

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USA,

Plaintiff,

v.

ALLAN JOSUE FUNEZ OSORTO,

Defendant.

Case No. [19-cr-00381-CRB-4](#)

**ORDER REJECTING PLEA
AGREEMENT**

Must a term of imprisonment be set in stone, no matter what happens after it is imposed? Should a court be able to reduce a sentence when unforeseeable tragedies change its consequences? What if the defendant’s children are effectively orphaned by the death of their other parent? What if a debilitating injury makes it impossible for the defendant to care for him or herself in prison, or recidivate outside of it? What if a terminal diagnosis turns a brief term of imprisonment for a minor crime into a life sentence? What if a global pandemic poses a mortal risk to an immunocompromised inmate who nobody intended to die in jail? When should a court be able to consider such events and revise a previously imposed sentence accordingly? How difficult should it be for a defendant to request this type of relief?

Congress has provided one set of answers to these questions, in the First Step Act of 2019. See 18 U.S.C. § 3582(c)(1)(A). The United States attorney’s office has very different answers in this case, for this defendant. See Plea Agreement (dkt. 206) ¶ 5. Because those answers undermine Congressional intent and all but foreclose this defendant’s ability to request a critical form of relief, the Court rejects the proposed Plea Agreement.

I. BACKGROUND

Allan Josue Funez Osorto is charged with conspiring to distribute controlled substances, in

1 violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B). Superseding Information (dkt. 204).
 2 Funez Osorto has pled guilty. See Plea Agreement. The Court must decide whether to accept or
 3 reject the proposed Plea Agreement.

4 **II. LEGAL STANDARD**

5 Courts have broad discretion to accept or reject a proposed plea agreement. In re Morgan,
 6 506 F.3d 705, 708 (9th Cir. 2007). A plea agreement can be rejected for reasons other than a
 7 finding that it was not entered into voluntarily and knowingly. See id. at 711.

8 **III. DISCUSSION**

9 This plea agreement, like all plea agreements, requires the Defendant to forgo numerous
 10 rights guaranteed by statute or the Constitution: the right to a trial by a jury of his peers, to testify
 11 on his own behalf, to confront his accusers, to pursue additional discovery from the Government,
 12 and so on. Plea Agreement ¶¶ 3–5. This Order focuses on just one of these sacrifices. The
 13 proposed agreement states “I agree not to move the Court to modify my sentence under
 14 3582(c)(1)(A) until I have fully exhausted all administrative rights to appeal a failure of the
 15 Bureau of Prisons to bring such a motion on my behalf, unless the BOP has not finally resolved
 16 my appeal within 180 days of my request despite my seeking review within ten days of each
 17 decision.” Id. ¶ 5. Because this waiver provision undermines Congressional intent and is an
 18 unconscionable application of a federal prosecutor’s enormous power to set the terms of a plea
 19 agreement, the Court cannot approve of the proposed Plea Agreement in this case.

20 To understand the Court’s objections, it is necessary to understand the practical
 21 implications of the waiver provision. 18 U.S.C. § 3582(c)(1)(A) permits a court to reduce a
 22 defendant’s term of imprisonment upon motion of the Director of the Bureau of Prisons or the
 23 defendant. This form of relief, known as compassionate release, is granted when it is consistent
 24 with the sentencing factors from 18 U.S.C. § 3553(a) and warranted by either “extraordinary and
 25 compelling reasons” or the statute’s age-based guidelines.¹ Any reduction in sentence under
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27 _____
 28 ¹ Specifically, if the defendant is at least seventy years old, has served at least thirty years in
 prison for the offense for which he or she is currently imprisoned, and is not a danger to another
 person or the community. 18 U.S.C. § 3582(c)(1)(A)(ii).

1 § 3582(c)(1)(A) must also be consistent with applicable policy statements issued by the United
2 States Sentencing Commission.

3 The circumstances that the Sentencing Commission has found constitute “extraordinary
4 and compelling reasons” illustrate the consequences of the waiver provision at issue here. They
5 include chronic illness, disability, or aging that makes it impossible for the defendant to care for
6 him or herself while incarcerated, terminal illness, and family tragedies that render the defendant
7 the sole caretaker for an incapacitated partner or minor children. U.S.S.G. § 1B1.13 cmt. n. 1(A)–
8 (D). Compassionate release is an avenue for courts to reconsider the length of a term of
9 imprisonment on account of unforeseen tragedy.

10 A defendant can move for compassionate release in two circumstances. First, if he or she
11 “has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a
12 motion on the defendant’s behalf.” 18 U.S.C. § 3582(c)(1)(A). Second, after “the lapse of 30
13 days from the receipt of such a request by the warden of the defendant’s facility.” Id.

14 The proposed Plea Agreement forecloses the second avenue for Funez Osorto to request
15 compassionate release. Plea Agreement ¶ 5. True, he may move for compassionate release if the
16 BOP fails to resolve his appeal within 180 days of his request, assuming he sought review within
17 ten days of each earlier decision. Id. This is hardly comparable to the statutory provision
18 allowing him to bring his own motion for compassionate release after thirty days of inaction by
19 the BOP on an initial request. It seemingly requires at least one appeal,² plus half a year of
20 inaction by the BOP, rather than one month. The lengthier wait would be significant in any case
21 and devastating for a person with a terminal illness or children left uncared for.

22 Requiring Funez Osorto to exhaust all administrative rights to appeal the BOP’s failure to
23 bring a motion for compassionate release, or wait 180 days to bring his own motion, meaningfully
24 limits his ability to seek relief under § 3582(c)(1)(A). BOP regulations require two levels of
25 appeal from a warden’s refusal to bring a compassionate release motion. 28 C.F.R. § 542.15(a).

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27 ² In addition to the shortcomings described below, this provision is confusing. What if the BOP
28 fails to rule on Funez Osorto’s initial request, meaning there is no appeal to leave unresolved?
The Plea Agreement does not say, and the Court does not relish the prospect of one day having to
divine an answer.

1 After the Warden refuses a defendant’s initial request, the defendant must “submit an Appeal on
2 the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the
3 date the Warden signed the response.” Id. If the Regional Director denies the appeal, the
4 defendant must “submit an appeal on the appropriate form (BP-11) to the General Counsel within
5 30 calendar days of the date the Regional Director signed the response.”³ Id. Only when the
6 General Counsel denies the defendant’s appeal is the administrative process complete. Id. The
7 regulations say nothing about when the warden, Regional Director, and General Counsel must
8 resolve a defendant’s requests or appeals, so the timeline they contemplate for administrative
9 exhaustion may fairly be characterized as indefinite. But they have plenty to say about the form of
10 each appeal: the forms that must be used, the documents that must accompany those forms, who
11 the forms must be mailed to, what content must (and must not) be included, and the exact
12 dimensions of any addendum, in case the required form is too small. Id. § 542.15(b). Exhausting
13 administrative remedies is no mean feat. And, like the 180-day lapse contemplated by the Plea
14 Agreement, the additional time exhaustion requires beyond thirty days will be significant in every
15 case and devastating in many.

16 That fact is reflected in the motions for compassionate release received by this Court. This
17 Court has granted three motions for compassionate release in the last month. See Order Granting
18 Motion for Compassionate Release, United States v. Reid, No. 17-cr-00175-CRB (N.D. Cal. May
19 5, 2020), ECF No. 554; Order Granting Compassionate Release, United States v. Morrison,
20 No. 18-cr-00238-CRB (N.D. Cal. Apr. 29, 2020), ECF No. 72; Order Granting Compassionate
21 Release, United States v. Trent, No. 16-cr-00178-CRB (N.D. Cal. Apr. 9, 2020), ECF No. 106.
22 None were brought by the BOP, and in each case the defendant was authorized to bring a
23 § 3582(c)(1)(A) motion on his own behalf because thirty days had lapsed since he requested relief
24 from the warden of his facility—not because he had successfully exhausted his administrative
25 remedies. See Order Granting Motion for Compassionate Release at 3, Reid, No. 17-cr-00175-

26 _____
27 ³ Recall that the plea agreement requires Funez Osorto to appeal within ten days of each decision
28 to take advantage of the 180-day lapse exception to the exhaustion requirement. Plea Agreement
¶ 5. In this way it imposes even more stringent requirements on the already rigorous procedures a
defendant must abide by to exhaust his administrative remedies.

1 CRB, ECF No. 554; Bischof Decl. ¶¶ 2–3, Morrison, No. 18-cr-00238-CRB, ECF No. 64; Order
2 Granting Compassionate Release at 2–3, Trent, No. 16-cr-00178-CRB, ECF No. 106. It appears
3 this is true of most and perhaps all compassionate release motions filed in this district. See, e.g.
4 Order Granting Emergency Motion for Release at 4, United States v. Burrill, No. 17-cr-00491-RS-
5 2 (N.D. Cal. Apr. 10, 2020), ECF No. 308. If this Court has received a motion for compassionate
6 release brought by the BOP or a defendant who exhausted his or her administrative remedies, it
7 cannot find or recall the case.

8 The point is this: while the Plea Agreement leaves open a path to compassionate release, it
9 is hardly wider than the eye of a needle. It is far narrower than the avenues to relief provided by
10 § 3582(c)(1)(A), and too narrow to provide meaningful relief in many of the circumstances that
11 would render Funez Osorto eligible for relief. And there is no doubt the Government would rely
12 on the waiver provision to deny Funez Osorto compassionate release. It has recently attempted to
13 do exactly that in another case before this Court. See United States’s Opp’n to Defendant’s
14 Motion for Compassionate Release from Custody at 2, Trent, No. 16-cr-00178-CRB, ECF No. 108
15 (“Defendant’s plea agreement waiver of the right to seek § 3582 relief should be enforced. His
16 motion [for compassionate release] should be denied on the ground of waiver alone.”). That result
17 is unacceptable for two reasons. First, it undermines Congress’s intent in passing the First Step
18 Act. Second, it is inhumane.

19 A brief history of compassionate release is helpful for understanding why the waiver
20 provision is contrary to congressional intent. Compassionate release was introduced by the Parole
21 Reorganization Act of 1976. Shon Hopwood, Second Looks & Second Chances, 41 *Cardozo L.*
22 *Rev.* 83, 100 (2019). Originally, only the BOP could move for a reduced term of imprisonment.
23 Id. 18 U.S.C. § 3582(c) was enacted by the Comprehensive Crime Control Act of 1984. Id. at
24 101. Once again only the BOP was authorized to bring a motion for compassionate release. Id.

25 It became clear over the course of the next two and a half decades that compassionate
26 release had, put generously, fallen short of its potential. A 2013 report by the Department of
27 Justice Office of the Inspector General painted a damning picture, concluding that “[t]he BOP
28 does not properly manage the compassionate release program, resulting in inmates who may be

1 eligible candidates for release not being considered.” Dept. of Justice, Office of the Inspector
2 General, The Federal Bureau of Prisons’ Compassionate Release Program 11 (2013) (“Inspector
3 General Report”). From 2006 to 2011, an average of just twenty-four defendants were granted
4 compassionate release each year. Id. at 1.

5 This dismal record was partly attributable to the BOP’s application of the “extraordinary
6 and compelling reasons” standard. “[T]he BOP did not approve a single non-medical
7 compassionate release request from 2006 through 2011.” Id. at 20. And even dire medical
8 conditions often failed to convince the BOP to bring a motion for compassionate release, as
9 demonstrated by an unsuccessful request brought on behalf of a defendant in a near vegetative
10 state. Id. at 24. Although the defendant was fed through a tube and bathed, toileted, and
11 repositioned by staff, the request was denied because his condition was not “terminal.” Id.
12 Indeed, the Inspector General found that in general the only requests given serious consideration
13 were for inmates with life expectancies under twelve months. Id. at 29.

14 The problem was compounded by the BOP’s failure to establish “timeliness standards for
15 reviewing [initial] compassionate release requests” or account for “the special circumstances of
16 medical compassionate release requests” in its timeliness standards for appeals. Id. at 27. The
17 timeframe for reviewing initial requests varied wildly from facility to facility, ranging from five to
18 sixty-five days. Id. at 28. After that, the appeals process could take as long as five months. Id.
19 at 27–28. Before submitting an appeal, a defendant had to attempt to informally resolve his or her
20 concern with facility staff. Id. at 28–29. There was no defined timeframe for informal dispute
21 resolution. Id. at 29. The next step was “a formal written administrative remedy request”
22 submitted to the Warden, who had twenty days to respond. Id. After that the defendant could
23 appeal to the Regional Director, who had thirty days to respond, and from there to the BOP’s
24 General Counsel, who had forty days to respond. Id. The BOP officials at every level of appeal
25 could, at their option, extend the time to respond if they thought it necessary: from twenty days to
26 forty for the Warden, thirty days to sixty for the Regional Director, and forty days to sixty for the
27 General Counsel. Id. The appeals process could thus take up to 160 days all told. Id.

28 “For inmates with terminal medical conditions and life expectancies of less than 1 year . . .

1 these timeliness standards likely provide[d] little to no meaningful opportunity to pursue an
 2 appeal.” Id. The BOP’s failure to timely resolve requests for compassionate release effectively
 3 denied relief even to defendants whose requests were initially approved. Between 2006 and 2011,
 4 twenty-eight defendants whose compassionate release requests had been approved by the Warden
 5 and Regional Director died waiting for the BOP Director to act. Id. at 11.

6 It was against the backdrop of this grim history that Congress enacted the First Step Act’s
 7 amendments to § 3582(c)(1)(A). Congress’s intent in amending the statute is clear. The title of
 8 the section containing the amendments was “Increasing the Use and Transparency of
 9 Compassionate Release.” First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194
 10 (2018). Senator Ben Cardin said, “The bill expands compassionate release under the Second
 11 Chance Act and expedites compassionate release applications.” 164 Cong. Rec. S7774 (Dec. 18,
 12 2018). Representative Jerry Nadler said, “The prison reform provisions of this bill . . . include a
 13 number of very positive changes, such as . . . improving application of compassionate release.”
 14 164 Cong. Rec. H10346, H10362 (Dec. 20, 2018). Congress’s aim was to increase the number of
 15 defendants who received compassionate release. Hopwood, 41 Cardozo L. Rev. at 106.

16 It is just as apparent how Congress chose to achieve this goal. The First Step Act made no
 17 change to the substantive standard for compassionate release eligibility. Instead, it changed the
 18 process by which compassionate release could be obtained. Now, rather than having to brave the
 19 lengthy and uncertain process of requesting that the BOP make a motion for compassionate release
 20 on their behalf, defendants could, under the right circumstances, bring that motion themselves.
 21 And while the Act added an exhaustion requirement, the requirement came with an escape hatch.
 22 If the Warden of the defendant’s facility failed to act for thirty days on a request for
 23 compassionate release, exhaustion was excused.

24 This Plea Agreement neatly undoes Congress’s work. It closes the escape hatch and
 25 replaces it with an alternative likely to be just as if not more time consuming than exhaustion.⁴ It
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27 ⁴ Recall that before the First Step Act, the appeal process could take as long as 160 days.
 28 Inspector General Report at 29. The Plea Agreement’s exhaustion exception requires Funez
 Osorto to wait 180 days to bring a motion for compassionate release. Plea Agreement ¶ 5.

1 restores the very obstacles the First Step Act removed and undermines the purpose of that law’s
 2 amendments. Of course, a federal prosecutor is not required to draft plea agreements that reflect
 3 Congress’s wishes. But since it is the Court’s duty to effectuate congressional intent, the Court
 4 considers Congress’s wishes an appropriate consideration in evaluating the Plea Agreement. The
 5 First Step Act received eighty-seven votes in the Senate, 358 votes in the House, and was signed
 6 into law by President Donald J. Trump. See Ames Grawert & Tim Lau, How the FIRST STEP
 7 Act Became Law — and What Happens Next, Brennan Center for Justice (Jan. 4, 2019),
 8 [http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-](http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next)
 9 [what-happens-next](http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next); Final Vote Results for Roll Call 448, House of Representatives,
 10 <http://clerk.house.gov/evs/2018/roll448.xml> (last visited May 8, 2020). It enjoyed broad
 11 bipartisan support from its inception. Shon Hopwood, The Effort to Reform the Federal Criminal
 12 Justice System, 128 Yale L.J. 791, 798–99 (2019). The Court cannot endorse this attempt by
 13 unelected federal prosecutors to unmake the work of elected representatives.

14 Although Congressional intent alone would be sufficient reason to reject the Plea
 15 Agreement, there is another reason that the compassionate release waiver renders it unacceptable.
 16 Plainly put, its effects are appallingly cruel. Compassionate release matters. It gives courts,
 17 defendants, and (in an ideal world) the Government the ability to account for the tragically
 18 unforeseeable: terminal illness, disability, the deaths of spouses and partners, and the deterioration
 19 of mental and physical health due to age. Current circumstances put the point in excruciatingly
 20 sharp relief. The Court has received requests for early release from multiple defendants who
 21 suffer from medical conditions that put them at high risk of death from COVID-19. See Order
 22 Granting Motion for Compassionate Release at 1, Reid, No. 17-cr-00175-CRB, ECF No. 554;
 23 Emergency Motion to Reduce Sentence at 2, Morrison, No. 18-cr-00238-CRB, ECF No. 63; Order
 24 Granting Compassionate Release at 3–4, Trent, No. 16-cr-00178-CRB, ECF No. 106. When these
 25 men were sentenced, nobody could have predicted that a relatively brief term of imprisonment
 26 could be rendered a death sentence by an unprecedented pandemic. But the unthinkable happened,
 27 and the compassionate release statute made it possible for the Court to adjust its sentences
 28 accordingly. See Order Granting Motion for Compassionate Release at 6, Reid, No. 17-cr-00175-

1 CRB, ECF No. 554; Order Granting Motion to Reduce Sentence, Morrison, No. 18-cr-00238-
 2 CRB, ECF No. 72; Order Granting Compassionate Release at 4, Trent, No. 16-cr-00178-CRB,
 3 ECF No. 106.

4 This is not to say that compassionate release only matters in a crisis. The unthinkable
 5 happens every day, albeit on a personal rather than global scale. A terminal diagnosis. The death
 6 of a parent caring for his or her children alone while their other parent is imprisoned. An accident
 7 that renders a person unable to feed, bathe, or move without assistance. Compassionate release
 8 exists to address these calamities as well.

9 It is no answer to say that Funez Osorto is striking a deal with the Government, and could
 10 reject this term if he wanted to, because that statement does not reflect the reality of the bargaining
 11 table. See Erik Luna & Marianne Wade, Prosecutors as Judges, 67 Wash. & Lee L. Rev. 1413,
 12 1414–15 (2010). As to terms such as this one, plea agreements are contracts of adhesion. The
 13 Government offers the defendant a deal, and the defendant can take it or leave it. Id. (“American
 14 prosecutors . . . choose whether to engage in plea negotiations and the terms of an acceptable
 15 agreement.”). If he leaves it, he does so at his peril. And the peril is real, because on the other
 16 side of the offer is the enormous power of the United States Attorney to investigate, to order
 17 arrests, to bring a case or to dismiss it, to recommend a sentence or the conditions of supervised
 18 release, and on and on. See Robert H. Jackson, The Federal Prosecutor, 24 J. Am. Judicature
 19 Soc’y 18, 18 (1940). Now imagine the choice the Government has put Funez Osorto to. All that
 20 power—and the all too immediate consequences of opposing it—weighed against the chance to
 21 request release in desperate and unknowable circumstances that may not come to pass. That
 22 Faustian choice is not really a choice at all for a man in the defendant’s shoes. But the Court has a
 23 choice, and it will not approve the bargain.

24 That leaves only one question, which is why? Why would federal prosecutors exercise the
 25 tremendous discretion entrusted to them with such a lack of compassion? Defendants released
 26 through the compassionate release program are less than a tenth as likely to recidivate as the
 27 average federal prisoner. Inspector General Report at 49–50. And the Department of Justice itself
 28 estimates that broader use of compassionate release could save taxpayers millions and free

1 desperately needed space in BOP facilities. Id. at 45–48. The waiver of compassionate release is
2 senseless.

3 **IV. CONCLUSION**

4 The Plea Agreement is rejected.

5 **IT IS SO ORDERED.**

6 Dated: May 11, 2020



CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

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