IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	**:**	**APPEAL NO. 20-1033**
	:	
V.	**:**	**Panel: Smith, C.J., Ambro and**
	:	**Chagares, JJ.**
FRANCIS RAIA,	**:**	
Appellee	**:**	

Petition for Panel Rehearing and/or Rehearing *En Banc*
Pursuant to Fed. R. App. P. 35(b) and 40(a)

This petition raises two issues: (1) whether the 30-day, pre-filing waiting period in 18 U.S.C. § 3582(c)(1)(A) is jurisdictional or prudential, and if prudential, can be bypassed based on irreparable injury, futility, or other extraordinary circumstances; and (2) whether the Panel should have remanded the question of the nature of § 3582(c)(1)(A)'s 30-day, pre-filing waiting period to the District Court for decision in the first instance.

Mr. Raia is a 68-year-old man with several preexisting medical conditions that place him at high risk for severe illness from COVID-19. He filed a request for compassionate release with the warden of his facility pursuant to § 3582(c)(1)(A), and without waiting 30 days, filed a petition for compassionate release with the District Court. The District Court held that it was without jurisdiction to decide Mr. Raia's petition because the government had appealed Mr. Raia's sentence, but also held that Mr. Raia's petition had "substantive merit" and that Mr. Raia "should be released to home confinement."

Notwithstanding the District Court's Decision and Order, the Panel refused to remand Mr. Raia's case to the District Court under Federal Rule of Appellate Procedure 12.1 because, according to the Panel, remand would be "futile." *Slip op.* at 7. The Panel concluded that Mr. Raia's failure to provide the Bureau of Prisons (BOP) with 30 days to consider endorsing his request for compassionate release before filing his motion with the District Court "present[ed] a glaring roadblock foreclosing compassionate release at this point." *Id.* The Panel reached its conclusion without discussing—and perhaps without considering—the particular nature of the waiting period requirement in § 3582(c)(1)(A). The Panel's failure to do so requires rehearing given both Supreme Court and Circuit precedent and the life-or-death consequences of the COVID-19 pandemic for Mr. Raia and other inmates at heightened risk in BOP custody.

Local Appellate Rule 35.1 Statement

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision in this case implicates issues of extraordinary importance and is contrary to statute and to decisions of the Supreme Court of the United States and the Court of Appeals for the Third Circuit, and that consideration by the full Court is necessary to secure and maintain the uniformity and accuracy of decisions of this Court, *i.e.*, the Panel's decision is contrary to, *inter alia*, 18 U.S.C. § 3582(c)(1)(A); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 204 L. Ed. 2d

116 (2019); *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Am. Fed'n of Gov't Emp. (AFL-CIO), Local 1904, AFGE (AFL-CIO), Local 1498, AFGE (AFL-CIO) v. Resor*, 442 F.2d 993 (3d Cir. 1971); and *Republic Indus., Inc. v. Cent. Pennsylvania Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982).[1]

[1] Pursuant to Local Appellate Rule 35.2, the judgment and the Panel majority opinion are attached hereto as Appendix A.

Factual and Procedural Background

Following a jury trial, Mr. Raia was convicted of conspiring to use the mails to promote a voter bribery scheme in connection with a municipal election in New Jersey. At sentencing, the government sought a 27-month sentence. The District Court instead imposed a 3-month sentence based on Mr. Raia's many charitable works, and the government timely appealed. On March 3, 2020, as the COVID-19 pandemic began to take grip of the country, Mr. Raia reported to BOP custody.

He reported to BOP custody as a 68-year-old man with multiple comorbidities that, without dispute, make COVID-19 more lethal for him than for most others. He is presently in a BOP facility that again, without dispute, is a tinderbox and the virus a lit match. The District Court already determined that he should be immediately released:

> [W]hile the Court was mindful of Defendant's age and health conditions at the time of sentencing, it concluded that the Government could address those conditions in a custodial facility for a short term of imprisonment, without putting Defendant at serious risk. Given the extraordinary changes since sentencing due to the COVID-19 virus, that conclusion is subject to serious reconsideration. … Due to the increased risk posed by a custodial term and the original reasons for a reduced sentence, this Court believes a non-custodial sentence would be more appropriate. The crime here was non-violent and Defendant has otherwise been a highly productive, charitable member of his community. *He should be released to home confinement*.

District Court Order (emphasis added).

The District Court could not effectuate that conclusion, however. As Judge Martini recognized, the District Court lacked jurisdiction to act because the judgment of sentence was then on appeal. While an appeal is pending, the district court lacks jurisdiction to alter the same judgment. *See, e.g.*, *United States v. Georgiou*, 777 F.3d 125, 145 (3d Cir. 2015). Accordingly, the District Court properly requested a Rule 12.1 remand, pursuant to Federal Rule of Criminal Procedure 37, and did not address any other issues.

The Panel refused to allow remand, however, because when Mr. Raia petitioned the District Court for compassionate release, he had not allowed BOP 30 days to first consider his petition. The Panel considered the time remaining on the 30-day clock to be a "glaring roadblock" foreclosing relief. *Slip op.* at 7. The Panel made its determination without considering the nature of that "roadblock"; or engaging in the "intensely practical" balancing of "the nature of the claim presented" on the one hand, and the "characteristics of the particular administrative procedure provided" on the other, as required by the Supreme Court, *see McCarthy v. Madigan*, 503 U.S. 140, 146 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516 (2002); or allowing the District Court to engage in that balancing in the first instance.

Grounds for Rehearing

The Panel declared § 3582(c)(1)(A)'s 30-day, pre-filing waiting period a "glaring roadblock" foreclosing relief without any sustained discussion or real consideration of the nature of that waiting period and without remanding to the District Court for the District Court to consider the nature of that waiting period in the first instance. The result is a decision that offers conclusion without consideration; contravenes the express purpose of the First Step Act—to vest greater discretion with the courts and expand compassionate release—with no offsetting benefits to agency deference; has kept Mr. Raia locked-up in the midst of a global pandemic longer than he should be; and, if left uncorrected, will force other inmates at high-risk of death from COVID-19 to wait unnecessarily for urgently needed relief.

1. The 30-day, pre-filing waiting period in § 3582(c) is not jurisdictional.

The 30-day, pre-filing waiting period in § 3582(c)(1)(A) is not jurisdictional.

There are two types of exhaustion requirements: jurisdictional and prudential. Jurisdictional exhaustion "is a prerequisite to a court's subject matter jurisdiction." *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). Prudential exhaustion is not. "[P]rudential exhaustion can be bypassed under certain circumstances, including waiver, estoppel, tolling or futility." *Id.* (emphasis

added). Importantly, "the fact that an exhaustion requirement is contained within statutory language does not mandate its jurisdictional nature." *Id.* at 175.

In *Fort Bend County, Texas v. Davis*, the Supreme Court recently considered a statutory exhaustion requirement nearly identical to that found in § 3582(c). Under Title VII, before a complainant can commence an action in court, the complainant must first file a charge with the Equal Employment Opportunity Commission. The question in *Fort Bend* was whether Title VII's charge-filing precondition to suit was a "'jurisdictional' requirement" or a "procedural prescription." 139 S. Ct. 1843, 1846, 204 L. Ed. 2d 116 (2019). The Court held that it was not jurisdictional. *See id*. Noting its desire "[t]o ward off profligate use of the term" "jurisdiction," the Court placed "the ball in Congress' court" and held that "when Congress does not rank a [prescription] as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 1848, 1850 (quotations and citations omitted). Applying its holding to Title VII's statutory charge-filing precondition, the Court found:

> Title VII's charge-filing provisions speak to ... a party's procedural obligations. They require complainants to submit information to the EEOC and to wait a specified period before commencing a civil action. … Title VII's charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts.

Id. at 1851 (quotations and citations omitted). *Accord Buck v. Hampton Twp. Sch. Dist.,* 452 F.3d 256, 263 (3d Cir. 2006). *See also Smith v. Berryhill*, 139 S.Ct. 1765, 1773-76, 204 L. Ed. 2d 62 (2019) (upon examination of statutory text and purpose, administrative exhaustion in Social Security case, as required by statute, held waivable in pertinent respect).

The 30-day, pre-filing waiting period in § 3582(c) is nearly identical to that in Title VII. Like the charge-filing precondition, it requires inmates "to submit [a compassionate release request] to the [warden] and to wait [30 days] before commencing a [district court] action." *Id.* If Title VII's exhaustion requirement is not jurisdictional, then neither is § 3582(c)'s 30-day requirement. Two circuits agree, at least as to other clauses of § 3582(c).

In *United States v. Taylor*, the Seventh Circuit considered whether the statutory criteria in § 3582(c)(2) were jurisdictional. *See* 778 F.3d 667, 669 (7th Cir. 2015). Anticipating the Supreme Court's reasoning in *Fort Bend*, the circuit court held that "[w]hether a limit on a court's power is truly jurisdictional is ultimately up to Congress" and "'when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'" *Id.* at 670-71 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Because "§ 3582 is not part of a jurisdictional portion of the criminal code" and because "subsection (c) [is not] phrased in jurisdictional

terms," the limits on § 3582(c)(2) relief are not jurisdictional. *Taylor*, 778 F.3d at 671. In *United States v. Calton*, the Fifth Circuit cited to *Taylor* and adopted its reasoning to hold that there was no jurisdictional bar to successive petitions under § 3582(c)(2). *See* 900 F.3d 706, 711 (5th Cir. 2018).[2]

2. The 30-day, pre-filing waiting period in § 3582(c) is subject to exceptions, including for "irreparable injury."

Given that the 30-day, pre-filing waiting period in § 3582(c) is prudential and not jurisdictional, it is subject to waiver, including for irreparable injury, futility, or other extraordinary circumstances.

"[C]ases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). Mr. Raia's case—and the many more like it—is such a case. Relief delayed could easily become relief denied. To provide for prompt resolution, the Supreme Court—and

[2] At least two circuits have disagreed with the Seventh Circuit's reasoning in Taylor, *see United States v. Spears*, 824 F.3d 908, 912 (9th Cir. 2016) (affirming district court dismissal on jurisdictional grounds where petitioner did not meet requirements of § 3582(c)(2)); *United States v. Spaulding*, 802 F.3d 1110, 1124 (10th Cir. 2015) ("[Section] 3582(c) acts as a jurisdictional limitation on the ability of district courts to alter previously imposed sentences of imprisonment."), but, importantly, did so before the Supreme Court's decision in *Fort Bend* and the Court's announced commitment to "ward off profligate use" of "jurisdiction." *Fort Bend Cty.*, 139 S. Ct. at 1848.

the Third Circuit—have long recognized exceptions to exhaustion, including exhaustion mandated by statute.

Eldridge itself held that even though "exhaustion of the administrative remedies provided under the [Social Security] Act" was in some respects a "jurisdictional prerequisite" that plaintiff had failed to satisfy, *id.* at 327, the Supreme Court nevertheless had jurisdiction because plaintiff had raised "at least a colorable claim that because of his physical condition and dependency upon the disability benefits" exhaustion would cause him irreparable injury. *Id.* at 331; *see also United States v. Zukerman*, No. 16 CR. 194 (AT), 2020 WL 1659880, at *3, n. 2 (S.D.N.Y. Apr. 3, 2020) (commenting that *Eldridge* "explains the Second Circuit's holding [in *Washington v. Barr*] that even statutory exhaustion requirements are 'not absolute'"). Most important, here, as in *Eldridge*, the agency has no power to grant the relief that the individual seeks. There, it was a due process hearing unauthorized by statute; here, it is a sentence reduction. The warden cannot reduce Mr. Raia's sentence; all he can do is recommend to BOP's Central Office that the Director of BOP consult with the United States Attorney and ask that a motion be filed in court. In the end, either way, it will be Judge Martini or no one who grants the sentence reduction, and the judge will have the opportunity to hear and consider the views of the BOP before ruling, if he cares to. Notably, § 3582(c)(1)(A) lists in detail what the judge must consider before

reducing a sentence, and the position of BOP is *not* one of those things. This is far from the usual sort of "exhaustion of remedies" requirement.

In *McCarthy v. Madigan*, the Supreme Court considered exceptions to exhaustion more directly. The issue before the Court was whether a federal inmate had to exhaust BOP's internal grievance procedure before initiating a *Bivens* action in federal court. *See* 503 U.S. at 141. While recognizing the salutary principles of administrative exhaustion, the Court also recognized the reciprocal obligation of federal courts "to exercise the jurisdiction given them" and noted that courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Id.* at 146 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821)). Attempting to balance the competing concerns between exhaustion and prompt access to the courts, the Supreme Court held:

> [A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.

Id. (quotations and citation omitted). The Court then proceeded to identify "three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion," *id*., including where: (1) "resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a

court action," *id.* at 146-47; (2) the "administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief," *id.* at 147 (quotations and citation omitted); and (3) "the administrative body is shown to be biased or has otherwise predetermined the issue before it," *id.* at 148.

Although *McCarthy* did not involve a statutory exhaustion requirement, it relied on cases that did and excused exhaustion nevertheless. *See id.* at 147 (citing *Aircraft & Diesel Equip. Corp. v. Hirsch* and *Bowen v. City of New York*). For example, in *Aircraft & Diesel Equipment Corp. v. Hirsch*, the Supreme Court held that even where "the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it," the administrative process can be "short-circuit[ed]" upon a "strong showing" of "the inadequacy of the prescribed procedure and of impending harm." 331 U.S. 752, 773-74 (1947). And in *Bowen v. City of New York*, the Supreme Court excused disabled applicants from exhausting the process created by statute and regulation to qualify for federal disability benefits because exhaustion would have caused "irreparabl[e] injur[y]" to plaintiffs:

> The ordeal of having to go through the administrative appeal process may trigger a severe medical setback. Many persons have been hospitalized due to the trauma of having disability benefits cut off. Interim benefits will not adequately protect plaintiffs from this harm.

> Nor will ultimate success if they manage to pursue their appeals.

476 U.S. 467, 483-84 (1986).

Together, *McCarthy*, *Aircraft & Diesel*, and *Bowen* make clear that "[e]ven where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute" and "when appropriate, [courts] have the power to act even if the administrative agency has not." *Washington v. Barr*, 925 F.3d 109, 118, 120 (2d Cir. 2019).[3] This Court adopted this same reading of Supreme Court precedent in *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*. There, plaintiff ignored a statutory arbitration requirement and proceeded directly to district court. Although this Court held that the exhaustion doctrine was inapplicable because there was no adequate administrative remedy, the Court took the opportunity to explain the doctrine and exceptions to it. *See* 693 F.2d 290, 295-96 (3d Cir. 1982). Included among the exceptions was "when the nonjudicial remedy is clearly shown to be inadequate to prevent irreparable injury," and held that where "extraordinary circumstances" are present, those circumstances serve as

[3] The rare exception is where Congress, by clear and unmistakable language, has precluded application of the traditional exemptions to administrative exhaustion requirements. *See Ross v. Blake*, 136 S. Ct. 1850 (2016). There is no such clear language in § 3582(c)(1)(A). Moreover, since the entire history of the 2018 First Step Act amendments to the provision shows the purpose to have been rejection of BOP's stranglehold over the process, it would be particularly inappropriate to infer an intent to eliminate the normal exceptions.

a "countervailing consideration" and exhaustion "should not be compelled." *Id.* at 293-94 (quotations and citations omitted). This Court did not limit the applicability of the exceptions to judicially-created exhaustion; they were held equally applicable to exhaustion mandated by statute. Indeed, *Republic Industries* was all about statutorily-required exhaustion. *See also Am. Fed'n of Gov't Emp. (AFL-CIO), Local 1904, AFGE (AFL-CIO), Local 1498, AFGE (AFL-CIO) v. Resor*, 442 F.2d 993, 994-95 (3d Cir. 1971) (considering statutory exhaustion and holding "if the prescribed administrative procedure is clearly shown to be inadequate to prevent irreparable injury … then a court need not defer decision until the conclusion of the administrative inquiry").

In response to the COVID-19 pandemic, several courts have accepted the invitation in *Washington v. Barr* "to act even [where BOP] has not," 925 F.3d at 118, because refusing to act would cause "irreparable injury." *Republic Indus.*, 693 F.2d at 293. They have done so based on the exceptions enumerated in *McCarthy*, and notwithstanding that the 30-day, pre-filing waiting period is statutory.

The court in *United States v. Haney* offered an especially thoughtful analysis of the nature of § 3582(c)(1)(A)'s 30-day, pre-filing waiting period. Like Mr. Raia, the defendant in *Haney* petitioned the court for compassionate release before 30 days had expired. The court held that was "not the end of the issue," however,

and proceeded to consider whether the waiting period in § 3582(c)(1)(A) was jurisdictional and, if not, could be waived. No. 19-CR-541 (JSR), 2020 WL 1821988, at *1 (S.D.N.Y. Apr. 13, 2020). On the first question, the court held that the waiting period was not jurisdictional because a "rule qualifies as jurisdictional only if 'Congress has clearly stated that the rule is jurisdictional,'" and § 3582(c)(1)(A) does not "clearly state" that the waiting period is jurisdictional. *Id.* at *2 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). "'[A]bsent such a clear statement,' the Supreme Court has cautioned, 'courts should treat the restriction as nonjurisdictional in character,' with the specific goal of 'ward[ing] off profligate use of the term jurisdiction.'" *Haney*, 2020 WL 1821988, at *2 (quoting *Sebelius*, 568 U.S. at 153).

On the second question, the court held that the waiting period could be waived because "strict enforcement of the 30-day waiting period would not serve [] Congressional objectives." *Haney*, 2020 WL 1821988, at *4. The court's reasoning was based on the plain language of § 3582(c)(1)(A) and the legislative intent that plain language reveals: the 30-day waiting period "was intended as an accelerant to judicial review," not an impediment to it. *Id.* (quotations and citation omitted). Its purpose was neither to "protect[] administrative agency authority [or] promot[e] judicial efficiency"—the traditional "twin purposes" of exhaustion—but rather was designed for a "third purpose": to provide inmates with "the right to a

meaningful and prompt judicial determination of whether [they] should be released." *Id.* at *3 (quotations and citation omitted) (emphasis in original). According to the court, strictly enforcing the 30-day waiting period would defeat rather than honor Congress's intent, with no offsetting benefits from agency deference since BOP would either fail to act in 30 days or, at best, provide a "superficial" review of an inmate's petition. *Id.*; *see also Zukerman*, 2020 WL 1659880 (waiving exhaustion requirement based on *McCarthy* exceptions and granting defendant compassionate release); *See also United States v. McCarthy*, No. 3:17-CR-0230 (JCH), 2020 WL 1698732 (D. Conn. Apr. 8, 2020) (same); *United States v. Colvin*, No. 3:19CR179 (JBA), 2020 WL 1613943 (D. Conn. Apr. 2, 2020) (same); *United States v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020) (same); *United States v. Smith*, No. 12 CR. 133 (JFK), 2020 WL 1849748, at *4 (S.D.N.Y. Apr. 13, 2020) (same).

3. The Court may remand to allow the District Court to rule on the statutory issue of excusability in the first instance, or if the Court rules the 30-day, pre-filing waiting period excusable, it should remand to allow the District Court to determine whether it should be excused for Mr. Raia.

The Court could either rule on the statutory issue of excusability itself, or remand for consideration by the District Court in the first instance upon full briefing. If the Court rules on the statutory issue, it should then grant the Rule 12.1 motion, relinquish jurisdiction, and remand to the District Court to consider

whether to waive the 30-day, pre-filing waiting period for Mr. Raia. That decision is not for this Court to make; the only issue before this Court is whether a remand would be "futile" because no waiver is legally allowable. Since waiver is possible, a remand should be allowed. Indeed, the careful, fact-intensive balancing that courts must engage in before determining whether exhaustion can be waived is best left to the District Court. That is especially true for Mr. Raia, who has a compelling case to make before the District Court—a case he has so far been precluded from making on the merits because of the Panel's refusal to remand.

In the first instance, it is the obligation of the District Court to engage in the "'intensely practical'" "balancing principle … directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided." *McCarthy*, 503 U.S. at 146 (quoting *Eldridge*, 424 U.S. at 331 n.11).

The "particular administrative procedure"—a 30-day, pre-filing waiting period for BOP to consider an inmate's application for compassionate release before the inmate can seek redress in the courts—offers almost nothing. Under non-emergency circumstances, there is little BOP could do in 30 days to serve the "twin purposes" of exhaustion: "protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145; *see also Cirko on behalf of Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 157 (3d Cir. 2020) (recognizing that "two governmental interests favor exhaustion: deference to

agency expertise and opportunity for agency error correction" and holding that neither was implicated). No fulsome consideration of Mr. Raia's application can be had in 30 days. No hearing will be completed. There will be no "useful record for subsequent judicial consideration." *McCarthy*, 503 U.S. at 145. And there is no "special expertise" for BOP to apply. *Id.* Indeed, in *McCarthy*, the Supreme Court noted that BOP "does not bring to bear any special expertise on the type of issue presented for resolution here," *i.e.*, the effective management of an inmate's medical conditions. *Id.* at 155. Notably, Congress assigned the advisory role here to the Sentencing Commission, not to BOP.

But while BOP's "institutional interests" in the present context are hard to identify, Mr. Raia's interests are not. At 68-years-old, diabetic, diagnosed with Parkinson's disease, a heart condition, and on nearly two dozen medications, Mr. Raia is "at higher risk for severe illness from COVID-19" according to the Centers for Disease Control and Prevention.[4]

Given the "intensely practical" balancing called for by the Supreme Court, *id.* at 146, it is clear that the District Court should be given the opportunity to determine in the first instance whether § 3582(c)'s 30-day, pre-filing waiting period should be waived for Mr. Raia. On the one hand is a 30-day administrative

[4] See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 10, 2020)

review period for BOP to consider an application that, according to the Supreme Court, it is without the expertise to evaluate. Nor can it even grant the requested relief, that is, a reduction in the sentence. On the other hand, are real life and death consequences for Mr. Raia.

Simply, even 30 days could be too late for Francis Raia. *See id.* at 147 ("Even where the administrative decisionmaking schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.").

WHEREFORE, Appellee Francis Raia requests rehearing by the Panel or by the Court *en banc* and remand to the District Court to consider the nature of § 3582(c)(1)(A)'s 30-day, pre-filing waiting period in the first instance.

Respectfully submitted,

/s/ Lee Vartan
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Dated: April 14, 2020

CERTIFICATE OF SERVICE

I, Lee Vartan, counsel for Appellee Francis Raia, hereby certify that I have electronically filed and served a copy of *Appellee's Petition for Panel Rehearing and/or Rehearing En Banc Pursuant to Fed. R. App. P. 35(b) and 40(a)* upon Filing User Steven Sanders, Assistant United States Attorney, through the Third Circuit Court of Appeals' Electronic Case Filing (CM/ECF) system.

/s/ Lee Vartan
LEE VARTAN

DATE: April 14, 2020

CERTIFICATE OF COMPLIANCE

I, Lee Vartan, counsel for Appellee Francis Raia, hereby certify that Appellee's petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this petition contains 3,716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Lee Vartan
LEE VARTAN

DATE: April 14, 2020

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GCO-002-E

No. 20-1033

UNITED STATES OF AMERICA

v.

FRANCIS RAIA,
Appellant

(D.N.J. No. 2-18-cr-00657-001)

Present: SMITH, AMBRO and CHAGARES, Circuit Judges

1. Appellee's Letter Motion to Dismiss the Appeal without Prejudice, or Alternatively, to Rule on Motion for Compassionate Release

2. Government's Letter Response in Opposition

Respectfully,
Clerk/CJG

ORDER

The Court denies Appellee's motion for the reasons stated in the accompanying opinion.

By the Court,

s/ D. Brooks Smith
Chief Judge

Dated: April 3, 2020
CJG/cc: Mark E. Coyne, Esq.
Steven G. Sanders, Esq.
Jenny Chung, Esq.
David M. Dugan, Esq.
Lee Vartan, Esq.
Alan L. Zegas, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-1033

UNITED STATES OF AMERICA,
Appellant

v.

FRANCIS RAIA

(D.N.J. No. 2-18-cr-00657-001)

Present: SMITH, Chief Judge, AMBRO and CHAGARES, Circuit Judges

1. Unopposed Motion to Amend Opinion

ORDER

The foregoing Unopposed Motion to Amend Opinion is GRANTED as follows: The April 2, 2020 precedential opinion in *United States v. Raia*, No. 20-1033, is VACATED. An amended opinion is filed contemporaneously with this order.

By the Court:

s/ D. Brooks Smith
Chief Circuit Judge

Dated: April 8, 2020
CJG/cc: Mark E. Coyne, Esq.
Steven G. Sanders, Esq.
Jenny Chung, Esq.
David M. Dugan, Esq.
Lee Vartan, Esq.
Alan L. Zegas, Esq.

PRECEDENTIAL
GCO-002-E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1033

UNITED STATES OF AMERICA,
Appellant

v.

FRANCIS RAIA

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 2-18-cr-00657
District Judge: The Honorable William J. Martini

Before: SMITH, *Chief Judge*, AMBRO and
CHAGARES, *Circuit Judges*.

(Filed: April 2, 2020)

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OPINION OF THE COURT

SMITH, *Chief Judge*.

The First Step Act empowers criminal defendants to request compassionate release for "extraordinary and compelling reasons." 18 U.S.C § 3582(c)(1)(A)(i).[1] But

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[1] The relevant portion of § 3582 provides:

> (c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.–The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case–
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of

before they make such requests, defendants must at least ask the Bureau of Prisons (BOP) to do so on their behalf and give BOP thirty days to respond. *See* § 3582(c)(1)(A). And even then, defendants must first submit their motion to "the [sentencing] court"; we can only consider these motions on appeal. § 3582.

Nevertheless, Francis Raia asks us to decide his compassionate-release motion in the first instance. Alternatively, he asks us to dismiss the government's pending appeal so the District Court can decide the motion. But although he asked BOP to move for compassionate release on his behalf, he did not give it thirty days to respond. So we will deny Raia's motion.

I

While running for local office in Hoboken, New Jersey, Raia directed campaign volunteers to bribe voters with $50 payments to vote for him by absentee ballot and support a measure he favored. A jury convicted Raia of

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> imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction

conspiring to use the mails to promote unlawful activity in violation of 18 U.S.C. § 371. *See also* 18 U.S.C. § 1952(b)(i)(2) (defining "unlawful activity" to include bribery). The District Court sentenced Raia to three months imprisonment, one year of supervised release, and a $50,000 fine. But the government thought the sentence was too lenient, having originally sought twenty-seven months imprisonment. It appealed to this Court under 18 U.S.C. § 3742(b).

On March 3, 2020, with the government's appeal pending, Raia reported to the federal correctional institute in Fairton, New Jersey to begin his sentence. Shortly thereafter, he asked BOP to move for compassionate release on his behalf. But before BOP responded, and before thirty days passed, Raia filed his own motion with the District Court for compassionate release given the present pandemic caused by COVID-19, a highly contagious respiratory virus which has already infected over 25,000 people in New Jersey and poses unique risks in population-dense prison facilities. *See* Federal Bureau of Prisons, *COVID-19 Action Plan* (Mar. 13, 2020, 3:09 PM), https://www.bop.gov/resources/news/20200313_covid-19.jsp; New Jersey, *COVID-19 Information Hub*, https://covid19.nj.gov/ (last updated Apr. 2, 2020, 1:00 PM). In particular, Raia claimed he faces heightened risk of serious illness or death from the virus since he is sixty-eight-years old and suffers from Parkinson's Disease, diabetes, and heart issues.

Two days later, the District Court denied the motion, concluding that the pending appeal divested it of jurisdiction. In a footnote, however, the District Court offered that it would have granted the motion and released Raia to home confinement "[d]ue to the increased risk posed by a custodial term" in light of COVID-19, and because Raia's offense "was non-violent and [Raia] has otherwise been a highly productive, charitable member of his community." Order n.1, Mar. 26, 2020 (ECF No. 86).

Raia has not appealed that order. Instead, he filed a motion asking this Court to decide his compassionate-release motion. Alternatively, he asks us to return jurisdiction to the District Court by dismissing the government's appeal without prejudice. He claims we have power to do so under Federal Rule of Appellate Procedure 3(a)(2), which notes: "An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal."

II

We cannot decide Raia's compassionate-release motion in the first instance. Section 3582's text requires those motions to be addressed to the sentencing court, a point several Circuits have noted and Raia himself acknowledges. *See, e.g.*, *United States v. Richardson*, 948 F.3d 733, 749 (6th Cir. 2020); *United States v. Smith*, 896 F.3d 466, 473 (D.C. Cir. 2018); Mot. 3.

Nor can we dismiss the government's appeal under Rule 3(a)(2). Rule 3(a)(2) dismissal is a sanction for "fail[ing] to comply with procedural rules." *Horner Equip. Int'l, Inc. v. Seaside Pool Ctr., Inc.*, 884 F.2d 89, 93 (3d Cir. 1989); *see also Lehman Bros. Holdings v. Gateway Funding Diversified Mortg. Servs., L.P.*, 785 F.3d 96, 101 (3d Cir. 2015). Here, there is nothing the government has failed to do.

We could, however, remand the case to the District Court while retaining jurisdiction over the government's appeal under Rule 12.1. That would allow the District Court to consider Raia's compassionate-release request in the first instance.

But any remand would be futile. As noted, Raia failed to comply with § 3582(c)(1)(A)'s exhaustion requirement: BOP has not had thirty days to consider Raia's request to move for compassionate release on his behalf, and there has been no adverse decision by BOP for Raia to administratively exhaust within that time period (as such, we need not address administrative appeals here). Although the District Court's indicative ruling did not mention the exhaustion requirement, it presents a glaring roadblock foreclosing compassionate release at this point.

Accordingly, since Rule 3(a)(2) is inapt and since remanding the matter under Rule 12.1 would be futile, we will deny Raia's motion outright.

* * *

We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread. *See generally* Federal Bureau of Prisons, *COVID-19 Action Plan* (Mar. 13, 2020, 3:09 PM), https://www.bop.gov/resources/news/20200313_covid-19.jsp. Given BOP's shared desire for a safe and healthy prison environment, we conclude that strict compliance with § 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance. And given the Attorney General's directive that BOP "prioritize the use of [its] various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic," we anticipate that the statutory requirement will be speedily dispatched in cases like this one. Memorandum from Attorney Gen. to Dir., Bureau of Prisons 1 (Mar. 26, 2020), https://www.justice.gov/file/1262731/download. So we will deny Raia's motion.