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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 UNITED STATES OF AMERICA,

Case No. 14-CR-712-SJO-2

12 Plaintiff,

13 v.

**RENEWED MOTION FOR
COMPASSIONATE RELEASE
PURSUANT TO 18 U.S.C. §
3582(c)(1); EXHIBITS IN SUPPORT
OF MOTION**

14 [REDACTED],
15 Defendant.
16

17 Defendant [REDACTED], by and through his attorney of record Deputy
18 Federal Public Defender Brianna Mircheff, hereby renews his motion for
19 compassionate release pursuant to 18 U.S.C. § 3582(c)(1).
20

21 This motion is based on the attached memorandum of points and authorities, the
22 attached exhibits, and all the records in this case.

23 Respectfully submitted,

24 AMY M. KARLIN
Interim Federal Public Defender

25
26 DATED: March 23, 2020

By */s/ Brianna Fuller Mircheff*
27 BRIANNA FULLER MIRCHEFF
Deputy Federal Public Defend
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TABLE OF CONTENTS

1
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4
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7
8
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A. [REDACTED]

B. [REDACTED]

C. Mr. Wishner’s Age and Medical Conditions Make Him Vulnerable To COVID-19 In Custody. 7

D. There Are No Logistical Barriers to Mr. Wishner’s Release..... 12

E. Mr. Wishner Need Not “Re-Exhaust” His Request. 13

F. Conclusion 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
24
25
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27
28

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Brown v. Valoff,
422 F.3d 926 (9th Cir. 2005) 13

Pepper v. United States,
562 U.S. 476 (2011)..... 14

In the Matter of the Extradition of Manrique,
2020 WL 1307109 (N.D. Cal. Mar. 19, 2020) 7, 8

Federal Statutes

18 U.S.C. § 3553(a)(2)(D)..... 11

18 U.S.C. § 3582(c)(1)..... 1, 7, 13, 14

U.S.S.G. § 1B.13..... 1, 5, 7

Regulations

28 C.F.R. § 571.63..... 13

Bureau of Prisons, Program Statement 5050.50..... 2, 3, 4

Other Authorities

Danielle Ivory, “We Are Not a Hospital: A Prison Braces for the
Coronavirus,” N.Y. Times, Mar. 17, 2020 8

Inspector General, *The Federal Bureau of Prisons’ Compassionate
Release Program* (April 2013) 2

Inspector General, *Review of the Federal Bureau of Prisons’ Medical
Staffing Challenges* (Mar. 2016) 11

Jan Ransom, “‘A Storm is Coming’: Fears of an Inmate Epidemic as the
Virus Spreads in the Jails,” N.Y. Times, Mar. 21, 2020 8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On December 17, 2019, this Court denied, without prejudice, Mr. Wishner's
 3 request for compassionate release. The Court noted "some inconsistencies" in the
 4 medical records previously provided, and some questions about the severity of Mr.
 5 Wishner's deterioration. Mr. Wishner renews his motion here, and provides the Court a
 6 more complete picture of his medical situation. Based on the attached medical records,
 7 the diagnosis of Mr. Wishner's treating physician, and the corroborating assessment of
 8 Dr. Orr, there is ample basis in these records for the Court to find that Mr. Wishner is
 9 suffering from a "serious physical or medical condition . . . serous functional or
 10 cognitive impairment, or . . . deteriorating physical or mental health because of the
 11 aging process that substantially diminishes [his] ability to provide self-care within the
 12 environment of the facility and for which he . . . is not expected to recover." U.S.S.G. §
 13 1B1.13, app. note 1(a). Mr. Wishner therefore requests that the Court grant his
 14 request under Section 3582(c)(1)(A) for release.

15 **A. The BOP Has Already Decided That Mr. Wishner's Dementia Meets the**
 16 **Medical Threshold For Release.**

17 On October 8, 2019, the general counsel for the Bureau of Prisons, Ken Hyle,
 18 denied Mr. Wishner's request for compassionate release based on the DOJ's assessment
 19 of the severity of the crime. Exh. 1. Germane to the Court's current inquiry, his denial
 20 letter also reports the BOP's assessment of Mr. Wishner's medical condition: The BOP
 21 determined that Mr. Wishner satisfied the "threshold criteria for [reduction in sentence]
 22 consideration under section 3(b), [i.e., that he has an incurable progressive illness or
 23 has suffered a debilitating injury from which she will not recover]." *Id.*¹

24 This is a meaningful statement because it reflects a significant amount of internal
 25 deliberation. When an inmate submits a request for reduction in sentence, the BOP
 26 policy statement requires the Warden to convene a committee that includes the inmates
 27

28 ¹ Exhibits A-L were submitted with this previous request; Exhibits 1 through 27
 are concurrently submitted with this request.

1 treating doctor, social worker, and counselor, to investigate the claim. *See* Bureau of
2 Prisons, Program Statement 5050.50, Compassionate Release/Reduction in Sentence, at
3 10.² Only if those treating the inmate at the local level recommend approval does the
4 process advance to the BOP’s General Counsel without further administrative steps. *Id.*
5 at 12. Then, as the letter reflects, BOP General Counsel reviews the recommendation of
6 the facility staff in consultation with the Medical Director of the BOP. *See* Exh. 1.

7 It is thus meaningful that the General Counsel’s letter states that Mr. Wishner
8 “meets the threshold criteria for [Reduction in Sentence] consideration under section
9 3(b).” *Id.* It reflects the judgment of those who treat and deal with Mr. Wishner on a
10 day-to-day basis, as well as the medical director with a bird’s eye view of the BOP’s
11 entire operation.³ That opinion is worthy of significant deference.

12 **B.** [REDACTED]
13 [REDACTED]
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7 There is thus ample evidence that Mr. Wishner satisfies at least one of the
 8 standard in U.S.S.G. 1B.13 for release.

9 **C. Mr. Wishner’s Age and Medical Conditions Make Him Vulnerable To**
 10 **COVID-19 In Custody.**

11 In addition to finding that one of the medical criteria applies, the Court must also
 12 consider the Section 3553(a) factors. *See* 18 U.S.C. § 3582(c)(1)(A). Mr. Wishner set
 13 out, in his previous pleadings, why the Section 3553(a) favored his release. But in
 14 addition to those reasons, the Court must, of course, take a wide-angle lens to the
 15 question and cannot ignore the current pandemic.

16 The Bureau of Prisons, on Saturday, announced their first positive case of
 17 COVID-19, in New York. Sunday brought two more cases.⁶ No doubt the problem is
 18 more widespread than that: The BOP’s protocol as of today does not mention testing,
 19 *see* BOP Implementing Modified Operations,⁷ and it’s unclear “what [a near zero rate
 20 of confirmed cases] means if people are not being tested.” *In the Matter of the*
 21 *Extradition of Manrique*, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020).
 22 Meanwhile the BOP is continuing to transfer inmates between facilities using a
 23 temperature check. *See* BOP Implementing Modified Operations. It continues to
 24

25 _____

26 ⁶ Available <https://www.bop.gov/coronavirus/>; *see also* “Some ‘low-risk’
 27 inmates to be released, NYC Mayor de Blasio said” (Mar 22, 2020),
[https://abc7ny.com/health/some-low-risk-inmates-to-be-released-due-to-](https://abc7ny.com/health/some-low-risk-inmates-to-be-released-due-to-coronavirus/6038522/)
[coronavirus/6038522/](https://abc7ny.com/health/some-low-risk-inmates-to-be-released-due-to-coronavirus/6038522/). (Last checked Mar. 23, 2020).

28 ⁷ Available https://www.bop.gov/coronavirus/covid19_status.jsp. (Last checked
 Mar. 23, 2020).

1 transfer inmates to and from local medical facilities, *id.*, as no doubt is happening at
 2 FMC Rochester, given that its population reflects the sickest of the sick. And because
 3 symptoms can arise days and weeks after exposure and contagion, as confirmed cases
 4 appear in a given facility, the BOP will necessarily be playing “a game of catchup.”
 5 *Manrique*, 2020 WL 1307109, at *1.⁸

6 It appears inevitable that the virus will spread throughout the prisons--and that if
 7 it does, the situation will quickly turn dire. *See* Federal prison workers say conflicting
 8 orders on coronavirus response is putting lives at risk, CBS News (Mar. 19, 2020),
 9 [https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-](https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19)
 10 [orders-putting-lives-at-risk-2020-03-19](https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19); Danielle Ivory, “We Are Not a Hospital: A
 11 Prison Braces for the Coronavirus,” N.Y. Times, Mar. 17, 2020,
 12 <https://tinyurl.com/se7emva>.

13 Voices in Congress are calling on the Department of Justice to “do all they can to
 14 release as many people as possible who are currently behind bars and at risk of getting
 15 sick.” *See* Exh. 17. Medical professionals behind bars are sounding the alarm as well.
 16 Craig McCarthy, “Top Rikers Doctor: Coronavirus ‘Storm is Coming,’” N.Y. Post
 17 (Mar. 19, 2020) (“[W]e cannot change the fundamental nature of jail. We cannot
 18 socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of
 19 a cruise ship recklessly boarding more passengers each day. . . . Please let as many out
 20 as you possibly can.”). Rikers went from zero cases to two confirmed inmate cases to
 21 21 confirmed inmate cases nearly overnight. *See* Jan Ransom, “‘A Storm is Coming’:

24 ⁸ This is already becoming clear. *See* “Some ‘low-risk’ inmates to be released,
 25 NYC Mayor de Blasio said” (Mar 22, 2020), [https://abc7ny.com/health/some-low-risk-](https://abc7ny.com/health/some-low-risk-inmates-to-be-released-due-to-coronavirus/6038522/)
 26 [inmates-to-be-released-due-to-coronavirus/6038522/](https://abc7ny.com/health/some-low-risk-inmates-to-be-released-due-to-coronavirus/6038522/). This article reflects that the
 27 inmate with a confirmed case in MDC Brooklyn was in the facility for two days before
 28 he started complaining of symptoms and was taken to the hospital. On Sunday, two
 more cases were identified in FCC Oakdale, in Louisiana. *Id.* A staff member at
 another facility has tested positive, and didn’t have contact with inmates *after* he tested
 positive. *Id.*

1 Fears of an Inmate Epidemic as the Virus Spreads in the Jails,” N.Y. Times, Mar. 21,
2 2020.⁹

3 While all inmates are vulnerable to catching COVID-19, certain populations are
4 at special risk. As of today, the CDC has indicated that those over 65 years old are at a
5 higher risk for severe illness. *See* CDC: Morbidity and Mortality Weekly Report (Mar.
6 18, 2020) (“Overall, 31% of cases, 45% of hospitalizations, 53% of ICU admissions,
7 and 80% of deaths associated with COVID-19 were among adults aged ≥65 years with
8 the highest percentage of severe outcomes among persons aged ≥85 years.”).¹⁰ Those
9 with underlying medical conditions, especially those affecting the heart, lungs,
10 diabetes, cancer, and hypertension, and those with compromised immune systems, are
11 at greatest risk. *See* Nat’l Foundation for Infectious Diseases, Common Questions and
12 Answers about COVID-19 for Older Adults (Mar. 19, 2020).¹¹

13 Mr. Wishner is in the heart of the most vulnerable population. He is 81 years old.
14 He has neurological deficits. *See* Minn. Dep’t of Health, About Coronavirus Disease
15 2019 (Mar. 19, 2020) (warning those with neurological conditions that they among
16 those “at highest risk for severe illness” under COVID-19).¹² And he has a series of
17 other medical conditions including several of those named on the above list. *See* Exh. 2.
18 (BOP’s summary of Mr. Wishner’s medical conditions). Those conditions include:

- 19 • [REDACTED]
- 20 [REDACTED]
- 21 [REDACTED]
- 22 [REDACTED]

24 _____
25 ⁹ Available <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html> (Last checked Mar. 23, 2020).

26 ¹⁰ Available <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>. (Last visited Mar. 21, 2020).

27 ¹¹ Available <https://www.nfid.org/infectious-diseases/common-questions-and-answers-about-covid-19-for-older-adults-and-people-with-chronic-health-conditions/>

28 ¹² Available <https://www.health.state.mn.us/diseases/coronavirus/basics.html>

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[REDACTED]

In addition to these medical conditions, Mr. Wishner is deemed a serious risk of falling. He is on a 24-hour a day watch as a fall risk. The records from 2019 show that he suffered two serious incidents; one, when he fell by his bed in his room Exh. 9, at 4, and one where he fell attempting to move from the wheelchair to the toilet, and sustained a hit to the back of his head. Exh. 22.

The upshot of this combination of conditions is that Mr. Wishner’s care requires a lot of interaction with medical staff. He receives pills from the pill line three times a day. Exh. 18. Records from December reflect that he was being checked by medical staff (“rounded”) “approximately every two hours.” Exh. 3, at 4. As an example, those rounds brought him into contact with eight different health care workers in one week during January, plus a rotation of inmate companions. Exh. 23. And those same health care workers are, of course, treating other patients--patients who, because those at the

1 facility are ones with the highest degree of medical needs, are likely those coming in
2 and out of the facility for medical treatments and risking exposure in the local hospitals
3 and medical facilities.

4 This is not to cast aspersions at FMC Rochester: the facility seems to have
5 provided good medical care to Mr. Wishner in the past, and is, no doubt, doing what it
6 can to minimize risk to its population. The point is the one made by the doctor at
7 Rikers: “[W]e cannot change the fundamental nature of jail.” Jail facilities involve a
8 number of people in small areas, sharing spaces and bathrooms and surfaces. Because
9 of his need for monitoring and assistance in toileting, Mr. Wishner cannot help but
10 come in contact with the various nurses and health care providers and inmate
11 companions who perform rounds on him every two hours. There’s simply no option for
12 Mr. Wishner to “socially distance” within the facility. But at his daughter’s house, Mr.
13 Wishner can limit his exposure to a small circle of family, and that’s precisely what the
14 CDC recommends that he do right now.

15 Under Section 3553(a), the Court is required to consider the history and
16 characteristics of the offender, and certainly Mr. Wishner’s health and his vulnerability
17 within the prison setting qualify under this factor.

18 Moreover, the Court is required to consider “the need . . . to provide the
19 defendant with needed . . . medical care . . . in the most effective manner.” 18 U.S.C. §
20 3553(a)(2)(D). Mr. Wishner is a high needs patient: His need for constant check-ins by
21 medical staff, constant monitoring for fall, and medication monitoring is resource
22 intensive, and they are resources that are likely to be strained in coming days. BOP
23 facilities are understaffed in the best of times¹³--and these are not the best of times.
24 Releasing Mr. Wishner to his daughter permits her to provide around the clock
25

26 _____
27 ¹³ See Office of the Inspector General, *Review of the Federal Bureau of Prisons’*
28 *Medical Staffing Challenges* (Mar. 2016) (“The OIG found that recruitment and
retention of medical professionals is a serious challenge for the BOP.”), available
<https://oig.justice.gov/reports/2016/e1602.pdf>

1 monitoring, to use available telemedicine and other options in the community, without
2 the exposure in the facility.

3 **D. There Are No Logistical Barriers to Mr. Wishner's Release.**

4 At the last status conference, government counsel raised two logical concerns
5 that suggested that Mr. Wishner's release would be stymied. The first was approval of
6 his residence, and the second was his transportation back to California. Neither of these
7 prevent the Court from issuing an order granting relief.

8 First, as part of the Bureau of Prisons review process, the BOP asks the local
9 probation office to approve the proposed residence. In this case, that approval happened
10 long ago. U.S. Probation Officer [REDACTED] went to Mr. Wishner's daughter's home
11 in [REDACTED], and approved the residence on June 21, 2019. The Probation
12 Officer indicated to us, on October 31, 2019, that that approval had not changed. Exh.
13 27.

14 The second potential barrier was transportation. Section 3624 of Title 18 requires
15 the Bureau of Prisons to provide transportation, upon release, to the place of the
16 prisoner's conviction. Counsel confirmed with FMC Rochester legal counsel [REDACTED]
17 [REDACTED] that such transportation is continuing to occur. *See* Exh. 24.¹⁴ An email from
18 Senior Counsel on Thursday, March 19, 2020, reflects that "there is no change with
19 respect to compassionate releases. . . . Depending on the particular circumstances, such
20 as a family member picking up the releasing inmate directly from the institution or
21 scheduling of appropriate transportation, it can take a few days to finalize details." *See*
22 Exh. 25.

23 In short, there are no logistical barriers to release.
24
25
26

27 14 [REDACTED]
28 [REDACTED]

1 **E. Mr. Wishner Need Not “Re-Exhaust” His Request.**

2 During a previous status conference, government counsel suggested that Mr.
3 Wishner would have to “re-exhaust” any new information in support of his request. Not
4 so.

5 Section 3582(c) says that the Court can consider the motion of a defendant who
6 has “fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a
7 motion on the defendant’s behalf.” 18 U.S.C. § 3582(c)(1)(A). Mr. Wishner made a
8 request for a reduction in sentence based on his health conditions, and received a
9 decision from Ken Hyle, General Counsel from the BOP. This means he has
10 “exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring
11 a motion on the defendant’s behalf.” *Id.*; 28 C.F.R. § 571.63 (denial from general
12 counsel constitutes “a final administrative decision”). Because he has satisfied the
13 exhaustion requirement by receiving an adverse decision from General Counsel, he
14 need not further exhaust his claim. Indeed, as befits a question as dynamic as medical
15 conditions, the statutory language requires only that a defendant give the agency the
16 first chance at passing on relief.

17 Factual developments since exhaustion have strengthened Mr. Wishner’s
18 argument that his medical conditions constitute an extraordinary and compelling
19 circumstance. But the Bureau of Prisons already found that Mr. Wishner met the
20 threshold medical standard for release. Exh. 1. There is no reason for the Court should
21 require further exhaustion when the agency already found the relevant criteria already
22 met and where the new facts have only strengthened his showing. *Cf. Brown v. Valoff*,
23 422 F.3d 926, 935 (9th Cir. 2005) (prisoner need not exhaust further once he has
24 received all remedies that are “available” from the agency).

25 But even if neither of these were correct, the Court would be still authorized--
26 indeed, required--take into account factual developments that post-date exhaustion in
27 deciding Section 3582(c)(1) motions. Section 3582(c)(1)(A) requires consideration of
28

1 the Section 3553(a) factors. The Supreme Court has said that, when conducting the
2 analysis under Section 3553(a), a district court must consider the individual and his
3 circumstances as they exist *at that moment*. See *Pepper v. United States*, 562 U.S. 476,
4 492 (2011) (holding that a sentencing court must base Section 3553(a) analysis on “the
5 most up-to-date picture” of a defendant’s history and characteristics). Mr. Wishner’s
6 current medical conditions bears on every aspect of the Section 3553(a) analysis. His
7 medical condition is an important factor of his history and characteristics. His inability
8 to dial a phone or use a computer (Exh. 2, at 2,) bears on the need to deter and to
9 protect the public from any further crimes. And, as argued above, the looming medical
10 crisis informs this court’s understanding of the “most effective manner” of providing
11 needed medical care. For these reasons, the Court should consider the entirety of the
12 record in judging whether relief is warranted.

13 **F. Conclusion**

14 For all of the foregoing reasons, and those set out in the prior briefing, Mr.
15 Wishner respectfully requests that the Court grant his application for reduction of
16 sentence under 18 U.S.C. § 3582(c)(1).

17 Respectfully submitted,

18 AMY M. KARLIN
19 Interim Federal Public Defender

20
21 DATED: March 23, 2020

22 By /s/ Brianna Fuller Mircheff
23 BRIANNA FULLER MIRCHEFF
24 Deputy Federal Public Defender
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