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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ROLAND HINKSON,

Defendant.

Case No. 04-cr-00127-RCT<sup>1</sup>

**OPPOSITION TO DEFENDANT'S  
SECOND MOTION FOR  
COMPASSIONATE RELEASE**

The United States of America opposes the Defendant's Second Motion for Compassionate Release (ECF No. 379) for two reasons: (1) this Court lacks jurisdiction because Defendant is currently appealing his first motion's denial and he also has not exhausted his administrative remedies on the new basis he seeks to raise, and (2) the motion fails on its merits. As this Court found six months ago, when it addressed the Defendant's first motion for compassionate release (ECF No. 366), the Defendant remains dangerous and the § 3553(a) factors do not weigh in favor of release. (ECF No. 373.) Defendant presents nothing that

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<sup>1</sup> Hinkson has filed the same motion in his two underlying criminal cases. Because the court issued a consolidated sentence for these two cases, *see* Case No. 1:04-cr-00127-RCT, Doc. Nos. 265, 269, and 271-1, the Government files this response in the lead case, 04-cr-127.

overcomes these recent determinations by this Court, which he is currently appealing. Defendant solely focuses on establishing one prong of the required three: extraordinary circumstances. But even if his serious medical condition and poor prognosis constitutes extraordinary circumstances, he would still be entitled to no relief. He has failed to show that he meets the other requirements for relief under § 3582. The § 3553(a) factors still do not favor his motion, and he remains delusional and dangerous. Accordingly, if this Court does not dismiss the motion, it should deny it.

### **Background**

Having just revisited Hinkson's crimes and the background of this case last summer, this Court is familiar with the Defendant's recurrent attempts to resort to violence and his consistent flouting of the law. A jury found Hinkson guilty of twenty-six criminal tax violations on May 4, 2004. *See* Case No. 3:02-cr-00142-BLW-RCT, ECF No. 307. These counts included financial crimes stemming from his operation of a highly profitable water bottling company, WaterOz, whose product, Hinkson claimed, could "cure, mitigate or treat human diseases including AIDS, alcoholism, Anthrax, cancer, gangrene, and manic depression." (PSR dated March 18, 2005 at ¶ 9.) More than \$3.5 million was due in income and employment taxes. Hinkson also pleaded guilty to several misdemeanor crimes involving FDA violations. (*Id.* at ¶ 39.) Sentencing on the tax and FDA counts was delayed until Hinkson's second trial was completed.

Hinkson's second trial was for soliciting the murders of three federal officials involved in his tax case: The Honorable Edward J. Lodge, who was supposed to preside over the tax trial, AUSA Nancy Cook, the prosecutor, and IRS Special Agent Steven Hines, the case agent. *See* (ECF No. 37.) Ultimately, a jury found him guilty on three counts of soliciting murder. (PSR dated March 18, 2005 at ¶ 57.) This Court sentenced Hinkson on all of the counts of conviction

from his first and second trials, and from his guilty pleas, in one consolidated proceeding. *See* Case No. 1:04-cr-00127-RCT, Doc. Nos. 265, 269, and 271-1.

The Court sentenced Hinkson to 516 months. Hinkson has now served approximately 206 months. (ECF No. 265.) His anticipated release date is April 21, 2040.

A fine of \$100,000 was imposed at sentencing. *See* (ECF No. 265 at 3.) Defendant has made only minimum payments in \$25 increments over the course of his incarceration. Moreover, to the best of the Government's knowledge, he has made no payments towards the taxes he owes.

Over the years, Hinkson has filed numerous appeals and collateral attacks on his convictions, all of which have been denied. Through privately-retained counsel, he is currently seeking permission from the Ninth Circuit to file a second or successive § 2255 motion. *See* Case No. 19-71881. He has never taken responsibility for his crimes and has repeatedly asserted, as he does again in this second motion, that he was wrongfully convicted in his second trial.

This Court denied Hinkson's previous motion for compassionate relief (ECF No. 366) on August 7, 2020, in a detailed memorandum decision and order. (ECF No. 373.) The Court concluded that Hinkson had shown none of the requirements for compassionate release at that time. Only his argument for extraordinary circumstances has changed. In his previous motion, he asserted that the risk presented by COVID-19 constituted extraordinary circumstances; in his current motion, he asserts new medical problems.

An appeal of this Court's denial of his first motion is currently pending before the Ninth Circuit Court of Appeals. *See* (Appeal No. 20-30149.) Briefing was complete in December 2020.

**The new bases alleged: COVID-19 and colon cancer.**

The Defendant's new motion asserts that the Defendant has COVID-19 and has been diagnosed with colon cancer and was told that he would only live for four weeks. *See* (ECF No. 379 at 3, 9.) The Defendant attached no evidence to support these allegations.

The Government has obtained medical records, excerpts of which are attached. They do not confirm the Defendant's claim that he has contracted COVID-19 (*see* Attachment at 15, 18, 27), but do confirm a colon cancer diagnosis. Specifically, the Defendant has been diagnosed with Stage IV colon cancer, has a "poor" prognosis, has undergone surgery, is receiving chemotherapy and responding favorably, and is on new medications to control pain and nausea to which he has also responded favorably. *See* (Attachment at 7, 10, 22, 27, 34.) The records also reflect that he continues to be treated for a delusional disorder. (Attachment at 6, 22.)

**Legal Standard**

Ordinarily, a sentencing court may not modify or reduce a sentence once imposed. There are, however, carefully-defined exceptions to this rule. *See* 18 U.S.C. § 3582(c)(1)(A); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003). Compassionate release, as defined by 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018), is one of those exceptions. It allows a court to modify a term of imprisonment if the defendant has exhausted his remedies and has satisfied his burden of showing that: 1) "extraordinary and compelling reasons warrant such a reduction," 2) the § 3553(a) factors warrant a reduction and 3) "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," which include a finding that "the defendant is not a danger to the safety of any other person or to the community" under 18 U.S.C. § 3142(g). *See* 18 U.S.C. § 3582 (c)(1)(A)(i) and U.S. SENT'G GUIDELINES MANUAL §1B1.13 cmt. ns. 1 and

2 (U.S. SENT’G COMM’N 2018). Because a grant of relief is both a drastic and a permanent remedy, strict adherence to all statutory requirements is paramount.

The Defendant bears the burden of proving that the unusual and extreme remedy of reducing his sentence by more than half and releasing him is warranted. 18 U.S.C. § 3582(c)(1)(A); *see United States v. Greenhut*, 2020 WL 509385, at \*1 (C.D. Cal. Jan. 31, 2020); *United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013); *see generally United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992). Even for defendants who are statutorily eligible, compassionate release is a “rare” and “extraordinary” remedy, within district courts’ discretion to deny. *United States v. Chambliss*, 948 F.3d 691, 693-94 (5th Cir. 2020); *United States v. Mangarella*, 2020 WL 1291835, at \*2–\*3 (W.D.N.C. Mar. 16, 2020). The reluctance expansively to apply compassionate release is grounded in a concern that any less narrow application would yield significant sentencing disparities, among other concerns. *United States v. Ebberts*, 2020 WL 91399, at \*6 (S.D.N.Y. Jan. 8, 2020).

### **Discussion**

The Defendant’s motion fails on two independent bases. First, this Court lacks jurisdiction for two different reasons. Defendant currently has an appeal pending in the Ninth Circuit that directly implicates his sentence, and thus the relief that he currently requests, and Defendant has not exhausted his administrative remedies on the new basis he asserts. Second, and in the alternative, if the Court had jurisdiction, it would have to deny relief. The motion would fail on its merits because the Defendant cannot establish two of the three substantive requirements. He cannot show that the § 3553(a) factors favor the large sentence reduction for which he argues and that such a reduction comports with “applicable policy statements issued by the Sentencing Commission,” which include a finding that “the defendant is not a danger to the

safety of any other person or to the community” under 18 U.S.C. § 3142(g). *See* 18 U.S.C. § 3582 (c)(1)(A)(i) and U.S. SENT’G GUIDELINES MANUAL §1B1.13 cmt. ns. 1 and 2 (U.S. SENT’G COMM’N 2018). Accordingly, the Court should dismiss this motion or, in the alternative, indicate that it would deny it. Each argument will be addressed in turn.

**I. The Court lacks jurisdiction over the Defendant’s second motion.**

**A. Jurisdiction is lacking due to the pending appeal.**

The procedural posture of this case divests this Court of the jurisdiction necessary to consider Defendant’s motion. Defendant filed this second motion after he filed a notice of appeal of his first motion. *See* (ECF No. 379). “The filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *United States v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 46, 58 (1982)) (internal quotation marks omitted); *United States v. Melkonyan*, No. 2:14-cr-0083-JAM, 2020 WL 2128591, at \*1 (E.D. Cal. May 5, 2020). The currently-pending appeal implicates the Defendant’s sentence. Thus, this Court is divested of jurisdiction over that aspect of his case. At most, it could file an indicative ruling. *Melkonyan*, No. 2:14-cr-0083-JAM, 2020 WL 2128591, at \*1.

**B. Jurisdiction is also lacking for want of exhaustion.**

This Court lacks jurisdiction over the Defendant’s motion for a second and independent reason: his failure to exhaust. The Defendant bears the burden of showing that he exhausted his administrative rights with the Bureau of Prisons. *United States v. Van Sickle*, No. CR18-0250JLR, 2020 WL 2219496, at \*3 (W.D. Wash. May 7, 2020) (collecting cases). Specifically, he must show that he has applied for relief from the warden on the same basis he seeks it from

the district court, and that the warden either denied relief or has done nothing for thirty days. *Id.* at \*3; 18 U.S.C. § 3582(c)(1)(A). Defendant has not presented any evidence to meet his burden and the Government has so far received nothing from the Bureau of Prisons suggesting that he could do so. In short, he appears not to have sought relief from the warden on the basis now raised. Accordingly, he has not exhausted his remedies and this Court lacks jurisdiction for that reason as well.

**II. The Defendant cannot satisfy at least two of the three substantive requirements for compassionate relief.**

Even conceding for the sake of argument that Defendant's colon cancer diagnosis and poor prognosis would constitute extraordinary and compelling reasons,<sup>2</sup> the Defendant's motion would fail on its merits. The Defendant has not and cannot satisfy the other requirements of compassionate release. He cannot show that the § 3553(a) factors now favor release or that he no longer presents a danger. If this Court decides to issue an indicative ruling, it should so indicate.

**A. The § 3553(a) factors still do not favor release.**

In order to grant early release from prison, the Court must be satisfied that the § 3553(a) factors support a defendant's early release. Defendant does not address the § 3553(a) factors or this Court's previous conclusion—now on appeal—that he did not satisfy them. And he still cannot satisfy them. The only potential change wrought by his current medical circumstances

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<sup>2</sup> The Government acknowledges the seriousness of the colon cancer diagnosis contained in the medical records it has obtained. The prognosis is not specified (beyond the statement that it is "poor"), however, and the Defendant appears to be responding well to treatment. Accordingly, the Government submits that, even with the help of the Government's evidence, the Defendant has not met his burden of establishing extraordinary and compelling circumstances. Accordingly, the Government concedes this issue only conditionally, in order to demonstrate that the motion fails on several other bases.

falls within the history and characteristics factor. The Defendant is seriously ill and he has a poor prognosis. His current filing reveals that he continues to avoid taking any responsibility for his actions, however, and he remains delusional.

In his current motion, Defendant once again claims to have been wrongfully convicted, the same argument he has made and re-hashed for years. Moreover, he has paid the absolute minimum from his prison employment towards his minimal restitution, which he has yet to satisfy, and still owes his substantial fine. In short, despite his serious illness, the Defendant's history and characteristics still do not favor early release. And the other § 3553(a) factors have not changed since the Court's previous analysis six months ago.

**B. Defendant remains a danger.**

The Government concludes that the danger Defendant currently poses is very much the same as it was at the time of sentencing and at the time this Court considered his first motion. His motions and prison records betray a disturbing continuity in his attitudes and beliefs, his failure to take responsibility for his actions, and a confounding unwillingness to conform to rules and requirements. He was convicted of hiring others to commit violence for him. The violent threat he posed to others, then, is not significantly reduced by his own corporal frailty. It stems from his beliefs that the rules do not apply to him and that he bears no responsibility for his actions. Thus, his illness does not particularly alleviate concerns regarding his danger. For the same reasons cited by the Court previously, the Defendant remains a danger to the community.



### **Conclusion**

This Court should dismiss the Defendant's Second Motion for Compassionate Release (ECF No. 379) for lack of jurisdiction on two bases. If the Court chooses to issue an indicative ruling, it should indicate that it would deny the motion on its merits.

Respectfully submitted this 10th day of February, 2021.

BART M. DAVIS  
UNITED STATES ATTORNEY  
By:

/s/ Syrena C. Hargrove  
SYRENA CASE HARGROVE  
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2021, the foregoing **OPPOSITION TO DEFENDANT'S SECOND MOTION FOR COMPASSIONATE RELEASE** was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s) by:

David Roland Hinkson Prisoner No. 08795-023 Federal Medical Center FMC BUTNER PO Box 1600 Butner, NC 27509	<input checked="checked" type="checkbox"/> United States Mail, postage prepaid <input type="checkbox"/> Fax <input type="checkbox"/> ECF filing <input type="checkbox"/> E-mail
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/s/ Syrena C. Hargrove  
SYRENA C. HARGROVE  
Assistant United States Attorney