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March 24, 2020

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Hon. Paul A. Engelmayer
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: United States v. William Knox
Dkt. No. 15-Cr-445 (PAE)

Dear Judge Engelmayer:

William Knox was sentenced by the Court in October, 2019 and still remains at the MCC. He is scheduled to complete his sentence on October 28, 2020. Because Mr. Knox has less than one year left on his sentence, the Bureau of Prisons ("BOP") is mandated to facilitate his reintegration into the community by determining the extent to which he should spend the last year of his sentence in a Residential Reentry Center ("halfway house") or under home confinement, 18 U.S.C. §3624(c)(1).[1]

As of today, the BOP has refused to make any decision. The BOP's refusal not only impairs Mr. Knox's ability to smoothly transition back into the community, but has become especially harmful to Mr. Knox in light of the recent **disclosures that at least one inmate at the MCC has been infected with COVID-19, well over 100 inmates have been exposed to the infected inmate,** and the virus is expected to spread quickly because the inmates and officers are unable to practice social distancing. The harm to Mr. Knox may be irreparable. If the BOP had properly complied with its statutory obligation, there is a high likelihood that Mr. Knox would no longer be in prison, much less at the MCC.

I respectfully request that the Court afford Mr. Knox the following relief:

1. Direct the BOP to issue a decision within the next ten days as to how Mr. Knox will serve his last seven months in custody. 18 U.S.C. §3624(c)(1); and

[1]I annex, as Exhibit A Mr. Knox's BOP computation sheet listing October 20, 2020 as his release date.

> 2. Recommend to the Bureau of Prisons ("BOP") that Mr. Knox serve the last seven months of his sentence as follows: 1 month in a Residential Reentry Center ("half-way house"), followed by 6 months in home confinement. 18 U.S.C. §§3624(c) and 3621(b)(4); and
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> 3. If the BOP fails to issue a decision within the next ten days determining that Mr. Knox should serve the next 6 months in a halfway house or home confinement, the Court should reduce Mr. Knox's sentence to time-served so that he can move into his mother's apartment and immediately begin his term of supervised release under the direction the this district's Probation Department. 18 U.S.C. §3582(c)(1)(A)(I).[2]

The BOP Failed to Perform its Statutorily Imposed Duty to Determine How Mr. Knox Should Serve His Final Year in Custody. 18 U.S.C. §3624(c)(1) & (2)

The BOP's failure to determine how and where Mr. Knox will complete his sentence violates 18 U.S.C. §3624(c)(1) & (2), which provides:

> **(C) Prerelease Custody—**
>
> (1) In general.—
>
> The Director of the Bureau of Prisons **shall,** to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.
>
> (2) Home confinement authority.—
>
> The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of

[2]I do not believe that any specific procedural mechanism is necessary to bring this application. To the extent that this is incorrect, I request that the Court treat this application as a habeas petition pursuant to 28 U.S.C. §2241.

> imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.

(Emphasis furnished)

18 U.S.C. §3624(c)(1) is phrased in the imperative: the Director of the Bureau of Prisons **shall,** to the extent practicable ..." ensure that an inmate serve the last part of his sentence in a manner that will facilitate his or her re-integration into the community. The Director has failed to exercise his statutorily imposed duty for over 5 months since the Court imposed sentence. Although the Director is afforded the authority to exercise to exercise discretion as to how the inmate will serve his final year in custody, *United States v. Henderson,* 2019 U.S. Dist. LEXIS 46329 (S.D.N.Y., Daniels, J.), he does not have the authority to refuse to exercise it.

The Court should order the Director to perform his duty to ensure that Mr. Knox spends the 7-month balance of his prison term "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's reentry into the community." The instant case is distinguishable from the long line of cases in which an inmate challenges the Director's decision itself. Under those circumstances, courts have generally held that an inmate must first exhaust his administrative appellate remedies within the BOP before seeking habeas relief in the district court pursuant to 28 U.S.C. §2241. However, there is no administrative appeal from the Director's refusal or failure to render any decision. Thus, the inmate's sole remedy is to ask the district court to compel the BOP to act or, if BOP fails to do so, to order the inmate released (See *infra* re 18 U.S.C. §3582(c)(1)(A)(I)).

Moreover, courts have resolved inmates' claims even in the absence of exhaustion where it is plain that an administrative appeal would be futile and/or any delay will result in irreparable damage to the inmate. *Dedaille v. Terrell*, 2010 U.S. Dist. LEXIS 45959 *2 (E.D.N.Y.). Here, both conditions are met. First, since there is no administrative decision to appeal, the requirement to exhaust administrative appeals is meaningless. Even if it were possible to appeal a non-decision, and demand that the Director make a decision, the procedure would be futile: the BOP appellate process is slow moving under the best of circumstances and, given the current circumstances, any final decision would likely be several months into the future. This would defeat the very purpose of the statute, which is to transition the inmate into the community during the final year of custody. Second, Mr. Knox has already suffered and will continue to suffer irreparable harm from continued confinement at the MCC. The conditions under which he has been living at the MCC, a

maximum security facility, are inferior to those of any prison to which he might have been designated, and far inferior to any he would have experienced in a halfway house. He has not received any of the services designed to facilitate his re-integration into society that he would likely have received if he had been designated promptly. Unless immediate action is taken, Mr. Knox will lose his right to serve the last 6 months of his sentence in a manner that will facilitate his transition back into the community.

The COVID-19 pandemic only heightens the harm Mr. Knox has already experienced by the Director's failure to act. Despite BOP's contention that it can protect its inmates, at least 1 inmate at the MCC has tested positive for COVID-19, and well over a hundred inmates have already been exposed to this person. (Report by Nicole McFarland, Esq.,, attorney for the MCC, to Deidre von Dornum, Esq., Attorney-Charge, Federal Defenders of New York). I attach as Exhibit B and affidavit from Jonathan Giftos, M.D., formerly Clinical Director of Substance Use Treatment for NYC Health & Hospitals, Division of Correctional Health Services at Rikers Island, and a recognized expert in the field of infectious diseases and prisons. Dr. Giftos sets forth in detail why inmates that the MCC in particular are vulnerable to COVID-19. Dr. Giftos is hardly alone in his opinion. Virtually every infectious disease specialist who is not employed by the United States Department of Justice has agreed that prisons are tinder boxes of COVID-19 that are ready to explode. See, *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State and Local Leaders from Public Health and Legal Experts in the United States*, March 2, 2020, annexed as Exhibit B. See also, *United States v. Dante Stephens*, Dkt. 15-CR-95 (S.D.N.Y.)(AN) (granting bail in part because of dangerous conditions at the MCC and MCC stemming from the COVID-19 pandemic); *United States v. Barkman,* Dkt. No. 3:19-cr-0052-RCJ-WGC (D. Nev. March 17, 2020)(court suspends jail term condition of probation due to dangers in jail created by pandemic). Exposing Mr. Knox to this heightened risk of infection not only harms him, but will place a very avoidable burden on the public health system should he need to be hospitalized.

The Court Should Recommend to the BOP That Mr. Knox Serve the Last 7 Months of His Sentence as Follows: 1 Month in a Halfway House and 6 Months Home Confinement

18 U.S.C. §§3624(c) and 3621(b)(4) authorize the Court to recommend where a defendant should be incarcerated. This includes whether a defendant should be confined in a halfway house or in home confinement during the last year he or she is in custody. Although the court usually exercises this power at the time of sentencing, nothing prevents it from doing so at any time the inmate is still serving his sentence. See also, *United States v. Ceballos*, 671 F.3d 852, 856 n.2 (9th Cir. 2011).

There is strong reason to believe that the BOP will follow the Court's

recommendation. As I detailed in my sentencing letter of September 19, 2019 (ECF 1047), Mr. Knox has made extraordinary strides towards rehabilitating himself since the trial. I will not repeat those reasons here. There is every reason to believe that, with the assistance of this district's Probation Department he will successfully integrate himself into society.

Mr. Knox and his family have already made arrangements for where he will live when he is released. Mr. Knox will live at 424 Morris Avenue, Apt. 6A, Bronx, NY 10451 with his mother, Claudia Knox, 52, a Senior Residence Specialist with the Adapt Agency; his step-father, Paul Donker, 62, a kidney dialysis technician at Beth Israel Hospital in Manhattan; and Mfah Sekou, 25, a family friend and a full-time college student at City College.

The Court Should Resentence Mr. Knox to Time Served If the BOP Does Not Comply with the Court's Order and Does Not Determine That Mr. Knox Should Serve the Last 7 Months of His Sentence in a Halfway House And/or Home Confinement.

The court should re-sentence Mr. Knox to time served if the BOP does not comply with the court's order and does not determine that Mr. Knox should serve the last 7 months of his sentence in a halfway house and/or home confinement. The combination of the COVID-19 pandemic, the short time remaining on Mr. Knox's sentence, his extraordinary efforts at rehabilitation, and the BOP's failure to exercise its discretion in a timely matter constitute the type of "extraordinary circumstances" which authorize the Court to shorten Mr. Knox's sentence under 18 U.S.C. §3582(c)(1)(A).

18 U.S.C. §3582(c)(1)(A)(I), as amended by the First Step Act, permits the sentencing court to reduce sentences based on "extraordinary and compelling reasons." Although this statute has been be colloquially coined the "compassionate relief" statute, courts have interpreted the current provision to permit a sentence reduction for "extraordinary and compelling" reasons other than the particular defendant's imminent death or old age. *United States v. Maumau*, 2020 U.S. Dist. LEXIS 28392 (D. Utah) (recognizing youth at time of crime, lengthy sentence, and change in laws as factors which may warrant compassionate release); *United States v. Cantu*, 2019 U.S. Dist. LEXIS 100923 (S.D.Tx.)(recognizing defendant's rehabilitation as a factor); *United States v. Urkevich*, 2019 U.S. Dist. LEXIS 197408 (Dist. Neb.).

Under the amended statute, a court can now reduce a sentence for "extraordinary and compelling reasons" in two circumstances: (I) if the Director of the BOP files a motion requesting such relief; or (ii) "upon motion of the defendant," if the defendant has fully exhausted all administrative remedies to appeal the BOP's failure to bring a motion, or if 30 days have lapsed "from the receipt of such a request by the warden of the defendant's

facility," whichever is earlier. 18 U.S.C. §3582(c)(1)(A).

There is no jurisdictional or other procedural bar to the Court's reducing Mr. Knox's sentence. The statute itself confers jurisdiction on the court, unlike the previous statute, which allowed a reduction only on the Warden's motion. To the extent that notice to the Warden remains a jurisdictional requirement, Mr. Knox has satisfied it. On March 23, 2020, Mr. Knox notified that Warden of the MCC in writing that he wished to be considered for release under 18 U.S.C. §3582(c)(1)(A). I confirmed this in an email which I sent on March 24, 2020 to Nicole MacFarland, Esq. of MCC's legal department.

Any jurisdictional prerequisite attaching to the notification requirement does not, however, extend to the waiting period described by the statute. First, the text of the statute provides two pathways by which a defendant may ordinarily file a motion for compassionate release: either by exhausting an administrative right to appeal BOP's failure to file such a motion, or by waiting 30 days after requesting that they do so. 18 U.S.C. § 3582 (c)(1)(A)(ii). The statute further specifies that "whichever is earlier" among these two potential dates is the date on which the defendant is ordinarily allowed to file. *Id*. In so doing, Congress ensured that neither exhaustion of remedies nor a 30-day waiting period is *per se* required. Congress further manifested an intent that, generally speaking, a defendant be able to file a compassionate release motion in an expeditious manner. Accordingly, the waiting period and exhaustion of remedies clauses are best understood as a "claims processing rule" that can be set aside by the court at least in cases of dire emergency.

As noted in *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993) (quoting *Granberry v. Greer*, 481 U.S. 129, 134 (1987); see also 28 U.S.C. § 2254(b) (authorizing application for writ of habeas corpus in the absence of exhaustion of State remedies where "circumstances exist that render such process ineffective to protect the rights of the applicant."), this Court can dispense with the administrative exhaustion requirement where there are "exceptional circumstances of peculiar urgency . ." The COVID-19 pandemic is precisely the type unforeseen emergency that constitutes "exceptional circumstances."

Several federal appellate courts, in interpreting a different portion of 18 U.S.C. §3582(c) have held that the language of that subsection is non-jurisdictional. *United States v. Taylor*, 778 F.3d 667, 671 (7th Cir. 2015) ("[Section] 3582 is not part of a jurisdictional portion of the criminal code but part of the chapter dealing generally with sentences of imprisonment. . . [n]or is subsection (c) phrased in jurisdictional terms."); *see also United States v. Calton*, 900 F.3d 706, 711 (5th Cir. 2018) (citing *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1243 (11th Cir. 2017); *May*, 855 F.3d at 274; *United States v. Anderson*, 772 F.3d 662, 667 (11th Cir. 2014); *United States v. Beard*, 745 F.3d 288, 291 (7th Cir. 2014); *United States v. Trujillo*, 713 F.3d 1003, 1005 (9th Cir. 2013);

Weatherspoon, 696 F.3d at 421); *see also United States v. Green*, 886 F.3d 1300, 1306 (10th Cir. 2018). Accordingly, subsection (c) generally should not be understood to impose jurisdictional requirements. While prior holdings governing compassionate release under earlier versions may create an ongoing requirement that defendants request that the BOP file compassionate release motions before filing on their own, the waiting period prescribed by the statute cannot be understood as a jurisdictional requirement.

Furthermore, the waiting period, like those attached to any administrative statute, may be overlooked by the court where compliance with the waiting period will result in irreparable harm to the petitioner.

On behalf of Mr. Knox, I thank the Court for its expedited consideration of this motion.

Sincerely,

s/s

Lloyd Epstein

LE:pc
Enc.

cc. AUSA Max Nicholas
(Via ECF and email Max.Nicholas@usdoj.gov)

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Mr. William Knox