

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA, :
:
Appellant :
v. **APPEAL NO. 20-1033**
:
FRANCIS RAIA :

UNOPPOSED MOTION TO AMEND OPINION

Appellee Francis Raia respectfully moves the Court to amend the precedential opinion issued in this case on April 3, 2020. As the government does not oppose the requested relief, this motion is certified as uncontested pursuant to Third Circuit Local Rule 27.3. In support, it is stated:

1. The Court’s opinion of April 3, 2020 denied Mr. Raia’s motion to dismiss this appeal without prejudice or, alternatively, to rule in the first instance on his motion for compassionate release pursuant to 18 U.S.C § 3582(c)(1)(A)(i). The Court ruled that compassionate-release motions cannot be adjudicated in the first instance by courts of appeals, and that remand would be futile because Mr. Raia failed to comply with the statute’s exhaustion requirement before seeking relief in the district court. *Slip op.* at 6-7.

2. Mr. Raia respectfully requests a modest amendment of the opinion to clarify that § 3582(c)(1)(A) requires *either* exhaustion of administrative rights to

appeal the failure of the Bureau of Prisons (BOP) to file for compassionate release *or* the lapse of thirty days from the receipt of a compassionate-release request by the warden—not both.¹

a. The text of § 3582(c)(1)(A) clearly states that exhaustion of administrative appeals and the lapse of thirty days are alternative grounds permitting a defendant to move for compassionate release in the district court:

[T]he 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 imprisonment

18 U.S.C. § 3582(c)(1)(A) (emphasis added).

b. The Court’s opinion, however, states these grounds in the conjunctive, suggesting defendants must wait thirty days for a response from BOP *and* exhaust administrative appeals:

[B]efore they make such requests, defendants must ask the Bureau of Prisons (BOP) to do so on their behalf, give BOP thirty days to respond, *and* exhaust any available administrative appeals. *See* § 3582(c)(1)(A).

¹ This motion is unopposed because the parties agree on the disjunctive nature of the requirement under the statute. While the parties differ as to whether (and the degree to which) the Court’s opinion is ambiguous on this point, and as to whether the requirement may be excused, they agree that the proposed revision appended to this motion accurately states the statutory requirement.

Slip op. at 4 (emphasis added). Further, the opinion suggests that Mr. Raia failed to comply with § 3582(c)(1)(A) twice over:

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, nor has Raia administratively exhausted any adverse decision by BOP.

Id. at 7.

c. Exhaustion of administrative appeals is not at issue in the case, as BOP made no adverse decision before Mr. Raia moved for compassionate release in the district court.² As such, Mr. Raia respectfully submits that the most appropriate and efficient clarifying amendment to the Court's opinion would be along the lines set forth in the appended proposed revision.

3. It is critically important that the Court's opinion be clear on § 3582(c)(1)(A)'s requirements. As the Court recognized, COVID-19 poses serious risks within the federal prison system, particularly to high-risk inmates such as Mr. Raia. *Slip op.* at 8. Now more than ever, individualized determinations of compassionate release must be made as expeditiously as the law

² The Court thus appropriately stated its holding as follows: “[A]lthough [Raia] 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.” *Slip op.* at 4.

permits. Any suggestion that defendants must both wait thirty days and exhaust administrative appeals will inevitably lead to confusion among the district courts and delays in adjudicating properly filed compassionate-release motions, potentially with life-or-death consequences. Mr. Raia respectfully asks the Court to expeditiously grant this unopposed motion.

WHEREFORE, for the foregoing reasons, the Court should grant appellee Francis Raia's Unopposed Motion to Amend Opinion.

Respectfully submitted,

/s/ Lee Vartan

Lee Vartan

Counsel for Appellee

Francis Raia

April 6, 2020

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-00657-001)
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

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~~., and exhaust any available administrative appeals.~~ 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

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

support a measure he favored. A jury convicted Raia of 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 nor has Raia to administratively exhausted any adverse decision by BOP 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 exhaustion-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.



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April 6, 2020

Via ECF

Patricia S. Dodszuweit, Clerk
U.S. Court of Appeals, Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106-1790

Re: *United States v. Raia*, No. 20-1033

Dear Ms. Dodszuweit:

I am counsel to Mr. Francis Raia. Enclosed, please find an Unopposed Motion to Amend the Opinion in the above-captioned matter.

Respectfully submitted,

/s/ Lee Vartan

Lee Vartan

April 6, 2020
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CERTIFICATION OF SERVICE

I, Lee Vartan, an attorney duly admitted to the bar of this Court, hereby certify that on April 6, 2020, I have caused the within Unopposed Motion to Amend the Opinion to be electronically filed and served with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and served on counsel for Appellant through the Notice of Docketing Activity generated by this Court's CM/ECF system.

Executed on: April 6, 2020

By: s/ Lee Vartan
LEE VARTAN