustion rule, but an option: the statute “requires the defendant to *either* exhaust administrative remedies *or* simply to wait 30 days.” *United States v. Haney*, __ F. Supp. 3d __, 2020 WL 1821988, at *3 (S.D.N.Y. 2020) (emphasis in original). “That the statute gives the defendant this choice is crucial to understanding Congress’s intent.” *Id.* Allowing defendants a choice, rather than allowing the BOP to continue to serve as the gatekeeper of compassionate release, shows that “Congress was determined not to let such exigencies [that is, delays in the BOP review process] interfere with the right of a defendant to be heard in court on his motion for compassionate release, and hence only limited him to 30 days before he could come to court in the ordinary course.” *Id.* It goes without saying that this is not the ordinary course. It is, instead, an

unprecedented pandemic and a national emergency. And the BOP's response has been inept at best, putting lives—including Mr. Beich's—at risk. Moreover, it is clear that the BOP has hamstrung defendants' ability to pursue remedies available to them, as is evidenced by FCI Terre Haute's refusal to provide counsel with access to Mr. Beich. Had counsel been able to speak with Mr. Beich on April 8, 2020, when counsel first attempted to set up a legal call, Mr. Beich could have begun the exhaustion process weeks ago. Under these circumstances, a statutory provision that was intended to increase defendants' access to the court and to remove arbitrary restrictions, cannot be read as a clear sign that Congress intended to prohibit the use of traditional equitable exceptions.

Concluding that Congressional intent did not foreclose the application of these equitable exceptions would be well in line with Seventh Circuit precedent. In a wide variety of contexts, the Seventh Circuit has held that the futility exception applies to statutory exhaustion requirements. *See, e.g., Victoria-Faustino v. Sessions*, 865 F.3d 869, 873 n.1 (7th Cir. 2017), *as amended* (Oct. 10, 2017) (noting that the statutory exhaustion requirement in 8 U.S.C. § 1252(d) “is subject to waiver, forfeiture, and *other discretionary considerations.*”) (quoting *Arobelidze v. Holder*, 653 F.3d 513, 517 (7th Cir. 2011) (emphasis added in *Victoria-Faustino*); *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 700 (7th Cir. 2015) (internal citations omitted) (“Generally, a district court is unable to waive a statutorily-mandated exhaustion requirement. However, a court may waive the exhaustion requirement where

exhaustion is futile.”); *Iddir v. I.N.S.*, 301 F.3d 492, 498 (7th Cir. 2002) (recognizing multiple exceptions to exhaustion including futility).

In this case, it would be futile to require Mr. Beich to pursue an administrative appeal. Administrative exhaustion would be futile in Mr. Beich’s case because it would be “inadequate to prevent irreparable harm.” *Citadel Sec., LLC* 808 F.3d at 700. The Bureau of Prison’s regulations set out a time consuming, multi-stage process for the consideration of compassionate relief request. 28 C.F.R. § 571.63. These regulations do not make any exception for expedited or emergency requests. Every day he is in custody, Mr. Beich is at risk of suffering a possibly fatal COVID-19 infection. Even if administrative exhaustion ultimately led the Bureau of Prisons to file a compassionate release motion on his behalf, ultimate relief would come weeks from now and would do nothing to mitigate the risk that he is experiencing at the present moment.

2. *Finally, even if this Court determines that § 3582(c)(1)(A) is not subject to any equitable exceptions, a clear textual exception applies. The Court should waive the 30-day requirement because Mr. Beich has no “administrative rights” capable of providing relief.*

The first prong of § 3582(c)(1)(A) provides that a defendant may move for compassionate release “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.” 18 U.S.C. § 3582(c)(1)(A). For the reasons set out above, Mr. Beich simply does not have an administrative right capable of providing him with timely or effective relief. In *Fletcher v. Menard Correctional Center*, the Seventh Circuit held

an inmate who could demonstrate the absence of meaningful procedures to address imminent harm had satisfied the PLRA's exhaustion requirement. *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010). As the *Fletcher* court made clear, its holding was not based on an equitable futility exception, but was instead rooted in the language of the statute. *Id.* As the Seventh Circuit put it, "if there are no administrative remedies, then of course there's nothing to exhaust. And we think it's also true that there is no duty to exhaust, in a situation of imminent danger, if there are no administrative remedies for warding off such a danger." *Id.* The same is true here. Mr. Beich simply does not have an administrative appeal right that could provide timely review of his request for compassionate release based on the imminent threat that COVID-19 poses to his life. Realistically, Mr. Beich either has the right to review in this Court or he does not have the right to review at all.

B. Mr. Beich is eligible for compassionate release because extraordinary and compelling circumstances exist that weigh in favor of immediate release.

In cases where the exhaustion requirement has been satisfied or excused, the First Step Act empowered this Court to make an independent determination as to whether there are "extraordinary and compelling reasons" for compassionate release. The Court is no longer required to defer to the BOP's determination of whether such circumstances exist. *See, e.g., United States v. Ebberts*, 2020 WL 91399, at *4 n.6 (S.D.N.Y. Jan. 8, 2020) ("[T]he First Step Act reduced the BOP's control over compassionate release and vested greater discretion with courts. Deferring to the BOP would seem to frustrate that purpose."); *United States v. Cantu*, 2019 WL

2498923, at *3-4 (S.D. Tex. June 17, 2019) (same).

Rather than deferring to the BOP, the First Step Act directed courts to consider whether the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A)(i). As a number of courts have noted, the Sentencing Commission has not issued any applicable policy statements since the passage of the First Step Act. *See, e.g., United States v. Beck*, 2019 WL 2716505, at *5–6 (M.D.N.C. June 28, 2019) (“By its terms, the old policy statement applies to motions for compassionate release filed by the BOP Director and makes no mention of motions filed by defendants.”). Nevertheless, courts have found that the old policy statement provides helpful guidance in determining whether a defendant is eligible for compassionate release. *See id.; United States v. Ebbers*, No. S402CR11443VEC, 2020 WL 91399, at *4 (S.D.N.Y. Jan. 8, 2020).

The old policy statement issued by the Sentencing Commission listed four conditions that would constitute “extraordinary and compelling reasons” to reduce a sentence. U.S.S.G. § 1B1.13 cmt. n.1(A)-(D). The second condition, set forth in Application Note 1(B), applies when 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 term of imprisonment, whichever is less. Mr. Beich meets these criteria.

Additionally, while the first three conditions set out precise criteria for eligibility, the Sentencing Commission recognized the limits of that mechanical approach and included a “catch-all” provision designed to cover “an extraordinary and

compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).” U.S.S.G. § 1B1.13 cmt. n.1(D).

Since the passage of the First Step Act, courts have found that they may rely on this “catch-all” provision to determine eligibility, even in cases where the BOP has made no determination regarding an inmate’s eligibility for compassionate release. *See, e.g., United States v. Reyes*, No. 04 CR 970, 2020 WL 1663129, at *2 (N.D. Ill. Apr. 3, 2020) (granting compassionate release motion under the catch-all provision in the absence of any BOP finding regarding eligibility); *United States v. Owens*, No. 97-CR-2546-CAB, ECF No. 93 at 4 (S.D. Cal. Mar. 20, 2020) (“In the wake of the First Step Act, numerous courts have recognized the court can determine whether extraordinary and compelling reasons exist to modify a sentence—and may do so under the ‘catch all’ provision similar to that recognized in U.S.S.G. Manual § 1B1.13 n.1(D). . . .”) (collecting cases); *United States v. Redd*, No. 1:97-cr-0006-AJT, 2020 WL 1248493, at *8 (E.D. Va. Mar. 16, 2020) (“[T]he Court joins other courts in concluding that a court may find, independent of any motion, determination or recommendation by the BOP Director, that extraordinary and compelling reasons exist based on facts and circumstances other than those set forth in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C)”). As a result, the policy statement in the Sentencing Guidelines does not prevent this Court from making an independent determination that the COVID-19 pandemic is an extraordinary and compelling reason justifying Beich release.

A. *Mr. Beich Meets the Criteria Set Forth in Application Note 1(B)*

In this case, Mr. Beich is without dispute older than 65 (year of birth: 1953,

PSR Identifying Data), and he has served the 75% his prison sentence as required, once good time and RDAP credit are counted. He is also experiencing “serious deterioration in physical . . . health because of the aging process,” as was documented throughout the pendency of his case.

While his heart conditions and diabetes do not rise to the level of terminal illness or the degree of illness that substantially diminishes his ability for self-care, as described in Application Note 1(A), the addition of the age-related category in Application Note 1(B) was part of the Sentencing Commission’s effort to “broaden the criteria for eligibility.” In line with this intent, the “serious deterioration” because of aging is separate from the medical condition category under Application Note 1(A), which requires more specific medical criteria but has no age limitation. *See* USSG App. C, Amend. 799 (Nov. 1, 2016). The development of serious cardiac problems, strokes, and diabetes should be treated as a serious deterioration in physical health associated with aging.

B. Mr. Beich Meets the Criteria Set Forth in Application Note 1(D)

i. COVID-19’s rapid spread through the BOP system is an unprecedented public health crisis.

As of April 29, 2020, over one million people in the United States had been diagnosed with COVID-19 and 53,034 people have died of the disease.¹¹ The COVID-19 death toll includes at least 30 federal inmates. *COVID-19 Coronavirus page*, Federal Bureau of Prisons (Apr. 29, 2020),

¹¹ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, Apr. 14, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<https://www.bop.gov/coronavirus/index.jsp>. The President of the United States has declared that the pandemic is a national emergency and has issued guidance advising everyone in the United States to “work or engage in schooling from home whenever possible” and to “avoid social gatherings in groups of more than 10 people.”¹²

Prisons and jails are especially susceptible to the rapid spread of coronavirus. See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1055, (2007). at <https://academic.oup.com/cid/article/45/8/1047/344842> (noting that in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”). Despite the BOP’s efforts to limit the spread of COVID-19, the virus continues to spread rapidly throughout BOP facilities. As of April 29, the BOP has confirmed that 1717 federal inmates and 467 BOP staff have tested positive for COVID-19. *COVID-19 Coronavirus page*, Federal Bureau of Prisons (Apr. 24, 2020), <https://www.bop.gov/coronavirus/index.jsp>.¹³ Even these numbers are likely a drastic undercount of the extent of the infection given the lack of testing in the BOP. See *Wilson v. Williams*, 20-cv-794 (N.D. Ohio Apr. 22, 2020) (ECF 22 at 3) (“it is unlikely that these figures represent the actual number of cases at the

¹² The President’s Coronavirus Guidelines for America, Mar. 16, 2020, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

¹³ The BOP website appears to remove inmates from the count of positives once they recover. For this reason, counsel adds the number of “recovered” inmates to the current total listed on the website.

institution, given the paltry number of tests the federal government has made available for the testing of Elkton’s inmates”). Terminal Island, a BOP facility in California, recently began expanding its testing last week and found that over 50% of 1,055 inmates tested were positive for coronavirus. Mark Berman, *Officials began testing every inmate at a federal prison in California; 4 in 10 have the virus*,

Washington Post (April 29, 2020)

<https://www.washingtonpost.com/world/2020/04/29/coronavirus-latest-news/> (NB:

although the article places the percentage at 40%, the numbers rose to over 50% shortly after the article was published). On April 26th, 105 inmates were listed as testing positive. By April 29th, the numbers had quintupled to 570.¹⁴

- ii. *Given Mr. Beich’s age and health, this public health crisis is an extraordinary and compelling reason justifying compassionate release.*

Health statistics show that contracting COVID-19 would quite possibly be a death sentence for Mr. Beich.¹⁵ As discussed above, Mr. Beich suffers from a cardiac conditions and diabetes, which make him particularly vulnerable to the disease. *See supra* at 3-7. And, as great as the risk Mr. Beich faces would be under normal

¹⁴ Bureau of Prisons, *COVID 19 Coronavirus*, <https://www.bop.gov/coronavirus/> (visited April 29, 2020); *See also* Cary Aspinwall and Joseph Neff, *These Prisons Are Doing Mass Testing For COVID-19—And Finding Mass Infections*, The Marshall Project (April 24, 2020), <https://tinyurl.com/yb5lh3ep>.

¹⁵ *See* Safiya Richardson, Jamie S. Hirsch, Mangala Narasimhan, James M. Crawford, Thomas McGinn, Karina W. Davidson, *Presenting Characteristics, Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York City Area*, *Journal of the American Medical Association* (Apr. 22, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2765184>.

circumstances, in prison he can't practice social distancing or proper hygiene. Similarly, his ability to go to a hospital or get tested (and treated) Mr. Beich is curtailed by the very fact of him being in custody. As a result, Mr. Beich is at a far greater risk of death or serious injury than he would be if he were released from custody.¹⁶

In comparable cases involving elderly and vulnerable defendants, courts have found that the COVID-19 pandemic is an extraordinary and compelling reason justifying a sentence reduction.¹⁷ In one recent case, a district court granted

¹⁶ See Centers for Disease Control, *FAQs for Administrators, Staff, Incarcerated People & Family Members*, Mar. 28, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html> (“People in correctional and detention facilities are at greater risk for illnesses, such as COVID-19 because of their close living arrangement with other people.”)

¹⁷ See, e.g., *United States v. Edwards*, No. 6:17-cr-3-NKM, R. 134 (W.D. Va. Apr. 2, 2020) (granting compassionate release; “[h]ad the Court known when it sentenced Defendant in 2018 that the final 18 months of his term in federal prison would expose him to a heightened and substantial risk presented by the COVID-19 pandemic on account of Defendant’s compromised immune system, the Court would not have sentenced him to the latter 18 months”); *United States v. Hernandez*, No. 18-cr-20474, R. 41 (S.D. Fla. Apr. 2, 2020) (granting unopposed motion for compassionate release for defendant with cancer and immunosuppression and just under 12 months left to serve on 39 month sentence); *Rodriguez*, 2020 WL 1627331 (granting release after finding risk factors for COVID-19 constitute extraordinary and compelling reason and noting that prisons are “tinderboxes for infectious disease”); *United States v. Gonzalez*, No. 2:18-cr-232-TOR, R. 834 (E.D. Wash. Mar. 31, 2020) (releasing defendant one month into a 10 month sentence in light of medical issues; ordinarily these conditions would be manageable but “these are not ordinary times”); *United States v. Marin*, No. 15-cr-252, R. 1326 (E.D.N.Y. Mar. 30, 2020) (“[F]or the reasons stated in his motion, including his advanced age, significantly deteriorating health, elevated risk of dire health consequences due to the current COVID-19 outbreak, status as a non-violent offender, and service of 80% of his original sentence.”); *United States v. Muniz*, Case No. 4:09-cr-199, R. 578 (S.D. Tex. Mar. 30, 2020) (releasing defendant serving 188-month sentence for drug conspiracy in light of vulnerability to COVID-19: “[W]hile the Court is aware of the measures taken by the Federal Bureau of Prisons, news reports of the virus’s spread in detention centers within the United States and beyond our borders in China and Iran demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection.”); *United States v.*

compassionate release to a defendant serving a sentence for a kidnapping, after concluding that the “benefits of keeping him in prison for the remainder of his sentence are minimal, and the potential consequences of doing so are extraordinarily grave.” *United States v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422, at *4 (S.D.N.Y. Apr. 1, 2020). The same is true here—whether he is sent home now or in October, Mr. Beich is well-positioned to lead a successful, law-abiding life. But that additional time in custody is certain to place his health in serious jeopardy.

III. The 3553(a) factors weigh in favor of Mr. Beich’s immediate release.

The § 3553(a) factors also weigh in favor of releasing Mr. Beich immediately. *See* 18 U.S.C. § 3582(c)(1)(A) (directing the court to “consider[] the sentencing factors set forth in section 3553(a) to the extent that they are applicable.”); *see also* U.S.S.G. § 1B1.13(2) (advisory guideline suggesting one factor weighing in favor of compassionate release is that “the defendant is not a danger to the safety of any other person or to the community”).

Even during his original sentencing proceedings, the Probation Office asserted that Mr. Beich is not a threat to the community and suggested a below-guidelines

Bolston, Case No. 1:18-cr-382-MLB, R. 20 (N.D. Ga. Mar. 30, 2020) (releasing defendant in part because “the danger inherent in his continued incarceration at the R.A. Deyton Detention Facility . . . during the COVID-19 outbreak justif[y] his immediate release from custody”); *United States v. Powell*, No. 1:94-cr-316-ESH, R. 98 (D.D.C. Mar. 28, 2020) (granting unopposed motion for compassionate release in light of COVID-19 and finding it “would be futile” to require defendant to first exhaust in light of open misdemeanor case); *United States v. Campagna*, 2020 WL 1489829 (S.D.N.Y. Mar. 27, 2020) (compassionate release grant); *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020) (suspending intermittent confinement because “[t]here is a pandemic that poses a direct risk if Mr. Barkman . . . is admitted to the inmate population of the Wahoe County Detention Facility”).

sentence. The Sentencing Recommendation stated: “It is further noted the community at large is not in need of protection from this defendant, as he is no longer employed as a pharmacist. There is no reason to believe he poses any current threat.” Dkt. #72, Defense Sentencing memorandum at 18-19 (citing Probation’s Sentencing Recommendation).

Especially in light of the danger Mr. Beich faces if he remains in custody, the nearly 24 months he has already served are sufficient “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” under § 3553(a)(2)(A). *See, e.g., United States v. Rodriguez*, 2020 WL 1627331, at *12 (E.D. Pa. Apr. 1, 2020) (finding § 3553(a)(2)(A) satisfied for the purposes of compassionate release after the defendant served the majority of his prison sentence). The “just punishment” factor is especially important under these highly unusual circumstances. When the Court sentenced Mr. Beich, surely “the Court did not intend for that sentence to ‘include incurring a great and unforeseen risk of severe illness or death’ brought on by a global pandemic.” *United States v. Zukerman*, 2020 WL 1659880, at*6 (S.D.N.Y. Apr. 3, 2020) (granting Zukerman’s compassionate release motion and modifying his sentence to home incarceration after he had served 33 months of a 70-month sentence); *see also United States v. Wurzinger*, 467 F.3d 649, 652 (7th Cir. 2006) (“There is a worthy tradition that death in prison is not to be ordered lightly, and the probability that a convict will not live out his sentence should certainly give pause to a sentencing court.”).

Keeping Mr. Beich locked up between now and October is also not necessary

“to protect the public from further crimes” under § 3553(a)(2)(C). This factor focuses specifically on Mr. Beich’s individual risk of recidivism. The last two years of Mr. Beich’s life shows that he has committed himself to becoming a law-abiding citizen. Moreover, Mr. Beich’s age renders him a very low risk of recidivism under § 3553(a)(2)(C). The Sentencing Commission finds that fully 93.5% of people age 65 or older do not commit new offenses after release.¹⁸ Sentencing Commission studies further indicate these low recidivism rates hold constant regardless of whether someone served their full-sentence or gained early release.¹⁹ The Seventh Circuit has repeatedly affirmed reduced sentences for older individuals because the sentencing guidelines “do not factor in a defendant’s age.” *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *see also United States v. Carter*, 538 F.3d 784, 792 (7th Cir. 2008) (affirming lower sentence for tax fraud partially based on age); *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir. 2007) (affirming below-range sentence based solely on age).

Finally, it almost goes without saying that requiring Mr. Beich to spend the next six months in custody will not provide him with “medical care . . . in the most effective manner” under § 3553(a)(2)(D). Even before the pandemic, the BOP was

¹⁸ U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders*, at 23, Fig. 14 (Dec. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

¹⁹ U.S. Sentencing Comm’n, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment*, at 3 (Mar. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf.

failing to provide adequate healthcare.²⁰ The situation has only worsened with the COVID-19 onslaught.²¹ One recent district court judge weighed this factor in granting compassionate release to an elderly defendant with underlying conditions, concluding that the defendant was “unlikely to be able to get the medical care he needs in the midst of an ongoing pandemic.” *United States v. Burrill*, 2020 WL 1846788, at *3 (N.D. Cal. Apr. 10, 2020). Further, BOP staff recently filed a complaint with the Occupational Safety and Health Administration, contending that various BOP policies “are proliferating the spread of a known and deadly contagion both within our prisons system and to our surrounding communities.”²² Living in the community

²⁰ See U.S. Dep’t of Justice, *Office of the Inspector General Review of the Federal Bureau of Prison’s Medical Staffing Challenges*, at i (Mar. 2016) (describing an inability to hire a sufficient number of healthcare professionals to meet the needs of a teeming incarcerated population); see also Erica Zunkel, *Article: 18 U.S.C. § 3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant With Rehabilitation, Training, and Treatment in “The Most Effective Manner,”* 9 Notre Dame J. Int’l & Comp. L. 49, 57–60 (2019) (detailing the BOP’s systematic failure to procure healthcare for inmates).

²¹ See Lisa Freeland et al, *We’ll See Many More COVID-19 Deaths in Prison if Congress and Barr Don’t Act Now*, WASH. POST (Apr. 6, 2020), https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders (“Numerous credible public-health experts have observed that overcrowded prisons with communal living; shared toilets, showers, and sinks; poor sanitation; and wholly inadequate medical care would allow covid-19 to sweep through the prison population far more quickly than the general public — with devastating consequences.”); see also Joe Davidson, *Unions for Prison, VA Workers File “Imminent Danger” Reports about Coronavirus Conditions*, WASH. POST (Apr. 9, 2020), https://www.washingtonpost.com/politics/unions-for-prison-va-workers-file-imminent-danger-reports-about-coronavirus-conditions/2020/04/08/78962ea0-79e4-11ea-8cec-530b4044a458_story.html.

²² Council of Prison Workers 33, *Imminent Danger Report*, at 3 (Mar. 31, 2020), available at <https://www.afge.org/globalassets/documents/generalreports/coronavirus/4/osh-7-form-national-complaint.pdf> (describing BOP’s policy of requiring staff to appear for work within 48 hours even after having contact with individuals showing symptoms of COVID-19, and BOP’s policy of continuously moving infected defendants).

with access to health care dramatically reduce Mr. Beich's risk of infection due to COVID-19.

II. In the Alternative, this Court Should Recommend to the BOP that Mr. Beich Be Transferred to Home Confinement Under the CARES Act & 18 U.S.C. § 3621(b)(4).

If the Court declines to grant Mr. Beich's compassionate release motion, this Court should recommend to the BOP that Mr. Beich be transferred to home confinement immediately pursuant to § 12003(b)(2) of the CARES Act and § 3621(b)(4). *See United States v. Doshi*, 2020 WL 1527186, at *1 (E.D. Mich. Mar. 31, 2020) (recommending that the BOP place a 64-year-old defendant convicted of health care fraud in home confinement for the remainder of his sentence). While the BOP has apparently already determined that it will not grant Mr. Beich maximum community confinement, the agency is required to consider a sentencing court's recommendation as to where a person should serve their sentence. 18 U.S.C. § 3621(b)(4). And, while the defense is aware of recent cases in which the Bureau of Prisons has failed to honor similar judicial recommendations,²³ Mr. Beich is hopeful that a recommendation from this Court would lead the BOP to reconsider their decision in this case.

²³ *See, e.g., United States v. Thompson*, 15-cr-448 (N.D. Ill. Apr. 17, 2020); *see also United States v. Scparta.*, No. 18-CR-578 (AJN), 2020 WL 1910481, at *1 (S.D.N.Y. Apr. 20, 2020) (“While this motion was pending, the BOP decided that Mr. Scparta should be released from custody to serve the remainder of his term in home confinement. One might conclude that this admirable decision would resolve the issue and moot the compassionate-release motion. Unfortunately it does not. That is because the BOP has determined that Mr. Scparta must remain in custody during the peak of the pandemic for what it labels a ‘14-day quarantine’—but his current confinement is neither a quarantine nor limited to 14 days.”).

Conclusion

For the foregoing reasons, Mr. Beich respectfully requests that the Court modify his sentence under 18 U.S.C. § 3582(c)(1)(A)(i) to time served. In the alternative, Mr. Beich respectfully requests that this Court recommend to the BOP that he be transferred to home confinement immediately under the CARES Act. Should the Court wish to hold a hearing, counsel waives Mr. Beich's appearance.

Dated: April 29, 2020

Respectfully submitted,

FEDERAL DEFENDER PROGRAM
John Murphy
Executive Director

By: /s/ Amanda G. Penabad
Amanda G. Penabad

AMANDA G. PENABAD
FEDERAL DEFENDER PROGRAM
55 E. Monroe, Suite 2800
Chicago, IL 60603
(312) 621-8340

CERTIFICATE OF SERVICE

The undersigned, Amanda G. Penabad, an attorney with the Federal Defender Program, hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

**DEFENDANT BEICH'S EMERGENCY MOTION FOR COMPASSIONATE
RELEASE OR RECOMMENDATION FOR IMMEDIATE RELEASE ON
HOME CONFINEMENT**

was served pursuant to the district court's ECF system as to ECF filings on April 29, 2020.

By: /s/ Amanda G. Penabad
AMANDA G. PENABAD
FEDERAL DEFENDER PROGRAM
55 E. Monroe, Suite 2800
Chicago, IL 60603
(312) 621-8340

EXHIBIT A



FEDERAL DEFENDER PROGRAM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

55 E. MONROE STREET - SUITE 2800
CHICAGO, ILLINOIS 60603

PHONE 312.621.8300
FAX 312.621.8399

JOHN F. MURPHY
EXECUTIVE DIRECTOR

CHRISTINA L. FARLEY JACKSON
DEPUTY DIRECTOR

ROBERT D. SEEDER
CHIEF TRIAL ATTORNEY

MICHAEL T. WYSOPAL
ADMINISTRATIVE OFFICER

TERENCE F. MacCARTHY
CAROL A. BROOK
DEFENDER EMERITI

PIYUSH CHANDRA
IMANI CHIPHE
SANTINO COLEMAN
MARIA TERESA GONZALEZ
DANIEL J. HESLER
CANDACE JACKSON-AKIWUMI
BETH W. JANTZ
JASMINE J. JOHNSON
MARY H. JUDGE
DANIEL P. McLAUGHLIN
GEOFFREY M. MEYER
AMANDA PENABAD
SERGIO F. RODRIGUEZ
KIMBERLY-CLAIRE E. SEYMOUR
WILLIAM H. THEIS

April 28, 2020

Via email to
THA/ExecAssistant@bop.gov
Thomas Watson
Warden, FCI Terre Haute

Via email to tknutson@bop.gov
Tracy Knutson, Esq.
BOP Regional Counsel, North-Central Region

**Re: Walter Beich, Fed. Reg. No. 47964-424— Request for
Compassionate Release Pursuant to 18 U.S.C. § [3582\(c\)\(1\)\(A\)](#) &
28 C.F.R. § 571.61, or in the Alternative, Release to Home
Confinement Pursuant to § 12003(b)(2) of the CARES Act**

Dear Warden Watson and Regional Counsel Knutson:

I am writing to request compassionate release for Mr. Beich, or in the alternative, that Mr. Beich be transferred immediately to home confinement pursuant to § 12003(b)(2) of the CARES Act, and the Attorney General's April 3, 2020, Memorandum finding the COVID-19 emergency conditions are materially affecting the functioning of the Bureau of Prisons. I am Mr. Beich's attorney and make this request on his behalf.

Pursuant to 18 U.S.C. § 3582(c)(1)(A) and 28 C.F.R. § 571.61, the Court may grant compassionate release for "extraordinary and compelling reasons." The outbreak of coronavirus within BOP, which poses a particular threat to Mr. Beich because of his underlying health conditions, constitutes such "extraordinary and compelling reasons."

The BOP should consider Mr. Beich for relief due to the unusual and dangerous circumstances presented by the coronavirus. Mr. Beich is at increased risk for more severe complications from COVID-19. He had a heart attack in 2007, suffered multiple small strokes in 2016 and was subsequently hospitalized for blocked arteries, and was diagnosed with diabetes in 2008, as documented in his PSR. According to the CDC, people with cardiac conditions and diabetes are at higher risk for severe illness, regardless of age. *Groups at Higher Risk for Severe Illness*, <https://tinyurl.com/w4yd732>; see also Harvard Health Publishing, *If You Are At Higher Risk*, <https://tinyurl.com/sgvmdvh>. With his health conditions, the consequences for Mr. Beich could be dire, were he to contract the virus. Allowing Mr. Beich to go home as a result of compassionate release or on home confinement would protect him from harm, and mitigate the spread of the virus within BOP in general.

Mr. Beich should be granted relief from custody because the Section 3553(a) factors and home confinement criteria favor his release. He has been in custody since May 2018 and, with good time credit and RDAP credit, has served well over 50% of his term. Indeed, he is near the end of his term: he is scheduled for release to community corrections in October of this year. With full community corrections, he would have been released to a residential reentry center last fall. Mr. Beich's sentencing judge also submitted a recommendation to the BOP that Mr. Beich receive the maximum amount of time in community corrections. See Exhibit A.

With regard to home confinement, in the April 3rd memo, Attorney General Barr stated that "inmates with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations." Given that all BOP facilities are currently in an extended lockdown, COVID-19 is materially affecting its operations. Mr. Beich is close to the end of his sentence. He is medically at-risk, and low or minimum security. (Counsel has been unable to get confirmation from Mr. Beich or his counselors as to his PATTERN score.) Transferring Mr. Beich will decrease the population and risk at FCI Terre Haute without endangering the greater community.

At this time, I do not have information about Mr. Beich's release plan. Despite requesting legal calls on April 8, 2020 and April 27, 2020, Mr. Beich's counselor has declined to set up a legal call. He has likewise declined to return email inquiries about Mr. Beich's security level or pending requests to the Warden. I would be pleased to speak with Mr. Beich and coordinate a release plan, if provided that opportunity.

Given the proximity of his community corrections date, this adjustment to his release date would be small in scale. But living outside of prison would dramatically reduce Mr. Beich's risk of infection due to COVID-19, and is therefore well worth the accommodation. I sincerely hope that the BOP will prioritize his health and safety during this tumultuous time. Please do not hesitate to contact me if you have any questions or require additional information.

Sincerely,

/s/Amanda G. Penabad

Amanda G. Penabad
Staff Attorney
Federal Defender Program
Northern District of Illinois
55 E Monroe Street, Suite 2800
Chicago, IL 60603
(312) 621-8340
Amanda_Penabad@fd.org

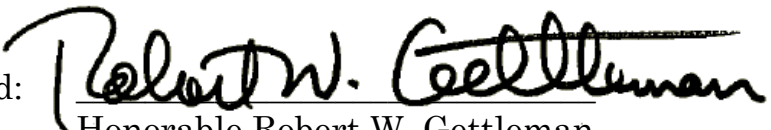
EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 15-cr-282
v.)	
)	Hon. Robert Gettleman
WALTER BEICH)	
)	

ORDER

This matter coming before the Court on Defendant’s oral motion for judicial recommendation to the Federal Bureau of Prisons pursuant to 18 U.S.C. §3621(b) is GRANTED: the Court recommends that the Bureau of Prisons place Beich in a residential reentry center for the maximum allowable term. The Clerk is directed to send a copy of this order to the Bureau of Prisons.

Entered: 
Honorable Robert W. Gettleman
U.S. District Court Judge

Dated: October 16, 2019

EXHIBIT B

DSCGN
PAGE 001

*
*

PUBLIC INFORMATION
INMATE DATA
AS OF 04-08-2020

*
*

04-08-2020
21:22:11

REGNO...: 47964-424 NAME: BEICH, WALTER

RESP OF: THA
PHONE...: 812-238-1531

FAX: 812-238-3301
RACE/SEX...: WHITE / MALE
AGE: 66
PAR ELIG DT: N/A
PAR HEAR DT:

PROJ REL MT: 3621E COND
PROJ REL DT: 10-21-2020

G0002 MORE PAGES TO FOLLOW . . .

DSCGN
PAGE 002

*
*

PUBLIC INFORMATION
INMATE DATA
AS OF 04-08-2020

*
*

04-08-2020
21:22:11

REGNO.: 47964-424 NAME: BEICH, WALTER

RESP OF: THA

PHONE.: 812-238-1531 FAX: 812-238-3301

HOME DETENTION ELIGIBILITY DATE: 05-29-2020

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.
THE INMATE IS PROJECTED FOR RELEASE: 10-21-2020 VIA 3621E COND

-----CURRENT JUDGMENT/WARRANT NO: 010 -----

COURT OF JURISDICTION.....: ILLINOIS, NORTHERN DISTRICT
DOCKET NUMBER.....: 15 CR 282-1
JUDGE.....: GETTLEMAN
DATE SENTENCED/PROBATION IMPOSED: 04-05-2018
DATE COMMITTED.....: 05-29-2018
HOW COMMITTED.....: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	\$200.00	\$00.00	\$00.00	\$00.00

RESTITUTION...: PROPERTY: NO SERVICES: NO AMOUNT: \$2,274,576.56

-----CURRENT OBLIGATION NO: 010 -----

OFFENSE CODE....: 153 18:286,371 FRAUD, OTHER
OFF/CHG: 18:1347 HEALTH CARE FRAUD CT 2.

SENTENCE PROCEDURE.....: 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE.: 24 MONTHS
TERM OF SUPERVISION.....: 2 YEARS
DATE OF OFFENSE.....: 09-23-2011

-----CURRENT OBLIGATION NO: 020 -----

OFFENSE CODE....: 160 18:1028 FRAUD IDENTITY THEFT
OFF/CHG: 18:1028A(A)(1) AGGRAVATED IDENTITY THEFT CT 10.

SENTENCE PROCEDURE.....: 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE.: 24 MONTHS
TERM OF SUPERVISION.....: 1 YEARS
RELATIONSHIP OF THIS OBLIGATION
TO OTHERS FOR THE OFFENDER....: 24M CS TO OBLG 010
DATE OF OFFENSE.....: 09-23-2011

G0002 MORE PAGES TO FOLLOW . . .

DSCGN
PAGE 003

*
*

PUBLIC INFORMATION
INMATE DATA
AS OF 04-08-2020

*
*

04-08-2020
21:22:11

REGNO.: 47964-424 NAME: BEICH, WALTER

RESP OF: THA
PHONE.: 812-238-1531 FAX: 812-238-3301

-----CURRENT COMPUTATION NO: 010 -----

COMPUTATION 010 WAS LAST UPDATED ON 08-13-2019 AT DSC AUTOMATICALLY
COMPUTATION CERTIFIED ON 06-04-2018 BY DESIG/SENTENCE COMPUTATION CTR

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN
CURRENT COMPUTATION 010: 010 010, 010 020

DATE COMPUTATION BEGAN.....: 05-29-2018
AGGREGATED SENTENCE PROCEDURE...: AGGREGATE GROUP 800 PLRA
TOTAL TERM IN EFFECT.....: 48 MONTHS
TOTAL TERM IN EFFECT CONVERTED...: 4 YEARS
AGGREGATED TERM OF SUPERVISION...: 2 YEARS
EARLIEST DATE OF OFFENSE.....: 09-23-2011

JAIL CREDIT.....:	FROM DATE	THRU DATE
	12-12-2012	12-13-2012
	05-26-2015	05-26-2015

TOTAL PRIOR CREDIT TIME.....: 3
TOTAL INOPERATIVE TIME.....: 0
TOTAL GCT EARNED AND PROJECTED...: 216
TOTAL GCT EARNED.....: 54
STATUTORY RELEASE DATE PROJECTED: 10-21-2021
EXPIRATION FULL TERM DATE.....: 05-25-2022
TIME SERVED.....: 1 YEARS 10 MONTHS 14 DAYS
PERCENTAGE OF FULL TERM SERVED...: 46.8

G0002 MORE PAGES TO FOLLOW . . .

DSCGN *
PAGE 004 OF 004 *

PUBLIC INFORMATION
INMATE DATA
AS OF 04-08-2020

* 04-08-2020
* 21:22:11

REGNO..: 47964-424 NAME: BEICH, WALTER

RESP OF: THA
PHONE..: 812-238-1531 FAX: 812-238-3301

PROJECTED SATISFACTION DATE.....: 10-21-2020
PROJECTED SATISFACTION METHOD...: 3621E COND

G0000 TRANSACTION SUCCESSFULLY COMPLETED